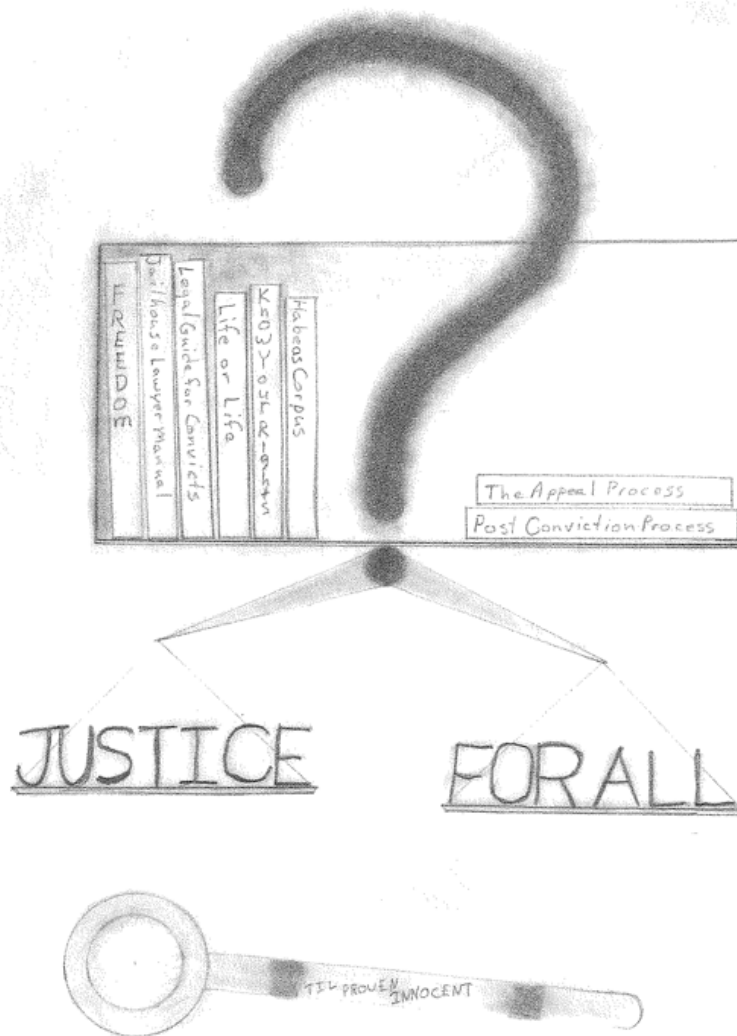


A Jailhouse Lawyer's Manual

Twelfth Edition



Columbia Human Rights Law Review

2020

Legal Disclaimer

A Jailhouse Lawyer's Manual (JLM) is written and updated by members of the Columbia Human Rights Law Review. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

Preface

This book is the newest edition of *A Jailhouse Lawyer's Manual (JLM)*. First published in 1978, the *JLM* is a practical legal resource written to provide incarcerated people with information about their rights while in prison. Student members of the *Columbia Human Rights Law Review* at Columbia Law School write, edit, publish, and distribute the *JLM* in collaboration with lawyers and law professors. In addition to the main manual, the *JLM* publishes several “supplements” geared towards people incarcerated in particular states, as well as an *Immigration and Consular Access Supplement*. In the past four decades, the *JLM* has supported tens of thousands of incarcerated people across the United States in understanding and exercising their legal rights.

Now more than ever, jailhouse lawyers are sorely needed. The number of people incarcerated in the United States has increased dramatically since the *JLM* began. In 1978, around 300,000 people were locked up in the United States. Today, that number is 2.3 million. No other country in the world imprisons people at a higher rate than the United States. As this book goes to print, the COVID-19 pandemic continues to rage in prisons across the country. The loss and prolonged family separation that incarcerated people and their loved ones have suffered throughout the pandemic is devastating. During a time in which the harms of mass incarceration are particularly severe, jailhouse lawyers are critically important.

Like previous editions, the 12th Edition of the *JLM* contains important updates to the law and procedures relevant to incarcerated people across a wide range of issue areas. In addition to our usual updates, we have made a few changes to the language we use throughout the manual. We have moved towards using the term “incarcerated person” rather than “prisoner,” except where we are directly quoting a legal authority. We made this change because we recognize that people in prison are much more than their circumstances, and want the language we use to reflect that. We are also working towards changing other language in the *JLM* that is outdated, biased, or exclusionary. In particular, we have changed much of the language we use to discuss the LGBTQ community. While we continue to use the words “man” and “woman” throughout the *JLM*, our use of those words is not meant to exclude people who are transgender, non-binary, or gender nonconforming. We will continue to update our language, and welcome your feedback.

All *JLM* material is available to download for free on our website, listed below. We now also have a website where you can order all of our publications. For information about how to order by mail, please visit our website or write to us at the mailing address or e-mail address below:

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The responses and feedback we receive from incarcerated people throughout the country are our most valuable resource for improving and developing the *JLM*. We thank the many jailhouse lawyers whose helpful comments have contributed to the improvements that may be found in this edition. The process of improving the *JLM* begins again even as this edition goes to press, and we ask that the readers of the *JLM* continue to share their ideas and suggestions.

Foreword

A Jailhouse Lawyer's Manual is an important and impressive work. Although it is well-established that prisoners have a constitutional right to affirmative governmental assistance in the preparation and filing of legal papers, *see Bounds v. Smith*, 430 U.S. 817 (1976), state and federal prisoners often still lack the necessary information and resources to obtain effective and adequate judicial review. This manual will help alleviate that problem. Written in a clear, readable fashion, the manual provides an easy, step-by-step guide to assist prisoners in understanding and maneuvering their way through an increasingly complex legal system. By making difficult and sensitive legal issues accessible to the lay person, the manual helps to empower prisoners to exercise a right we, as a society, hold dear—the right to speak for oneself. I commend Columbia's law students for publishing so comprehensive and insightful a manual. *A Jailhouse Lawyer's Manual* should be read by everyone involved in, or concerned about, prisoners' rights.

Justice Thurgood Marshall
February, 1992

Acknowledgements

Special thanks to the many practitioners and professors whose thoughtful contributions and ideas helped make the Twelfth Edition of the *JLM* possible. They include but are not limited to John Boston, Philip Genty, Brett Dignam, and Colleen Shanahan.

Putting together a resource like *A Jailhouse Lawyer's Manual* (*JLM*) requires the hard work and dedication of several students, professors, practitioners, and volunteers. We would like to thank everyone who contributed to this publication, and particularly all of the Articles Editors who spent so much of their time ensuring that we published the most accurate and readable *JLM* yet. Additionally, we are grateful to the students who served as staff editors on the *JLM* since 2017, all of whom worked on this edition of the manual. We are particularly appreciative of our current staff editors (2020–2021) and those from last school year (2019–2020), whose hard work on the 12th Edition of the *JLM*—during difficult circumstances—was invaluable. Additional thanks go to fellow law students and friends who volunteered their sharp eyes and time to improving the *JLM*.

Distribution of the *JLM* would not be possible without our Managing Directors and Undergraduate Fellows. The COVID-19 pandemic has made distributing the *JLM* especially challenging. Despite the difficulties, the Managing Directors have made huge improvements to our distribution system that we hope will make it easier for incarcerated people to access our publications going forward.

All of the students who work on the *JLM* do so in addition to their schoolwork and extracurricular activities. That work has been particularly challenging in 2020. The grace, patience, and diligence of the students who worked on the 12th Edition is greatly appreciated.

Special thanks also to those who sent artwork to the *JLM*. The cover art for this edition was contributed by Joseph Pippen. The title page art is by Scott Cook.

Finally, we would like to thank all the jailhouse lawyers who read the *JLM*. Your dedication to fighting for justice for people in prison is why we write our publications. Thank you.

The *Columbia Human Rights Law Review* is an academic journal that publishes articles and commentary concerning legal issues of domestic and international human rights. The *Human Rights Law Review* strives to illuminate subjects of concern to advocates, activists, organizations, courts, scholars, and students of human rights around the world.

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Table of Contents

Preface.....	vii
Foreword by Thurgood Marshall	viii
Acknowledgments.....	ix
Legal Disclaimer.....	x
Table of Contents.....	xi

Section I: Introduction to the *JLM* and How to Use It

Chapter 1: How to Use the *JLM*

A. General Comments	1
B. How to Use the <i>JLM</i> to Learn About the Law	2
C. How to Use the <i>JLM</i> When Filing a Lawsuit	2
D. How to Use the <i>JLM</i> if You Are Not Incarcerated in New York State.....	3

Section II: Learning Your Rights

Chapter 2: Introduction to Legal Research

A. Introduction	4
B. An Overview of the Court System	4
C. Legal Research: How to Find and Support Legal Arguments	9
D. Citation	25
E. Important Next Steps.....	27
F. Summary.....	29
G. Other Ways to Learn About Legal Research	30
H. Conclusion.....	30
Appendix A	31

Chapter 3: Your Right to Learn the Law and Go to Court

A. Introduction	34
B. Fulfilling the Actual Injury Requirement.....	35
C. How the State's Limited Duty to Provide Access to the Courts May Apply to You.....	36
D. What is an Adequate Law Library	39
E. The State's Duty to Permit Access to Adequate Legal Assistance	41
F. The State's Duty to Provide Materials	43
G. The State's Duty in the Internet Age	45
H. Conclusion.....	45
Appendix A	46

Section III: How to File a Lawsuit and Learn About Your Case

Chapter 4: How to Find a Lawyer

A. Introduction	56
B. Lawyers for Criminal Appeals.....	56
C. Lawyers for Civil Cases.....	57
D. Conclusion.....	59

Chapter 5: Choosing a Court and a Lawsuit

A. Introduction	60
B. Lawsuits to Challenge Your Conviction or Sentence	60
C. Lawsuits to Challenge the Conditions of Your Imprisonment.....	62

D. Conclusion.....	67
Appendix A	68
Appendix B	69
Chapter 6: An Introduction to Legal Documents	
A. Introduction: The Right and Responsibilities of Self-Representation	72
B. The Legal Documents	73
C. Conclusion.....	77
Appendix A	78
Appendix B	81
Chapter 7: Freedom of Information	
A. Introduction	92
B. The Federal Freedom of Information Act.....	92
C. Conclusion.....	103
Chapter 8: Obtaining Information to Prepare Your Case: The Process of Discovery	
A. Introduction	104
B. Civil Discovery	105
C. Criminal Discovery	116
D. Conclusion.....	123
Appendix A	124
Section IV: How to Attack Your Conviction or Sentence	
Chapter 9: Appealing Your Conviction or Sentence	
A. Introduction	128
B. Limits on Your Right to Appeal.....	129
C. What You Can Ask the Courts to Do <i>Before</i> Your Appeal is Heard	146
D. What You Can Ask the Court to Do in Your Appeal	148
E. Preparing Your Papers for Your Appeal	159
F. Continuing Your Appeal.....	162
G. Three Options for Dealing with Ineffective Assistance of Appellate Counsel	164
H. Conclusion.....	167
Appendix A	168
Appendix B	169
Chapter 10: Applying for Re-Sentencing for Drug Offenses	
A. Introduction	180
B. Re-Sentencing for Federal Drug Crimes	180
C. Re-Sentencing for Drug Crimes in New York State	202
D. Re-Sentencing: What Happens if You Apply?.....	212
E. Conclusion.....	218
Appendix A	219
Appendix B	226
Appendix C	230
Chapter 11: Using Post-Conviction DNA testing to Attack Your Conviction or Sentence	
A. Introduction	233
B. Common Procedures Used to Obtain DNA Testing.....	233
C. Legal Assistance for Those Seeking Post-Conviction DNA Testing	241
D. Conclusion.....	241
Appendix A	242

Chapter 12: Appealing Your Conviction Based on Ineffective Assistance of Counsel

A. Introduction	249
B. Ways to Claim Ineffective Assistance of Counsel	249
C. How to Prove Ineffective Assistance of Counsel	253
D. Common Ineffective Assistance of Counsel Claims	258
E. Conclusion	261

Chapter 13: Federal Habeas Corpus

A. Introduction	262
B. The Fundamental Elements of a Federal Habeas Corpus Agreement	268
C. What You Cannot Raise in Your Habeas Petition	284
D. Procedures for Filing a Petition for Habeas Corpus	289
E. The Mechanics of Petitioning for Federal Habeas Corpus	317
F. How to Get Help from a Lawyer	328
G. Conclusion	330
Appendix A	331
Appendix B	333
Appendix C	334

Section V: How to Attack the Conditions of Your Imprisonment

Chapter 14: The Prison Litigation Reform Act

A. Introduction	348
B. Filing Fees	349
C. The “Three Strikes” Provision	357
D. Screening and Dismissal of Incarcerated People’s Cases	374
E. Exhaustion of Administrative Remedies	375
F. Physical Injury Requirement: Section 1997e(e) of the PLRA	418
G. Attorney’s Fees	439
H. Waiver of Reply	441
I. Hearings by Telecommunication and at Prisons	442
J. Revocation of Earned Release Credit	443
K. Diversion of Damage Awards	444
L. Injunctions	445
M. Conclusion	449

Chapter 15: Inmate Grievance Procedures

A. Introduction	450
B. Exhausting Your Administrative Remedies	451
C. Grievances in New York	452
D. The Basic Structure of the New York IGP	456
E. The New York IGP Rules	457
F. Rules for Inmate Grievance Procedures in Other States	465
G. Conclusion	466

Chapter 16: Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law

A. Introduction	467
B. Using 42 U.S.C. § 1983 to Challenge State or Local Government Action	471
C. Procedural Requirements for Your Lawsuit	489
D. Alternate Ways to Bring Lawsuits	520
E. Special Concerns for People Incarcerated in Federal Prisons	522
F. Conclusion	526
Appendix A	527

Chapter 17: The State’s Duty to Protect You and Your Property: Tort Actions	
A. Introduction	552
B. Know Your Rights: Tort Actions	552
C. Protecting Your Rights	561
D. Checklist for Filing with the Court of Claims.....	573
E. Conclusion.....	574
Appendix A	575

Chapter 18: Your Rights At Prison Disciplinary Proceedings	
A. Introduction	600
B. Definition of “Due Process”	600
C. Due Process in Prison.....	601
D. Incarcerated Person’s Basic Rights in Disciplinary Procedures	616
E. New York Disciplinary Proceedings and Appeal Procedures.....	629
F. Administrative Segregation Proceedings	636
G. Conclusions	641

Chapter 19: Your Right to Communicate with the Outside World	
A. Introduction	642
B. The Right to General (Non-Legal) Correspondence.....	643
C. Legal Correspondence with Courts, Public Officials, and Attorneys: Privileged Correspondence.....	652
D. Internet Communication.....	658
E. Receipt and Possession of Publications	659
F. Access to the News Media	664
G. Visitation.....	665
H. Using Telephones	670
I. Conclusion.....	672

Section VI: How to Attack Your Conviction, Sentence, or Prison Conditions at the State Level

Chapter 20: Using Article 440 if the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence	
A. Introduction	674
B. When to Use Article 440.....	674
C. How to File and Article 440 Motion.....	690
D. What to Expect After You Have Filed Your Article 440 Motion.....	692
E. What Relief the Court Can Provide Under Article 440.....	693
F. How to Appeal if Your Article 440 Motion is Denied.....	694
G. Conclusion.....	695
Appendix A	696
Appendix B	697

Chapter 21: State Habeas Corpus: Florida, New York, and Michigan	
A. Introduction	704
B. Florida	710
C. New York.....	721
D. Michigan.....	736
E. Conclusion.....	741

Chapter 22: How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules

A. Introduction	742
B. What You Can Complain About Under Article 78	744
C. When You Can Obtain Relief Under Article 78	750
D. Procedures for Filing an Article 78 Petition	753
E. How to Bring an Article 78 Proceeding	762
F. How to Appeal Your Article 78 Decision	764
G. Conclusion.....	766
Appendix A	767

Section VII: General Health and Safety Rights in Prison

Chapter 23: Your Right to Adequate Medical Care

A. Introduction	783
B. The Right to Adequate Medical Care	784
C. Specific Health Care Rights.....	798
D. Medical Care for Female Incarcerated People	805
E. Your Right to Informed Consent and Medical Privacy.....	809
F. Actions You Can Bring When You Are Denied Medical Care.....	812
G. Conclusion.....	815

Chapter 24: Your Right to be Free from Assault by Prison Guards and Other Incarcerated People

A. Introduction	817
B. Your Right to be Free from Assault.....	819
C. Sexual Assault and Rape	840
D. Assault on LGBTQ Incarcerated People	844
E. Legal Remedies Available for Victims of Unlawful Assault	848
F. Conclusion.....	850

Chapter 25: Your Right to be Free from Illegal Body Searches

A. Introduction	851
B. Involuntary Exposure.....	852
C. Body Searches.....	854
D. Legal Remedies.....	874
E. Conclusion.....	876

Chapter 26: Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prison

A. Introduction	877
B. Background Information on Infectious Diseases	877
C. Constitutional Rights in a Prison Setting.....	883
D. Legal Rights Concerning Testing for Infectious Diseases.....	884
E. Legal Rights and Prevention of Infectious Diseases	890
F. Legal Rights and Confidentiality.....	894
G. Legal Rights and Medical Treatment.....	895
H. Discriminatory Treatment and Infectious Diseases	898
I. Sentencing Persons with Infectious Diseases	901
J. Life After Imprisonment: Planning for Your Release.....	902
K. Conclusion.....	902
Appendix A	903

Section VIII: Issue-Specific Rights

Chapter 27: Religious Freedom in Prison

A. Introduction	910
B. The First Amendment Establishment Clause	912
C. The First Amendment Free Exercise Clause, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and the Religious Freedom Restoration Act (RFRA)	917
D. Your Rights Under New York State Statutes.....	941
E. Faith-Based Rehabilitation Programs.....	944
Appendix A	945

Chapter 28: Rights of Incarcerated People with Disabilities

A. Introduction	948
B. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act	949
C. Enforcing Your Rights Under the ADA and Section 504	974
D. Conclusion.....	983

Chapter 29: Special Issues for Incarcerated People with Mental Illness

A. Introduction	984
B. Your Right to Receive Treatment.....	988
C. What to Do if You Receive Unwanted Treatment	998
D. Conditions of Confinement for Prisoners with Mental Illness.....	1010
E. Special Considerations for Pretrial Detainees	1015
F. Planning for Your Release	1021
G. Planning for Parole.....	1021
H. Where to Go for Help.....	1021
I. Conclusion.....	1022
Appendix A	1023
Appendix B	1026

Chapter 30: Special Information for Lesbian, Gay, Bisexual, Transgender, and/or Queer Incarcerated People

A. Introduction	1027
B. Unequal treatment Because of Sexual Orientation or Gender Identity.....	1028
C. Your Right to Control Your Gender Presentation While in Prison	1031
D. Your Right to Confidentiality Regarding Your Sexual Orientation or Gender Identity	1037
E. Assault and Harassment.....	1041
F. Housing and Protective Custody	1048
G. Visitation Rights: Special Issues for LGBTQ Incarcerated People.....	1052
H. Right to Receive LGBTQ Literature.....	1056
I. Changes in the Law.....	1058
J. Jury Bias.....	1062
K. Conclusion.....	1064
Appendix A	1066

Chapter 31: Security Classification and Gang Validation

A. Introduction	1068
B. General Security Classification	1068
C. Gang Validation.....	1079
D. Conclusion.....	1085

Chapter 32: Parole

A. Introduction	1086
B. New York.....	1086
C. Minimum Term of Incarceration Under an Indeterminate Sentence & Conditional Release Under Determinate Sentence	1087
D. Shock Incarceration Program	1088
E. Sentence of Parole Supervision.....	1089
F. Parole Release Hearing and Appeals	1090
G. Release on Parole.....	1101
H. Revocation of Your Parole (Taking Away Your Parole).....	1104
I. Appeals.....	1109
J. Parole Violator Reappearances.....	1110
K. Release from Parole Supervision	1110
L. Parole in California	1111
M. Parole in Florida	1113
N. Parole in Illinois	1115
O. Parole in Texas	1116
P. Parole in Michigan	1117
Q. Conclusion.....	1119

Chapter 33: Rights of Incarcerated Parents

A. Introduction	1121
B. Private Placement with a Relative or Friend	1123
C. Foster Care	1124
D. Involuntary Termination of Parental Rights	1141
E. Voluntary Adoption	1148
F. Incarcerated Fathers with Children in Foster Care.....	1149
G. Getting to Court.....	1152
H. The Right to Counsel.....	1152
I. Conclusion.....	1153
Appendix A	1154
Appendix B	1155

Chapter 34: The Rights of Pretrial Detainees

A. Introduction	1162
B. Your Rights Before You Are Charged.....	1163
C. Your Rights After You Are Charged.....	1168
D. What Determines Whether You Stay in Jail or Are Released Pretrial	1171
E. Conditions of Confinement.....	1180
F. Conclusion.....	1189
Appendix A	1191

Chapter 35: Getting Out Early: Conditional and Early Release

A. Introduction	1195
B. New York State.....	1195
C. Sentencing Structure in New York.....	1195
D. Good-Time Credit	1197
E. Merit-Time Credit	1202
F. Conditional Release.....	1204
G. Early Release from a Definite Sentence.....	1211
H. Presumptive Release	1212
I. Clemency and Commutation in New York.....	1213
J. Compassionate Release for Persons with Terminal Diseases.....	1218

K. Federal Sentences.....	1220
L. Credit for Time Served.....	1220
M. Substantial Assistance Prosecuting Others.....	1223
N. Additional Ways to BOP Can Shorten a Federal Sentence.....	1224
O. Federal Supervised Release.....	1238
P. Federal Executive Clemency.....	1242
Q. Conclusion.....	1246
 Chapter 36: Special Considerations for Sex Offenders	
A. Introduction.....	1247
B. Protective Custody.....	1248
C. “Recommended” Counseling and the Loss of Good Time Credits.....	1249
D. HIV Testing.....	1251
E. Post-Conviction DNA Testing.....	1255
F. Special Parole Considerations.....	1255
G. Incarceration Beyond Your Conditional Release Date.....	1256
H. The Importance of Following Parole Rules.....	1256
I. Community Registration and Notification Laws.....	1256
J. Civil Commitment.....	1266
K. Conclusion.....	1271
Appendix A.....	1272
 Chapter 37: Rights Upon Release	
A. Housing Rights and Registration.....	1273
B. Eligibility for Public Benefits and Entitlements.....	1280
C. Employment.....	1286
D. Child Custody.....	1297
E. Military Service.....	1301
F. Voting Rights.....	1304
G. Conclusion.....	1307
Appendix A.....	1308
Appendix B.....	1310
Appendix C.....	1319
Appendix D.....	1321
 Chapter 38: Rights of Youth in Prison	
A. Introduction.....	1324
B. The Federal System.....	1326
C. Procedure in New York State.....	1336
D. Prison Conditions.....	1343
E. Conclusion.....	1348
Appendix A.....	1349
 Chapter 39: Temporary Release Programs	
A. Introduction.....	1351
B. Overview of Temporary Release Programs.....	1351
C. Eligibility Requirements for Temporary Release Programs.....	1359
D. How to Apply for Temporary Release Programs.....	1362
E. What to Do if Your Temporary Release Application is Denied or Revoked.....	1370
F. The Second Chance Act of 2007 and Federal Bureau of Prisons Temporary Release Programs.....	1375
G. Conclusion.....	1377

Chapter 40: Plea Bargaining

A. Introduction	1378
B. Plea Bargaining Considerations	1378
C. Plea Bargaining Agreements	1383
D. Court Acceptance of a Plea Bargain	1386
E. Withdrawing from a Plea Bargain.....	1398
F. Conclusion.....	1400

Chapter 41: Special Issues of Incarcerated Women

A. Introduction	1401
B. Equal Protection and Programming.....	1402
C. Adequate Medical Care	1404
D. Sexual Assault, Harassment, and Privacy Concerns	1413
E. Drug Treatment Programs.....	1421
F. Clemency.....	1422
G. Conclusion.....	1427
Appendix A	1428

Section IX: Appendices

Appendix I: Addresses of Federal Courts & New York State Prisons and Their Respective Federal Judicial Districts	1430
Appendix II: New York State: Filing Instructions & Addresses of New York State Courts	1461
Appendix III: Addresses of New York District Attorneys	1473
Appendix IV: Directory of Legal and Social Services for Incarcerated People	1478
Appendix V: Definitions of Words Used in the <i>JLM</i>	1500
Appendix VI: Definitions of Latin Words Used in the <i>JLM</i>	1516

CHAPTER 1

HOW TO USE THE *JLM*

A. General Comments

If you have been convicted of a crime and sentenced to prison, *A Jailhouse Lawyer's Manual* (the “*JLM*”) is for you. It contains information about challenging your conviction or your sentence, what your rights are while you are in prison, and different ways to obtain an early release from prison.

The *JLM* contains 41 chapters. You should begin by reading Chapters 2, 5, and 6. These Chapters teach you the basics of understanding and using legal materials. You can also look in the Table of Contents for the subject or subjects that are related to your concerns.

The Appendices at the end of the *JLM* are also important. Appendices I and II contain the addresses of the federal courts and state courts in New York. Appendix III is a list of addresses for District Attorneys' offices in New York. Appendix IV contains a list of several organizations that support incarcerated people. Appendix V contains a dictionary of legal terms used in the *JLM*. Appendix VI defines Latin terms used in the *JLM*.

There are also supplements to the *JLM*. There is an immigration supplement that will give you information on how to handle any immigration-related legal problems you might have. There are also state-specific supplements for Louisiana and Texas, and additional state supplements currently being written. For more information about these state supplements, refer to Chapter 1, Part D. A full copy of this edition of the *JLM* as well as our supplements is available online for free at blogs2.law.columbia.edu/JLM.

The *JLM* discusses only those areas of law that relate to the rights of incarcerated people. To learn about the law relating to other matters—such as automobile accidents or apartment leases—you will need to look elsewhere. Chapter 2, “Introduction to Legal Research,” explains how to research these and other areas of law in your prison law library.

Similarly, although the *JLM* explains the procedures you can use to attack your conviction, it does not explain many other areas of the law, such as the constitutional limits on the power of the police to search you, seize evidence from you, or arrest you. The *JLM* does not describe the limits on a grand jury's power to indict you, the limits on what the prosecutor can say to the jury, or the questions the prosecutor cannot ask witnesses or defendants during the trial. If you have been convicted of a crime, these are areas of law that you will probably need to know more about to determine whether your conviction was lawful. The most important rules in these areas of the law come from the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution, and from court rulings declaring what these amendments mean in relation to specific cases. To learn about Fourth, Fifth, and Sixth Amendment issues, you may research them in the library using the skills you will learn by reading Chapter 2 of the *JLM*.

In general, it is always a good idea to seek the help of a lawyer in pursuing any legal action. But it is often not possible to get professional legal help—at least at first. If you do not have a lawyer, the *JLM* can help you initiate a legal action on your own or show you how to get a lawyer interested in your case. Even if you have a lawyer, the *JLM* can help you understand your rights. Understanding what your lawyer is doing, what papers he or she should be filing, and what questions he or she should be asking will enable you to actively participate in your case. You might even be able to help your lawyer with some of the work. Remember: there are very strict deadlines in criminal appeals and most other actions. Learn these deadlines and make sure your lawyer files all necessary papers on time.

Two final suggestions about using the *JLM*: use it cautiously and share it. Use it cautiously because the law changes often, and so the *JLM* may contain statements that are out-of-date by the time you read them. To make sure that a statement, statute, or holding is up to date, follow the steps described in Chapter 2, which explain “Shepard's” and “pocket-parts.” Remember that an incorrect or weak legal argument may waste a valuable opportunity to challenge a violation of your rights.

Please share the *JLM* because there are not enough copies of the *JLM* to go around and because you will benefit from others' understanding and assertion of their rights. One person's victory in court may bring about changes in prison conditions that will improve life for all the people incarcerated in that person's jail or prison, including you.

B. How to Use the *JLM* to Learn About the Law

If you are not a jailhouse lawyer and you want to learn the basic tools of legal research, begin by reading Chapter 2, "Introduction to Legal Research." If at all possible, read Chapter 2 in the law library and look at each book the chapter mentions. Do not expect to understand all of Chapter 2 the first time you read it. It often takes law students many months before they understand how all of the different research tools work. The key to learning how to do legal research is practice.

The next step is to read Chapter 6, which introduces you to basic legal papers and to the most common types of legal proceedings. After you have read Chapters 2 and 6, you will be able to understand how the research for the memorandum in Chapter 6 was done and why the memorandum was written. From this point on, it is simply a question of improving your skills and becoming more familiar with the law. The best way to do this is to read the rest of the *JLM*.

If you come across a word in the *JLM* that you do not understand, look it up in Appendix V. If the word is not explained there, use the legal dictionary in your prison's law library.

If you already know how to do legal research but have a specific problem, look at the Table of Contents to see which sections may apply to your problem. If you need to determine your rights in an area covered by the *JLM*, like religious freedom or temporary release programs, read the appropriate chapter and then confirm what it states through research in the library. This is done by finding the part(s) of the chapter discussing your problem and then writing down the cases or statutes that are cited in the footnotes. If these authorities are cases, read the cases and then "Shepardize" them; if they are statutes, find the statutes, check their pocket-parts to make sure that they have not been repealed or amended, and then look at the "notes of decisions" in the pocket-parts to see if they have been recently interpreted by the courts. Although terms like "Shepardize" and "notes of decisions" may seem strange to you right now, Chapter 2 will explain them. You should make sure to read all the chapters that might contain information on any part of your case.

You should read Chapter 5 if you have a serious problem and you think you require relief (help) from a court. This chapter points you to other chapters that explain the kinds of legal proceedings you can use. Again, verify and update anything cited in the *JLM* that you plan to use in your case. Outdated and incorrect cases or statutes will hurt your chances of winning and may delay the process.

If no chapter in the *JLM* discusses your problem, you will have to start from the beginning, using the legal research skills that you will learn by reading Chapter 2. It is also possible that one of the chapters in the *JLM* discusses a similar problem. If this is the case, it may be helpful to start your research by reading some of the cases or statutes cited in that chapter.

C. How to Use the *JLM* When Filing a Lawsuit

Once you have decided that your rights have been violated or that you have a valid claim and you want to go to court, you should turn to the sample legal papers in Chapters 9, 16, and 17 (and Chapters 10, 20, and 22 for people incarcerated in New York State). Each of these chapters discusses a different kind of lawsuit and provides examples of the legal papers that you must send to the court in order to initiate the suit. These legal papers are called "forms" because you can use the basic language provided in the sample form and fill in the blanks with the facts that apply to your case. For example, Chapter 9, "Appealing Your Conviction or Sentence," contains the types of papers you will need to start a criminal appeal.

It is important that you do not tear these sample legal papers out of the *JLM* and do not copy them word for word. If you tear them out and try to send them to a court, or if you simply copy them and then send your copy to a court, the court will either throw them out or send them back to you. Before using these forms, you should read the first part of the chapter that discusses how to use them. Then follow the footnotes contained in each legal paper, which will tell you exactly how to prepare your own version.

After you have written your version of the legal papers, you must make copies of what you have written. Each chapter tells you how many copies you will have to make. Then you will have to mail the original form plus several copies to a court. Appendices I and II tell you which court you should send the papers to. You may also have to send copies to the District Attorney. Appendix III contains the mailing addresses of all the District Attorneys in New York. Most prisons have photocopying machines. If your prison does not, you can copy your papers by retyping or rewriting them.

Chapters 4 and 9 also explain how to request a court-appointed lawyer to pursue your case. When you make this request—by filing “poor person’s” or in forma pauperis papers—you can also ask the court to assume the responsibility for “serving” all of your papers on your opponents and to allow you to proceed without paying court fees up front. Under the Prison Litigation Reform Act (“PLRA”), incarcerated people may be required to pay court-filing fees in full. The full cost of the fees will be deducted gradually from your prison account. For a fuller discussion of the PLRA and how it affects your rights, read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

D. How to Use the *JLM* if You Are Not Incarcerated in New York State

Many of the Chapters in the *JLM* discuss the law as it exists in New York State. If you are not incarcerated in New York State, these laws do not apply to you. You must find out what laws and regulations your state or municipality has issued. Similarly, cases decided by New York state courts that are described in the *JLM* do not apply directly to people incarcerated in states outside New York.

If you are unable to find materials dealing with the laws and regulations of your state in the *JLM*, do not be discouraged. The *JLM* is valuable for people incarcerated outside of New York for several reasons. First, many of the Chapters discuss laws that affect people incarcerated outside of New York. Several Chapters have parts on, or are entirely focused on, the law of states other than New York, like Chapter 21, “State Habeas Corpus: Florida, New York, and Michigan.” In addition to Chapters in the *JLM* that address state law outside of New York, you may find information on the laws and regulations affecting you in the State Supplements. There is a Louisiana and Texas supplement to the *JLM*, and supplements for additional states are currently being written. If you are incarcerated in Louisiana or Texas, these supplemental books will provide you with information on the state laws and regulations affecting your rights, especially when they are different from the laws discussed in the main *JLM*. The *JLM* is also valuable for people incarcerated outside of New York for two other reasons. First, as you will learn in Chapter 2, decisions by the United States Supreme Court discussed in the *JLM* often apply to all people in prison or jail across the country. Second, by reading the chapters in the *JLM* you will learn how to effectively research the laws of your own state.

Although this book does not always answer your specific question, it teaches you how to get the answer on your own. Wherever you are incarcerated, you can use your new skills to protect your rights. Carefully reading the *JLM* will allow you to think like a lawyer and to analyze your problem from a legal perspective. Knowing how to think this way is very important because what matters most is knowing what remedies you are entitled to, and not what remedies you think are best.

CHAPTER 2

INTRODUCTION TO LEGAL RESEARCH*

A. Introduction

To be an effective “jailhouse lawyer,” you must understand both how the judicial system is organized, and how to find and use the law so that you can work within that system. This Chapter will first explain the structure of the courts that make up the judicial system. Then this Chapter will discuss how you can research the law in your prison library. Legal research is important in helping you understand your legal rights so that you can present your position to a court clearly and effectively.

Before you research the law, you will need to know the powers and functions of the court where you will make your argument. Different types of courts have different powers and hear different types of arguments. For example, the argument you make in a trial court may not be appropriate in an appellate court. Part B of this Chapter describes how the judicial system is organized and will help you understand the different powers that courts have at each level of the system. Part C explains basic legal research and provides an outline for how to develop legal arguments. Part D provides the general rules for how to cite cases and statutes (laws passed by a state legislature or Congress) in documents that you submit to a court. Part E suggests next steps you should take after you complete your legal research, such as double-checking that all your cases are up-to-date and have not been overruled.

B. An Overview of the Court System

In order to move your case successfully through the judicial system, you need to understand the system’s basic structure. Some courts will only hear cases that have to do with a certain subject matter. Other courts will only hear specific types of legal proceedings (such as an appeal) or will only hear cases from a certain geographic area. So, before you file a case, you have to make sure that you are filing it with the correct court.

Courts are responsible for determining what a law means. There are two types of law: law created by a legislature, and law created by judges in a court. Understanding this basic structure will help you be an effective jailhouse lawyer.

1. The Court System

The American judicial system is made up of two types of courts: trial courts and appellate courts. In trial courts, lawyers put evidence before a judge or jury who will decide the outcome of the dispute. “Criminal trials” determine the guilt or innocence of the accused, while “civil cases” determine whether the defendant is “liable” (responsible for harms or wrongs) to the plaintiff. In civil cases, one party sues another party for a “remedy,” usually money. “Appellate courts” review the legal conclusions of trial courts for errors. If the appellate court finds legal errors, it may order a new trial. The major difference between trial and appellate courts is that the trial courts decide issues of fact (for example, “did person A hit person B with a baseball bat?”). However, appellate courts generally will only check to make sure that the trial court correctly applied the law to those facts (for example, “if person A did hit person B, was it an assault as defined by the law?”). Appellate courts will rarely interfere with the facts that have been found by a trial court. If the trial court decided person A did hit person B, the appellate court will generally accept that as true. Appellate courts will normally only consider arguments about the law, and not about the facts.¹

* This Chapter was revised by Susan Maples based on previous versions by Kristin Heavey, Jennifer Parkinson, Paul Quinlan, William H. Knight, Andrew Cameron, and Patricia A. Sheehan.

1. Normally, appellate courts will overturn factual findings of a trial court only if the findings were “clearly erroneous.” “A fact finding is clearly erroneous only when ‘although there is evidence to support it, the reviewing

Most states and the federal system have two levels of appellate courts. In the state system, the “intermediate” appellate court² is often called the Court of Appeals. In the federal system, it is called the Circuit Court of Appeals. The higher level of appellate court, sometimes referred to as the “court of last resort,” is often called the Supreme Court. If you are a criminal defendant, you usually have an automatic right to appeal your conviction or sentence to the intermediate appellate court.³ You can only appeal to a higher appellate court if that court agrees to hear your case. Usually, higher appellate courts only grant appeals to cases that raise new legal issues. The typical court structure is shown below in Figure 1.

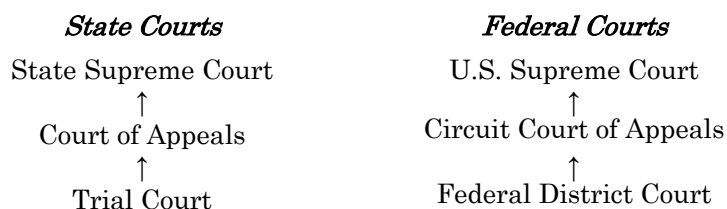


Figure 1: Typical Organization of State and Federal Courts. (For a more detailed diagram, see the inside front and back covers of the *JLM*.)

Some states have different names for their courts, but the basic organization remains the same.⁴ Every state (and the District of Columbia) has its own court system. Each court system only handles cases in its “jurisdiction.” Jurisdiction is the area over which a court has the power to resolve disputes and enforce its decisions. Some courts have jurisdiction only over certain subject matter, and some courts only have jurisdiction over certain geographic territory. Both of these types of jurisdiction are discussed below.

(a) Subject Matter Jurisdiction

Courts are divided into state and federal courts. Federal courts have jurisdiction over cases that involve the U.S. Constitution or a law passed by the U.S. Congress (called a “federal statute”).⁵ You can also file a civil complaint in federal district court if you and the other party are citizens of different states and the dispute involves more than \$75,000.⁶ State courts, on the other hand, are generally free to deal with any matter; that is, generally a state court can decide a dispute that has to do with a

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” Catharine M. Goodwin, Jay E. Grenig & Nathan A. Fishbach, *Federal Criminal Restitution* § 13:4 (2012); *see also Speedy Trial*, 35 Geo. L.J. Ann. Rev. Crim. Proc. 360, 380 n.1269 (“Most courts adopt . . . a clearly erroneous standard of review for questions of fact.”).

2. The first level of appellate court is called an “intermediate” appeal court because it is between the trial court below and the higher appellate court above. However, some states lack an intermediate appellate court, and only have trial courts and the high appellate court.

3. Prosecutors, on the other hand, can only rarely appeal. *See, e.g.*, Gary Muldoon, *Handling a Criminal Case* in NY § 24:43 (2018) (“The prosecution has the right to appeal in certain limited circumstances.”).

4. For example, New York State has a more complicated court structure, but it still follows the basic pattern of other states. In New York, the trial court is called the Supreme Court. The intermediate appellate courts are called the Appellate Division, which is subdivided into four regional Departments; each Department has jurisdiction over different parts of the state. The highest court is called the Court of Appeals. For more details on the organization of the New York State court system, see the diagrams on the inside back cover of the *JLM*.

5. U.S. CONST. art. III, § 2. The § symbol means “section.” Additional federal statutes also provide original jurisdiction in federal district court for civil cases that concern the “Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

6. 28 U.S.C. § 1332.

state law or a federal law. Defendants often prefer to bring their case in federal court, if possible, because federal courts can often hear cases more quickly than state courts.

In addition to the distinction between state and federal law, some courts are further limited in the subject matter of law they may consider. For example, the New York City Criminal Court can only hear non-felony criminal cases; the Federal Tax Court can only hear tax cases.⁷

(b) Territorial Jurisdiction

Courts are also limited to hearing cases from particular regions. For example, the Criminal Court of New York City can only hear cases about crimes that took place in New York City. Similarly, the federal court for the Eastern District of New York is restricted to hearing cases about incidents arising in Long Island, Queens, Brooklyn, and Staten Island. So, even if a case is within a court's subject matter jurisdiction, the court cannot hear the case unless it also took place in the court's territorial jurisdiction.

Appellate courts also have limited geographic jurisdiction. Each federal circuit court of appeals represents a specific geographic region; the regions are numbered and may include more than one state. The following are the twelve Circuit Courts and the states (and territories) that are in their jurisdiction:

First Circuit: Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island;
Second Circuit: Connecticut, New York, and Vermont;
Third Circuit: Delaware, New Jersey, Pennsylvania, and the Virgin Islands;
Fourth Circuit: Maryland, North Carolina, South Carolina, Virginia, and West Virginia;
Fifth Circuit: Louisiana, Mississippi, and Texas;⁸
Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee;
Seventh Circuit: Illinois, Indiana, and Wisconsin;
Eighth Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota;
Ninth Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the Northern Mariana Islands;
Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming;
Eleventh Circuit: Alabama, Florida, and Georgia;
D.C. Circuit: District of Columbia.

The U.S. Supreme Court, also known as “the Court,” is the highest appellate court in the federal judicial system and is the final court of appeal for all federal cases. The Court can also hear criminal appeals from the highest appellate state court, but only if those cases involve constitutional questions or issues of federal law.⁹ If a case does not have a federal legal issue, then the State Supreme Court is the court of last resort for criminal cases that began in the state court system.

Understanding the position and powers of different courts will help you make sure that you file your case in a court that has the power to hear it, and has the power to grant you the remedy you are asking for. If you know the limited jurisdiction of various courts, you will also know if a court has acted beyond its powers. For example, if you were convicted of assault in the Federal Tax Court, the conviction may be invalid because that court is only authorized to hear tax cases; convicting someone of assault would exceed the Tax Court's subject matter jurisdiction. Similarly, if you were convicted of

7. *See Handeland v. Comm'r of Internal Revenue*, 519 F.2d 327, 329 (9th Cir. 1975) (quoting *Burns, Stix Friedman & Co., Inc. v. Comm'r of Internal Revenue*, 57 T.C. 392, 396 (1971)) (“[T]he basic jurisdiction of the Tax Court . . . is now limited to . . . [f]ederal income, estate, and gift taxes.”).

8. Before Oct. 1, 1981, the Fifth Circuit included all of the states that are now in the Fifth Circuit plus all of the states now in the Eleventh Circuit.

9. As explained in Part B(1)(a) of this Chapter, federal law includes matters involving the Constitution, a federal statute, or a treaty.

a crime in the Criminal Court of New York City but the offense took place outside the City of New York, then that court would not have territorial jurisdiction over the case.

2. The Basis of Judicial Decision Making: What is “The Law”?

(a) Types of Law: Constitutions, Statutes, and Case Law

Judges make decisions based on law. Your goal as a jailhouse lawyer is to convince the judge that the law supports your arguments. There are three sources of law: (1) constitutions; (2) legislation (also called “statutes” or “statutory law”); and (3) “case law” (previous decisions made by judges). Judges weigh each source of law in the following order: constitutions are more “persuasive” (more convincing to the court) than legislation, and legislation is more persuasive than case law. Figure 2 lists the sources of law from the most to the least persuasive.

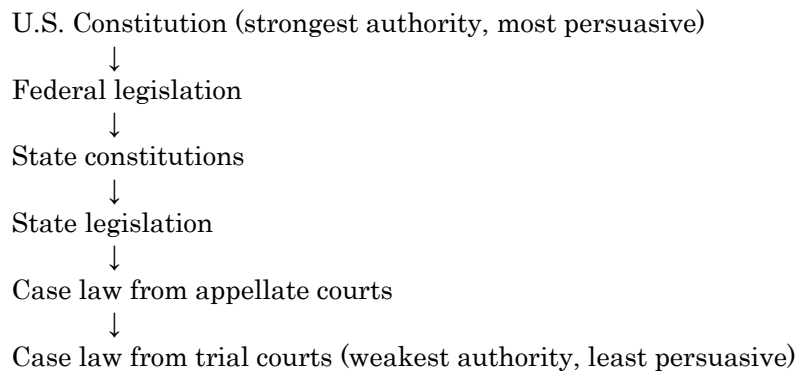


Figure 2: Hierarchy of Sources of Law

Part C of this Chapter will describe how to find the relevant law(s) for your case. Before you start researching, though, it is important that you understand how the different kinds of law work together.

A constitution is the supreme law of the jurisdiction. The United States Constitution is the supreme law of the United States. Each state also has a constitution; if a state constitution and the U.S. Constitution are in conflict, a court will follow the U.S. constitution.¹⁰

The second type of law, legislation, refers to laws passed by a legislature (by the U.S. Congress for federal law and state legislatures for state law). Legislation is the typical form in which laws are enacted.

Finally, case law is the law that results from a court decision regarding a particular dispute or criminal proceeding. Judges often explain how they interpreted and applied the law when making their decision by writing an “opinion.” The opinions are good places to look to figure out how to interpret statutes and constitutions. The following section provides additional information on case law.

(b) Case Law: How to Use Legal Precedents

In deciding a case, the court is making law in two ways. First, the court determines what the law says about the dispute between the parties directly involved in the case. Second, this decision will also affect other people in the future because the court’s resolution of the issues in the case forms “precedent” for other similar cases: the case becomes an example and sets a rule that other judges will follow in similar cases. Therefore, when a court is deciding a case, it will look at how other courts decided similar precedential cases in the past and will follow those examples (precedents). Courts rely on earlier, similar cases to determine how a current case should be resolved. This process is called “stare decisis,” which means “already decided.” *The greater the similarity between the cases, the*

10. U.S. CONST. art. VI.

stronger the precedent. This means that if a past case is very similar to your case it will be more persuasive to the judge. However, if there are important distinctions between your case and the past case, the judge may have more freedom to depart from that decision. Therefore, it is very important to find out whether issues in your case have already been decided by your court or other courts. These other cases can help you predict how a judge would rule in your case. You can also see what arguments were successful in other cases, so that you can use those arguments to succeed in your case. If you find arguments that hurt your case, you will need to rebut (argue against) them before the court and show why they are different from your case.

If you find precedential cases which are similar to your case, where the court ruled favorably on issues that you want to argue, you can use them to support your arguments. You will try to show the court that your case is similar enough to the previous cases so that the conclusions in those cases should be followed in your case. For example, suppose that you have been placed in solitary confinement because you complained to a newspaper reporter about prison conditions. You should look for a precedential case that ruled that the prison could not punish an incarcerated person, or put an incarcerated person in solitary confinement, for similar complaints. If you find such a case, your next step is to convince the court that you were put in solitary confinement because of your complaints, and not for a different, valid reason. Then, you should use the rulings in the precedential cases to argue that your case should be decided in the same way.

If the precedential case works against you, you will have to convince the court that your case is different enough that the judge should not follow the precedent. This is called “distinguishing” a case. One way you can distinguish your case is to show that there were factual differences between your case and the earlier cases. A superficial (or insignificant) difference will not help your case, for example, saying: “that case involved that person, but my case involves me.” A useful distinction is one that casts doubt on whether the precedent should be applied in your case. For example, it would be useful to demonstrate that the facts are so different that the cases are not really the same. You might want to say, “in that case the defendant didn’t get a speedy trial because he fired his lawyers three times when they were ready to go to trial, but my trial has been delayed over and over through no fault of my own.” You should always try to distinguish a precedential case that works against you. Ignoring the case is not a good idea because the other side will likely use it against you in its arguments.

It is important for you to note that not all precedential cases are equally persuasive. If the case was decided by a judge on the same court as your judge or by an appellate court above your court, the case will be very persuasive. After all, earlier cases define the law in your particular jurisdiction. A lower court must follow the higher court’s precedent or risk almost certain “reversal” (a decision by the appellate [higher] court rejecting the outcome decided by the lower court). The court that created the precedent is also unlikely to overrule its prior decision without extremely good reasons. Precedents from the same court or from the appellate court above it are sometimes called “controlling precedents.”¹¹ Thus, a case decided in the U.S. Supreme Court, the highest court, is controlling precedent for all other courts.

Courts almost always follow controlling precedents. However, there are exceptions. In some instances, courts will recognize that older controlling precedents have become outdated when applied

11. Certain state court systems are structured to require trial courts to consider the decisions of all appellate courts within the state as controlling. For example, New York’s first level appellate courts are called the Appellate Division. The Appellate Division is divided into four departments. An appellate decision from any department is controlling for all trial courts within the state, unless the trial court’s own department rules otherwise. *Stewart v. Volkswagen of Am., Inc.*, 181 A.D.2d 4, 7, 584 N.Y.S.2d 886, 889 (N.Y. App. Div. 2d Dept. 1992), *rev’d on other grounds*, 81 N.Y.2d 203, 597 N.Y.S.2d 612, 613 N.E.2d 518 (N.Y. 1993); *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664, 476 N.Y.S.2d 918, 919–20 (N.Y. App. Div. 2d Dept. 1984). *But see People v. Salzarulo*, 168 Misc. 2d 408, 411, 639 N.Y.S.2d 885, 887 (N.Y. Sup. Ct. 1996) (holding that while other departments are “entitled to have their rulings accorded great respect and weight,” trial courts are only bound by the appellate court in their judicial department).

to modern facts. Furthermore, precedents can be overruled and therefore become useless. This might happen if a higher court believes a lower court made an incorrect decision, or if the legislature passes a law that invalidates a court's decision. It is therefore very important to make sure the precedent you have found is still good law and has not been overruled.

Precedents from other jurisdictions are valuable but are not controlling (so your judge is not obligated to follow those precedential cases). A case from another jurisdiction sets out the law in that court, but not necessarily for your court. Still, the reasoning in the case might persuade your judge, especially if no court in your jurisdiction has ruled on the legal issue. Additionally, if most courts in other states have decided the issue in the same way, that can be a persuasive suggestion for how your state should decide the issue.

Chapter 6 of the *JLM*, “An Introduction to Legal Documents,” will discuss the legal papers you need to provide to a court. These documents are very important; they should be written clearly and persuasively, and should have no errors. Before you write any papers, however, you will need to figure out your most compelling or convincing arguments and find cases to support those arguments. Finding precedential cases is an extremely important part of your research because those cases will reveal which arguments were successful with other courts. They will also show you which arguments failed and why the court rejected them. Cases from higher courts, and cases that are very similar to yours, carry the greatest weight and will help your case the most. You should search for similar cases not only in your jurisdiction but also in other jurisdictions, even though cases from your own jurisdiction will be much more persuasive. You will also need to distinguish any precedential cases that do not support your argument, as discussed above. Finally, you should also consider public policy reasons for why a court should rule in your favor. Public policy arguments focus on why ruling in your favor will be good for society as a whole, not just for you.

C. Legal Research: How to Find and Support Legal Arguments

1. Sources for Legal Research

There are three categories of resources in your law library. The first category is “primary sources.” Primary sources include the documents that make up the “law”: constitutions, legislation, and case law (court decisions). Primary sources also include law created by “delegated authority.” That includes executive orders, regulations, and the rulings of administrative tribunals. Legislative bodies like the U.S. Congress cannot regulate the details of every law. So, other government bodies (such as administrative agencies) fill in the details of generally-worded statutes, usually by creating regulations. Courts base their decisions on all of these primary sources of law.

The second category of resources found in a law library is “secondary sources.” These are not law, but books and articles that discuss and comment on the law. This commentary can help you understand the law and help you find relevant primary sources. Secondary sources include textbooks, treatises, form books, dictionaries, periodical literature such as law journals, and manuals like the *JLM*. While courts prefer primary sources, sometimes you can use a secondary source, such as a law review article or a treatise, if you cannot find any applicable cases or statutes. These sources can be useful in persuading a court to rule a certain way. However, ***you should not use a manual such as the JLM as authority for the court—you should use the JLM to help you find law that you can use to persuade the court.***

The third category of resources found in a law library is “search books.” Search books are library tools that help you find primary and secondary sources of authority. They include digests of court decisions, “citators” (which are indexes of legal resources, such as Shepard's), and annotated statute books. These search tools can help you find cases to make strong arguments. They are discussed in more detail in the rest of this Chapter.

2. Methods of Legal Research

Your goal in researching a legal question should be to find relevant primary sources. Your prison library may have research tools that will help you find these primary sources and, of course, the

sources themselves. Although you will need to find different sources for each case, the research process will be similar. This process has seven basic steps:

- (1) Analyze the problem;
- (2) Get an overview of the subject matter;
- (3) Find relevant legislation;
- (4) Find relevant cases;
- (5) Check other sources;
- (6) Update your research; and
- (7) Cite cases. Part D of this Chapter explains more about citations.

If you know an issue well, you may be able to skip some steps, but we recommend that you follow all seven steps for each research issue. This way, you can be sure that you have researched your question completely and accurately.

Remember to take careful notes during your research. Your notes will provide a record of your research and will help you to avoid losing information. Careful note-taking is very important in successful legal research.

(a) Analyze the Problem

Your case will begin with a story. While you will eventually translate the story into legal issues, you must first confirm the facts of your story. If you are preparing to appeal your criminal conviction, you must first review all the evidence from the trial court transcript. If you are filing a civil case (for example, if you are suing the prison for use of excessive force), you should gather as much information as possible about what happened. Written documents (like medical records, complaints you have filed, etc.) are especially important. As your research goes on, you will need to look at the facts again to figure out which ones are most important.

If you are planning to appeal a lower court decision, remember that the appellate court will accept the facts as found by the lower court. As footnote one of this Chapter explains, challenging the factual findings of the lower court is very difficult. Therefore, you should research your legal issues as they apply to the facts that the lower court found to be true in your case.

Once you have a strong grasp of the facts of your case, you should examine the legal issues these facts raise. In doing so, you should start by asking yourself the following three questions:

- (1) What are the legal issues that I want to introduce?
- (2) Which court has the power to hear my case and rule on the issues I will bring up?
- (3) If the court agrees with my legal arguments and rules in my favor, does the court have the power to award me the relief that I seek (such as award me money, reverse my conviction, or force someone else to take a specific action)?

The last question is whether the court can grant you your requested remedy. Remedies are discussed in detail in Chapter 9 and Chapters 13–17 of the *JLM*. The rest of this Chapter deals with the first two questions.

The first question goes to the heart of your case: What legal issues do you want the court to consider? To answer, you should look first at the general areas of law in your case. Is your case about arrest? Bail? Parole?

In a civil case, you need to find out what you will have to prove in order to show that the defendant is liable for each claim you are asserting. In civil cases, you are the plaintiff and each person or prison you are suing is a defendant. You should also be prepared to rebut (argue against) any defense the defendant may claim. You will find a lot of this information in case law, but statutes may also be important.

If you are appealing a criminal conviction, you should focus on errors made by the trial court. You should review secondary sources covering arrest and trial practices to learn the most common arrest and trial errors. Then you should carefully review the lower court proceedings and the judge's decision in your case to find any areas of possible error. Carefully researching the laws that apply to your case

will help you figure out if an error was made. This Chapter focuses on how to conduct the legal research that you need for your appeal, but you should also read Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence.” Chapter 9 has important information such as how to file your appeal, time limitations you might face, and your right to have a lawyer.

As you are deciding which issues to investigate, it may be helpful to break down the general areas of law into more specific problems. For example, you may start your research in a broad area of law (such as “criminal procedure”) and move to a narrower area (such as “searches incident to arrest”). Then you can go to a precise question (such as: “Can a police officer use a ‘choke hold’ to arrest a suspect and search for drugs?”). It is easier to research a narrow issue and build it into a larger case than to try to research the entire case right away.

Once you have a legal question, you must ask which court has jurisdiction to hear it. As discussed in Part B(1) of this Chapter, there are both territorial (geographic) and subject matter limits on a court’s power. You must bring your action or appeal in a court that has jurisdiction to hear it, or your case will be dismissed. Territorial jurisdiction for a trial court will depend on where the alleged incident took place. For an appellate court, territorial jurisdiction will depend on which court made the ruling that you are appealing.¹² You should also confirm subject matter jurisdiction before doing more research on the merits of your case. Most cases will not have complicated jurisdictional issues, but you must make sure you are filing your case in a court that has jurisdiction to hear it.

(b) Get an Overview of the Subject Matter

Legal research is hardest at the beginning, since you will need to understand the general area of law that covers your case before you focus on narrower issues. Background reading will help you understand how to apply the current law to your facts. Legal encyclopedias are very helpful sources for general overviews because they provide short summaries of the law. Treatises are also very helpful and provide a more detailed analysis of a particular type of law. Prison libraries usually have the two most common legal encyclopedias, American Jurisprudence and Corpus Juris Secundum. They also usually have copies of treatises like McCormick on Evidence, Johnson’s *The Elements of Criminal Due Process*, Kerper’s *Introduction to the Criminal Justice System*, and Kerper’s *Legal Rights of the Convicted*.¹³ As you read these background materials, take notes about any cases, legislation, or constitutional provisions that seem like they may apply to your case. To find a subject in an encyclopedia or treatise, use either the “index” (usually found in the back of a book) or the “table of contents” (usually found in the beginning of a book). Both types of research are fully described later in this Chapter.

(c) Find Relevant Legislation

After learning the basics of a subject area, you should turn to the main sources of law—legislation and cases. Research can take a long time, so remember to take good notes about the sources you read and to follow the outline this Chapter provides.

You should start your research by reading legislation. Legislation includes constitutions, federal and state statutes, and supporting governmental enactments, like regulations and administrative decisions. Constitutions and statutes are generally broken down into parts called articles, sections (the § symbol means “section”), and clauses. Regulations issued by state or federal agencies, like the New York Department of Correctional Services or the U.S. Bureau of Prisons, are important forms of legislation and should be checked during your research. Each form of legislation will now be discussed in greater detail.

12. See Part B(1) of this Chapter.

13. Online legal dictionaries are *available at* <https://dictionary.law.com/> (last visited January 25, 2019) or <https://www.merriam-webster.com/legal> (last visited January 25, 2019).

(i) Federal Constitution

Constitutions create the structure of government and define individual rights and liberties. They are the most important authorities. The Constitution of the United States is the supreme law of the United States.¹⁴ Any federal case or statute, or any state constitution, case, or statute that violates the U.S. Constitution is “unconstitutional,” which means it is completely invalid. So, the Constitution should be your first source to research your case. You should determine if a constitutional provision applies to your case at the beginning of your research. The first ten amendments to the Constitution (known as the “Bill of Rights”), along with the Fourteenth Amendment, are the most important parts of the Constitution for criminal defendants and incarcerated people. They have guarantees of personal rights and liberties. The First Amendment (freedom of speech, religion, and association), Fourth Amendment (search and seizure), Fifth Amendment (grand jury indictment, double jeopardy, self-incrimination, and due process), Sixth Amendment (jury trials for crimes and procedural rights), and Eighth Amendment (excessive bail and cruel and unusual punishment) are all very important. The Fourteenth Amendment is also very important because it prohibits state governments from depriving you of life, liberty, or property without due process of law (that is, certain legal procedures, typically including notice and a hearing). It also guarantees the equal protection of law (meaning it bans discrimination by the state on the basis of race, sex, and national origin). The Fifth Amendment ensures that these guaranteed rights apply to both state and federal actions.

(ii) State Constitutions

Each state has its own constitution. The text of the New York State Constitution appears in the first few volumes of McKinney’s Consolidated Laws of New York Annotated (“McKinney’s”). Each state’s constitution is supreme over all other laws of that state. This includes state statutes passed by the legislature, and precedent from cases that state courts decide. But state constitutions are *not* more important than federal law (federal law includes the U.S. Constitution and laws passed by the U.S. Congress). State constitutions apply only to state law. Many provisions of state constitutions are similar to provisions found in the U.S. Constitution, but your state constitution may give you more rights than the U.S. Constitution. So, you should always check your state constitution after reviewing the U.S. Constitution.

The U.S. Constitution and most state constitutions are found in annotated volumes. Following the constitutional text is a section titled “Notes of Decisions” (on Westlaw) and “Case Notes” (on LexisNexis) which have the case summaries grouped into separate legal subjects. There is an index to these legal subjects at the beginning of each Notes of Decisions section. You will find the case citation¹⁵ at the end of each summary. Annotated volumes also contain other helpful research tools. These include cross-references, which are citations to legal encyclopedias and relevant treatises in which the same legal subject is discussed. They also include the West “key number system,” which is discussed in Part C(2)(d) of this Chapter. Finally, annotated volumes often have summaries of legislative history, which give you information about why a particular law was passed.

14. The text of the Constitution can be found in each of the first twenty-eight volumes of the United States Code Annotated (“U.S.C.A.”). Annotated volumes include the text of each constitutional provision and summaries of cases that have interpreted them. The un-annotated text is *available at* <http://www.law.cornell.edu/constitution/> (last visited January 25, 2019) or <http://constitutionus.com/> (last visited January 25, 2019).

15. Case citations are discussed in Part D of this Chapter.

To find the relevant constitutional provisions for your case, use the constitutional index found at the back of the final constitutional volume.¹⁶ The methods you use to locate statutes¹⁷ and cases¹⁸ related to your legal question also apply to finding relevant constitutional provisions in a constitutional index.

(iii) Federal Statutes

The U.S.C.A. (which stands for United States Code Annotated) contains the text of the U.S. Constitution and all laws passed by the U.S. Congress. Following the text of many of the legislative provisions is a section titled “Notes of Decisions” which contains summaries of cases that have interpreted each provision. These summaries are not law but will give you an idea of which cases may be helpful to read in detail, and will show you how the law was applied to different situations. The U.S.C.A. also has other useful research tools like cross-references to the West key number system (discussed in Part C(2)(d) of this Chapter), which can be found in the section called “Library References,” located after each legislative provision.

The U.S.C.A. is divided into fifty “titles.” Each title brings together in one place all federal laws in a particular subject area. For example, Title 18 contains all federal laws about crimes and criminal procedure. Title 28 contains all laws about the judiciary and judicial procedure. Each title may have multiple volumes. There is a paperback index to the entire U.S.C.A. (not including the constitutional volumes) shelved after the main volumes that tells you where a given subject can be found in the U.S.C.A. Each title also has its own index located in its last volume.

The text of all federal laws also appears in the United States Code (“U.S.C.”). The U.S.C. is organized in exactly the same way as the U.S.C.A. It is different from the U.S.C.A. only because each title only has the law, not the Notes of Decisions. Your prison library may have the U.S.C.A., the U.S.C., both, or neither.

If you are charged with an offense under federal law, a good starting point is to review the text of the provision you are charged with. Beneath the text of that provision of law there may be summaries of cases interpreting the text that will allow you to see how courts have applied that provision in other cases.

It is very important that your research is current. Hardcover volumes of sources are not replaced often. The most up-to-date information is in soft cover updates found in a folder inside the back cover of each hardcover volume or next to the volumes on the shelf (called the “pocket part”). Soft cover updates have information received after publication of the hardcover volume. These pocket parts will have any recent amendments (changes) to the statutory provision and any recent cases interpreting that provision. You must check the pocket part for the most current law whenever you use a hardcover volume of any source in your research.¹⁹

The entire U.S.C. is updated every six years. The most recent volumes are from 2018. The U.S.C.A. is updated more often. If your prison library has not updated its collection of hardcover volumes, you should continue to check the pocket parts to make sure that your research is up-to-date.

You should ***always*** check whether statutes have changed before using them in a legal paper. When referring to a federal statute, cite to the most recent U.S.C. or U.S.C.A. in your prison library, meaning

16. Note that there is a separate index for the constitutional volumes of the U.S.C.A. A larger multi-volume paperback index is published for the rest of the U.S.C.A. volumes that refer to legislation, but that index does not contain any references to the Constitution.

17. Statutes are described in Part C(2)(c)(v) of this Chapter.

18. Cases are described in Part C(2)(d) of this Chapter.

19. When a statute has been amended or repealed within the past twelve months, the pocket part may not have the most recent change. For the most up-to-date information, consult the paperback supplement normally shelved at the end of the volumes you are using. Paperback supplements are updated monthly.

the book and pocket parts that you looked at while researching your case. It may not be the same year as the versions cited in the *JLM*.

(iv) State Statutes

State statutes are organized in a way similar to federal statutes. Each state organizes its statutes a little differently, but consider New York as an example. The permanent laws of New York are found in a set of books called McKinney's Consolidated Laws of New York Annotated ("McKinney's").²⁰ Like the U.S.C.A., McKinney's is organized according to subject matter but divided into "books" rather than "titles." It is arranged in alphabetical order. Like titles, each book may contain multiple volumes. Thus, Book 10B brings together all New York laws on the subject of Correction Law (Prison Law), Book 11A does this for Criminal Procedure, and Book 39 does this for Penal Law (Criminal Law). McKinney's also contains "Notes of Decisions," which summarizes cases that have interpreted each provision of the statutes. When working with state statutes, like with federal statutes, be careful to consult the pocket parts (located inside the back cover of the book). The pocket part has information on the most current statutes and cases. State statutes are updated frequently. The years listed in *JLM* citations to state statutes may not correspond to the version in your prison library. As with federal statutes, cite to the version in your prison library.

McKinney's also contains a section called "Practice Commentary" following certain statutory provisions. This commentary is neither a case summary nor actual law; it is the comments of a lawyer who has studied the statute. The commentaries help researchers understand the law. Like general summaries of particular subjects, commentaries can be useful sources of analysis and research information. They explain how a lawyer would use a given statute or how that statute has been used in the past.

If you are charged with an offense under state law, a useful starting point is to review the text of the provision under which you are charged. In New York, crimes are defined in Book 39, "Penal Law." The procedural aspects of criminal prosecution are found in the New York Criminal Procedure Law ("N.Y. Crim. Proc. Law"). The N.Y. Crim. Proc. Law is found in the fifteen volumes that make up McKinney's Book 11A. Do not confuse the N.Y. Crim. Proc. Law with the New York Civil Practice Law and Rules ("N.Y.C.P.L.R."), which explains the rules of the courts in New York.

(v) Finding Statutes—The General Index

You will not always have a particular statute or statutory section to begin your research. If you are starting from scratch and the provision under which you were charged is not helpful, the best place to turn is the "general index" of a source. This is true whether you are researching the U.S. Constitution, federal legislation, or state legislation. The general index is normally found in separate volumes at the end of the source you are using. For example, the general index for New York legislation is found in several paperback volumes after the McKinney's main volumes. The index lists topics in alphabetical order. So, you can begin by searching for a word that describes or is related to your problem. These descriptive words can refer to an event (for example, "arrest" or "homicide"), certain persons (for example, "addicts" or "police"), places (for example, "prison" or "hospital"), or things (for example, "motor vehicles" or "weapons"). General descriptive words are divided into subcategories. For example, under "weapons" you will find separate entries for different types of firearms. The general index is designed to lead you to the relevant statutes from a variety of descriptive words. So, you do

20. If you need to find a law that is no longer in force (for example, if you were convicted under a version of the Penal Law that was later changed), look first to McKinney's for the current version of the law. After the current statute, find the "Historical and Statutory Notes" section, which will tell you what year of the Session Law to look at in order to find the old law. That year's "Session Law" can be found in McKinney's Session Laws of New York. It is unlikely, however, that a prison library will have the Session Laws. If your library does not have the Session Laws, the "Historical and Statutory Notes" section often lists a short summary of changes that have been made to the original law.

not need to find the perfect word. Keep track of the different possible descriptive words as you research and use the many indices to help you find relevant authorities.

A second way to find legislation is to check the title or book index. The title or book index is similar to a table of contents, and is found at the beginning of each volume. So, for example, scanning the names of the McKinney's volumes shows three possible criminal titles: "Correction Law," "Penal Law," and "Criminal Procedure Law."²¹ If you were researching a procedural issue (say your home was searched under a search warrant in the middle of the night), the volumes on Criminal Procedure Law (Book 11A or "11A") seem like the most useful place to begin. You would then take out a volume of 11A and turn to its "book index." Note that this table appears after the shorter "Table of Contents" section, and is immediately before the statutory provisions. The book index breaks down the general subject of Criminal Procedure into smaller topics and subtopics.

Following each subtopic is a list of statutory sections that deal with that subtopic, so you can review the subtopics to find statutory provisions that may be helpful for your research. For example, on the issue of "nighttime searches," the book index in any of the volumes of 11A shows a section on "procedures for securing evidence," and another on "search warrants."²² If you go to the volume of 11A that contains the legislation on search warrants (Sections 690.05 to 690.55) and turn to the beginning of that section, you will see another listing of even more specific subtopics that includes "search warrants; when executable" (Section 690.30). Turning to that section of the legislation, you will find that, in New York, search warrants may only be used between 6:00 a.m. and 9:00 p.m. unless the warrant provides otherwise. Thus, you have found a law to support your complaint if the warrant used to search your house did not explicitly allow the search to be conducted after 9:00 p.m. After the text of Section 690.30, you will find a "Practice Commentaries" and a "Notes of Decisions" section that contains summaries of a number of cases applying this legal rule to various circumstances. To locate even more recent cases on nighttime searches, check the pocket part of that volume. Checking the pocket part is one way to update your research to make sure that there have been no new cases or statutes that have changed the law.

Do not be discouraged if you are having trouble finding a relevant law. Research takes time, and you may need to try the general index, the title or book index, or even a little browsing before you can find relevant legislation. Or, the issue in your case may have been dealt with through court cases rather than legislation. Finding case law is the subject of Part C(2)(d) of this Chapter.

(vi) Legislative History

When reading legislation, the "legislative intent," or what the legislators hoped the statute would accomplish, is sometimes unclear. Knowing the legislative intent can often help you to better understand the legislation. It may help you apply the legal rule to the facts of your case. Remember that legislators may not have considered your exact factual situation when they created the law. One of the best ways to find legislative intent is to review the "legislative history" of the legislation. State legislative history is difficult to find and often cannot be found at all. This Subsection will concentrate on how to find the legislative history of federal laws and therefore learn the congressional purpose behind federal legislation.

Legislative history consists of the written record of what Congress considered before passing a law. It includes the text of the bill²³ introduced into the legislature, any later amendments (changes) to the bill, committee and conference reports,²⁴ congressional hearings, and the debates of the House of

21. Criminal Procedure Law sets out the procedures (processes) used to enforce and prosecute crimes. So, Criminal Procedure Law describes, for example, how a trial is supposed to happen. Penal Law is the law that actually defines the crimes. Correction Law is the law relating to incarcerated people in correctional facilities.

22. N.Y. CRIM. PROC. LAW § 690.05 (McKinney 2009).

23. A "bill" is a proposed statute before it has either been passed or rejected by legislators.

24. The House of Representatives and the Senate are subdivided into committees that work in particular areas. For example, the House Judiciary Committee works on legislation that concerns the federal judiciary.

Representatives and Senate. Committee reports are produced by the Congressional Committees that review legislation.²⁵ Conference reports are produced by “conferences” set up when the House and Senate pass different versions of the same legislation. Because the conference report is produced jointly by the committees of both the Senate and the House just before the final passage of the legislation, it is perhaps the most important source of legislative intent.

Legislative history is found in many books that are not located in prison libraries. However, one publication, the United States Code Congressional and Administrative News (“U.S.C.C.A.N.”), publishes “compiled” legislative histories that bring several sources together in one place. Although the U.S.C.C.A.N. does not provide all legislative history, it is the only source of legislative history you are likely to find in a prison library. There are several volumes of the U.S.C.C.A.N. for each year. To use these books, you must know the year in which the statute was passed. The U.S.C.A. tells you the year the statute was passed at the end of each section. It may also tell you where in the U.S.C.C.A.N. to find the legislative history. Each set of annual U.S.C.C.A.N. volumes also contains a table of “Legislative History.” This table lists all the laws passed during that year and identifies certain parts of the legislative history. To find legislative history in U.S.C.C.A.N., look in the index found in the last volume of that year. Search the index for the name or the subject matter of the statute you are researching. The index will list the page number where you can find legislative history for that topic. The volumes of U.S.C.C.A.N. with “Legislative History” on their spines contain the text of the legislative report from the House of Representatives or the Senate.

If you review the legislative history of a statute, you will often find a statement by a member of Congress or by a committee that explains what Congress intended the statute to mean. If this explanation helps your argument, you should quote it in the papers you submit to the court.

Legislative histories of state statutes are hard to find because few states keep a record of the process of enacting a bill. In New York, legislative history is usually found in the New York Legislative Annual,²⁶ which you are unlikely to find in a prison library. Your library may, however, have McKinney’s Session Laws of New York (see footnote 18 of this Chapter), which contains limited legislative history for some bills enacted that year. This legislative history is found at the end of the final Session Law volume for that year.

(vii) Court Rules

Court rules lay out how to get a case into court and what procedures are used once the case is before the court. Sometimes these rules are called “rules of practice” or “rules of procedure.” The U.S. Supreme Court has created court rules that apply to all cases in federal courts. The rules are published as part of Title 28 of the U.S.C.A. (in the volumes that have the word “rules” on their spines) and include “Notes of Decisions” sections summarizing cases interpreting the rules. Formally, the rules are separated into three parts: the Federal Rules of Civil Procedure (rules for federal civil cases), the Federal Rules of Criminal Procedure (rules for federal criminal cases), and the Federal Rules of Appellate Procedure (rules for appellate procedure in all federal cases). There may also be additional local rules enacted by local federal courts. In addition, the Federal Rules of Evidence govern what can be used as evidence in federal cases. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are published in separate volumes that are part of Title 28 of the U.S.C.A.

State courts have their own court rules. In New York, for example, the rules are contained in McKinney’s New York Rules of Court.²⁷ This paperback volume contains the rules of court for all New York state courts. It also contains the “local federal rules” for the federal district courts in New York and the Second Circuit Court of Appeals. These rules will tell you which court to file papers in and how the papers should be filed (size, form, etc.). The rules will also tell you the normal court calendar.

25. See About Committee Reports of the U.S. Congress, *available at* <https://www.congress.gov/congressional-reports/about> (last visited January 25, 2019).

26. N.Y. Legis. Ann. (2009).

27. N.Y. Ct. R. (McKinney 2009).

For example, some courts hear certain kinds of cases only on specific days of the week. The rules will also tell you what information is required for certain kinds of lawsuits. If you are involved in a New York State or federal case, always review the New York Rules of Court. In particular, review the section(s) that apply to the court to which you are sending your papers. This review should be done before filing any legal papers, since you do not want to find out afterwards that the deadline for filing the papers has already passed. If you cannot figure out something in the New York Rules of Court, sometimes a court clerk will tell you the answer over the telephone. The addresses and telephone numbers of the trial courts in New York are contained in Appendix II of the *JLM*. Call the courthouse and ask for the court clerk's office. Although this does not always work, it might save you time and effort.

(viii) Administrative Codes

Federal and state legislatures often give government agencies the power to create rules or regulations that govern specific subjects. The rules are often referred to as "administrative rules" or "regulations." Here are two examples: the federal government gives the Bureau of Prisons power to make specific rules about how federal prisons are run,²⁸ and a state will often allow the state's Department of Corrections to make specific rules about how state prisons are run.

All federal administrative rules and regulations are published in the Code of Federal Regulations ("C.F.R."). Similarly, rules and regulations from all departments or agencies within a state are also collected together and published. Each state organizes the regulations a little differently, but publications of the rules and regulations are often referred to as the administrative "code," "rules," or "regulations." For instance, New York's administrative rules are published in the Official Compilation of Codes, Rules & Regulations of the State of New York ("N.Y. Comp. Codes R. & Regs."), and Texas's codes are published as the Texas Administrative Code ("Tex. Admin. Code"). Your prison library may have a copy of the C.F.R. and/or a copy of your state's administrative code.

If you are in a federal prison, you may want to review a copy of the C.F.R. to find out if any provisions are relevant to your case. The C.F.R. has many volumes, organized alphabetically by subject matter, and a separate general index will likely be shelved after the main volumes. This general index is a good place to begin your research. For instance, you can open the general index and look under "Prisons Bureau," and under this main heading (which will be in bold type), there are several subtopics. You can scan those subtopics, and if any of them appears to be related to your case, the index will refer you to the appropriate title and section of the C.F.R. For example, if you are interested in parole issues, you can look under "Prisons Bureau" for the subtopic on "Parole," which will refer you to "28 C.F.R. 572."²⁹ This means that the rules on parole in federal prisons are contained in Title 28, Part 572 of the C.F.R. You can then pull out the volume from the shelf which contains Title 28, Part 572 (the title and part information is on the spine of the book), and read through Part 572 to see if there is a "section" that interests you. In the C.F.R., "sections" are simply subtopics under each Part. For example, if you are referring to a smaller subtopic within Part 572—for instance, section 572.30—you would say "section 572.30," not "Part 572." The index to the C.F.R. is updated once every year.³⁰

If you were charged or convicted of a crime by the state government, you may want to review a copy of your state's administrative code. The administrative code will likely have many volumes, organized by subject. A good place to begin your research is in the general index, which should be in one or more volumes shelved after the code's main volumes. For instance, if you have a question about how much exercise time incarcerated people are supposed to have, you may want to begin by looking in the general index under "prisons." In New York, the index would then refer you to the section on

28. 18 U.S.C. § 4042.

29. 28 C.F.R. § 572 (2020).

30. To get updates before the new version is printed, you first have to look at the monthly "List of C.F.R. Sections Affected" which will refer you to the appropriate section in the Federal Register. This can be accessed online at <https://www.govinfo.gov/help/lssa> (last visited January 25, 2019).

“correctional institutions.” Under “correctional institutions,” there are many subtopics. One of these subtopics is “exercise,” which refers you to “7 § 304.3” and “7 § 1704.6 of the N.Y. Comp. Codes R. & Regs.”³¹ If you then read Title 7, section 1704.6 of the N.Y. Comp. Codes R. & Regs., you will find that in New York, most incarcerated people have the right to exercise outside of their cells for at least one hour each day. If you are using a state administrative rule or regulation in your legal papers, be sure to check whether the regulation has been recently updated or changed. Updates to state administrative codes can usually be found in soft cover volumes that follow the main volumes of the administrative code.

(d) Find Relevant Cases

The bulk of your research time will be spent trying to find cases to support your arguments about how the court should decide your case or request. In researching cases, you want to search for a case that is similar to your case. To be most useful to you, the case must have very similar facts to your case and have been decided by a court in the jurisdiction you have been charged with the crime in. In addition, the cases cannot have been reversed or overruled by a later case or statute. It also helps if the case is recent.

Sometimes you may hear about the “holding” or the “dicta” of a case. Parts of a judge’s decision may either be described as part of the “holding” or as “dicta.” The holding is the major part of the decision in a case and usually controls only those cases with facts like the case the court decided. Dicta is all of the other things that the court says in the opinion. For example, the holding of a case may be that you have the right to an attorney in a criminal case, and other comments that the court may make about the general role of an attorney would be dicta. Dicta can also be found in the footnotes to a case. For example, the Supreme Court decided in a case that the defendant had to prove that they were under duress (being threatened), instead of the government disproving that they were under duress, but described what a good defense of duress would look like in a footnote in the decision.³² You will rarely find a “perfect” case (one that matches the facts of your case exactly). Thus, your search should be for cases that have strong similarities to your case.

In addition to looking for similar cases that help you, you need to be aware of any similar cases that do not support your position. You must be prepared to explain to the judge why that conflicting case should not apply to your situation or why the judge should not follow that case.³³ Remember, your opponent will also be researching your case. You must be ready to respond to your opponent’s arguments and to make your own.

A law report is the written record of the decision reached by the court. The decision set out by the court is called an “opinion.” Books that contain these reports are known as “reporters.”³⁴ This is where you will find case law to support your arguments.

(i) Federal Reporters

There are three levels of courts in the federal system, and each level has a separate reporter containing the court’s decision. The Supreme Court reporter is called the United States Reports (abbreviated as “U.S.”).³⁵ The circuit court (federal court that will hear your case if it is appealed) reporter is called the Federal Reporter (abbreviated as “F.,” “F.2d,” or “F.3d”).³⁶ The trial court is called a district court and its reporter series is called the Federal Supplement (abbreviated as “F. Supp.” or

31. N.Y. COMP. CODES R. & REGS. tit. 7, § 304.3 (2020); N.Y. COMP. CODES R. & REGS. tit. 7, § 1704.6 (2020).

32. *Dixon v. United States*, 548 U.S. 1, 4 n.2; 126 S. Ct. 2437, 2440 n.2; 165 L. Ed.2d. 299 (2006).

33. See Part B(2)(b) of this Chapter for more information on precedential cases.

34. See, e.g., United States Reports (for Supreme Court decisions) and North Eastern Reporter (for New York Court of Appeals decisions).

35. See, e.g., *Brown v. Plata*, 563 U.S. 493 (2011).

36. See, e.g., *Welch v. Galie*, 207 F.3d. 130 (2d Cir. 2000).

“F. Supp. 2d”). Not all decisions of federal district courts are published. Publication is called “reporting” a decision. In New York, there are four federal district courts: the Northern, Southern, Eastern, and Western Districts. Reported decisions of each of these courts are found in the F. Supp. Each reported case is found and referred to by its “citation.” The citation of a case provides the official way of referring to an opinion, and tells you where to find the text of the opinion in the correct reporter. Citations will be explained in Part D of this Chapter, but you may want to read that Part now.

Unfortunately, many opinions that are of interest to incarcerated people are “unreported” or “unpublished”—that means they do not appear in the Federal Supplement or Federal Reporter volumes available in prison law libraries. Many unpublished cases may appear in the Federal Appendix. Citations to the Federal Appendix look like citations to cases in the Federal Reporter or Federal Supplement, but cite instead to the Federal Appendix (F. App’x).³⁷ Other cases that do not appear in a reporter are available on computer services like Lexis and Westlaw. Citations like “2000 U.S. App. LEXIS 12345” or “2000 U.S. Dist. LEXIS 12345” are Lexis citations. Citations like “2016 WL 1256789” are Westlaw citations. In the *JLM*, unpublished cases are generally cited to Lexis (“LEXIS”), and occasionally Westlaw (“WL”), and are always indicated with the text, “(*unpublished*)” after the citation. Sometimes cases have book citations (such as “F.2d”), but the opinions are not actually printed; they are just listed in a table. In the *JLM*, table citations are included, where available, along with a citation to an electronic source.

You should note that a citation like “___ F. Supp. ___, 2013 U.S. Dist. LEXIS 12345” does not mean the case is unpublished, but that it is merely a recently reported decision that will be available in the Federal Supplement in the near future. You should check to see if this decision has been published in a reporter since the *JLM* was printed.

The *JLM* cites published decisions whenever possible. Courts generally prefer that you cite published cases, so you should research the rules of the court in which you are filing before you cite unpublished cases. Some courts may not allow citations to unpublished cases altogether; some allow it in certain circumstances where specific requirements are met, such as serving, or providing, a copy of the case to other parties and to the court. These rules can be obtained for a small fee from the court clerk (the *pro se* clerk in New York), and they should also be available on the websites of most courts.³⁸ At the very least, an unpublished case may help you predict the outcome of similar lawsuits. Many legal researchers find unpublished cases helpful because they can shed light on particular applications of law or provide insight into how a court may respond to a certain type of claim. Recently, the Federal Rules of Appellate Procedure were changed, which affects your ability to cite to unpublished cases in certain situations. For federal appellate courts, you can now cite to any unpublished cases that were decided on or after January 1, 2007.³⁹ You should note that most unpublished cases are not precedential, which means that courts do not have to follow their holdings. They can be cited, however, for their persuasive value. Also, you generally must attach a paper copy of the case to your petition or brief, unless the case is available on a publicly accessible electronic database.⁴⁰ Some jurisdictions have more specific rules. For example, many federal courts allow you to cite to unpublished cases of their

37. See, e.g., *United States v. Hayes*, 409 F. App’x 277 (11th Cir. 2010).

38. For example, the rules for New York courts can be found at <http://ww2.nycourts.gov/rules/index.shtml> (last visited January 25, 2019) and the rules for Texas courts can be found at <http://www.txcourts.gov/media/806639/texas-rules-of-appellate-procedure-updated-with-amendments-effective-1114-w-appendices.pdf> (last visited January 25, 2019). The New York rules do not actually address the issue whether unpublished opinions can be cited. Therefore, we recommend you call the *pro se* clerk to confirm where you can find a rule on the citing of unpublished opinions, or confirm whether unpublished opinions can be cited, even if the rules are available online.

39. FED. R. APP. P. 32.1A.

40. The courts’ own databases and the two commercial services mentioned above, Lexis and Westlaw, are examples of publicly accessible databases.

own even if they were decided *before* January 1, 2007.⁴¹ There are a few ways you can learn about cases that don't appear in the federal reporters. First of all, you can read the *JLM*. Usually you shouldn't cite a case that you haven't read. For some cases, however, you may have to rely on the descriptions in this book. But you should only do so after you read the rules of the court where you are filing your claim and decided it is acceptable to cite unpublished cases. The West Group sells a

41. The 1st, 3rd, 4th, 5th, 6th, 10th, and 11th Circuit Courts allow citation to unpublished cases decided before and after Jan. 1, 2007, by specifically saying so or by not mentioning a date. 1st Cir. R. 32.1.0(a) ("An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance."); 1st Cir. R. 32.1.0(b) ("The citation of dispositions of other courts is governed by Fed. R. App. P. 32.1 and the local rules of the issuing court."); 3d Cir. L.A.R. 28.3(a) ("Citations to federal decisions that have not been formally reported must identify the court, docket number and date, and refer to the electronically transmitted decision."); 4th Cir. R. 32.1 ("If a party believes . . . that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP [Federal Rules of Appellate Procedure] 32.1(b) are met."); 5th Cir. R. 47.5.3 ("Unpublished opinions issued before January 1, 1996, are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a)."); 5th Cir. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent" but "may be cited pursuant to Fed. R. App. 32.1(a)"); 6th Cir. R. 32.1(a) ("The court permits citation of any unpublished opinion, order, judgment, or other written disposition. The limitations of Fed. R. App. P. 32.1(a) do not apply."); 10th Cir. R. 32.1(C) ("Parties may cite unpublished decisions issued prior to January 1, 1997, in the same manner and under the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule."); 11th Cir. R. 36.2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."); 11th Cir. R. 36, I.O.P. 7 ("The court generally does not cite to its 'unpublished' opinions because they are not binding precedent. The court may cite to them where they are specifically relevant to determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case."). However, the 2nd, 7th, 8th, and 9th Circuit Courts allow citation to unpublished cases only if the cases were decided on or after Jan. 1, 2007 or fall within specified exceptions. 2d Cir. R. 32.1.1(b)(2) ("In a document filed with this court, a party may not cite a summary order of this court issued prior to January 1, 2007, except: (A) in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata; or (B) when a party cites the summary order as subsequent history for another opinion that it appropriately cites."); 7th Cir. R. 32.1(d) ("No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding."); 8th Cir. R. 32.1A ("Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited."); 9th Cir. R. 36-3(b) ("Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP [Fed. R. App. P.] 32.1."); 9th Cir. R. 36-3(c)(i)—(iii) ("Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances. (i) They may be cited . . . when relevant under the doctrine of the law of the case or rules of claim preclusion or issue preclusion. (ii) They may be cited . . . for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case. (iii) They may be cited in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition or panel rehearing or rehearing en banc, in order to demonstrate a conflict among opinions, dispositions, or orders."). When filing in the D.C. Circuit Court, you can cite to its own unpublished opinions dating back to Jan. 1, 2002, but you can only cite to unpublished opinions from another circuit court decided prior to Jan. 1, 2007, if that particular court's rules allow it. D.C. Cir. R. 32.1(b)(1)(B) ("All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent."); D.C. Cir. R. 32.1(b)(2) ("Unpublished dispositions of other courts of appeals and district courts entered before January 1, 2007, may be cited when the binding (i.e. the [Rule 32.1] res judicata or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP [Fed. R. App. P.] 32.1.").

compilation of U.S. Court of Appeals unpublished opinions called the Federal Appendix. You could ask your library to subscribe to the Federal Appendix, but your library might not grant your request, as the 182-volume set is very expensive. You can also ask a lawyer or someone else with access to Lexis or Westlaw to print out the case and send it to you. Keep in mind that these electronic sources are expensive and lawyers who assist *pro se* incarcerated people may not have the resources to respond to such requests.

Finally, some federal courts will send incarcerated people copies of unreported cases, upon request and for a fee. Others will not. Send your request to the clerk of the court in which the case was decided. You could also try writing a letter to the chambers of the judge who wrote the opinion to request a copy. In both instances, be sure you include the case name, the docket number (for example, “No. 12-345 67”), the court, and the date of the decision you are requesting. If you can tell which decision you are looking for (for example, the summary judgment motion, the motion to dismiss, or the motion to set aside the jury verdict, etc.), indicate that as well.⁴²

Citations will be discussed further in Part D of this Chapter. However, here is a short example of a citation: *Mukmuk v. Comm’r*, 369 F. Supp. 245 (S.D.N.Y. 1974). The italicized portions of the citation are the parties involved in the case. (Comm’r is the accepted abbreviation for “Commissioner.”) The first number, 369, is the volume number of the reporter, which appears on the spine of the book. “F. Supp.” identifies the Federal Supplement reporter. The second number, 245, is the page in the 369th volume of the Federal Supplement where the case of *Mukmuk v. Comm’r* begins (the 245th page). The information in parentheses refers to the court in which the case was decided (S.D.N.Y. is the accepted abbreviation for the Southern District Court of New York) and the year in which the case was decided (1974). Thus, if you need to refer to this case in your legal papers, you should use the citation listed above. In your research, you will come across many similar citations, or variations of such citations. You can use a citation to find the text of the case by following the procedure explained in this paragraph. A fuller explanation of citations is provided in Part D and Appendix A of this Chapter.

For now, however, this Subsection will continue the discussion of the federal reporters. District courts are at the lowest level in the federal system. They are trial courts, and their reporters were described at the beginning of this Subsection. The second level of courts in the federal system is called the circuit court of appeals.⁴³ There are twelve such circuits in the United States.⁴⁴ Circuit courts are the intermediate appellate courts in the federal system. Reports of all circuit court decisions are found in the Federal Reporter (abbreviated as “F.”, “F.2d” or “F.3d”). The Federal Reporter has three series of reporters, to keep the volume numbers from getting too high within each series. Volumes are individually numbered within each series. Each circuit court of appeals covers the appeals from several federal district courts. For example, cases from the four New York federal district courts plus the district courts of Connecticut and Vermont are appealed to the Second Circuit Court of Appeals (abbreviated “2d Cir.”). Thus, the case *United States v. Bush*, 47 F.3d 511 (2d Cir. 1995) is a 1995 case from the Second Circuit Court of Appeals found on page 511 of volume 47 of the Federal Reporter (Third Series).

The third and highest level of the federal court system is the United States Supreme Court. There is only one U.S. Supreme Court. In addition to hearing cases from lower federal courts, the Supreme Court can also hear certain cases from the highest state courts. All Supreme Court decisions are reported in the “official” reporter, United States Reports (abbreviated as “U.S.”). Decisions of the Supreme Court are also reported in two “unofficial” reporters, the Supreme Court Reporter (abbreviated as “S. Ct.”) and the United States Supreme Court Reports, Lawyers’ Edition (abbreviated

42. You can sometimes tell what motion the decision relates to by the parenthetical explanation that follows the citation. For example, if a case citation has a parenthetical explanation that begins with “(granting motion to dismiss where),” the opinion you are looking for decided the motion to dismiss.

43. When a losing party is not satisfied with the outcome of a trial court case in the federal system, it can challenge the decision by bringing the case before the Circuit Court for review.

44. See Part B(1) of this Chapter for a discussion of the Circuit Courts of Appeals.

as “L. Ed.” or “L. Ed. 2d”).⁴⁵ The text of the opinions published in any of the three Supreme Court reporters is identical, although the citations are different. However, if you are citing a case in a legal paper, use the United States Reports (“U.S.”) citation, if available. Thus, the citation for the famous case that requires the police to inform those in custody of their rights is *Miranda v. Arizona*, 384 U.S. 436 (1966). Because only Supreme Court cases are reported in the reporter “U.S.,” it is not necessary to list the court name in the citation.

Prison libraries usually have copies of only the Supreme Court Reporter. However, you can find the “U.S.” citation at the top of each case in the Supreme Court Reporter listed above the case name. The “S. Ct.” version of the case also provides cross-references throughout the opinion to the corresponding “U.S.” pages. This is useful if you are quoting text from the decision, since you can read the decision in the “S. Ct.” reporter but cite the correct page in the “U.S.” reporter. We have tried to give the citations to all three of the Supreme Court reporters in the *JLM*.

(i) State Reporters

State reporters are organized in the same way as federal reporters. New York has three levels of courts and three official state reporters. New York Miscellaneous Reports (abbreviated as “Misc.” or “Misc. 2d”) reports the decisions of state trial courts.⁴⁶ Appellate Division Reports (abbreviated as “A.D.” or “A.D.2d”) reports the decisions of New York’s intermediate appellate courts.⁴⁷ New York Reports (abbreviated as “N.Y.” or “N.Y.2d”) and the North Eastern Reporter (abbreviated as “N.E.” or “N.E.2d”) both report decisions by New York’s highest court, the New York Court of Appeals.⁴⁸

Important appellate decisions of the New York courts are also reported in an unofficial reporter called the New York Supplement (abbreviated as “N.Y.S.” or “N.Y.S.2d”). This is the only New York reporter in most New York prison libraries. The text of opinions published in the New York Supplement is identical to that published in the official reporters. However, if possible, citations to the official reporter should be used when submitting papers to New York State courts. The N.Y.S. or N.Y.S.2d version of the case provides the official citation at the beginning of each opinion. Every state has its own official reporter. Check your prison library to find the official reporter of your state.

(ii) Reporters as Research Tools

All reporters are useful as research tools, but those published by West Publishing Company (“West”) are the most useful. West reporters begin each case by providing “headnotes.” Headnotes are separate paragraphs that summarize each of the major issues decided in the case. Each headnote is numbered and labeled with a “key number” that identifies the legal issue that was discussed. As the next Subsection of this Chapter will explain, these key numbers allow you to find other cases that deal with the same issue.

Although they are useful research tools, headnotes are not official parts of the decision, so you should not quote or discuss them in legal papers. Reading only the headnotes may give you a mistaken understanding of the decision. If the headnote discusses a topic that might be relevant to your case, you should find and read the section of the decision on which the headnote is based. If this section of the decision is helpful, you can use that part of the decision in your legal papers. To find the part of the decision that supports a particular headnote, refer to the paragraph(s) in the decision labeled with the same number as the headnote. Because West publishes almost all of the major reporters, headnotes

45. One advantage of the Lawyers’ Edition is that for selected cases, not only is the text of the case provided but attorneys’ briefs submitted to the Court are also summarized. This reporter also includes essays written by its editorial staff on important issues raised by certain cases. These essays provide a good review of the case law on those issues.

46. See, e.g., *Ross v. Fay’s Drug Co.*, 132 Misc. 2d 65 (Sup. Ct. Albany County 1986).

47. See, e.g., *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1 (1st Dept. 1998).

48. See, e.g., *Sabetay v. Sterling Drug*, 69 N.Y.2d 329 (1987).

will be present in most case reports that you read. Ultimately, however, you must read the entire case to determine if the case will be truly useful to you.

(iii) Digests and the “Key Number System”

You may have found helpful cases while doing your background reading (for example, in treatises), or while researching relevant constitutional or statutory references (in the “Notes of Decisions” section of the applicable source). If you have not found any useful cases (and even if you have), the next step is to look at a “digest.” A digest is a book with a list of legal concepts showing which cases support each concept. Your prison library probably has three digests. The United States Supreme Court Digest is the digest used to find relevant Supreme Court cases. For relevant cases from other federal courts, use the Federal Practice Digest. Your prison library should also have a state digest, which will help you find relevant cases from your state. In New York, that digest will be the New York Digest.

Digests summarize case law using the West headnotes discussed above. Whereas cases have individual headnotes for each issue discussed in the case, the digests take headnotes from all the reported cases and group them together by subject matter. These subject areas, known as the “Digest Topics,” are arranged alphabetically. You can use digests by finding the broad subject area relating to your issue. Examples of Digest Topics include arrest, bail, convictions, and criminal law. The Digest Topic number will be the first number in a key cite. Within each Digest Topic, there will likely be many subtopics, each of which is assigned a “key number.” You will know you are looking at the key number because it will have a little picture of a key in front of it. The key number will be the second number in a key cite. Once you find the Digest Topic and key number of a particular legal point, you can use that number to find cases on that legal point in any jurisdiction. The key numbers are the same for all digests. For example, the digest topic number for criminal law is 110 and within that topic, the key number for the subject of entrapment is 37(1). So, if you use the New York Digest to find Criminal Law (110) key number 37(1)⁴⁹ you will find cases in on the subject of entrapment in New York State. That same key number can be used to find cases in the Federal Practice Digest on the subject of entrapment under federal law, in the U.S. Supreme Court Digest to find U.S. Supreme Court cases on the subject of entrapment, or in the digest for any state for cases on entrapment from that state. For this reason, finding a key number for a particular issue in your case can greatly advance your research.

Under each key number, a digest will list “headnotes,” i.e., cases and their citations that address the topic of the key number. Depending on how often a particular issue is litigated, there may be no headnotes, or there may be hundreds of headnotes under each key number. Headnotes are listed first by the level of the court that decided the case, next in alphabetical order by jurisdiction, and finally in reverse chronological order (by date, beginning with the most recent) within each jurisdiction. Each headnote also provides a citation to the relevant case.

Digests do not provide comments on cases. They simply contain organized lists of headnotes (cases by topic). It is up to you to decide whether a particular case might apply to your legal issue. Once you decide that a headnote discusses a topic that might be helpful, you should write down the citation given in the headnote and use that case citation to find the text of the case in a reporter. You should decide whether the headnote has pointed you to a useful case only after you have actually read that case. But remember that digests are only research guides. You may find that a headnote points you to a helpful case, but you also may find that a promising headnote leads you to an unhelpful case.

Note that digests are usually published in several series, with each series limited to a certain time period. For example, the fourth series of the New York Digest only contains headnotes for cases decided from 1978 to the present. For earlier cases, you would need to consult an earlier series of this digest. You must be aware of the period covered by the digest to maximize your research effort. Each digest

49. “110” refers to the section containing Criminal Law, “37” refers to the key number for entrapment, and “(1)” refers to the subsection of “entrapment” entitled “in general.” This is where you will find the cases most often cited for the concept of entrapment.

will explain its coverage in its preface, found at the beginning of each volume. As with all other sources, do not forget to check to make sure the statute is still accurate by referring to the pocket part of each hardcover volume you consult.⁵⁰

(iv) Finding Key Numbers

There are three basic ways to find relevant key numbers. The first and easiest way is if you have already found a useful case. Obtain the case from a reporter published by West. Next, review the headnotes found at the beginning of the case. One or more of the headnotes will concern the issue(s) with which you are interested. At the beginning of the headnote, there will be a number preceded by the picture of a key. This is the “key number.” As described earlier, this key number can be used to find other cases that address the same issue by looking in the digests under that key number.

The two other ways to obtain key numbers are similar to the way you would find relevant legislation. As described earlier, one of these ways is the “book index” method. This method requires looking in a digest’s book index (located at the front of the volume) and scanning the alphabetical list of subject areas (digest topics) and the breakdown of each subject area into smaller topics and even smaller subtopics. For example, suppose that you were looking for federal cases on whether a search pursuant to a search warrant could be executed at night. You would start by finding the volume that has “Search and Seizure” on the spine of the book (Volumes 84 and 85 in the Federal Practice Digest [Fourth Series]). At the beginning of the Search and Seizure section is an index that breaks down the large topic of Search and Seizure into smaller and more specific legal areas. Part III refers to “Execution and Return of Warrants.” By looking at the subtopics under Part III, you will find an entry for “Time of Execution” and an even more specific entry for “Nighttime Execution.” This last entry of “Nighttime Execution” corresponds to the key number 146 in the digest topic “Search and Seizure.” You should then write down all relevant key numbers (here, “Search and Seizure 146”) and look up each key number and review a few headnotes under each number. Through this process, you can find useful key numbers and potentially helpful cases.

The final method to find key numbers is to use the general index of the digests. This index is called the Descriptive Word Index (“DWI”) and contains several volumes. The DWI lists words in their common, everyday usage. It then tells you what digest topic in the main part of the digest you should look at to find cases and headnotes related to that word. Often, the DWI will give you the key number under which to look.

For example, suppose that you wanted to know whether you were entitled to be represented by a lawyer in prison disciplinary proceedings. A reasonable place to start looking would be the digest topic “Prisons,” since that is where the disciplinary proceeding is to occur. In the DWI of the New York Digest (Fourth Series), there is a subheading under “Prisons” called “Proceedings” under which you will see a section titled “Discipline and Grievance,” which includes “Counsel and Counsel Substitutes.” Next to “Counsel and Counsel Substitutes” is the key number “Prisons 13(9).”

You would then look at the digest volume containing the digest topic “Prisons” and turn within that volume to key number 13. You will see that the specific issue of whether you are entitled to be represented by counsel in prison disciplinary proceedings is discussed as the ninth heading under key number 13, or “13(9).” As indicated earlier, you should read the descriptions of the cases, write down the citations of potentially useful cases, and then read these cases. To find similar cases in another jurisdiction, look up “Prisons 13(9)” in the digest for that jurisdiction.

A more specialized digest index is the Words and Phrases Index, which is found in a separate volume of each digest series. This index gives citations of cases that define a word or phrase. For example, if you want to know in detail what is meant by the term “detention,” look it up in this index. The index will give you the citations of cases that have defined that term. Although the Words and

50. For a discussion on pocket parts see Part C(2)(c)(iii) of this Chapter.

Phrases Index will not give you a key number, you can go to the cases it cites to obtain relevant key numbers.

D. Citation

Whenever you mention cases, statutes, regulations, etc. in your legal writing, you must reference them in a proper legal form known as a “citation.” Legal citations allow a reader to easily find the sources that you use in your legal writings.

There are many rules about citation style, and the major ones are detailed below. In addition, Appendix A at the end of this Chapter analyzes the most common types of citations and will help you understand basic citation style. Detailed rules for every imaginable legal citation are contained in *The Bluebook: A Uniform System of Citation*—a publication that your prison library may have. Proper legal citation of cases, statutes, regulations, etc. should not be ignored, as proper citation not only helps your readers find the materials that you are discussing, but also gives the judge a good first impression of your research.

3. Citing Cases

A case citation includes: (1) information about the parties involved in the case, (2) the reporter (a bound compilation of cases) in which the case can be found, (3) the court that decided the case, and (4) the date of the decision. An example of a complete case citation is: *People v. Delaremore*, 212 A.D.2d 804 (N.Y. App. Div. 1995). The case name (a listing of the names of the parties on either side) comes first and is underlined or italicized: *People v. Delaremore* or People v. Delaremore. Next comes the information that tells you where to find the case, in this order: the volume number of the reporter, the abbreviation of the reporter, and the page number where the case starts (in this example, 212 A.D.2d 804). The final portion of the citation is enclosed in parentheses. It includes the court that decided the case and the year the decision was released (here: N.Y. App. Div. 1995). The court name “N.Y. App. Div.” stands for the New York Supreme Court, Appellate Division. Note that in New York, the intermediate level of appellate court (the Appellate Division) is split into four separate “Departments.” If you are citing a case that was decided in the Appellate Division of the New York Supreme Court, you may also want to include which Department the decision came from. So, in the example above, the court name could be expanded to “N.Y. App. Div. 2d Dept.” in order to show that the decision came from the Second Department. If the reporter that you are using publishes the decisions of only one state (for example, N.Y.S.2d), it is not necessary to repeat the state in the court name. For example, a correct citation would be: *People v. Aponte*, 759 N.Y.S.2d 486 (App. Div. 1995), not “(N.Y. App. Div. 1995).” If the reporter publishes the decisions of only one court (for example, the “S. Ct.” reporter only publishes Supreme Court cases), it is not necessary to list that court in the citation. Appendix A at the end of this Chapter summarizes the major citation styles.

You will sometimes want to refer to a particular page within the written opinion. If you are citing part of a case for the first time, put a comma after the number of the first page of the case and then put the specific page number (called a “pincite”). For example, *Allen v. Hardy*, 478 U.S. 255, 259 (1986) indicates you are specifically referring to page 259 of the case *Allen v. Hardy*, which starts on page 255 of the 478th volume of the “U.S.” reporter. If you have already given a citation to that particular case earlier in the paper, you can use a “short form citation” (abbreviated citation). The basic rule for a short form is to write the name of the first party in the case (for example, *Allen*), then the volume number of the reporter and the reporter abbreviation, and then the word “at,” followed by the page number of what you want to cite. For example, the short form citation of this case would be: *Allen*, 478 U.S. at 259. If the first party is a governmental party, use the other party’s name. Thus, *United States v. Rosario* would be shortened to *Rosario* and never to *United States*.

Normally, you cite to the decision of the highest court that considered a case. For example, if the case was appealed and ultimately decided by the New York Court of Appeals (the highest state court in New York), it is not necessary to cite to the decisions of the lower New York courts that heard the same case. There may be times, however, when you wish to cite to the lower court decision specifically.

It would be appropriate to cite a lower court decision where the lower court considered an issue that a later court upheld, or agreed with, without commenting on or not addressing at all why it agreed. However, if the case has been appealed to a higher court, this should be reflected in the citation. For example, *Schmuck v. United States*, 840 F.2d 384 (7th Cir. 1988), *aff'd*, 489 U.S. 705 (1989). In this citation, “*aff'd*” shows that the U.S. Supreme Court “affirmed,” or agreed with, the decision of the Seventh Circuit Court of Appeals in the *Schmuck* case. If a decision has been reversed on appeal but the part of the decision that helps you was not reversed, the citation should reflect this—for example, *People v. Perkins*, 531 N.E.2d 141 (Ill. App. Ct. 5th Dist. 1988), *rev'd on other grounds sub nom. Illinois v. Perkins*, 496 U.S. 292 (1990). This citation tells you that the Supreme Court decided the *Perkins* appeal two years after the Fifth District of the Illinois Appellate Court made its decision and that it reversed that decision for a reason unrelated to the part of the case that helps you. The citation also shows that the Supreme Court considered the case under a different name than the Fifth District of the Illinois Appellate Court (which is what “*sub nom.*” means).

When you cite a federal appellate court decision, you also should show whether the Supreme Court has refused to review the decision. For example, *United States v. Fisher*, 895 F.2d 208 (5th Cir. 1990), *cert. denied*, 493 U.S. 834 (1989). “*Cert.*” stands for “writ of certiorari,” which is what the Supreme Court issues, or gives, to the parties when it decides to review a lower court decision. “*Cert. denied*” means that a party asked the Supreme Court to review the case, but the Supreme Court refused to grant certiorari (meaning refused to review the case). The Supreme Court refuses to review most of the cases that come before it for certiorari.

You must check each case you cite to find out whether it was appealed and whether it was reversed or affirmed on appeal. Read Part E(2)(a) of this Chapter for information of how to update a case. If the entire case was reversed, you should not mention the lower court’s decision in your legal papers because it is no longer good law.

4. Citing Statutes and Administrative Regulations

Citations for statutes are similar to other legal citations. The citation shows: (1) the “volume” number of the book the statute is in (the “title” or “book” number); (2) the statutory source in which you found the statute (for example, the United States Code is cited as U.S.C.); and (3) the section of the law to which you are referring. An example is 42 U.S.C. § 1983. Here, “42” is the title, “U.S.C.” is the abbreviation for United States Code, “§” means section, and “1983” means section 1983 within title 42 of the U.S.C. If the statute was changed recently, you must cite to the changed version of the statute. You can see if a statute has been changed by looking at the supplement or “pocket part” at the back of the hardcover volume. For instance, if section 1983 had been amended in 2019, you would cite the amended section like this: 42 U.S.C. § 1983 (Supp. 2019). If you want to refer to the entire statute and only part of it has been amended, you would cite it like this: 42 U.S.C.A. § 1983 (2018 & Supp. 2019). Note that the U.S.C. is only published in full every six years, so if a statute was amended in between the six-year period, you must cite to the supplement or pocket part. Please cite to the United States Code when possible. However, if a statute does not yet appear in the United States Code and does appear in an unofficial code (like West’s *United States Code Annotated* or the *United States Code Service*), you should cite to the unofficial code instead. The proper citation for a statute in the United States Code Annotated is: 12 U.S.C.A. § 1321 (West).

Citations for federal administrative regulations are very similar to citations for statutes. The citation includes: (1) the title number of the regulation, (2) the source in which you found the regulation (the Code of Federal Regulations is cited as C.F.R.), (3) the specific section cited, and (4) the year of the code edition you found the regulation published in. For example, 28 C.F.R. § 544.70 (2013) refers to section 544.70 of Title 28 of the C.F.R. volume published in 2013. This section discusses the Federal Bureau of Prisons’ literacy program.

The format for citations to state administrative codes is slightly different in each state, but generally contains the same information as citations to federal statutes or regulations. Generally, the citation includes: (1) the source that contains the state’s administrative code (for example, the Official

Compilation of Codes, Rules & Regulations of the State of New York, cited as N.Y. Comp. Codes R. & Regs.); (2) the title or book number of the regulation (for example, in New York, Title 7 contains the rules and regulations of the Department of Corrections); (3) the specific section of the regulation you are referring to; and (4) the publishing year of the volume where you found the regulation. For example, N.Y. Comp. Codes R. & Regs. tit. 7 § 1704.6 (2013) is the correct citation for Title 7, section 1704.6 of the Codes, Rules, and Regulations of the State of New York volume that was published in 2013. Although the format varies slightly in each state, you may be able to find the correct citation format for your state's administrative code by looking in the first few pages of any volume of the code. Depending on the publisher of your state's code, these pages may include information that gives the correct, official citation format. Otherwise, the Bluebook has a complete guide to each state's citation style.

Any citation in a footnote should be followed by a period, unless it is part of a string or list of citations, in which case the each citation but the last one would not be followed by a period, but a semicolon. The last citation should end with a period.

E. Important Next Steps

1. Check Other Sources

A final way to research an issue is to read the *JLM*. If there is a chapter that discusses the issue or topic that you are interested in, read the cases cited in that chapter. If you want additional cases in a subject area, you can obtain the key numbers by looking at the case headnotes in the relevant reporter. The key numbers will allow you to find additional cases in the digests.

To find out more about a relevant case and its subject matter, you can look up that case in the "Table of Cases" of a relevant treatise. A treatise is a written work that gives an in depth explanation of a topic of the law. If the case is listed in the table of cases, read what the treatise author has to say about the case and the issues it discusses. While not binding on courts, treatise commentary can be helpful to a researcher and can be used to support your legal arguments.

Although legislation and case law will be the major sources of support for your legal arguments, other sources in your library might also be useful. Another review of general treatises may be helpful in explaining some of the cases you found, and may also provide leads for other possible arguments. You may also want to read legal magazines and newspapers. Your prison library will likely have the local legal newspaper, such as the New York Law Journal. Any other type of legal aid found in your library should also be consulted. Practice commentaries, loose-leaf services, manuals, form books, textbooks, and legal dictionaries are all useful sources that your law library may have.

2. Update Your Research

It is extremely important that your research is up to date. You should make sure that any authority you use is current law. For example, you might want to use a case from two years ago, but there could have been a case one year ago that changed the law in some way. If you do not check, you could miss important changes. To make sure that statutes are current, look at the latest code editions and supplements. As described in Part C(2)(c)(iii) of this Chapter, a hardcover volume will likely have soft cover supplements in the pocket located at the back of the volume. There could also be other updates that were shelved separately from the hardcover volume. Additionally, you must make sure that any case or statute you use has not been changed (overruled, overturned, amended, repealed, etc.). Finally, you must check to see if recent cases or statutes have changed the issue you have been researching. You normally check to make sure that cases and the issues decided in them are up-to-date with a research tool called Shepard's Citations ("Shepard's").

(a) Shepard's

Shepard's is a research tool that provides a listing of all cases or statutes that have cited the case or statute you are checking. Shepard's comes in a print version call the Shepard's Citation booklet and on internet legal research databases like Westlaw and LexisNexis. However, you will need someone

with accounts on these websites to help you get access online. Using this tool is called “Shepardizing.” Shepard’s serves two purposes: (1) it allows you to update your research and to make sure that other cases have not overruled, criticized, or otherwise affected the case you want to use in your legal documents; and (2) it points you to more cases that might be helpful.

There is a separate series of Shepard’s Citation booklet volumes for each level of federal courts. Thus, there is a separate series for the Federal Supplement, the Federal Reporter, and the United States Reports. Shepard’s volumes are also available for state reporters. The basic function of Shepard’s is to list every reported case that discusses a particular case. You use it to check for updates to cases that you want to cite. Updating means checking to see if the case is still good law that you can rely on. Thus, if ten other cases discuss *Miranda v. Arizona*, Shepard’s will identify these ten cases. Shepard’s will list any cases that overrule the case you are researching, as well as other cases that discuss, explain, or even mention the case you would like to use. This will allow you to find out what other courts have said about the case you are researching and will also show you how other courts have handled the issues raised by that case.

Cases are listed in Shepard’s only by citation, not by name. To “Shepardize” a case, first find the Shepard’s series that matches the reporter in which your case is found. The reporter name is printed on the spine of each Shepard’s booklet volume. For example, if the case you are updating is reported in “F.2d,” find the Shepard’s volumes that have “Federal Reporter (Second Series)” printed on the binding. The binding will also show what year(s) or volume(s) of the reporter are covered by that Shepard’s volume. Next, find the volume number in the citation of the case you are updating. The volume is the first number in the citation. Look for the binding that includes the volume number of the reporter. Then, search for that volume number in the upper right-hand corner of the page. Once you’ve found the page where the citations for that volume number begin, look down the columns of citations listed until you find the starting page number of the case you are updating. This page number will be printed in large bold type. Under the bold page number are citations to cases that have mentioned the case you are researching. Citations in Shepard’s are provided alphabetically by the jurisdiction where the court is that decided the case. Within each jurisdiction, the cases are listed from the most recent to the oldest. The citations are not given in full. They contain only the volume number, the reporter, and the page number that refers to the case you are researching. The page number listed in Shepard’s is the page that mentions the case that you are researching. It is not the first page of that particular case.

Each Shepard’s volume has a list of abbreviations in the front to help you decode the reporter abbreviations. There are often letters in front of the listed citations. The letters tell you whether a later court overruled, criticized, or followed the case that you are researching. The code letters are explained in a table on the inside of the front cover of each Shepard’s volume. The most important symbols to look for are “o,” which means the case you are researching has been overruled, “r,” which means that the case you are researching has been reversed, and “d,” which means that the case you are researching has been distinguished (that is, another court has identified why this case is different from others dealing with the same rule). These are “negative treatments” of the case. Negative treatment makes a case less reliable. If the case you are researching has been overruled or reversed, then it is no longer useful to you. If it has been distinguished, try to figure out why it was distinguished. Then, you will have to think of reasons why the court you are going in front of or filing your papers in should not distinguish your situation from the case you are researching. Sometimes a court reverses, overrules, or distinguishes only a part of a previous case rather than the entire opinion. That means that you might still be able to use that case. Therefore, it is important to determine whether the specific issue of interest to you has been reversed, overruled, or distinguished. Even if the court overruled or reversed the case based on a different issue, if you use this case in your legal documents, your case citation should show that the case was reversed on other grounds so the court knows you have done your research.

To find the most recent cases that have mentioned the case you are updating, check the hardcover Shepard’s supplement books, if any. Next, check the current paperback Shepard’s supplement books.

You should check the supplements just as you would the main volume because they are organized in the same way. There are also volumes of Shepard's citations for statutes and federal regulations, which list the judicial opinions that cite particular statutory provisions or federal regulations. These are used to update statutes and regulations in the same manner as the series for updating case law.

You can Shepardize not only to update cases but also to find other helpful cases. If you already have one case that is useful, Shepardizing that case will often lead you to other cases that will be helpful. The disadvantage of this method of finding cases is that Shepard's does not contain headnotes. Thus, you must read the cited case to learn whether it is helpful. However, you can shorten your search if you know the relevant headnote number from the case you are updating. You can use this headnote number to limit the cases you need to review to those containing the same number. In some citations there is a small superscript number between the reporter abbreviation and the page number. This shows that the cited case discusses the issue described in that headnote (superscript is text written small and high like this: ^{superscript}). For example, if you are interested in the issue discussed in headnote number 2 of the case you are updating, scan the list of citations for those that have a superscripted "2" in the citation. This will limit your review of cases to those that discuss the issue corresponding to headnote number 2 of the case you are updating. However, not all citations will list which headnotes are discussed. If you find a citation that does not list which headnotes are discussed, then you cannot tell whether that case will be useful until you read it.

Regardless of whether you use Shepard's to find cases, you must always use it to ensure the cases you are citing were not overruled, reversed, or distinguished.

F. Summary

Research is a key step in developing and presenting a legal argument. This Chapter has suggested an outline for the development of your legal arguments:

- (1) Analyze the problem: separate your case into small, separate issues. This will help you get started and provide manageable issues for you to research;
- (2) Get an overview of the subject area: review treatises and legal encyclopedias to become familiar with a particular area of law;
- (3) Find relevant legislation: consult the annotated codes to find U.S. and state constitutional provisions, federal statutes, state statutes, and legislative history;
- (4) Find relevant cases: read cases cited in annotated codes such as U.S.C.A. and McKinney's. Find additional cases through digests, key numbers, indices, words and phrases tables, and Shepard's;
- (5) Check other sources: review treatises, legal periodicals, practice commentaries, manuals, form books, texts, and legal dictionaries for additional commentary;
- (6) Update your research: make sure that you rely on the most up-to-date editions and supplements, and that you Shepardize your case law and legislation; and
- (7) Complete your citations: properly cite the authorities upon which you rely.

Two issues you should figure out before beginning your research are: (1) which court has jurisdiction to hear your case (both territorial and subject matter jurisdiction), and (2) if you are appealing a conviction, whether the prosecutor followed proper court rules to get your case to court. The following are the sources most often used in prison law libraries to find the law.

For federal law:

- (1) U.S.C.A. (for statutes and the annotations that follow the statutory text); and
- (2) Modern Federal Practice Digest (for federal cases on specific topics).

The major reporters you will be looking to for reported federal cases will be: (1) the Federal Supplement, cited as __ F. Supp. __, __ F. Supp. 2d __, and __ F. Supp. 3d __ (the 3d series will contain the most recent cases), for selected cases from all federal district courts; (2) the Federal Reporter, cited as __ F. __, __ F.2d __, and __ F.3d __ (the 3d series will contain the most recent cases), for cases from all federal circuit courts of appeals; and (3) the Supreme Court Reporter, cited as __ S. Ct. __, for cases

from the U.S. Supreme Court. In case citations, the reporter volume number goes before the reporter name, and the page number on which the case begins goes after.

For New York law:

- (1) McKinney's (for statutes and for the case annotations that follow the statutory text); and
- (2) New York Digest (for New York cases on specific topics).

The major reporter for reported New York cases is the New York Supplement (Second Series). It is cited as __ N.Y.S.2d __.

G. Other Ways to Learn About Legal Research

Many organizations have developed materials to help non-lawyers understand the law. For example, Gale Group publishes Gale Encyclopedia of American Law, which is directed toward non-lawyers.⁵¹ Additionally, you can find a detailed explanation of how to conduct legal research in M. Cohen's Legal Research in a Nutshell.⁵² Finally, the law is full of technical terms. Black's Law Dictionary is particularly helpful in explaining legal terms.⁵³

H. Conclusion

Legal research is an important task for jailhouse lawyers because it provides you with the legal rules and principles you will need to argue your case effectively. The process begins with identifying the appropriate court (state versus federal, trial versus appellate, and one with proper jurisdiction). The next step involves breaking down the issues in your specific case—the factual story—to see what legal sources you can use to make your argument. You should start with finding the legislation or administrative rules that apply, which can help you identify where your rights have been violated or how the court got it wrong. It will then be important to find previous cases that have facts similar to your case and support your position. Finally, after you gather different legal sources, you must make sure these sources are still valid and up-to-date (i.e., Shephardize) and cite to them properly.

51. GALE ENCYCLOPEDIA OF AMERICAN LAW (Donna Batten ed., 3d ed. 2011).

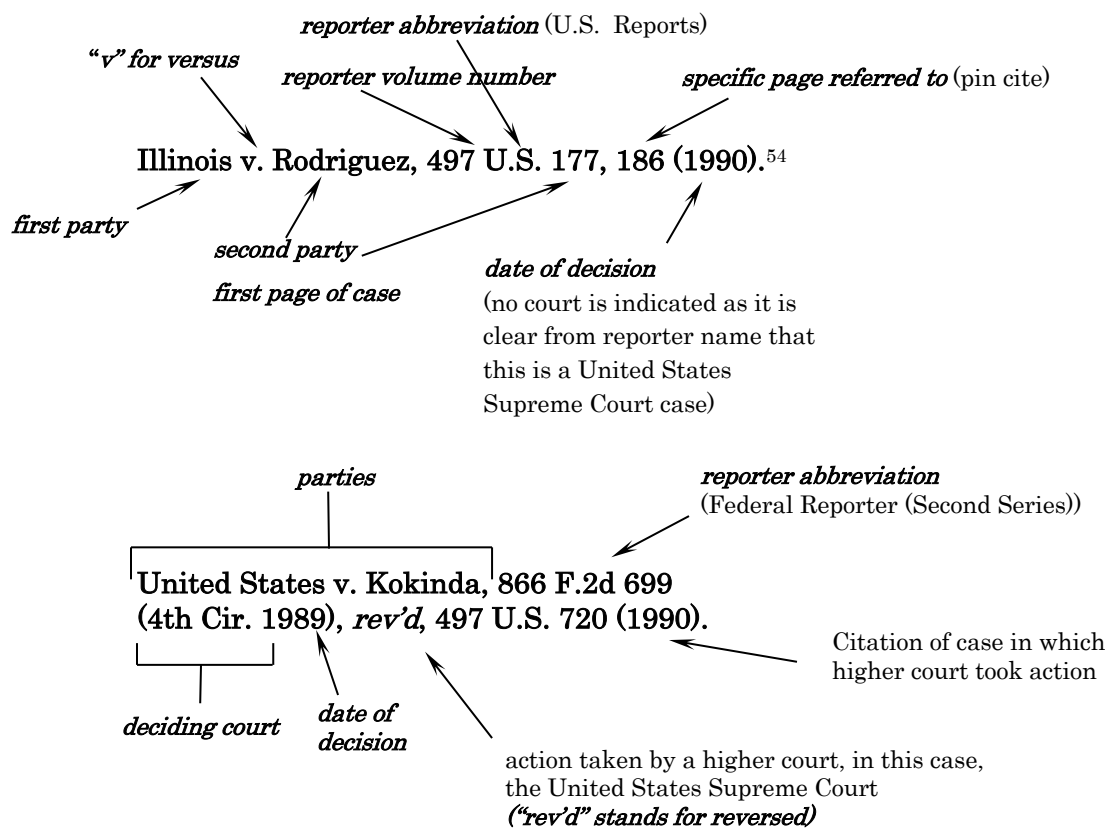
52. MORRIS L. COHEN & KENT OLSON, LEGAL RESEARCH IN A NUTSHELL (11th ed. 2013).

53. BLACK'S LAW DICTIONARY (10th ed. 2014).

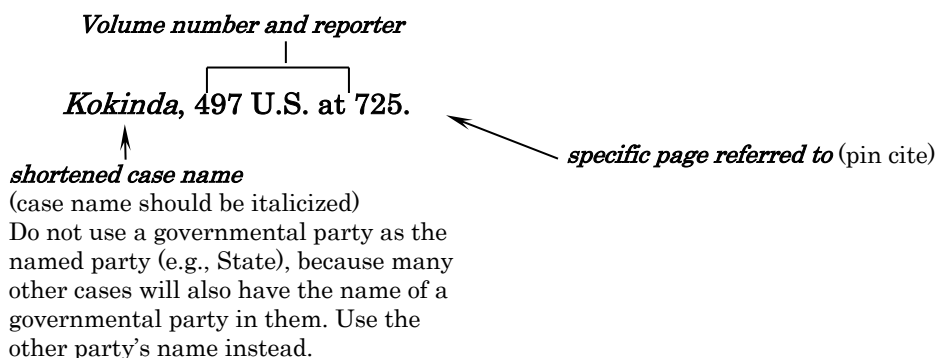
APPENDIX A

CITATION EXAMPLES OF COMMON AUTHORITIES

A-1. Federal Cases

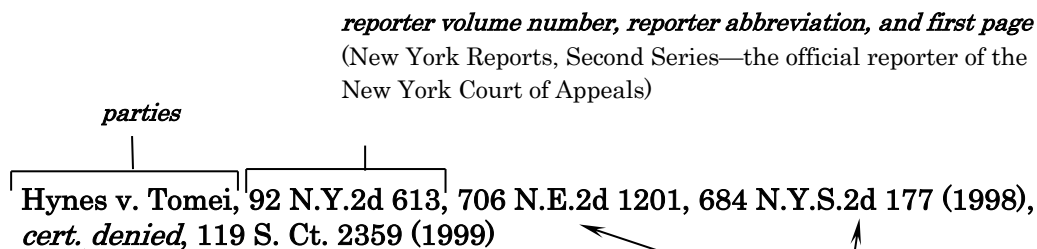


Shortform (abbreviated) citation for the above case after it has been cited in full earlier in your legal paper:



54. You will notice that the *JLM* often cites to many different reporters for each case. Often, cases are published in more than one reporter; these “extra” citations are “parallel citations.” If possible, you should always cite to an official reporter (for example, “U.S.” or “F.2d.”). If you do not have the official reporter available at your prison library, just make sure that your citation to an unofficial reporter is accurate.

A-2. State Cases



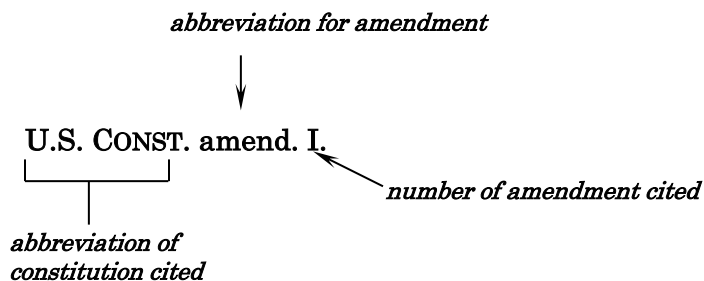
Action taken by a higher court, in this case, the United States Supreme Court. (“cert. denied” indicates that the U.S. Supreme Court denied the petition for certiorari). The reporter “S. Ct.” is an unofficial reporter for the U.S. Supreme Court. This is a recent case—often cases are available in the Supreme Court Reports (“S. Ct.”) before they are printed in the United States Reports (“U.S.”). The next number is the citation of the case in which the Supreme Court took action.

parallel citations

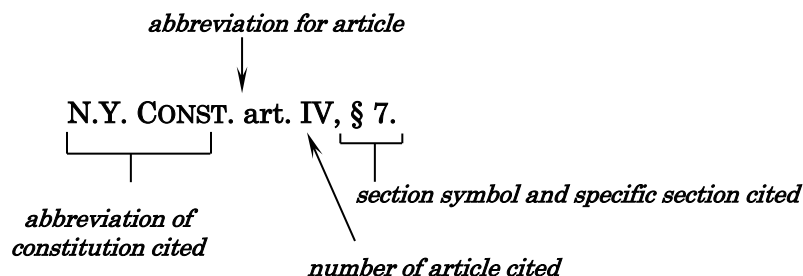
The two citations that refer to “N.E.2d” and “N.Y.S.2d” are parallel citations. For more information on parallel citations, see note 55 of this Appendix A.

A-3. Constitutions

United States Constitution

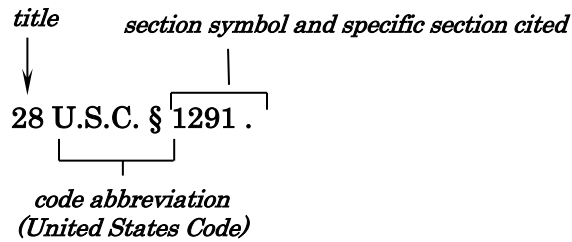


State Constitution

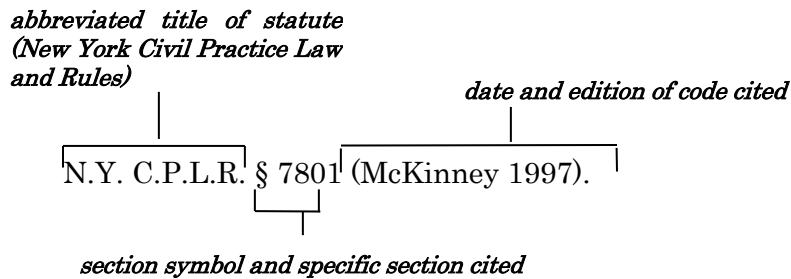


A-4. Statutes

Federal Statute



State Statute



A-5. Definitions for Common Statutory Abbreviations

Ann.	Annotated
App.	Appendix
art.	Article
Civ.	Civil
Comp.	Compilation
Const.	Constitution
Ct.	Court
Crim.	Criminal
et seq.	et sequentes, latin for 'and the following ones'
Gen.	General
Jud.	Judicial
P. or Proc.	Procedure
Rev.	Revised
R.	Rules
Stat.	Statutes
S. Ct.	Supreme Court
tit.	Title

CHAPTER 3

YOUR RIGHT TO LEARN THE LAW AND GO TO COURT*

A. Introduction

Incarcerated people have a constitutional right to access the state and federal courts (referred to as “right of access”).¹ This right includes an incarcerated person’s ability to prepare and submit petitions and complaints, including federal habeas corpus petitions and civil rights actions.² The prison authorities are required by the Constitution to provide incarcerated people with “adequate law libraries or adequate assistance from persons trained in law.”³ In other words, incarcerated people have a right to legal resources to prevent harmful legal outcomes. If the state stands in the way of your ability to do legal research or get legal assistance, you may be able to file a suit claiming that you have been denied access to the courts. You may also be able to file a suit claiming a denial of court access if the state prevents you from creating and mailing your legal papers by withholding necessary resources or materials. The Supreme Court has stated that the right of access to the courts includes the state’s obligation to provide indigent incarcerated people “with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them.”⁴

The Supreme Court has limited the circumstances in which an incarcerated person can win a denial of access suit. To win a right of access case, an incarcerated person must show: (1) that he suffered an “actual injury,” and (2) that this injury was connected to a “non-frivolous legal claim.”⁵ An incarcerated person cannot satisfy the “actual injury” requirement “by establishing that his prison’s law library or legal assistance program is subpar in some theoretical sense.”⁶ In other words, you cannot simply base your claim on any perceived harm caused by the denial of access. The harm must be related to the loss of an opportunity to raise a specific substantive legal claim.⁷ One example could be losing the opportunity to file an appeal.⁸

*This Chapter was revised by Sarah Jackel based on previous versions by Laura Burdick, Shima Kobayashi, Monica Ratliff, Jeffra Becknell, Carolyn Hotchkiss, and Marianne Yen. Special thanks to John Boston of the Prisoners’ Rights Project at The Legal Aid Society.

1. See *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974) (describing right of access to courts as part of constitutional due process of law requirements); see also *Murray v. Giarratano*, 492 U.S. 1, 11 n.6, 109 S. Ct. 2765, 2771 n.6, 106 L. Ed. 2d 1, 12 n.6 (1989) (tracing right of access to courts to due process and equal protection clauses of United States Constitution).

2. *Bounds v. Smith*, 430 U.S. 817, 828 n.17, 97 S. Ct. 1491, 1498 n.17, 52 L. Ed. 2d 72, 83 n.17 (1977). For an explanation of federal habeas corpus petitions and how to use them, see *JLM*, Chapter 13. Civil rights actions involve the violation of your constitutional rights. For more information about your constitutional rights and how to sue those who violate your constitutional rights, see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law,” which discusses Section 1983 and *Bivens* actions.

3. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977). For recent cases discussing the right of access, see *Hebbe v. Pliler*, 627 F.3d 338 (9th Cir. 2010) (holding that the incarcerated person Hebbe satisfied the *Lewis* “actual injury” requirement, because while the prison was on lockdown, Hebbe was denied access to the law library to file a brief for his appeal); *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 164–69 (holding that three of the eight allegations of “actual injury” fulfilled the *Lewis* requirement).

4. *Bounds v. Smith*, 430 U.S. 817, 824–825, 97 S. Ct. 1491, 1496, 52 L. Ed. 2d 72, 81 (1977).

5. *Lewis v. Casey*, 518 U.S. 343, 352–355, 116 S. Ct. 2174, 2180–2182, 35 L. Ed. 2d 606, 618–620 (1996).

6. *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996).

7. *Lewis v. Casey*, 518 U.S. 343, 351–353, 116 S. Ct. 2174, 2180–2181, 135 L. Ed. 2d 606, 617–619 (1996). *Lewis* was a class action claiming denial of incarcerated people’s right of access to courts. The Supreme Court reversed a Ninth Circuit decision ordering Arizona to provide incarcerated people with extensively equipped law libraries and experienced library staff.

8. *Lewis v. Casey*, 518 U.S. 343, 350–351, 116 S. Ct. 2174, 2179–2180, 135 L. Ed. 2d 606, 617–618 (1996); see also

Congress has also limited the ability of incarcerated people to bring denial of access suits. In 1995, Congress enacted the Prison Litigation Reform Act (“PLRA”). The PLRA, among other things, requires incarcerated people to exhaust their prison’s administrative remedies before filing claims alleging violation of civil rights under 42 U.S.C. § 1983 in federal court. The information provided in this Chapter is to be used *only as a supplement* to the information provided in Chapter 14 of the *JLM*. **If you decide to pursue any claim in federal court, you must read Chapter 14 of the *JLM* on the Prison Litigation Reform Act.** Failure to follow the requirements of the PLRA can lead to the loss of your good-time credit and the loss of your right to bring future claims in federal court without paying the full filing fee at the time you file your claim, among other negative consequences.⁹

This Chapter explains what is considered a violation of your right of access to the courts. Parts B and C explore the threshold requirements that you must prove before the court will weigh your opportunities for access. There are two threshold requirements: (1) that you suffered an actual injury, and (2) that you did so because the state failed to fulfill its duty to provide access to the courts. Part B explains the actual injury requirement. Part C outlines the extent of the state’s¹⁰ duty to provide you access to the courts. The Parts following Part C explain your rights once these requirements have been met. Part D explains what adequate law libraries must contain. Part E explains what is considered adequate assistance from persons trained in the law (including the role of “jailhouse lawyers”¹¹ in providing adequate assistance). Part F explains the state’s duty to provide you with legal materials. The Appendix at the end of this chapter provides a list of useful, publicly accessible online resources. Most of these websites provide access to searchable databases of recent trial and appellate decisions, in addition to Supreme Court cases. The Appendix highlights websites that integrate various types of secondary resources most effectively. Be aware, however, that these organizations usually charge a fee for access to their services.

Because the rights described in this Chapter relate to the conditions of your confinement, **the PLRA requires you first try to protect your rights through your institution’s administrative grievance procedure. Read Chapter 15 of the *JLM* for further information on grievance procedures for incarcerated people.** If you are unsuccessful or do not receive a favorable result through these procedures, you can then either bring a case under 42 U.S.C. § 1983, file a tort action in state court (or in the Court of Claims if you are in New York), or file an Article 78 petition in state court if you are in New York. More information on all of these types of cases can be found in Chapter 5, “Choosing a Court and a Lawsuit: An Overview of the Options;” Chapter 14, “The Prison Litigation Reform Act;” Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law;” Chapter 17, “The State’s Duty to Protect You and Your Property: Tort Actions;” and Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” of the *JLM*.

B. Fulfilling the Actual Injury Requirement

The Supreme Court requires that you show “actual injury” from the alleged violation in order to establish that your right to access the courts has been violated.¹² This requirement makes it harder

Christopher v. Harbury, 536 U.S. 403, 413–415, 122 S. Ct. 2179, 2185–2186, 153 L. Ed. 2d 413 (2002) (distinguishing between forward-looking claims, where future adjustments can solve the problem, and backward-looking claims, where the opportunity was already lost. In both cases, the complaint must describe the legal opportunity that will be or was missed. In backward-looking claims, the complaint must identify a remedy that could not be awarded in some other suit that can still be brought.).

9. 28 U.S.C. § 1915(g).

10. “State” in this chapter means either a state government or the federal government. In other words, if you are a federally incarcerated person, when we refer to “state” in this chapter, for you it means the federal government.

11. BLACK’S LAW DICTIONARY (10th ed. 2014) defines a jailhouse lawyer as “[a] prison inmate who seeks release through legal procedures or who gives legal advice to other inmates.”

12. Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 617–618 (1996); *see also*

for incarcerated people to succeed in their right to access cases. Establishing that the prison's law library or legal assistance program is inadequate is not enough to prove actual injury. You must show that you were kept from pursuing a non-frivolous claim because of these deficiencies.¹³ A "non-frivolous claim" is "a claim for relief that is at least arguable in law and in fact."¹⁴

Here is one way to prove an actual injury: you can show that a complaint you prepared was dismissed for failure to meet a "technical requirement" that you could not have known about because of the insufficient legal assistance provided at your prison facility.¹⁵ "Technical requirement," in this context, could refer to a procedural or document-related rule of a court that, if broken, might be grounds for dismissal of the claim. Another way may be to show you were prevented from filing a claim in the first place because of deficiencies in the legal facilities of the prison.¹⁶ If you and others bring a class action, you must show that the injury was systemic, which means, you must show a system-wide problem.¹⁷

C. How the State's Limited Duty to Provide Access to the Courts May Apply to You

There are a few things to keep in mind when developing your claim:

- (1) the state's duty to provide you with adequate law libraries or adequate assistance by persons trained in law may not extend to the type of action you want to bring;
- (2) your correctional facility can choose how it will meet its duty to provide legal information or expertise;
- (3) the state's duty almost always applies, regardless of the kind of facility in which you are incarcerated;
- (4) it is currently unclear how far the state's duty to provide access extends; and
- (5) the state's duty applies whether or not you are considered indigent (meaning whether or not you

Chriceol v. Phillips, 169 F.3d 313, 317 (5th Cir. 1999) (finding that denial of access to funds from prison accounts to pay for filing fees did not constitute an actual injury because the complaint had been successfully filed); Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999) (finding that defendant failed to allege facts demonstrating that the number of hours he was required to work frustrated his access to the courts); Klinger v. Dep't of Corr., 107 F.3d 609, 617 (8th Cir. 1997) (showing a complete and systematic denial of access to the law library or legal assistance was not enough to demonstrate actual injury); Oliver v. Fauver, 118 F.3d 175, 178 (3d Cir. 1997) (granting summary judgment for state corrections officers because the incarcerated person suffered no injury as a result of alleged interference with legal mail); Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996) (holding that *pro se* incarcerated people failed to demonstrate that inadequacy of the prison law library or legal assistance caused actual injury); Sabers v. Delano, 100 F.3d 82, 84 (8th Cir. 1996) (finding incarcerated person had to show actual injury due to denial of access to courts, even if denial was systemic; specifically, incarcerated person had the burden of showing that the "lack of a library or the attorney's inadequacies hindered [her] efforts to proceed with [the] legal claim in a criminal appeal, post-conviction matter, or civil rights action."); Stotts v. Salas, 938 F. Supp. 663, 667–668 (D. Haw. 1996) (holding that a state incarcerated person transferred to another state must show actual injury to have law books sent from the state of his former prison); Cody v. Weber, 256 F.3d 764, 769–770, (8th Cir. 2001) (holding that there was no "actual injury" when the inmate was not allowed to access his computer which stored his legal data, because no specific injury was demonstrated; rather the inmate vaguely claimed that the data would set him free); Hartmann v. O'Connor, 415 Fed. Appx. 350, 352 (3rd Cir. 2011) (holding that there was no "actual injury" when the inmate was allegedly denied access to the internet, because the inmate eventually made his legal claims in court).

13. Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (concluding that "the inmate ... must ... demonstrate ... the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim").

14. Lewis v. Casey, 518 U.S. 343, 399, 116 S. Ct. 2174, 2203, 135 L. Ed. 2d 606, 662 (1996).

15. Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996).

16. Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (arguing that an incarcerated person could prove actual injury if the "inadequacies of the law library" prevented him from even filing a complaint).

17. See, e.g., Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606, 616 (1996) (holding that "isolated instances of actual injury" are not enough to show a systemic *Bounds* violation).

can afford to sue).¹⁸

First, courts disagree about whether your right of access to the courts is applicable in all cases or only in those cases where your constitutional rights are involved. In *Lewis v. Casey*,¹⁹ the Supreme Court stated that your right of access does not guarantee your right to file *any* claim. Instead, this right is limited to non-frivolous lawsuits that either attack prison sentences or challenge the conditions of confinement at your prison.²⁰ This language is somewhat unclear. But, *Lewis* and subsequent cases have narrowly defined the claims to which the right of access to the courts applies.²¹ For example, some courts have held that the state's duty extends only to the initiation of habeas corpus proceedings, direct appeals, and civil rights actions,²² because these are the only actions specifically mentioned in *Bounds v. Smith*.²³ *Bounds* was the first case where the Supreme Court held that the right to access courts placed a constitutional duty on the states to provide adequate law libraries and adequate assistance by persons trained in the law to incarcerated people.²⁴ Thus, your state's duty to provide

18. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977) (holding federal habeas corpus or state or federal civil rights actions are encompassed within right of access to the courts); *see also* *Knop v. Johnson*, 977 F.2d 996, 1009 (6th Cir. 1992) (determining that requiring a state to provide affirmative legal assistance to incarcerated people in actions unrelated to constitutional rights or their incarceration would be “an unwarranted extension of the right of access”); *cf.* *Glover v. Johnson*, 75 F.3d 264, 269 (6th Cir. 1996) (finding female incarcerated people *not* entitled to legal assistance in child custody matters beyond those related to “habeas corpus, and civil rights matters involving the prisoner’s custodial situation or constitutional claims personally involving the prisoner”); *John L. v. Adams*, 969 F.2d 228, 235–236 (6th Cir. 1992) (holding states do *not* have a duty to provide affirmative assistance to incarcerated people on civil matters arising under state law, but noting that “states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration ... [and also that] in all other types of civil actions states may not erect barriers that impede the right of access of incarcerated people”); *Walters v. Edgar*, 900 F. Supp. 197, 229 (N.D. Ill. 1995) (finding incarcerated people have no constitutional right to assistance from the state to pursue child custody matters).

19. *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

20. *Lewis v. Casey*, 518 U.S. 343, 355, 116 S. Ct. 2174, 2182, 135 L. Ed. 2d 606, 620 (1996) (holding “*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration”).

21. *See, e.g.,* *Thaddeus-X v. Blatter*, 175 F.3d 378, 391, 1999 Fed. App. 0088P (6th Cir. 1999) (holding that “a prisoner’s right to access the courts extends to direct appeals, habeas corpus applications, and civil rights claims only”); *Wilson v. Blankenship*, 163 F.3d 1284, 1291, 12 Fla. L. Weekly Fed. C 373 (11th Cir. 1998) (holding that the civil forfeiture case that the plaintiff was attempting to litigate was “not a type of case that is included under the right of inmates’ access to courts under *Lewis*”).

22. *Thaddeus-X v. Blatter*, 175 F.3d 378, 391, 1999 Fed. App. 0088P (6th Cir. 1999).

23. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977) (holding federal habeas corpus or state or federal civil rights actions are encompassed within right of access to the courts); *see also* *Knop v. Johnson*, 977 F.2d 996, 1009 (6th Cir. 1992) (determining that requiring a state to provide affirmative legal assistance to incarcerated people in actions unrelated to constitutional rights or their incarceration would be “an unwarranted extension of the right of access”); *cf.* *Glover v. Johnson*, 75 F.3d 264, 269 (6th Cir. 1996) (finding female incarcerated people *not* entitled to legal assistance in child custody matters beyond those related to “habeas corpus, and civil rights matters involving the prisoner’s custodial situation or constitutional claims personally involving the prisoner”); *John L. v. Adams*, 969 F.2d 228, 235–236 (6th Cir. 1992) (holding states do *not* have a duty to provide affirmative assistance to incarcerated people on civil matters arising under state law, but noting that “states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration ... [and also that] in all other types of civil actions states may not erect barriers that impede the right of access of incarcerated people”); *Walters v. Edgar*, 900 F. Supp. 197, 229 (N.D. Ill. 1995) (finding incarcerated people have no constitutional right to assistance from the state to pursue child custody matters).

24. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977).

access to the courts may not extend to ordinary civil proceedings.²⁵ Nonetheless, you should check your state's law on this issue, which *may* extend the right of access to cover civil proceedings.

Second, the state may choose how to fulfill its duty to provide incarcerated people access to legal information and expertise.²⁶ The state may provide you with an adequate law library, adequate assistance from persons trained in the law, a combination of the two, or something slightly different.²⁷ For example, an inadequate or non-existent law library may not violate a incarcerated person's right of access when the state provides some other sort of legal assistance.²⁸ At the same time, while the state is free to devise its own legal access plan, there is no guarantee that courts will find that plan sufficient to satisfy your right of access to the courts.²⁹

Third, the state's duty to provide incarcerated people with access to the courts is not limited to those in state prison, but also extends to incarcerated people in county and city jails,³⁰ incarcerated

25. *See Glover v. Johnson*, 75 F.3d 264, 269 (6th Cir. 1996) (holding female incarcerated people *not* entitled to legal assistance in child custody matters beyond those related to "habeas corpus, and civil rights matters involving the prisoner's custodial situation or constitutional claims personally involving the prisoner"); *John L. v. Adams*, 969 F.2d 228, 235–236 (6th Cir. 1992) (holding that states do *not* have a duty to provide affirmative assistance to incarcerated people on civil matters arising under state law).

26. *Morello v. James*, 810 F.2d 344, 346–347 (2d Cir. 1987) ("The right of access to the courts is substantive rather than procedural. Its exercise can be shaped and guided by the state but cannot be obstructed, regardless of the procedural means applied." (citations omitted)); *Ramos v. Lamm*, 639 F.2d 559, 583 (10th Cir. 1980) ("*Bounds* does not hold that inmates have an absolute right to any particular type of legal assistance. The states are still free to choose among a variety of methods or combinations thereof in meeting their constitutional obligations [to provide access to the courts]." (citations omitted)); *Glover v. Johnson*, 75 F.3d 264, 266–267 (6th Cir. 1996) (holding that state could terminate funding for prison legal services program that provided female incarcerated people with assistance on child care matters because the termination did not violate the right of access to courts).

27. The Supreme Court has pointed out that "while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts," alternative programs may be acceptable. *Bounds v. Smith*, 430 U.S. 817, 830, 97 S. Ct. 1491, 1499, 52 L. Ed. 2d 72, 84 (1977). The *Bounds* Court suggested some alternatives to having a law library:

"Among the alternatives [to providing law libraries] are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students ..., the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices."

The *Bounds* Court did not consider this list of proposed alternatives complete, stating that "a legal access program need not include any particular element we have discussed, and we encourage local experimentation." *Bounds v. Smith*, 430 U.S. 817, 831–832, 97 S. Ct. 1491, 1499–1500, 52 L. Ed. 2d 72, 84–85 (1977).

28. Prison authorities may "replace libraries with some minimal access to legal advice and a system of court-provided forms ... that asked the inmates to provide only the facts and not to attempt any legal analysis." *Lewis v. Casey*, 518 U.S. 343, 352, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618–619 (1996) (citations omitted); *see also Blake v. Berman*, 877 F.2d 145, 146 (1st Cir. 1989) (finding law school clinical program might be considered an adequate alternative to a law library).

29. *See Novak v. Beto*, 453 F.2d 661, 663–664 (5th Cir. 1971) (finding that a prison legal access program consisting of a small "library," permission to use the law books of fellow incarcerated people, the prison employment of two full time attorneys, and three senior law students employed one summer may not be a sufficient alternative to allowing incarcerated people to provide some form of legal assistance to one another).

30. *See Leeds v. Watson*, 630 F.2d 674, 676–677 (9th Cir. 1980) (finding that there is a question of obstruction when incarcerated people in a county jail are required to get a court order to have access to a law library close by, and must be accompanied by a guard, and are not given sufficient information concerning these requirements); *Williams v. Leeke*, 584 F.2d 1336, 1340 (4th Cir. 1978) (finding that a situation where an incarcerated person in a city jail was only allowed access to legal resources 45 minutes a day, three days a week was "on its face a constitutional violation"); *Cruz v. Hauck*, 475 F.2d 475, 476–477, 23 A.L.R. Fed. 1 (5th Cir. 1973) (holding that prison regulations must not unreasonably invade the relationship of the incarcerated person to the courts in a case where the incarcerated person was in a county jail); *Tuggle v. Barksdale*, 641 F. Supp. 34, 36–37 (W.D. Tenn. 1985) (discussing how the fundamental right of access to the court may be applied in a county jail).

juveniles,³¹ persons serving brief sentences in local jails, pretrial detainees, and mental patients under commitment. Incarcerated people who are transferred from one state correctional facility to another or from a state correctional facility to a federal correctional facility retain their right of access to the courts, and therefore, must be provided some legal access program.³² For example, a federal court in New York has suggested that a state might fulfill its obligation to provide access to the courts by either supplying law books or providing legal counsel to state incarcerated people incarcerated in federal facilities.³³ However, as in *Blake v. Berman*, the court may find that the state has fulfilled its duty by providing you with persons trained in the law, although the state did not provide any legal materials pertaining to the state in which you were convicted.³⁴

Fourth, the extent of a state's duty to help you access the courts is unclear. For example, is it enough for a state to assist only until you are finished writing your complaint? In *Lewis*, the Supreme Court said that prison authorities have no duty to assist the incarcerated person to find or recognize violations of his rights³⁵ or to "litigate effectively once in court."³⁶

Finally, the right of access to the courts applies to all incarcerated people regardless of their financial status.

D. What is an Adequate Law Library?

The Supreme Court has never defined exactly what is an "adequate" law library.³⁷ The American Association of Law Libraries' ("AALL") Special Committee on Law Library Services to Prisoners has a suggested list of resources that should be in a prison law library. But, states are not required to follow the AALL's guidelines. Additionally, various lower courts have come up with their own list of what a prison law library should contain.³⁸ Even if a prison has a law library that meets either a court's

31. *John L. v. Adams*, 969 F.2d 228, 233 (6th Cir. 1992) (holding that incarcerated juveniles have a constitutional right of access to the courts).

32. *Messere v. Fair*, 752 F. Supp. 48, 50 (D. Mass. 1990) (holding that neither a copying service providing Massachusetts law that required specific citations, nor a Connecticut legal assistance program that refused to work on Massachusetts legal materials, provided an incarcerated person "meaningful access to the Massachusetts courts within the contemplation of *Bounds v. Smith*").

33. *See Kivela v. U.S. Att'y Gen.*, 523 F. Supp. 1321, 1325 (S.D.N.Y. 1981) (holding incarcerated people' right of access to courts satisfied where state has provided either law books or legal counsel), *aff'd*, 688 F.2d 815 (2d Cir. 1982).

34. *Blake v. Berman*, 877 F.2d 145, 146 (1st Cir. 1989) (finding prison program providing legal assistance instead of full law library satisfied access requirements).

35. *Lewis v. Casey*, 518 U.S. 343, 354, 116 S. Ct. 2174, 2181, 135 L. Ed. 2d 606, 619 (1996) (denying that "the State must enable the incarcerated person to discover grievances" (emphasis omitted)).

36. The *Lewis* Court restricted the *Bounds* ruling to require states to provide the tools "that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Lewis v. Casey*, 518 U.S. 343, 355, 116 S. Ct. 2174, 2182, 135 L. Ed. 2d 606, 620 (1996).

37. The Court simply stated that incarcerated people' access to the courts should be "adequate, effective, and meaningful" and that "[m]eaningful access' to the courts is the touchstone." *Bounds v. Smith*, 430 U.S. 817, 822–823, 97 S. Ct. 1491, 1495, 52 L. Ed. 2d 72, 79–80 (1977) (quoting *Ross v. Moffitt*, 417 U.S. 600, 611, 612, 615, 94 S. Ct. 2437, 2444–2446, 41 L. Ed. 2d 341, 351, 353 (1974)).

38. In *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 856 (9th Cir. 1985), the Ninth Circuit held that the following list of books "meets minimum constitutional standards and provides inmates with sufficient access to legal research materials to prepare *pro se* pleadings, appeals, and other legal documents" for Idaho State: Idaho Code; Idaho Reports; United States Reports, from 1962 to present; Federal Reporter Second Series, beginning with volume 273 [1960]; portions of the United States Code Annotated, including Federal Rules of Appellate Procedure and Federal Rules of Evidence; Appellate Rules of the Ninth Circuit Court of Appeals; Local Rules of the United States District Court for the District of Idaho; various Nutshells on procedure, civil rights, criminal law, constitutional law, and legal research; West Pacific Digest Second Series; various volumes of Federal Practice & Procedure; Manual for Complex Litigation Pamphlet Subscription; Federal Practice & Procedure, Criminal Pamphlet; West Federal Practice Digest 2d; Pacific Digest Second Series; Federal Supplement, beginning with

requirements or the AALL's guidelines, a court may still decide that access to the court has been denied if books are frequently missing³⁹ or if incarcerated people cannot use the library.⁴⁰ For example, functionally illiterate incarcerated people,⁴¹ non-English speakers,⁴² and the blind cannot use typical law libraries.⁴³ When incarcerated people cannot use the law library because of illiteracy, an inability to speak English, or a disability, the state may need to provide a legal assistance program with persons trained in the law in addition to, or in place of, an adequate prison law library.⁴⁴

Generally, the state may limit your access to law libraries and legal materials for security reasons.⁴⁵ As long as the restrictive practices are justified by security reasons, they are upheld in courts, even if the restrictive practices make court access more difficult for incarcerated people.⁴⁶ For example, prison officials may restrict the amount of time an individual incarcerated person may spend in the library⁴⁷ and the amount of time the library is open "in light of legitimate security

volume 482 [1980]. In *Tuggle v. Barksdale*, 641 F. Supp. 34, 39 (W.D. Tenn. 1985), the court stated that the law library in this case should include the following: "[all] volumes and titles of U.S.C.A. ... which cover the United States Constitution, and Titles 5, 15, [and] 18 [of the U.S.C.A.] with complete rules of the various courts, [Title] 28 with complete rules, [Title] 42 and the General Index ... Federal Practice and Procedure by Wright and Miller, ... Tennessee Code Annotated Volume 7 and 10 and Criminal Law Library (2-volume set, latest edition)[.] ... [and] Black's Law Dictionary latest edition." See also *Griffin v. Coughlin*, 743 F. Supp. 1006, 1020–1025 (N.D.N.Y. 1990), in which the court detailed and examined the inventory of the Clinton Main law library and stated that it was constitutionally sufficient and provided incarcerated people with "access to a law book inventory which rises above the constitutional minimum."

39. *Walters v. Edgar*, 900 F. Supp. 197, 226–227 (N.D. Ill. 1995) (finding that prison's replacement of missing volumes only once a year appeared to be inadequate maintenance of library, and holding that even if incarcerated people might be responsible for stealing the missing volumes, "each plaintiff's right of access to the courts is individual, and therefore a . . . [prisoner] cannot be prevented access by ... theft").

40. See, e.g., *Cruz v. Hauck*, 627 F.2d 710, 721 30 Fed. R. Serv. 2d 494 (5th Cir. 1980) ("Library books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate."); *Acevedo v. Forcinito*, 820 F. Supp. 886, 888 (D.N.J. 1993) ("[F]or prisoners who cannot read or understand English, the constitutional right of access to the courts cannot be determined solely by the number of volumes in, or size of a law library").

41. A functionally illiterate person is someone who has reading and writing skills that are inadequate to help him with tasks beyond a basic skill level. See, e.g., *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 855–856 (9th Cir. 1985) (stating that "[a] book and a library are of no use, in and of themselves, to a prisoner who cannot read"); *U.S. ex rel. Para-Prof. Law Clinic v. Kane*, 656 F. Supp. 1099, 1105–1107 (E.D. Pa. 1987) (the elimination of a jailhouse lawyer association, leaving only a law library for incarcerated people, would leave functionally illiterate incarcerated people without court access), *aff'd*, 835 F.2d 285 (3d Cir. 1987).

42. See, e.g., *U.S. ex rel. Para-Prof. Law Clinic v. Kane*, 656 F. Supp. 1099, 1106 (E.D. Pa. 1987) (stating that "Spanish-speaking inmates who cannot read or write English are unable to present, with reasonable adequacy, complaints to the courts without assistance").

43. *Phillips v. United States*, 836 F. Supp. 965, 967–968 (N.D.N.Y. 1993) (accepting that an incarcerated person's blindness may effectively deny him access to the prison law library).

44. *Phillips v. United States*, 836 F. Supp. 965, 967–968 (N.D.N.Y. 1993) (stating that in some circumstances denial of access to a legal assistance program may give rise to a claim of denial of access to the court).

45. *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 858 (9th Cir. 1985) (stating that "[p]rison officials of necessity must regulate the time, manner, and place in which library facilities are used") (citing *Twyman v. Crips*, 584 F.2d 352, 358 (10th Cir. 1978)).

46. *Lewis v. Casey*, 518 U.S. 343, 361–362, 116 S. Ct. 2174, 2185, 135 L. Ed. 2d 606, 624 (1996) (holding that "delays in receiving legal materials or legal assistance" are "not of constitutional significance, even where they result in actual injury" as long as they come from "prison regulations reasonably related to legitimate penological interests").

47. *Shango v. Jurich*, 965 F.2d 289, 292–293 (7th Cir. 1992) (holding that restrictions on library hours which included: being closed nights, weekends, and holidays; allowing general population prisoners to use library, optimally for 10 to 11 hours, one day each week; and limiting the library visitation hours for prisoners in segregation and protective custody to about three hours every third to fifth weekday, did not deny prisoners the constitutional right of meaningful access as described in *Bounds*); see also *Lindquist v. Idaho State Bd. of Corr.*,

considerations.”⁴⁸ However, the state may not limit your access to law libraries or legal assistance to the point that it functionally blocks access to the courts.⁴⁹

Prison regulations can also affect segregated incarcerated people’s access to law libraries, legal materials, and legal assistance. Courts have stopped states from enforcing regulations restricting or withholding law books from incarcerated people in solitary confinement.⁵⁰ Several (but not all) courts have criticized “paging systems” where incarcerated people are given access only to legal books they specifically request.⁵¹ Other request requirements for library access have also been criticized.⁵² However, a prison can meet its obligation to provide a segregated incarcerated person with access to the courts by allowing some (but limited) access to legal materials or some access to legal assistance.⁵³

E. The State’s Duty to Permit Access to Adequate Legal Assistance

It is unclear what “adequate” means in the context of adequate assistance from persons trained in the law. The Supreme Court in *Bounds* did not define that. However, courts have occasionally

776 F.2d 851, 858 (9th Cir. 1985) (stating that library being open a minimum of eleven hours each day was “an adequate amount of total library access time”).

48. *Shango v. Jurich*, 965 F.2d 289, 292 (7th Cir. 1992) (quoting *Caldwell v. Miller*, 790 F.2d 589, 606 (7th Cir. 1986)).

49. *See* *Straub v. Monge*, 815 F.2d 1467, 1469 (11th Cir. 1987) (stating that “[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid”) (quoting *Procunier v. Martinez*, 416 U.S. 396, 419 (1974)).

50. *See, e.g.,* *Knell v. Bensinger*, 489 F.2d 1014, 1017 (7th Cir. 1973) (holding that, although an incarcerated person in isolation does not have unlimited rights to use the library, if an incarcerated person in solitary confinement is prevented from using the library or consulting an advisor to prepare a petition, the courts may find that the incarcerated person’s right of access was effectively denied); *U.S. ex rel. Para-Prof. Law Clinic v. Kane*, 656 F. Supp. 1099, 1104–1105 (E.D. Pa. 1987) (finding prison’s program of providing a small number of cases or books to segregated incarcerated people was unconstitutional, and prison had a “duty to insure that the ‘opportunity to do legal research [given to segregated prisoners] must be at least the equivalent of the opportunity that is available to an inmate who is permitted to go personally to the prison law library’”) (quoting *Wojtczak v. Cuyler*, 480 F. Supp. 1288, 1301 (E.D. Pa. 1979)); *Johnson v. Anderson*, 370 F. Supp. 1373, 1383–1385 (D. Del. 1974) (holding prison rules allowing an incarcerated person in solitary confinement access to only one law book of his choosing on two times during the week violated the incarcerated person’s due process right), *modified on other grounds*, 420 F. Supp. 845 (D. Del. 1976).

51. The runner system or paging system, “also known as an ‘exact-cite system’ because an inmate must request materials by exact cite,” has been deemed an inadequate legal access system for both segregated and non-segregated incarcerated people by some courts. *Cannell v. Bradshaw*, 840 F. Supp. 1382, 1389 (D. Or. 1993) (holding paging system alone does not provide adequate access to the courts); *Griffin v. Coughlin*, 743 F. Supp. 1006, 1023 (N.D.N.Y. 1990) (finding book request system deprived protective custody incarcerated people of meaningful access to the courts).

52. *See, e.g.,* *Cepulonis v. Fair*, 732 F.2d 1, 4 (1st Cir. 1984) (finding requirement that incarcerated people identify specific volumes sought prior to entering library to be suspect); *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978) (“It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.”).

53. *See, e.g.,* *Lovell v. Brennan*, 566 F. Supp. 672, 696–697 (D. Me. 1983) (stating that an adequate legal access plan would provide segregated incarcerated people with access to law books and an advocate, or other persons trained in the law, depending on the circumstances), *aff’d*, 728 F.2d 560 (1st Cir. 1984).

described what might qualify as adequate.⁵⁴ For example, if the state only provides people to assist you who are *not* trained in the law, such assistance does not satisfy your right of access to the courts.⁵⁵

Occasionally, the state may decide to fulfill its obligation to provide you with access to courts by allowing other incarcerated people to assist you.⁵⁶ Incarcerated people who provide other incarcerated people with legal assistance are called jailhouse lawyers or “writ writers.”⁵⁷ In *Johnson v. Avery*, the Supreme Court held that a state could not prevent one incarcerated person from assisting another incarcerated person in the preparation of his writ in the absence of reasonable alternatives to such assistance.⁵⁸ Therefore, if the state does not provide you with any sort of adequate legal access program, it cannot prohibit you from getting assistance from a jailhouse lawyer.⁵⁹ Although the state may not be able to prohibit you from getting assistance from a jailhouse lawyer, the state still has the power to regulate reasonably the activities of jailhouse lawyers.⁶⁰ For example, the state can require that a jailhouse lawyer get approval from the state prior to helping another incarcerated person.⁶¹ The state can also prohibit jailhouse lawyers from visiting the cells of the incarcerated people they are assisting⁶² and from receiving payment for their services.⁶³

54. In *Gluth v. Kangas*, the Ninth Circuit upheld the district court’s imposition of a training program for incarcerated person legal assistants. The *Gluth* Court stated that “*Bounds* requires, in the absence of adequate law libraries, some degree of professional or quasi-professional legal assistance to prisoners. Although legal training need not be extensive, *Bounds* does require that inmates be provided the legal assistance of persons with at least some training in the law.” *Gluth v. Kangas*, 951 F.2d 1504, 1511–1512 (9th Cir. 1991) (citations omitted); see also *Darby v. Schmalenberger*, 2012 U.S. Dist. LEXIS 160858, at *19–20 (D.N.D. May 7, 2012) (holding that the incarcerated person has “neither a right to internet access nor a right to file electronically” because the State has a “legitimate penological interest in restricting inmates’ internet access”).

55. *Valentine v. Beyer*, 850 F.2d 951, 956 (3d Cir. 1988) (“An untrained legal research staff is insufficient to safeguard an inmate’s right of access to the courts.”) (quoting *U.S. ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1104 (E.D. Pa. 1987), *aff’d*, 835 F.2d 285 (3d Cir. 1987), *cert. denied*, 485 U.S. 993 (1988)).

56. This has also been called “mutual assistance among inmates.” *Johnson v. Avery*, 393 U.S. 483, 490, 89 S. Ct 747, 751, 21 L. Ed. 2d 718, 724 (1969).

57. See *Johnson v. Avery*, 393 U.S. 483, 487–488, 89 S. Ct 747, 750–751 (1969) (discussing role of incarcerated people who provide legal assistance to other incarcerated people).

58. *Johnson v. Avery*, 393 U.S. 483, 490, 89 S. Ct 747, 750–751 (1969) (striking down a prison regulation that forbade incarcerated people from providing each other with any sort of legal help or advice).

59. *Johnson v. Avery*, 393 U.S. 483, 490, 89 S. Ct 747, 751 (1969) (“[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners”). However, you have no right to demand the assistance of a specific jailhouse lawyer. See *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981) (incarcerated person had no right to “services of a particular writ writer”); *Prisoners’ Legal Ass’n v. Robertson*, 822 F. Supp. 185, 190 (D.N.J. 1993) (holding an incarcerated person has no “right to the assistance of a particular prisoner”).

60. *Johnson v. Avery*, 393 U.S. 483, 490, 89 S. Ct 747, 751 (1969) (“[T]he State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance . . . for example, by limitations on the time and location of such activities.”); *Sizemore v. Lee*, 20 F. Supp. 2d 956, 958 (W.D. Va. 1998) (holding the incarcerated person can be ordered not to engage in writ writing on an individual basis when the security of the prison requires the order, and holding that writ writers were not mandated where the prison provided incarcerated people with a law library and legal assistance).

61. *Rivera v. Coughlin*, 620 N.Y.S.2d 505, 506, 210 A.D.2d 543, 543 (3d Dept. 1994) (upholding determination of disciplinary violation by an incarcerated person who sent a letter to the FBI on behalf of another incarcerated person without receiving prior approval for providing such assistance pursuant to state directives).

62. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984) (holding that an incarcerated person was not denied effective assistance of counsel where jailhouse lawyers were prohibited from visiting his cell because he could meet with them in the prison law library, which he did several times).

63. *Johnson v. Avery*, 393 U.S. 483, 490, 89 S. Ct 747, 751 (1969) (discussing the state’s power to regulate jailhouse lawyers in situations where they may be punished for receiving payment for legal assistance); *Henderson v. Ricketts*, 499 F. Supp. 1066, 1069 (D. Colo. 1980) (distinguishing that while reasonable access to the court cannot be denied, “[c]ompensation to jailhouse lawyers by other inmates may be prohibited”).

F. The State's Duty to Provide Materials

The right of access to the courts requires more than just being provided with a library and research tools. The Supreme Court has held that the right of access to the courts also includes providing incarcerated people “with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.”⁶⁴ In other words, even if the state provides an adequate law library or assistance from persons trained in the law, if they fail to provide you with the materials necessary for drafting, notarizing, and mailing your legal documents, that may also violate your right to access the courts.

There are a few important things to consider before claiming that you have been denied access to the courts based on the state's failure to provide you with materials. First, you may not be entitled to all or any of the specific materials that you may request. For example, the courts have held that incarcerated people may be given pencils instead of the pens mentioned in *Bounds*,⁶⁵ that incarcerated people have no constitutional right to use or possess computers or typewriters,⁶⁶ that the state is not required in all cases to provide free photocopying,⁶⁷ that the state need not provide unlimited free postage,⁶⁸ and that a notary need not be available at all times.⁶⁹ Second, unlike its duty to provide

64. *Bounds v. Smith*, 430 U.S. 817, 824–825, 97 S. Ct 1491, 1496 (1977).

65. *Canell v. Bradshaw*, 840 F. Supp. 1382, 1391 (D. Or. 1993) (“Security considerations may . . . justify the issuance of two-inch ‘golf’ pencils.”) (citing *Jeffries v. Reed*, 631 F. Supp. 1212, 1215 (E.D. Wash. 1986)). However, the court also stated that if the incarcerated person in *Canell* had suffered from a medical condition preventing him from drafting legal documents longhand with a two-inch pencil, then “[u]nder those circumstances, a full-sized writing instrument or typewriter might become an indispensable tool for communicating with the court. If prison officials know of such a problem, then their denial of . . . [the prisoner's] request could constitute a deprivation of necessary legal supplies unless that action was justified by a sufficient penological interest.” *Canell v. Bradshaw*, 840 F. Supp. 1382, 1391 (D. Or. 1993).

66. *See, e.g., Taylor v. Coughlin*, 29 F.3d 39, 40 (2d Cir. 1994) (finding “no constitutional right to a typewriter as an incident to the right of access to the courts” and no “constitutional right to typewriters of a specific memory capacity” (citations omitted)); *Sands v. Lewis*, 886 F.2d 1166, 1169 (9th Cir. 1989) (holding that incarcerated people have no constitutional right to a typewriter); *Am. Inmate Paralegal Ass’n v. Cline*, 859 F.2d 59, 61 (8th Cir. 1988) (“Prison inmates have no constitutional right of access to a typewriter and prison officials are not required to provide one as long as the prisoner is not denied access to the courts.”) (citation omitted); *Walters v. Edgar*, 900 F. Supp. 197, 229 (N.D. Ill. 1995) (“[P]risons are not required to provide inmates with typewriters.”); *Howard v. Leonardo*, 845 F. Supp. 943, 946 (N.D.N.Y. 1994) (“[I]nmates have no constitutional right to the possession and use of a typewriter . . . since prisoners are not prejudiced by filing hand written briefs.”) (citations omitted); *Lehn v. Hartwig*, 13 F. App’x 389, 392 (7th Cir. 2001) (holding that “if prisoners have no constitutional right to a typewriter, they certainly do not have one to a computer”) (citations omitted). *But see Tuggle v. Barksdale*, 641 F. Supp. 34, 38 (W.D. Tenn. 1985) (holding jail must provide a sufficient number of usable typewriters in legal room unless they can be proven to be a security threat).

67. *Gittens v. Sullivan*, 670 F. Supp. 119, 122 (S.D.N.Y. 1987), *aff’d*, 848 F.2d 389 (2d Cir. 1988) (finding a provision of carbon paper to incarcerated people was “sufficient to provide proper access to the courts . . . The State should not be forced to provide free access to copier machines for prisoner use when there is an acceptable, less costly substitute.”); *Dugar v. Coughlin*, 613 F. Supp. 849, 854 (S.D.N.Y. 1985) (noting prisons may make incarcerated people pay for photocopies, as this is a “reasonable balance of the legitimate interests of both prisoners and the State”). *But see Canell v. Bradshaw*, 840 F. Supp. 1382, 1392 (D. Or. 1993) (holding that incarcerated people clearly have an established right to photocopying under certain limited circumstances).

68. *Gittens v. Sullivan*, 670 F. Supp. 119, 123 (S.D.N.Y. 1987) (holding that a provision of \$1.10 per week for stamps and an additional advance of \$36 for legal mailings to indigent incarcerated person satisfied the constitutional minimum for access to the courts); *Dugar v. Coughlin*, 613 F. Supp. 849, 853 (S.D.N.Y. 1985) (upholding the directive providing that incarcerated people could mail five one-ounce letters per week free of charge but would have to pay for any mail weighing more than one ounce, or in excess of five one-ounce letters in one week, because “a prisoner’s constitutional right of access to the courts . . . does not require that prisoners be provided with unlimited free postage”); *see also Pacheco v. Commissioner*, 897 F. Supp. 671, 681 (N.D.N.Y. 1995) (Department of Correctional Services’s refusal to advance postage to an incarcerated person for legal mail did not violate the incarcerated person’s right of access to courts because the incarcerated person could not show that the delay interfered with an upcoming legal action).

69. The courts have held that correctional facilities must provide incarcerated people with notaries public.

adequate law libraries or assistance from persons trained in the law, the state's duty to provide you with materials may only apply to indigent incarcerated people. You may need to research the laws and regulations in your state to determine what the accepted standard for indigence is in your correctional facility and in your state.⁷⁰ Third, your right of access to the courts is not unlimited: it may be lessened when balanced against the state's "legitimate interests, including budgetary concerns."⁷¹ For example, a court could determine that the state's duty to provide you with materials is limited by state budgetary or security concerns. Fourth, the state's duty to assist you may be limited to only habeas corpus petitions and civil rights actions involving constitutional claims.⁷²

Finally, and most importantly, when you sue on the basis of the state's refusal to provide necessary materials, you also need to show that you suffered an "actual injury" as a direct result of that refusal. Because standards vary depending on where you are, you will need to research this "actual injury" requirement in your state and circuit. *Canell v. Bradshaw* is an example of one state's particular requirements. In *Canell*, an incarcerated person claimed that he was denied access to the courts because the state would not make photocopies for him. The court stated that he could prove that the state had deprived him of meaningful access to the courts, but in order to do so, he needed to demonstrate: (1) that he wanted to copy specific documents that could not be duplicated longhand—in other words, that the documents were too long for the incarcerated person to copy them himself with pen and paper, (2) that those documents were to be filed with the court as part of a specific document, (3) that he had advised [prison] officials of this need, (4) that his request was denied in accordance with a policy promulgated by the defendants, (5) that those documents were relevant and necessary to his particular case, and (6) that the documents had to be left out of the filing as a consequence of the prison officials' refusal to provide photocopying services.⁷³

Remember, if you are going to pursue this type of action, you must bring a Section 1983 or a *Bivens* claim. Please refer to Chapter 16 of the *JLM* for more details on these claims.

Tuggle v. Barksdale, 641 F. Supp. 34, 39–40 (W.D. Tenn. 1985) (holding the prison "must continue to afford notary publics for all inmates at all times"). *Correctional facilities, however, need not make the notary services available five days a week.* *Dugar v. Coughlin*, 613 F. Supp. 849, 854 (S.D.N.Y. 1985) (holding that incarcerated people do not have a constitutional right to notary services five days a week).

70. *See, e.g., Gluth v. Kangas*, 951 F.2d 1504, 1508–1509 (9th Cir. 1991) (holding that the Department of Correction's indigency policy, which only allowed an incarcerated person to apply for indigency classification if his prison account balance was less than \$12 was unconstitutional because it forced incarcerated people to choose between purchasing the mandatory hygienic supplies and essential legal supplies, and that an indigency standard of \$46 was more appropriate).

71. *See Gittens v. Sullivan*, 670 F. Supp. 119, 122 (S.D.N.Y. 1987) ("The State should not be forced to provide free access to copier machines for prisoner use when there is an acceptable, less costly substitute."); *Dugar v. Coughlin*, 613 F. Supp. 849, 853–854 (S.D.N.Y. 1985) (holding that making incarcerated people pay for photocopies is a "reasonable balance of the legitimate interests of both prisoners and the State").

72. *See Lewis v. Casey*, 518 U.S. 343, 354–355, 116 S. Ct. 2174, 2181–2182 (1996) (holding that *Bounds* only requires states to provide tools that "inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.").

73. *Compare Canell v. Bradshaw*, 840 F. Supp. 1382, 1392 (D. Or. 1993), *aff'd*, 97 F.3d 1458 (9th Cir. 1996), with *Woodward v. Subia*, CIV S-07-498 JAMKJMP, 2008 WL 4196692 (E.D. Cal. Sept. 11, 2008) (holding that the confiscation of the incarcerated person's computer that stored materials which the incarcerated person claimed would set him free was too vague to demonstrate actual injury).

G. The State's Duty in the Internet Age

Internet and database search technologies have revolutionized legal research in recent decades and dramatically increased the accessibility of court documents and legal knowledge. Despite this, courts have not recognized a right to use these tools.⁷⁴

H. Conclusion

In this Chapter, you have learned that if you (1) exhaust your prison's administrative remedies for getting your complaint heard, (2) are not able to go to court or are hindered in pursuit of your claim by state interference, and (3) suffer an injury as a result of the state's interference or denial of your right to access the courts, you may pursue a claim against the state. You can request that the state provide you with access to an adequate law library, adequate assistance from someone trained in the law, or some other legal access program. While a state can regulate its jails and prisons for the purpose of discipline and safety, it cannot completely deny an incarcerated person's right of access to the courts.

Pursuing a claim has several requirements. First, you must show that you suffered an actual injury from the state's failure to provide you with an adequate opportunity to litigate your claim.⁷⁵ Second, some state courts have held that the state only needs to provide you with an adequate law library or legal access program if you want to pursue federal habeas corpus petitions or state or federal civil rights actions. Third, while the state, not you, decides what type of legal access you will get, it must provide you with meaningful access to the courts.⁷⁶ Fourth, the state must adhere to the requirements laid out in this Chapter whether or not you are considered indigent. Finally, the state can place reasonable limits on your ability to use the library or other legal access programs.

74. See, e.g., *Darby v. Schmalenberger*, No. 1:12-CV-033, 2012 WL 5471881 (D.N.D. May 7, 2012) (holding that the incarcerated person has "neither a right to internet access nor a right to file electronically" because the state prison has a "legitimate penological interest in restricting inmates' internet access").

75. See *Lewis v. Casey*, 518 U.S. 343, 350–351, 116 S. Ct. 2174, 2179–2180 (1996) (explaining that there is no general right to a law library or legal assistance except as they relate to an incarcerated person's actual ability to access the courts).

76. *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978) ("Under *Bounds*, the state is duty bound to assure prisoners some form of meaningful access to the courts. But states remain free to satisfy that duty in a variety of ways.").

APPENDIX A

DIRECTORY OF SELECTED LAW LIBRARIES OFFERING SERVICES TO PRISONERS AND OF ONLINE LEGAL RESOURCES**

This Appendix provides information about online resources you can use for your legal research. Section A covers national online resources. Section B covers circuit specific library and online resources. Lastly, Section C covers state specific library and online resources. Because the sections are divided by region, the new order should be helpful to your research. For example, if you are interested in state resources, you can refer to Section C.

A. General Online Resources

Cornell University Law School Legal Information Institute (LII): <http://www.law.cornell.edu>
LII is a great free online legal resource of federal and state statutes, summaries of laws, a legal encyclopedia, federal cases, and more. The LII is really good for finding statutes, the meaning of legal terms, and summaries of laws. You may have to register to access some of the site's information, but registration is free. To register, you will have to use an email for the system that will verify that you are a user (i.e. email confirmation).

FindLaw: <http://www.findlaw.com>

FindLaw is a good resource for learning about various areas of the law. There are over a dozen subjects, including criminal law, DUI, marriage/family and divorce law, civil rights, and more. The site provides a detailed and straightforward description of these areas of the law. FindLaw also has a legal forum, blog, a current events section, and a question and answer section.

Lexis Web: <http://www.lexisweb.com/>

Lexis Web provides a range of material on legal matters, but the majority of the content requires registration at a fee.

Wikipedia: <http://www.wikipedia.org>

Wikipedia is a general online resource that also has information about legal issues. Wikipedia offers a broad range of information, including case summaries, case citations, history about the case or legal topic, definitions of legal terms, and more. Wikipedia provides straightforward information about some issues that may be more complicated to understand. It is important to remember that some of the information on Wikipedia is provided by the general public, so the information on the website may not always be correct. It would be a good idea to double-check the information on Wikipedia with another source.

B. Federal Cases Online

PACER: <http://www.pacer.gov/>

pacer@psc.uscourts.gov

PACER Service Center Number: (800) 676-6856

Public Access to Court Electronic Records (PACER) is a centralized electronic service that provides public access to information about cases that have been filed in the federal courts. PACER allows public users, including incarcerated people, to obtain information about cases filed

** These are the libraries or facilities that provide materials in states where the most *JLMs* are sold. If you live in a different state than those listed, you should contact law school or governmental law libraries in your state.

in federal appellate, district, and bankruptcy courts. In addition to opinions, PACER includes case docket information and may provide briefs and other filings from the parties.

PACER is not a free service, and to use it, users must register online to receive a login and password. Fees for viewing cases online are \$.10 per page.

The Supreme Court: <http://www.supremecourt.gov/opinions/opinions.aspx>

The Supreme Court Website is a limited resource. The website contains a searchable database that is limited to opinions rendered since 2007. For an entire list of cases, you can click on the “opinions” link. It also contains PDF versions of the complete volumes of cases dating back to 1991.

D.C. Circuit: <http://www.cadc.uscourts.gov/internet/opinions.nsf>

The D.C. Circuit’s official website provides all published D.C. Circuit opinions and summary orders and selected unpublished decisions since 1997 at no cost.

1st Circuit: <http://www.ca1.uscourts.gov/?content=opinions/main.php>

The First Circuit’s official website provides First Circuit opinions and summary orders from 1992 at no cost. Opinions and orders before 1999 are available in HTML form only. Later opinions may be downloaded in PDF or WordPerfect form.

2nd Circuit: <http://www.ca2.uscourts.gov/decisions.html>

The Second Circuit’s official website provides Second Circuit opinions and summary orders from 2002 at no cost.

3rd Circuit: <http://www.ca3.uscourts.gov/search-opinions>

The Third Circuit’s official website provides Third Circuit opinions and summary orders from 1994 at no cost.

4th Circuit: <http://pacer.ca4.uscourts.gov/opinions/opinion.htm>

The Fourth Circuit’s official website provides Fourth Circuit opinions and summary orders from 1996 at no cost.

5th Circuit: <http://www.ca5.uscourts.gov/Opinions.aspx>

The Fifth Circuit’s official website provides Fifth Circuit opinions and summary orders from 1992 at no cost. The opinions are also available in a searchable database and for bulk download.

Keyword Search: <http://www.ca5.uscourts.gov:8081>

Bulk Download Server: <ftp://opinions.ca5.uscourts.gov> (Note: Accessing download database requires accessing an FTP server. This may not be available due to restrictions on your internet access.)

6th Circuit: <http://www.ca6.uscourts.gov/opinions/opinion.php>

The Sixth Circuit’s official website provides published Sixth Circuit opinions from 2000 and unpublished opinions from 2004 at no cost. The opinions are also available in a searchable database and for bulk download.

7th Circuit: <http://media.ca7.uscourts.gov/opinion.html>

The Seventh Circuit’s official website provides access to both published and unpublished opinions from 1999, as well as selected unpublished court orders, oral arguments, and other court documents from that period.

The court’s primary database must be searched by docket number. The court’s library provides a complete listing of all decisions dating from 2007, along with a series of relevant terms for each decision on a single webpage. (<http://www.lb7.uscourts.gov/ArchivedURLs.html>). The court recommends using a web browser’s “Find” function to perform a keyword search of these opinions. To use this function,

press “Control” and the “F” button (when using a Windows computer) or “Command” and the “F” button (when using an Apple computer).

8th Circuit: <http://www.ca8.uscourts.gov/all-opinions>

The Eighth Circuit’s official website provides all published Eighth Circuit opinions and summary orders, and selected unpublished decisions from 1995 at no cost. The database is searchable by docket number, keyword, party name, and attorney name. The website also provides Mp3 audio recordings of all oral arguments from 2009. To find an oral argument, use the “One Stop Search” option.

9th Circuit: <http://www.ca9.uscourts.gov/opinions/>

The Ninth Circuit’s official website provides all published Ninth Circuit opinions and summary orders from 1995 and unpublished opinions from 2002 at no cost. For published opinions prior to January 3, 2005, you can contact the clerk’s office at (413) 355-8000.

Published Opinions (2005–Present): <http://www.ca9.uscourts.gov/opinions/>

Unpublished Opinions (November 10, 2009–Present): <http://www.ca9.uscourts.gov/memoranda/>

Unpublished Opinions (December 8, 2008–November 10, 2009):

http://www.ca9.uscourts.gov/memoranda_archive/

For unpublished opinions prior to December 8, 2008, you may call the clerk’s office at (413) 355-8000 or send a request via email to CA09Public_Information@ca9.uscourts.gov.

10th Circuit: <http://www.ca10.uscourts.gov/clerk/opinions.php>

The Tenth Circuit’s official website provides all published opinions from 1995 and all unpublished opinions from 1996 at no cost. The database is searchable by date, docket number, and keyword.

11th Circuit: <http://www.ca11.uscourts.gov/opinions>

The Eleventh Circuit’s official website provides all published Eleventh Circuit opinions and summary orders from 1995 and all unpublished decisions from 2005 at no cost.

Published Opinions: <http://www.ca11.uscourts.gov/published-opinions>

Unpublished Opinions: <http://www.ca11.uscourts.gov/unpublished-opinions>

D. Online and Library Resources By State

If your state is not listed you or someone you know should check the Southern Center for Human Rights' webpage (<http://www.schr.org>) for organizations providing other legal materials to incarcerated people.

CALIFORNIA

Internet Resources:

Many decisions (including all decisions published or ordered for publication) of California's appellate courts are available online. Some California Superior Court decisions are available online.

A note about the California court system:

- California's trial court is the California Superior Court.
- California's appellate courts are the California Supreme Court and the California Courts of Appeal. The California Courts of Appeal is California's second highest court and hears appeals from the California Superior Court. Appeals from any California Court of Appeal are heard by the California Supreme Court, California's highest court that makes binding decisions over all California lower courts.

(1) California Appellate Decisions

The California Official Reports: <http://www.lexisnexis.com/clients/CACourts/>

All published California state appellate court decisions are available online at no cost. LexisNexis, the official publisher of the California Reports, provides access to opinions from 1850 to the present. The California Official Reports website is updated monthly, and generally decisions are made available online within sixty days of filing.

Appellate Slip Opinions: <http://www.courts.ca.gov/opinions.htm>

Slip opinions, which are uncorrected California opinions as filed, are available for free online at the California Courts official website. Slip opinions are opinions that have not been officially published in the California Reports but have been ordered to be published. Slip opinions are only available for recent matters—specifically, opinions that have been filed within the last 120 days. Where the option is available, it is generally preferable to cite to California Reports, as these include corrections and other changes that will not be incorporated into the slip opinions.

Unpublished Appellate Opinions: <http://www.courts.ca.gov/opinions-nonpub.htm>

Unpublished California appellate opinions are available online for up to 60 days on the California Courts official website.

(2) California Trial Court Decisions

The Guide to California Court Records: <http://www.courtreference.com/California-Courts.htm>

Some California Superior Court opinions as well as docket information can be found online at the Guide to California Courts website.

Library Resources:

Oakland

Alameda County Law Library
125 Twelfth Street

Oakland, CA 94607
(510) 208-4832
<http://www.acgov.org/law/index.htm>

This library serves incarcerated people in Alameda County. Photocopies are \$1/page plus a \$10 handling fee, tax, postage and prepayment. Emailed materials are \$15/citation. The library requires correct citations and will not conduct legal research. Additional details about document delivery: <http://www.acgov.org/law/feeservices/docdelivery.htm>

Los Angeles **Los Angeles County Law Library**
301 W. First Street
Los Angeles, CA 90012
(213) 785-2529
<http://www.lalawlibrary.org/>

This library serves incarcerated people and other institution residents in California. No material is loaned. Correct citations are required and limited reference work is done. Prepayment is required. A debit account is formed with the library, and the library charges the debit account. The library emails or faxes the requested material.

Photocopies: \$12.00 transaction charge per document for the first 25 pages (includes postage and tax) and sales tax if applicable. \$0.25 per page over first 25 pages. Ask to speak to Christine.

Payee: Los Angeles County Law Library

San Diego **San Diego County Public Law Library**
1105 Front Street
San Diego, CA 92101-3904
(619) 531-3900
<http://sandiegolawlibrary.org/>

This library serves incarcerated people and other institutional residents located at institutions in California. It lends materials to the incarcerated people of San Diego County Jail under procedures set up by the Sheriff under a federal court consent decree. Loan periods are 1, 3, or 7 days. Correct citations are required.

Photocopies: For mail, email, and local fax (i.e. San Diego area code) the price is \$15 for a package of 20 pages or less. For every additional page over 20 pages, the rate is \$1.25 per page. If the fax is long distance (an area code outside of San Diego) the price is \$30 for a group of 20 pages or less, and for every additional page the price is \$2.25. On the website, click on a link called "document request" that will provide a document delivery form on which you can make your document requests.

Payee: San Diego County Public Law Library

Santa Clara **Heafey Law Library**
Attn: Prisoner requests
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053
(408) 554-4452
<http://law.scu.edu/library/>

The Heafey Law Library no longer provides services to individual incarcerated people. Interlibrary loan is the only way this library can offer material. The material is provided only to the prison libraries. However, the material that can be requested is limited. Heafey Law Library does not provide the following material: case reporters (including case law), statutes, journals, and treatises.

Ventura **Ventura County Law Library**
800 South Victoria Avenue
Ventura, CA 93009-2020
(805) 642-8982
<http://vencolawlib.org>

This library serves incarcerated people in California. Correct citations are required and only material that is available is provided. Available material may include cases, statutes, and journal articles.

Photocopies: First 3 pages are free. Afterward the fee is \$0.25 per page, plus postage.
Prepayment by cash or check is required; limit of 20 pages per letter.

Payee: Ventura County Law Library

LOUISIANA

Internet Resources:

(1) Louisiana Appellate Decisions and Supreme Court Decisions

Published Appellate Opinions:

The Louisiana Court of Appeals is made up of five circuit courts. Appellate opinions from each of the five circuits are accessible through the links provided on the website. Additionally, access to Supreme Court materials is available through a hyperlink on the site.

Louisiana Supreme Court: <http://www.lasc.org/>

Louisiana First Circuit Court of Appeal: <http://www.la-fcca.org/>

Louisiana Second Circuit Court of Appeal: <http://www.la2nd.org/>

Louisiana Third Circuit Court of Appeal: <http://www.la3circuit.org/>

Louisiana Fourth Circuit Court of Appeal: <http://www.la4th.org/>

Louisiana Fifth Circuit Court of Appeal: <http://www.fifthcircuit.org/>

(2) Louisiana Trial Court Decisions:

Library Resources:

Statewide: State Library of Louisiana
P.O. Box 131
Baton Rouge, LA 70821-0131
(225) 342-4913
<http://www.state.lib.la.us/about-the-state-library/policies/interlibrary-loan-policy>

This library serves only in-state institutions. No material is loaned. Photocopies are made by request.

NEW JERSEY

Internet Resources:

(1) New Jersey Appellate Decisions and Supreme Court Decisions

Published Appellate Opinions: <http://njlaw.rutgers.edu/collections/courts/>

The Rutgers University Law Library maintains a free online database containing all of the New Jersey Supreme Court opinions and *published* appellate level opinions issued since 1995. Additionally, the database contains all *unpublished* appellate level opinions issued since 2005. Library staff may be contacted via email to assist users.

Library Contact: courtweb@camlaw.rutgers.edu

Recent Appellate Opinions: <http://www.judiciary.state.nj.us/opinions/index.htm>

All appellate opinions are available on the New Jersey Judiciary official website for ten business days after filing. After that period, the decisions will be available in the Rutgers University database.

Unpublished Appellate Opinions: <http://njlaw.rutgers.edu/collections/courts/>

Unpublished appellate decisions filed after September 20, 2005 are available in the Rutgers University database. Unpublished decisions filed before that date are maintained by the Appellate Division and cannot be accessed electronically.

Appellate Division Contact: (609) 984-5761

(2) New Jersey Trial Court Decisions

Recent Trial Court Decisions: <http://www.judiciary.state.nj.us/decisions/index.htm>

Certain trial court opinions are made available for six weeks on the New Jersey Judiciary official website. This service is provided for the convenience of parties involved in the cases.

Library Resources:

Newark

Seton Hall Law School, Rodino Law Library

One Newark Center
1109 Raymond Boulevard
Newark, N.J. 07102
(973) 642-8720
<http://law.shu.edu/library/>

This library only provides documents via email or fax. Specific citations are required. Note that there is no formal document delivery service at this library and the librarians that receive the request have the discretion to decide whether to fulfill the request. There are no fees.

Trenton

New Jersey State Library

185 West State Street
Trenton, N.J. 08608
(609) 278-2640
<http://www.njstatelib.org/>

For in-state service, the fees are as follows: \$3 per citation plus \$0.50 per page. The minimum fee is \$5.00. For out of state requests, the fees are \$3 per citation plus \$1 per page. The minimum fee is \$10. For both instate and out-of-state, the maximum pages per request are 100 pages. The

material will be emailed to the appropriate prison administrator. There are no additional fees for emailing. The library does not work directly with inmates. Instead, incarcerated people must make their requests to the appropriate prison administrator, who will then make that request with the library on inmates' behalfs.

NEW YORK

Internet Resources:

Many decisions from New York State's trial and appellate courts are available online.

A note about the New York State court system:

- The New York State Unified Court System is, like other states, divided into three levels, but the terminology used for these three levels differs from other states.
- The New York Supreme Court is New York State's trial court (the lowest level court). It is the primary civil court in New York and it also hears criminal prosecutions of felonies. The New York Supreme Court, Appellate Division is New York's second highest court and hears appeals from the New York Supreme Court. The New York Court of Appeals is New York State's highest court and makes decisions that bind all of New York's lower Courts.

(1) New York Appellate Courts

New York Official Reports Decisions: <http://www.courts.state.ny.us/reporter/Decisions.htm>

Provides free access to New York Supreme Court, Appellate Division and New York Court of Appeals decisions and motions. Coverage begins from roughly 2003, depending on the type of filing being searched.

New York Official Reports Services: <http://government.westlaw.com/nyofficial/>

Provides free access to all decisions appellate decisions published in the New York Official Reports from 1980. Has select coverage of landmark and other notable decisions prior to 1980.

(2) New York Trial Courts

New York Supreme Court: <http://decisions.courts.state.ny.us/search/query3.asp>

Provides New York Supreme Court Civil and Criminal Cases, from select counties, from 2001.

Library Resources:

Albany

Prisoner Services Project—New York State Library
Cultural Education Center
222 Madison Av.
Albany, NY 12230
(518) 474-5355
<http://www.nysl.nysed.gov/index.html>

This library serves only incarcerated people located at institutions operated by New York State Department of Correctional Services. To access library services, you should send a letter to the library

and the library will respond by sending you the proper forms. Some prison libraries already have these forms available, so it is best to check with your prison library first. No material is loaned and all material must be law-related. Correct citations are required and limited reference work is done, and no legal advice is given. If the requested material is covered by the project (e.g. case law, statutes, etc.), there is no charge for photocopies. But if the material is not covered, the following fees apply: \$10 for every group of 10 pages (for example, if you requested 11 pages, the fee is \$20.). Prepayment is required.

VIRGINIA

Internet Resources:

(1) Virginia Appellate Decisions and Supreme Court Decisions:

Opinions Search – Supreme Court of Virginia and Court of Appeals of Virginia:

<http://www.courts.state.va.us/search/textopinions.html>

Provides Supreme Court of Virginia decisions from 6/9/95, published Court of Appeals of Virginia opinions from 5/2/95, and unpublished Court of Appeals of Virginia opinions from 3/5/02.

(2) Virginia Trial Court Decisions:

District Court Decisions:

Provides free access to Virginia Trial Court decisions for both civil and criminal cases.

Library Resources:

Williamsburg

Wolf Law Library

William and Mary School of Law

P.O. Box 8795

Williamsburg, VA 23187-8795

(757) 221-3255

<http://law.wm.edu/library/home/index.php>

The library will provide cases if correct citations are given. No legal advice is given. In addition, incarcerated people may borrow certain materials that circulate (books and treatises, not statutes or case reporters) through inter-library loan if their prison library has an official ILL program. Alternatively, photocopies of documents can be used.

Photocopies: Prepayment is required. \$10 per citation plus \$.15 per page. \$.30 per page for microforms. Payment is by check, money order, or cash.

Payee: Wolf Law Library

TEXAS**Internet Resources:****(1) Texas Appellate Decisions and Supreme Court Decisions:**

<http://www.search.txcourts.gov/CaseSearch.aspx?coa=coa01>

Provides free access to Texas Supreme Court and Courts of Appeals decisions.

(2) Texas Trial Court Decisions:**Library Resources:****Lubbock****Texas Tech University Law Library**

1802 Hartford Avenue
Lubbock, Texas 79409-0004
(806) 742-3957

<http://www.law.ttu.edu/lawlibrary/>

Photocopies:

Specific citations only. \$15 per citation plus \$.50 per page. Prepayment is required. Only money orders are accepted. To submit a request, send a letter to the address above with the specific citations. The library will send an invoice with the total cost. After you send the money order, the documents will be delivered.

Payee:

Texas Tech University Law Library

CHAPTER 4

HOW TO FIND A LAWYER*

A. Introduction

Finding a lawyer can be difficult. It can be even more difficult if you do not have the money to pay a private lawyer. But finding a lawyer is not impossible. Before you try to find a lawyer, you must know the following information:

- (1) The type of correctional institution you are in (city, county, state, or federal);
- (2) The type of case for which you are seeking representation (civil, criminal, or criminal appeal);
- (3) If you are seeking a criminal appeal, the name of the county in which you allegedly committed the crime; and
- (4) Your county of residence.

The more specific information you know about your case, the easier it will be to find a lawyer and to help the lawyer prepare your case. There are generally two types of cases in which you may be involved:

- (1) **Criminal:** In a criminal case, the state charges you with a crime. If you have already been convicted and are in prison, you are probably not currently involved in a criminal trial. One exception is if the state thinks that you committed a crime *while* you were in prison. This chapter does not discuss how to find a lawyer for a criminal trial. But, you may want to try a “criminal appeal.” In a criminal appeal, you appeal the conviction or sentence that sent you to prison. If you have a right to a criminal appeal and you cannot afford a private lawyer, you have the right to a court-appointed lawyer.¹ Read Part B below if you would like to find a lawyer to help you in your criminal appeal.
- (2) **Civil:** In a civil case, either you bring a claim against someone (for example, an individual, a corporation, or the state), or someone brings a non-criminal claim against you. In a civil case, someone asks for a “remedy” (for example, money compensation for an injury, a statement by the court that someone has to stop doing something that violates your rights). You file a civil claim whenever you bring any of the suits explained in the *JLM* Chapters about federal and state habeas corpus, Section 1983, Article 78 of the New York Civil Practice Law and Rules, or tort actions. You do not have the right to a lawyer when filing a civil case (unlike in criminal cases and appeals where you do). Read Part C if you would like to try to find a lawyer to help you in your civil case.

B. Lawyers for Criminal Appeals

If you have the right to bring a criminal appeal and you are unable to pay a private lawyer to represent you, then you have the right to get a lawyer assigned to your case.² If you cannot afford an attorney (lawyer) for your criminal appeal, you should petition the court to proceed as a person who cannot afford a lawyer (or what in legal terms is called “*in forma pauperis*”) and ask the court to assign an attorney to your case. Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” has sample *in forma pauperis* forms.

* This Chapter was written by Won Park based on a previous version by Angie Armer and members of the 1991–1992 *Columbia Human Rights Law Review*.

1. Douglas v. California, 372 U.S. 353, 357–58, 83 S. Ct. 814, 816–17, 9 L. Ed. 2d. 811, 814–15 (1963) (finding that a state must provide counsel for an indigent defendant in a first appeal from a criminal conviction).

2. Douglas v. California, 372 U.S. 353, 357–58, 83 S. Ct. 814, 816–17, 9 L. Ed. 2d. 811, 814–15 (1963). There are some higher-level appeals that you do not necessarily have the right to bring, such as an appeal to the United States Supreme Court. In these cases, you may not have the right to a lawyer if you cannot afford one. See Ross v. Moffitt, 417 U.S. 600, 610, 94 S. Ct. 2437, 2443, 41 L. Ed.2d 341, 351 (1974) (holding that a state need not appoint counsel to aid a poor person pursuing a second-tier discretionary appeal).

One of the first places to contact when looking for a lawyer is the Public Defender or Indigent Defender office in any of the following places:

- (1) The county where the appellate court (the higher court) is located,
- (2) The county where your prison is located,
- (3) The county where your original trial took place, or
- (4) The county where you live.

If you have access to the Internet, the easiest way to find a Public Defender is by doing a simple Internet search. For example, you can try searching for “Public Defender” and the name of one of the four counties mentioned above on a research site like Google or Yahoo.³ These offices can provide you with more information about having a lawyer assigned to your criminal appeal.

If you would like to choose your lawyer instead of being assigned one, you have fewer options. Most Legal Aid offices do not handle criminal appeals. However, some organizations do handle criminal appeals. The Legal Aid Society of New York City is one such organization. See Appendix IV of the *JLM* for a list of other such groups. You might also contact local prisoners’ rights groups, which may refer you to organizations that handle criminal appeals free of charge.⁴ Keep in mind that lawyers are not allowed to arrange “contingency fees” with you for a criminal case. Read Part C for more information about contingency fees.

C. Lawyers for Civil Cases

If you are looking for a lawyer for a civil case in federal court (as opposed to state court), think about whether it is worth it to bring your case in light of what may happen under the Prison Litigation Reform Act (“PLRA”). **You must read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” to understand the requirements of the PLRA.** Failure to follow the requirements in the PLRA can have negative consequences. For example, you can lose the good-time credit you have earned so far. Not all attorneys are familiar with the PLRA. So, you should make sure to know about it yourself so that you can tell your attorney about the requirements.

If you have a civil case and you are incarcerated in a New York state prison (as opposed to a city, county, or federal prison), you may be able to find a lawyer through the Prisoners’ Legal Services of New York (“PLS”). PLS is described in the very beginning of Appendix IV of the *JLM* (Part A(1)(a)). PLS helps incarcerated people in state institutions in cases involving habeas corpus, jail time and sentence problems, warrants, and detainers. They may also be able to forward your letter to a private attorney who could handle your Section 1983 case, Article 78 petition, or tort action. But, unlike the Legal Aid Society of New York mentioned above, PLS does not handle criminal cases or criminal appeals.

3. To find a list of Federal Public Defenders, visit the Office of Defender Services website, *available at* <http://www.fd.org>. Federal Public Defenders either work for the federal government directly, or are paid through federal government funds. Note that Federal Public Defenders take on fewer cases than state or local Public Defenders. For a partial list of Federal Public Defenders, New York State Public Defenders, and New York City Public Defenders, visit the New York State Association of Criminal Defense Lawyers website, *available at* <http://www.nysacdl.org>.

4. The American Civil Liberties Union (“ACLU”) publishes a Prisoners’ Assistance Directory with contact information for organizations helping incarcerated people around the U.S., *available at* <http://www.aclu.org/prisoners-rights/2012-prisoners-assistance-directory>. You may also buy a physical copy of the book for \$35. If you would like to buy it, write to:

National Prison Project of the ACLU
Attn: Prisoners’ Assistance Directory
915 15th St. NW, 7th Floor
Washington, D.C. 20005

You may also find contact information for the New York State Bar Association’s Lawyer Referral Service and Information Service on its website, *available at* <http://www.nysba.org/>. Please bear in mind that these are private lawyers who may or may not charge a consultation fee. If you use the referral service, you should ask whether the lawyer charges a consultation fee before telling him about your case.

If you are in a city, county, or federal prison, check the other organizations listed in Appendix IV to see if special legal assistance programs serve prisons in your area. Check if a Legal Aid office exists in the county in which you are incarcerated. If none exist in your county, check for offices in the surrounding counties, since these organizations might still be able to help you. Note that Legal Aid organizations usually handle only civil cases, unless they have a special criminal appeals division.

You can also ask the court to appoint a lawyer for you. You should do this at the same time that you file your *in forma pauperis* forms.⁵ A New York court may assign an attorney to you in a civil case at the same time that it allows you to proceed as a person who cannot afford legal representation, but this is very rare.⁶ If you can establish your inability to pay a lawyer, then you may be able to get a lawyer assigned to your case if your claim is “substantial.” For example, you are much more likely to get a lawyer if there is a lot of factual investigation that must be done on your case that you cannot do because you do not have the money. You are also more likely to get a lawyer if the facts of your case depend on the credibility (believability) of people involved.⁷ If your case requires you to know complex legal issues that you may not be able to understand and handle on your own, the court may be more willing to assign you a lawyer to help with your case.⁸

For example, the Seventh Circuit, the court of appeals which covers Illinois, Indiana, and Wisconsin, has listed some factors (“*Maclin* factors”) that district courts consider when deciding whether or not to appoint counsel (a lawyer) for a civil claim.⁹ First, district courts will generally consider the merits (quality) of the claim and determine if it is frivolous (frivolous means that the claim is pointless) or substantive (substantive means the claim has value).¹⁰ The more likely a claim is to be successful (the stronger the legal argument being made), the more likely the district court will appoint counsel.¹¹ Next, district courts will generally consider the complexity of the facts and legal

5. Chapters 2–8 of the *JLM* discuss how to bring a lawsuit. Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” explains how to file poor person’s (also called *in forma pauperis*) papers in the context of an appeal. You should change the affidavit example shown in Appendix B-3 of *JLM* Chapter 9 to show that you are filing poor person’s papers in a civil case, not a criminal appeal. See N.Y. C.P.L.R. § 1101 (McKinney 2012). These papers establish that you do not have the money to pay for a lawyer. See also New York State Application for Poor Person Status and Assignment of Counsel in a Criminal Appeal, available at <http://www.courts.state.ny.us/ad3/Criminal/NEWFfinancialAffPoorPersonRelief.pdf> (last visited February 1, 2014).

6. N.Y. C.P.L.R. § 1102(a) (McKinney 2012). The court has the discretion to appoint you a lawyer for free if a lawyer is needed to reach a fair decision. But, you do not have a constitutional or statutory right to a lawyer. See *In re Smiley*, 36 N.Y.2d 433, 438, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 91 (1975) (noting that there is no absolute right to assigned counsel and that the determination to assign an attorney lies within the discretion of the court).

7. See *Maclin v. Freake*, 650 F.2d 885, 888 (7th Cir. 1981) (quoting *Manning v. Lockhart*, 623 F.2d 536, 538–40) (8th Cir. 1980) for the proposition that courts should appoint counsel where the credibility of witnesses is an issue). For example, if you claim that your warden assaulted you, the facts of your case would depend on the credibility of you, your warden, witnesses, and maybe other incarcerated people or staff members who knew you and the warden. In such a case, a court might be more willing to assign you a lawyer. Note that *Maclin* was overturned within the Seventh Circuit by *Farmer v. Haas*. There, the court held that the real question was: “did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?” *Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1983). However, the *Maclin* factors were adopted by and continue to be good law in other circuits. See *Hodge v. Police Officers*, 802 F.2d 58, 61–62 (2d Cir. 1986) (reaffirming that the *Maclin* factors apply to judicial determinations of appointment of counsel).

8. See *Hodge v. Police Officers*, 802 F.2d 58, 61–62 (2d Cir. 1986) (reaffirming that the *Maclin* factors apply to judicial determinations of appointment of counsel); *Maclin v. Freake*, 650 F.2d 885, 887–889 (7th Cir. 1981) (setting forth the factors for a district court to consider in determining whether to appoint counsel). But see *Stewart v. McMickens*, 677 F. Supp. 226, 227–228 (S.D.N.Y. 1988) (interpreting *Hodge* to require appointment of counsel “only where the individualized assessment suggests that an apparently legitimate case cannot proceed without the assistance of an attorney”).

9. *Maclin v. Freake*, 650 F.2d 885, 887–889 (7th Cir. 1981).

10. *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981).

11. *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981).

issues being raised.¹² For example, if the person suing is not able to properly investigate the crucial facts of a case, counsel will generally be appointed.¹³ A court is also more likely to appoint counsel in situations where there is conflicting testimony about relevant evidence, and the factual issues are complicated enough that trained attorneys would be more likely to uncover the truth.¹⁴ Additionally, district courts should appoint counsel in situations where the claimant is unable to present the case himself because of either physical or mental illness.¹⁵

If you are not assigned a lawyer but your case survives the defendant's motion for summary judgment (lets the case go to trial),¹⁶ then you should request a lawyer again (the court might be more likely to assign a lawyer at that stage).¹⁷ Remember, if the court assigns you a lawyer, you will have little or no say as to who your lawyer is. Thus, you may want to first try on your own to find a lawyer you trust and who is committed to helping you.

Keep in mind that many lawyers will be taking your case to earn a fee. Whether you pay a flat fee (fixed amount of money for the lawyer to represent you), an hourly fee, or a contingency fee (a slice of the winnings), you will still be expected to pay for the lawyer's litigation expenses, either before or after money is spent on your case.¹⁸ These expenses may include things like long-distance telephone calls, postage, photocopying, hiring an investigator, medical reports, etc. Unless you get poor person's status, you are also responsible for all court costs, such as filing fees.

If you cannot pay a lawyer's fees, a lawyer might take your case for a contingency fee.¹⁹ You will be asked to sign an agreement giving the lawyer a percentage (usually 33%) of whatever money the other side gives you if you win. If you do not win, your lawyer gets no money. Lawyers *cannot* ask you for a contingency fee in criminal or domestic relations (family law) cases.

D. Conclusion

Finding a lawyer you trust and who you can work with is an important part of your legal process. You should feel that you can be truthful with your lawyer, and that your lawyer is working in your best interest. Even if finding a good lawyer seems frustrating, keep on trying. When you write letters to ask for legal help, provide as much specific information about your case as possible so that a lawyer can see you have a good case.

If you cannot find a lawyer, or you choose not to hire a lawyer, you have the option of acting "pro se." This means that you represent yourself without the help of an attorney. While it will be more difficult, it is still possible to proceed pro se.

12. Maclin v. Freake, 650 F.2d 885, 887–889 (7th Cir. 1981).

13. Maclin v. Freake, 650 F.2d 885, 887–888 (7th Cir. 1981). The court found that the claimant's status as a paraprofessional made it such that it would be hard for him to investigate the facts of his case.

14. Maclin v. Freake, 650 F.2d 885, 888 (7th Cir. 1981).

15. Maclin v. Freake, 650 F.2d 885, 888 (7th Cir. 1981).

16. Fed. R. Civ. P. 56. Summary judgment is when a court decides before a trial that no trial will be necessary because in applying the law to important undisputed facts, one party is clearly the winner.

17. You should request assignment of counsel again at this stage because if your case survives a summary judgment motion, then the court thinks that it is worthy of a trial or hearing. *See* Hendricks v. Coughlin, 114 F.3d 390, 393 (2d Cir. 1997) (invalidating lower court's application of a bright line rule of appointing counsel only after plaintiff's case survived a motion for summary judgment because, in some cases, an indigent plaintiff will have trouble developing even the basic facts necessary to survive summary judgment without assistance of counsel).

18. *See* N.Y. State Bar Assoc., The Courts of New York: A Guide to Court Procedures with a Glossary of Legal Terms, 66–68 (2001), available at <https://www.personalinjury317.com/wp-content/uploads/2017/05/courtsofny.pdf>.

19. You cannot be convinced to enter into a contingency fee arrangement by fraud, nor can your lawyer ask for so much money that the lawyer obviously took advantage of you. *See* Gair v. Peck, 6 N.Y.2d 97, 106, 160 N.E.2d 43, 48, 188 N.Y.S.2d 491, 497–498 (1959) (holding that contingency fees may be disallowed where "the amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client or, in other words, that a legal fraud was perpetrated on him"); *see also* King v. Fox, 7 N.Y.3d 181, 191, 851 N.E.2d 1184, 1191, 818 N.Y.S.2d 833, 840 (2006) (stating that a contingency fee may be unconscionable (excessive or unreasonable) if not proportional to the value of the services rendered).

CHAPTER 5

CHOOSING A COURT AND A LAWSUIT: AN OVERVIEW OF THE OPTIONS

A. Introduction

This Chapter will briefly explain the different lawsuits available to you, so that you can decide which type of lawsuit is best for you to bring. Each kind of lawsuit is described in more detail in later chapters of the *JLM*, so you should read those chapters for more specific information.

The first step you should take when determining what suit to bring is to ask yourself: “Do I want to challenge my conviction or sentence, do I want to challenge the conditions I am suffering in prison, or do I want to challenge both?” If you think something unlawful *led to your imprisonment*, read Part B of this Chapter. If you think something unlawful and harmful has happened to you *while you have been in prison*—for example, the prison refuses to give you your mail—read Part C. If you are not sure, read both Part B and Part C for more information.

For the best chance of winning your lawsuit, you must pay attention to the things the law requires you to do when bringing a specific type of lawsuit. Many lawsuits require you to do certain things before you even begin the lawsuit (such as pursue help within your prison). Some lawsuits also require you to do certain things when you begin the lawsuit (such as pay court fees, unless you can qualify for an exception).

Different types of lawsuits have different outcomes, or “remedies,” if you are successful. For example, some lawsuits allow you to demand that the opposing party pay you money, known as “money damages,” if you win. Other lawsuits do not result in money damages, but may require the opposing party to do something (such as give you your mail) or stop doing something that is causing you harm. Some types of lawsuits may lead to the reversal of your conviction or sentence, while other types do not provide for such remedies. Once you know what remedies each type of lawsuit can provide, you can decide which type of lawsuit, if any, is the right one for you to file.

B. Lawsuits to Challenge Your Conviction or Sentence

1. Criminal Appeal

If a New York trial court convicted you of a crime, you have the right to appeal your conviction or sentence to a higher New York court, unless your conviction ended in a death penalty sentence that was not harsh or excessive.¹ Incarcerated people who were convicted of crimes in other states, and incarcerated people who were convicted of a crime in federal court, have similar rights to appeal their convictions.² On appeal, the higher, or “appellate,” court will examine the record of your trial to determine whether the judge or prosecutor committed any legal errors³ in conducting your trial or sentencing. The appellate court may also consider whether the jury improperly weighed the evidence at your trial, or if your sentence was too harsh or longer than the maximum time allowed by law. Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” explains the process of appealing your conviction or sentence in detail.

2. Post-Conviction Remedies

New York also has three other procedures you can use to challenge your sentence or conviction. These additional procedures are often called “post-conviction remedies,” because they let you ask the court to help you *after* you have been convicted. These procedures are different from an appeal, because

1. N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2009).

2. FED. R. APP. P. 4(b).

3. “Legal errors” are explained in different chapters of the *JLM*: Chapter 9, “Appealing Your Conviction or Sentence;” Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence;” Chapter 13, “Federal Habeas Corpus;” and Chapter 21, “State Habeas Corpus.”

during the appeal process, your conviction is not yet final. The three post-conviction remedies are: (1) an Article 440 motion, (2) a petition for state habeas corpus, and (3) a petition for federal habeas corpus.

These procedures do not exist only in New York. Chapter 20 of the *JLM* lists the procedures in other states that are similar to New York's Article 440 motion.⁴ Chapter 21 of the *JLM* covers state habeas corpus procedures for Florida and New York, and the habeas corpus procedures for other states are published in the *JLM* State Supplements. Finally, incarcerated people in every state have the same right to petition for federal habeas corpus. Federal habeas corpus is described in more detail in Chapter 13 of the *JLM*.

Although these three types of post-conviction remedies are available to you, keep in mind that filing an appeal is usually the best way to challenge your conviction or sentence. You should try to appeal your conviction or sentence before you pursue these post-conviction remedies.

(a) Article 440 Motion⁵

In an Article 440 motion, you ask the trial court to review circumstances that made your conviction or sentence unfair. Examples of these circumstances are a change in the law, discovery of new evidence, an unauthorized or illegal sentence, or misconduct by the prosecutor or judge that you did not and could not have known about at the time of your trial.⁶ You may also make an Article 440 motion if your conviction and sentence violate your rights under the U.S. Constitution or New York State Constitution.⁷ However, you cannot raise any claims in an Article 440 motion that you have already raised, or could have raised, in a criminal appeal. The remedy you get from winning an Article 440 motion is a new trial, appeal, or sentence. Keep in mind that, although there is no statute of limitations (time limit) for making an Article 440 motion, a court may choose not to grant your motion if you wait too long after your sentencing to file your motion.⁸ Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," discusses Article 440 in great detail, and you should read it before filing this motion.

(b) State Habeas Corpus⁹

In a state habeas corpus petition, you challenge the government's right to keep you in prison by asserting that your confinement is illegal. In general, however, New York courts require incarcerated people to file Article 440 motions instead of petitions for state habeas corpus unless they are challenging a parole or bail decision. New York habeas corpus petitions are often used to challenge bail determinations, revocations of your parole, extradition, arraignment and delay, misdemeanor complaint and delay, felony complaint and delay, and speedy trial issues. The remedy you get for filing a successful state habeas corpus petition is immediate release from custody. Chapter 21 of the *JLM*, "State Habeas Corpus," explains the New York habeas corpus process in detail, as well as Florida's habeas corpus procedures. State-specific habeas corpus procedures are published in the *JLM* State Supplements.

4. See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Conviction or Sentence," Appendix A.

5. N.Y. CRIM. PROC. LAW §§ 440.10–440.70 (McKinney 2009).

6. N.Y. CRIM. PROC. LAW § 440.10(1)(a)–(g) (McKinney 2009).

7. N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2009).

8. See *People v. Byrdsong*, 161 Misc. 2d 232, 236, 613 N.Y.S.2d 543, 545 (Sup. Ct. Queens County 1994) (stating that a post-conviction motion that was filed nine years after the trial and seven years after all appeals had been exhausted was not permitted because "in the interest of finality, there comes a time in any case when further litigation should come to an end.").

9. N.Y. C.PL.R. §§ 7001–7012 (McKinney 2009).

(c) Federal Habeas Corpus¹⁰

In a federal habeas corpus petition, you ask a federal judge to review your claim that your conviction or sentence violates your rights under the U.S. Constitution. This is different from an Article 440 motion or a petition for state habeas corpus. Recently, federal judges have been more cautious about disrupting state criminal proceedings, so it has become more difficult for incarcerated people convicted in state courts to get federal courts to review their federal habeas corpus claims.¹¹ Also, federal laws now require incarcerated people to exhaust all forms of state relief (such as filing an Article 440 motion or petitioning for state habeas corpus), before they seek relief in federal court.¹² You also have only one year to make a federal habeas corpus claim from the time you were sentenced or re-sentenced to prison.¹³ Chapter 13 of the *JLM*, “Federal Habeas Corpus,” explains federal habeas corpus in detail, and you should read it carefully if you are thinking about making a federal habeas corpus claim.

C. Lawsuits to Challenge the Conditions of Your Imprisonment¹⁴

Before you decide to bring a lawsuit challenging your prison conditions, it is very important that you read *JLM*, Chapter 14, “The Prison Litigation Reform Act.” The PLRA, as it is known, makes it harder for incarcerated people to bring lawsuits about prison conditions in federal court. The PLRA also sets harsh consequences if you bring your claim incorrectly. Though the PLRA only applies to federal court cases, many states have passed similar laws to reduce the number of lawsuits from incarcerated people. Chapter 2 of the *JLM*, “Introduction to Legal Research,” will help you learn how to research whether your state has laws like the PLRA.

In order to bring a lawsuit in federal court, the PLRA requires you to pay the full court filing fee even if you proceed *in forma pauperis* (as a poor person). If you file as a poor person, however, your fees will be taken in installments from your prison account. This means that instead of having to pay the full fee up front, you can pay a little bit at a time. However, if you file a federal lawsuit *in forma pauperis*, you risk receiving a “strike” under the “three strikes” provision of the PLRA. Under the “three strikes” provision, you get a strike if you file a lawsuit that gets dismissed for being frivolous, malicious, or for failing to make a valid legal claim. If you get three strikes, you will never be able to use the *in forma pauperis* procedure again in future lawsuits, so you will have to pay the full filing fee up front. Also, if the court finds that you filed a lawsuit for a malicious or harassing purpose, you may lose good-time credit you have earned in prison.¹⁵

The PLRA also requires you to “exhaust” (use up) or attempt to exhaust all of your administrative remedies *before* you bring a claim in court.¹⁶ To do this, you must pursue all of the administrative grievance procedures available to you before filing a federal lawsuit (this is described more in Part C(1) below). If you do not exhaust all your administrative remedies, your claim will be thrown out and you will not get your filing fee back. These are only a few of the restrictions imposed by the PLRA. You

10. 28 U.S.C. §§ 2241–2266.

11. Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887, 887 (2012) (noting “federal judges . . . dismiss the vast majority of [habeas petitions] . . . on procedural grounds”) ((*reviewing* NANCY J. KING & JOSEPH L. HOFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* (2011)). This concern will not apply to you if you are a federally incarcerated person in a federal institution.

12. The Prison Litigation Reform Act is explained briefly below in Part (C), and in further detail in *JLM*, Chapter 14.

13. 28 U.S.C. § 2244(d)(1) (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”).

14. You can also file a complaint with the U.S. Department of Justice (DOJ), but this is not a lawsuit since the DOJ does not have to respond to your complaint. See Part C(7) below for more details on the DOJ process.

15. 28 U.S.C. § 1932 (codified below heading “Revocation of earned relief credit”).

16. 42 U.S.C. § 1997e(a).

should read Chapter 14 of the *JLM* before you file any federal lawsuit challenging your prison conditions to make sure you know all the rules created by the PLRA.

1. Exhausting Administrative Grievances

The PLRA requires you to use all administrative grievance programs available to you—both state and federal—before filing a lawsuit in federal court. Many states also have this requirement. In New York, you must first file a complaint in the New York State Inmate Grievance Program before bringing a lawsuit. Read Chapter 15 of the *JLM*, “Inmate Grievance Procedures,” for more details about the New York program as well as some basic information about similar incarcerated person grievance programs in other states.

The New York State Inmate Grievance Program allows incarcerated people in any of the facilities of the Department of Corrections and Community Supervision (“DOCCS”) to file a complaint with “grievances” (something you think is wrong) about their prison conditions. Grievances must be about a DOCCS policy, rule, or regulation, either as it is written or as correction officials or officers have applied it to you personally. Issues and problems that do not relate to a DOCCS policy, rule, or regulation, or that do not involve you personally cannot be resolved through this program. For example, if your complaint involves a policy, rule, or action of an outside agency DOCCS cannot help you.¹⁷ Therefore, the PLRA does not require that you exhaust the DOCCS grievance procedure before you file a federal lawsuit *if your claim does not relate to a DOCCS policy, rule, or regulation*. However, you should be sure before proceeding, and it may still be a good idea to file a grievance just to be sure.

2. Lawsuits under 42 U.S.C. § 1983

A federal law, 42 U.S.C. § 1983 (“Section 1983”), allows you to sue state and city prison or jail officials and guards if they deprive you of your rights under the U.S. Constitution or other federal laws (such as your rights to adequate medical care, to be free from assault, and to have access to the courts and to legal materials). *You cannot use Section 1983 to attack your conviction or sentence.*

When you file a Section 1983 lawsuit, you must give a detailed description of the incident or practice which you want resolved. If the problem affects many other people in your prison, you might also be able to bring your lawsuit as a “class action.” A class action is a lawsuit brought on behalf of you and others who experience the same problem or have the same complaint.¹⁸ You can also bring a state claim, together with your federal claim, if the state claim involves the same facts as your federal claim.¹⁹

Section 1983 has a statute of limitations, which prevents you from bringing a Section 1983 lawsuit if you do not file it quickly enough after you are harmed. Section 1983 lawsuits have the same statute of limitations as personal injury lawsuits in the state in which you file your Section 1983 lawsuit. The statute of limitations time period begins to run when you find out about (or should have found out about) the injury you suffered.

A federal judge who hears a Section 1983 claim may order any of the following remedies: (1) an “injunction” (an order to prison officials to stop denying you your rights or to take steps to allow you to exercise your rights); (2) money damages (to make up for your injuries); or (3) a “declaratory judgment” (a statement by the court about what your rights are, made before they have been violated).

After you decide which district court you will file your Section 1983 lawsuit in, you should write to the clerk of that court asking for the forms and information you need. You can complete the filing of your Section 1983 lawsuit simply by mailing the appropriate documents to the clerk. Chapter 16 of the

17. State of New York, Department of Corrections and Community Supervision, Directive No. 4040 § 701.3(f), Inmate Grievance Program (2016), *available at* <http://www.doccs.ny.gov/Directives/4040.pdf>.

18. But keep in mind that you need a lawyer to file a class action. You cannot file one by yourself.

19. See Part C(6)(b) of Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” for more information on supplementing your federal § 1983 case with state claims.

JLM, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” discusses Section 1983 lawsuits in detail.

3. *Bivens* Actions²⁰ under 28 U.S.C. § 1331

There is no statute (law) similar to Section 1983 that allows you to sue *federal* officials who violate your federal rights. However, you can still sue federal officials who violate your constitutional rights by bringing a “*Bivens* action.”²¹ A *Bivens* action is similar to a Section 1983 claim. Much of the information about Section 1983 lawsuits also applies to *Bivens* actions. For example, like a Section 1983 lawsuit, you may use a *Bivens* action to complain about prison conditions or treatment violating your constitutional rights. The PLRA also requires that you exhaust all available administrative remedies before filing your *Bivens* action, like you need to do in a Section 1983 lawsuit.

A *Bivens* action allows you to sue a federal officer who violated your rights. However, you can only sue a federal officer as an *individual*, not as an *official*. This means that you can sue the officer as a person, but not as a government employee, and therefore your remedies are limited to what the individual can do to “make you whole” (make it up to you).²² Additionally, you cannot bring a *Bivens* action against a federal agency or a private corporation that operates a federal prison facility.²³ If you want to sue a private corporation that operates prison facilities, you might be able to bring a tort claim in state court (this is described in more detail below). Federal courts also may not listen to your complaint if it sounds like you are suing for a harm that is relatively less serious, such as your personal items being taken from you.

If you bring a *Bivens* action, you must serve a copy of the summons and complaint on (1) the named defendants, (2) the U.S. Attorney for the district in which you bring your lawsuit, and (3) the U.S. Attorney General in Washington, D.C.²⁴ If you seek injunctive or declaratory relief (meaning you are asking the court to stop something being done to you, but you are not asking for money), you may file your lawsuit in the federal district where any defendant resides, where the events complained of occurred or are occurring, or where you presently reside.²⁵ If you are filing a *Bivens* action for money damages, you must file in (1) the federal district in which any of the defendants resides, so long as all the defendants live in the same state, or (2) the district in which your claim arose (that is, where the events you are complaining about occurred).²⁶ You can only use registered or certified mail to serve the U.S. Attorney and Attorney General with your summons and complaint.²⁷ All service to the named defendants must be by personal service, unless the defendants waive personal service under the Federal Rules of Civil Procedure.²⁸

20. For more information on *Bivens* actions, see Part E of Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 & 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

21. The claim comes from the case *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 91 S. Ct. 1999, 2001, 29 L. Ed. 2d 619, 622 (1971), which allowed a lawsuit against federal agents claiming a Fourth Amendment violation.

22. See *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) (stating that a *Bivens* action “must be brought against the federal officers involved in their individual capacities”). This is because if you sue an officer in his “official capacity,” it is like suing the federal government. However, the federal government usually cannot be sued due to “sovereign immunity.” Sovereign immunity is the legal idea that a government may not be sued unless it specifically allows suits against it.

23. See *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 486, 114 S. Ct. 996, 1005–1006, 127 L. Ed. 2d 308, 323–324 (1994) (holding that *Bivens* suits cannot be brought against a federal agency); see also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63, 122 S. Ct. 515, 517, 151 L. Ed. 2d 456, 461 (2001) (refusing to extend *Bivens* to allow recovery against a private company operating a halfway house under contract with the Federal Bureau of Prisons).

24. FED. R. CIV. P. 4(i)(3).

25. 28 U.S.C. § 1391(e).

26. 28 U.S.C. § 1391(b).

27. FED. R. CIV. P. 4(i)(1), (3).

28. FED. R. CIV. P. 4(i)(3).

4. Tort Actions in State Courts

As noted above, if you were injured by a state official or employee, *and* as a result, your constitutional rights were violated, you may file a Section 1983 suit. This is a claim under federal law even though the person who injured you is a state official or employee. You may also file a tort action under state law in state court against anyone who deliberately or carelessly injured you, or damaged or destroyed your property. You can file a state tort action regardless of whether they violated any of your constitutional rights, and regardless of whether you are also filing a Section 1983 federal lawsuit.

In New York, if the person who injured you was a state official, state employee, or someone acting under the authority of the state (such as a private doctor the state hired), you may sue New York State. When suing the state in a tort action, you must do so in the Court of Claims.²⁹ The Court of Claims only hears such claims against the state and can only award money damages; it cannot issue an injunction. Also, before filing a lawsuit in the Court of Claims, you must exhaust administrative procedures, such as the Inmate Grievance Program, and you must pay the filing fee. Read Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for more information about tort lawsuits.

5. Tort Actions in Federal Courts

If you are incarcerated in federal prison and want to file a tort lawsuit, you must sue using the Federal Tort Claims Act (“FTCA”)³⁰ instead of a *Bivens* action. The FTCA creates the procedures to sue the federal government for harm federal employees may have caused you or your property while they were doing their jobs. You must first send in a completed Form 95, “Claim for Damage, Injury, or Death,” and ask for damages from the federal agency that employs the person who harmed you.³¹ Often, the agency settles FTCA claims. But if the agency refuses to resolve your claim, you may file suit in federal court. Remember, if you have not sought all of the possible administrative remedies before going to federal court, the judge will dismiss your case.

6. Article 78 Proceedings

Article 78 of the New York Civil Practice Law allows you to go to court to challenge decisions made by New York State administrative bodies or officers.³² Like the other lawsuits mentioned in Part C of this chapter, you cannot use Article 78 to challenge your conviction or sentence. Article 78 is useful to challenge decisions made by administrative bodies like the Department of Corrections and Community Supervision, the Board of Parole, and the Temporary Release Committee, or decisions made by state employees such as prison guards and administrators. You may challenge these decisions when you think the people making the decision: (1) acted beyond their legal authority; (2) failed to do something required by law; (3) made an unreasonable or grossly unfair decision; or (4) made a decision at a hearing without enough evidence to warrant such a decision.³³ Even though you cannot challenge your sentence or conviction under Article 78, you may challenge the Board of Parole’s decision to revoke your parole, which, if successful, would lead to your release from prison. Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the N.Y. C.P.L.R.” discusses Article 78 proceedings in greater detail.

29. Although the name is similar, this is not the same as Small Claims Court.

30. Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1).

31. 28 U.S.C. § 2675(a) (2012). You can get this form by writing to the clerk of the federal district court in which you plan to file your action. You may also download the form online via the General Services Administration Form Library. See Claim for Damage, Injury, or Death, GEN. SERVS. ADMIN., available at <https://www.gsa.gov/forms-library-claim-damage-injury-or-death> (last visited Sept. 12, 2018).

32. N.Y. C.P.L.R. § 7801 *et seq.* (McKinney 2009).

33. N.Y. C.P.L.R. § 7803 (McKinney 2009).

7. Challenging Unconstitutional Prison Conditions Through the Department of Justice

The Special Litigation Section of the U.S. Department of Justice (“DOJ”) has authority under the Civil Rights of Institutionalized Persons Act to investigate state and local jails and prisons for unconstitutional conditions.³⁴ This section of the DOJ does not investigate federal prisons; you must use another agency like the Bureau of Prisons if you want to file a complaint about a federal prison.³⁵ The DOJ will only investigate allegations of widespread abuse—problems experienced by many people incarcerated at a particular prison or jail. If you think your prison suffers from widespread constitutional abuses, you might consider writing to the DOJ. *The DOJ cannot provide individual relief, nor can it bring a claim regarding your criminal sentence. For these matters, you should contact an attorney.*³⁶

The Special Litigation Section of the DOJ protects the constitutional and federal statutory rights of people confined in certain institutions owned or operated by state and local governments. These institutions include facilities for individuals who are mentally ill or developmentally disabled, nursing homes, juvenile correctional facilities, and adult jails and prisons. Recently, the Special Litigation Section has focused on abuse in nursing homes, juvenile facilities, sexual victimization of women who are incarcerated, and the unmet medical needs of people serving criminal sentences and people detained before trial.

The Special Litigation Section enforces federal civil rights statutes in four major areas: (1) conditions of institutional confinement; (2) law enforcement misconduct; (3) access to reproductive health facilities and places of religious worship; and (4) protection of institutionalized people’s religious exercise rights. The DOJ receives a large number of claims every year and cannot investigate every claim. The DOJ also takes a long time to conduct an investigation, so it is important to be patient if you do bring a claim.

If you write to the DOJ, be as specific and clear as possible about the abuses you and other people in your prison or jail are experiencing. Your letter should include your name, prison ID number, race, the length of your sentence and how much of it you have served, and a description of what happened or the condition you believe to be unconstitutional. When you talk about what happened, be sure to include all relevant information, including how many times the abuse happened, the names and races of the people involved, and whether the abuse has happened to other people incarcerated at your facility. If you know of others who have had similar experiences, encourage them to write letters too. Send the letter to:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Office of the Assistant Attorney General, Main
Washington, D.C. 20530
Telephone: (877) 218-5228; (202) 514-6255; Fax: (202) 514-0212; (202) 514-6273

If you are filing a complaint under the Americans with Disabilities Act, you must write to a different division of the DOJ. Chapter 28 of the *JLM*, “Rights of Incarcerated People with Disabilities,” will help

34. 42 U.S.C. § 1997a(a). Some federal courts in New York have held that, under the PLRA, incarcerated people must exhaust the DOJ’s disability complaint procedure, in addition to their prisons’ internal grievance procedures, before filing a disability-related complaint in federal court. Other courts have disagreed. For more information about whether your complaint would qualify as an “administrative remedy” under the PLRA, read Part E(1) of *JLM*, Chapter 14.

35. For more information, see FEDERAL BUREAU OF PRISONS, available at <https://www.bop.gov> (last visited Sept. 12, 2018).

36. See *How to File a Complaint*, DEP’T OF JUSTICE, available at <http://www.justice.gov/crt/complaint/> (last visited Sept. 12, 2018).

you file this complaint. A summary of the Special Litigation Section's work is also available on the DOJ website at <http://www.justice.gov/crt/about/spl/> (last visited November 15, 2020).

D. Conclusion

If you are thinking about bringing a lawsuit, you should start by determining the details of your problem. This will help you decide which laws or procedures are most appropriate for your situation. Then decide whether you are challenging your conviction or sentence, or whether you are challenging the conditions of your imprisonment. Read additional chapters of the *JLM* that relate to your issue to help you make a decision. Next, learn what you must do for different types of legal action. Review the different types of suits described above (and in the chart below) for each type of legal problem, and think about what is required to be successful. Finally, think back to what your problem is and who is responsible, and decide what your goals are for fixing that problem. Since different lawsuits provide different types of solutions (or “remedies”), you should decide what kind of legal action to take with your goal in mind. At that point, you will be in the best position to decide whether legal action is right for you, and if so, which type of lawsuit you should pursue.

APPENDIX A

LAWSUITS THAT CHALLENGE YOUR CONVICTION OR SENTENCE

Type of Suit	Characteristics of the Suit	Where Do I Bring My Claim: State or Federal Court?	Important Things to Remember	<i>JLM</i> Chapters you should consult
Criminal Appeal	A higher court looks at your case to see if the lower court, judge, or prosecutor committed any legal errors during the trial or sentencing.	It depends on where you were first convicted. If you were convicted in a state trial court, you will appeal to a higher state court. If you were convicted in a federal court, you will appeal to a higher federal court.	The higher court can only look for legal errors, not factual ones.	Chapter 9: "Appealing Your Sentence or Conviction"
Article 440	A trial court reviews circumstances that may have made your conviction or sentence unfair.	You can bring this claim only in the New York State courts. See <i>JLM</i> , Chapter 20, Appendix A for similar laws in other states.	You cannot raise any claims you have already raised or could have raised in a criminal appeal.	Chapter 20: "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence"
Federal Habeas Corpus	A federal judge reviews your claim that your rights were violated under the U.S. Constitution.	You may bring a federal habeas corpus claim only in federal court.	You must have tried to use all the relief that your state provides before seeking federal habeas corpus. Remember that you have a one-year time limit to bring a federal habeas corpus action. Judges do not often grant habeas relief.	Chapter 13: "Federal Habeas Corpus"
State Habeas Corpus	In New York, state habeas corpus is used mainly to challenge bail determinations and revocations of parole.	You may bring a state habeas corpus claim only in state court.	In New York, try Article 440 before you bring a state habeas petition. Courts will generally make you use Article 440 unless you are challenging bail or a parole decision.	Chapter 21: "State Habeas Corpus"

APPENDIX B

LAWSUITS THAT CHALLENGE THE CONDITIONS OF YOUR IMPRISONMENT

Type of Suit	Characteristics of the Suit	Which Court- State or Federal?	Important Things to Know	<i>JLM</i> Chapters you must consult
Administrative Grievance	You may file a complaint to an administrative body. In prison, this means that you will first file a complaint with your prison.	An administrative grievance is not filed with a court, but rather with your prison.	Make sure you know about the Prison Litigation Reform Act (PLRA) and its requirements. See <i>JLM</i> , Chapter 14, “The Prison Litigation Reform Act.”	Chapter 15: “Inmate Grievance Procedures”
42 U.S.C. § 1983	You may sue state or city prison officials if they violate your federal constitutional rights and federal statutory rights “under color” of state law.	Section 1983 claims are usually filed in federal court.	You cannot use a Section 1983 claim to challenge your conviction or sentence. You must follow the state statute of limitations (time limit) for personal injury suits and file your complaint by this deadline. Consider whether you might also bring your suit as a class action. You cannot use a Section 1983 claim if you are complaining about a <i>federal</i> official.	Chapter 16: “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law”

<p>28 U.S.C. § 1331 (<i>Bivens</i> Actions)</p>	<p>You use this type of lawsuit to complain about <i>federal</i> officials who violate your federal constitutional rights.</p> <p>This is the equivalent to a Section 1983 lawsuit, but applied to federal officials, so much of the information about Section 1983 suits also applies to <i>Bivens</i> actions.</p>	<p>You may only bring a <i>Bivens</i> action in federal court.</p>	<p>You can sue a federal official only in his <i>individual</i> capacity, not in his <i>official</i> capacity.</p> <p>You cannot sue federal agencies through a <i>Bivens</i> action.</p> <p>You cannot use a <i>Bivens</i> action to sue private corporations that work with the federal government to operate your prison facility (use a tort action instead).</p>	<p>Chapter 16: "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law"</p>
Type of Suit	Characteristics of the Suit	Which Court- State or Federal?	Important Things to Know	<i>JLM</i> Chapters you must consult
<p>Tort Actions</p>	<p>In addition to a Section 1983 suit or a <i>Bivens</i> action (above) you can file a tort action against anyone who deliberately or carelessly injured you or your property.</p> <p>You can also bring a tort claim by itself.</p>	<p>You may bring a tort action in federal or state court.</p>	<p>In New York, you can sue the State of New York in the Court of Claims if the person who injured you was a state official or employee.</p> <p>Remember, if you are a person incarcerated in a federal prison, you must first exhaust administrative remedies under the Federal Tort Claims Act and Prison Litigation Reform Act before bringing a claim in federal court.</p>	<p>Chapter 17: "The State's Duty to Protect You and Your Property: Tort Actions"</p>

Article 78	<p>You may challenge decisions made by administrative bodies or officers in court (for example, the Board of Parole, or state-employed prison guards).</p> <p>You may challenge decisions that may be unlawful or actions that show the administrative bodies failed to follow the law.</p>	You may bring an Article 78 suit only in New York State court.	You cannot use this type of lawsuit to challenge your conviction or sentence.	Chapter 22: “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules”
U.S. Department of Justice (DOJ)	The DOJ will investigate only allegations of systemic abuse (continued unconstitutional behavior that harms everyone) in state and local institutions.	This type of action is initiated by writing to the DOJ.	<p>The DOJ cannot provide individual relief—it will only look into problems that are experienced by many people incarcerated at a particular prison or jail.</p> <p>Also, the DOJ will not look into problems in federal institutions.</p> <p>If you decide to write to the DOJ Special Litigation Unit, make sure your letter is as clear and specific as possible.</p>	<p>There are no <i>JLM</i> Chapters on this subject. For more information, go to:</p> <p>http://www.justice.gov/crt/complaint</p>

CHAPTER 6

AN INTRODUCTION TO LEGAL DOCUMENTS*

A. Introduction: The Right and Responsibilities of Self-Representation

If you want to represent yourself in court without the aid of an attorney, you have the right to bring the lawsuit “pro se.” This means that you must bring the lawsuit yourself and take on all legal responsibilities.¹ Although it is always helpful to have a lawyer, it can be difficult to get legal assistance, especially at the beginning of a lawsuit. If you plan to bring a lawsuit, it is important that you learn what documents you will need to submit to the court. Courts require that you prepare and file certain documents at specific times in order to begin and continue a lawsuit. The purpose of this Chapter is to introduce you to some of these legal documents and explain how to use them.

Each type of lawsuit described in the *JLM* has at least one “plaintiff” or “petitioner” (the person bringing lawsuit) and at least one “defendant” or “respondent” (the person being sued).² In some lawsuits, there may be more than one plaintiff. For example, if several incarcerated people were all mistreated in the same way, they could bring a lawsuit together, and every incarcerated person would be a separate plaintiff. Your lawsuit may be stronger if you can show that several people suffered the same mistreatment. You may even be able to bring a lawsuit for a group of people without having to ask all of them to join your lawsuit as plaintiffs. Such a lawsuit is called a “class action.”³

A class action can be very powerful, especially because it may help the case stay in court. For example, let us say you are bringing a lawsuit against prison officials for mistreating you and several other incarcerated people, but you are the only named plaintiff. In this case, the prison officials can have the case thrown out by simply treating you better and no one else. This is because the court only has power over those people named in the lawsuit—whoever is a plaintiff/petitioner or defendant/respondent. Once the prison officials have improved conditions for you, your problem is solved and your case will be dismissed. If this happens, the court cannot do anything about the conditions or mistreatment of the other incarcerated people unless they bring a lawsuit for themselves. On the other hand, if you bring a class action lawsuit on behalf of all affected incarcerated people, prison officials may have to improve conditions for everyone before the court can dismiss the case. You should try to find a lawyer if you want to bring a class action case.

Whether you bring a class action or not, you may sue more than one defendant. Under the rule of employer liability (“respondeat superior”), an employer may sometimes be liable for the illegal acts of his employees. Therefore, you should not only name the individual who injured you as a defendant, but also that individual’s bosses or superiors, up to the Commissioner of Corrections.

If you are a plaintiff, you begin your lawsuit by telling the court and the person you are suing (the defendant) that you plan to bring suit. You do this by filing papers with the court (discussed in more detail below). In these papers, you explain the problem you are having and what you would like the

* This Chapter was revised by Sohan Manek based on previous versions written by Taryn A. Merkl, Colleen Romaka, and other former members of the *Columbia Human Rights Law Review*.

1. New York Prisoners’ Legal Services publishes a newsletter entitled *Pro Se*, which discusses how to proceed *pro se* in various contexts. Many libraries have it. The newsletter is also available from Prisoners’ Legal Services. To subscribe, send in a request with your name, DIN number, and facility to: Pro Se, 114 Prospect Street, Ithaca, NY 14850. For questions about the newsletter, send a letter to: Pro Se, 41 State Street, Suite M112, Albany, NY 12207.

2. The terms “plaintiff” and “petitioner” are both used to refer to the person who brings a lawsuit (the person who sues). Similarly, the terms “defendant” and “respondent” are both used to refer to the person who is being sued. Which terms are used will change depending on the court in which the case is brought.

3. A “class action” is a lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group. See FED. R. CIV. P. 23 (the Federal Rule of Civil Procedure laying out the procedures for class actions); N.Y. C.P.L.R. 901–909 (McKinney 2009) (the rule laying out the procedures for class actions in New York State courts).

court to do about it. Once the court receives these papers, the person you are suing is allowed to defend himself by filing papers with the court that respond to your claims. At this point, you are usually given another opportunity to file more papers, in which you respond to what your opponent has stated in his papers. In most cases, this exchange of claims and responses to the charges occurs before the court makes any decisions on the content (also called the “merits”) of the lawsuit itself.

B. The Legal Documents

All lawsuits, regardless of type, require the same basic legal documents. These documents usually fall into five categories: (1) papers you need to start the lawsuit, (2) papers supporting your claims, (3) miscellaneous papers, (4) the answer from the defendants, and (5) your reply to the defendant’s answer. The names of these documents may differ depending on the particular lawsuit you choose to file, even though they serve the same purposes. For example, in a federal habeas corpus action, the paper needed to start a lawsuit is called a “petition,” while, in a criminal appeal, it is called a “notice of appeal.”

JLM Chapters 2–5 describe in detail the various types of lawsuits that you may bring and provide you with instructions on how to prepare the forms that you need for each type of lawsuit. A summary of different types of lawsuits, based on New York procedure, is also given in *JLM* Chapter 5.

This Part provides an overview of the legal documents you will need to prepare if you decide to bring one of the lawsuits discussed in the *JLM*. The chart at the end of this Chapter matches the various names given to the five basic categories of papers to each type of lawsuit that you may bring.

When people think about a lawsuit, they usually think about arguing in a courtroom in front of a judge and jury. However, before any case actually gets into court, certain legal documents must be prepared and filed with the court. If you are bringing a lawsuit pro se (without a lawyer), you are responsible for preparing the necessary documents. Therefore, it is important that you read Chapters 2–5 of the *JLM* and carefully follow the directions on how to prepare the necessary documents. This Part discusses the functions of the five basic types of legal documents that you need to start and continue the different types of lawsuits.

1. Papers Needed to Start a Lawsuit (Starting Papers)

Once you have figured out what type of lawsuit you would like to bring, you must file papers (called “pleadings”) with the court that explain why you are seeking help (or “relief”) from the court. In these documents, you will usually state what the defendant has done to you and what you want the court to do about it. For example, if the defendant has injured you, you will tell the court how the injury occurred and tell them that you want money to pay for your medical bills. You will also explain why the court has the jurisdiction (power) to decide your case. Depending on what type of lawsuit you bring, the names of the papers may differ. The chart in Appendix A of this Chapter provides the names of these papers for each lawsuit. You should refer to the chapter of the *JLM* describing your legal problem in detail to determine how these documents should be prepared.

2. Supporting Papers

In the papers that you file to start a lawsuit, you will make claims about what the defendant did to you and why you are seeking help from the court. At this point in most lawsuits, the court will need some sort of evidence that supports your claims. Two types of supporting evidence are discussed below, called affidavits and memorandums:

(a) Affidavits

A supporting document often takes the form of an affidavit. An affidavit is a sworn written statement, by you or by a witness, supporting the claims you made in your starting papers. An affidavit must be notarized. This means that it must be signed by a notary public, or “friend of the court,” a person who has been authorized to “notarize” official documents. An affidavit’s purpose is to provide the court with some factual evidence that supports your claims. Therefore, it should contain specific

facts.⁴ It may consist of your own testimony or that of someone else who witnessed or knows about the facts of your claim. You must make sure that all claims in an affidavit are true. If you lie in an affidavit, you may be prosecuted for perjury.

(b) Memorandum of Law

In some suits, a legal memorandum is required. A legal memorandum (also called a “brief”) is a statement of the law on a particular legal issue (as opposed to the facts, which would be in an affidavit). A memorandum discusses the legal arguments upon which your claim is based. In your memorandum, you compare your case to cases with similar facts. The memorandum of law serves a purpose similar to that of the affidavit—it supports the claims that you made in your starting papers, but it uses the law to make the argument instead of only facts. The legal memorandum should begin with a statement of the facts of your case. An example appears in Appendix B of this Chapter. The rest of the memorandum should deal with all of the legal issues that you think arise from the facts of your case. When trying to figure out what legal issues are important, you will need to research your legal rights and responsibilities. You should research these questions of law and explain to the court how other cases have dealt with issues similar to yours. Chapter 2 of the *JLM*, “Introduction to Legal Research,” explains how to research an issue in the law library.

3. Miscellaneous Papers

You may also file miscellaneous papers, which usually deal with questions of legal procedure (the process by which your case is decided). These questions of law differ from “substantive questions of law” (the legal rights that you claim the defendants have violated). However, procedural questions can still affect your chances of success in the lawsuit. For example, miscellaneous papers may include a request for a lawyer, whose expertise could make the difference between whether you win or lose your case. They may also include a request to file as a “poor person,” known as *in forma pauperis*. This would free you from having to pay the normal fees and filing costs necessary to bring a lawsuit.⁵ The miscellaneous papers that you will need to file will be different depending on the type of lawsuit you are bringing. You should refer to the chart at Appendix A of this Chapter to determine what papers are necessary and appropriate for your particular lawsuit. You should also refer to the specific section of the *JLM* that discusses your legal problem in detail in order to determine how to prepare these documents.

4. Answering Papers from the Defendant

The defendant that you sue is required to answer your starting papers. There are several ways the defendant might answer. The defendant may simply admit or deny the claims in your papers. The defendant may also state that he does not know if your statements are true. This is the same as a denial.⁶ If the person you have sued answers without replying to one of your factual allegations, the court will conclude that he has admitted that your allegation is true.⁷

4. Include as many details as you can and make them as specific as you can. For example, describe specific injuries (where on your body, what did the injury look like, did it receive a medical diagnosis, etc.); mention specifically what was done to you, who did it, what time of day, and what day of the week; describe what you were doing before the other person wronged you and what they were doing before and after. Try to think of the event like a movie, and explain it with the detail that you would see if the event was being played on a movie screen in front of you.

5. Under the Prison Litigation Reform Act (“PLRA”), incarcerated people filing claims in court are required to pay full court filing fees. The full fee will gradually be deducted from your prison account. For a full discussion of the PLRA and how it affects your rights, see *JLM* Chapter 14, “The Prison Litigation Reform Act.”

6. See FED. R. CIV. P. 8(b) (rule on defenses and forms of denials for actions in federal court); N.Y. C.P.L.R. 3018(a) (McKinney 2009) (rule for denials and defenses in New York State courts).

7. See FED. R. CIV. P. 8(b)(6) (federal rule regarding the effect of a party’s failure to deny allegations); N.Y. C.P.L.R. 3018(a) (McKinney 2009) (rule regarding the effect of a party’s failure to deny allegations in New York State courts).

Another option that the defendant has is to attack your starting papers by raising certain defenses.⁸ The defendant will usually raise these types of defenses in a “motion to dismiss” your complaint. If the defendant wins such a motion to dismiss your complaint, the court has the option of either dismissing your case or granting you the opportunity to amend (change) your complaint to fix your argument. If you are given a chance to amend your complaint, you should think of the amended complaint as new starting papers, which your opponent needs to answer again.

(a) Motion to Dismiss for Failure to State a Claim

An example of a defendant’s answer that would attack your starting papers is a “motion to dismiss for failure to state a claim.” By filing this motion, your opponent argues that you have no legal claim.⁹ For example, you might want to sue a prison official because you feel you do not get to spend enough time outside. But if no law says prison officials must let you outside for a certain amount of time, your claim could be dismissed. This is because, no matter what the facts were, you could not show that the official violated a law. In this example, the judge would look at the pleadings (the papers you filed to start the case and your opponent’s motion to dismiss), and would dismiss your case because there would be no law that requires the prison official to give you a certain amount of time outside.

(b) Motion for Summary Judgment

Another type of answer that your opponent can submit is a “motion for summary judgment.” Note that you (the plaintiff) or a defendant may file a motion for summary judgment, but it is very rare that plaintiffs are successful. That is why we describe the motion for summary judgment as the defendant’s motion, but keep in mind that the same standards apply to plaintiffs. In a motion for summary judgment, the defendant argues that, even if your facts are true, he has not violated a law. Therefore, he is entitled to “judgment as a matter of law.”¹⁰ This means that a judge may decide the case without the case ever going before a jury.

For example, you might bring a Section 1983 action¹¹ claiming that a prison guard hit you and therefore violated your constitutional right under the Eighth Amendment to be protected against “cruel and unusual punishment.” The defendant might file a summary judgment motion arguing that one violent incident does not establish “cruel and unusual punishment” within the meaning of the Eighth Amendment.¹² The judge will read the legal papers and will assume that the facts you claimed are true. This means that the judge will give you the benefit of the doubt. If the judge believes that there is no way you can demonstrate that the single incident amounted to a violation of the Eighth Amendment, he will grant the guard’s motion for summary judgment. If the judge thinks that the officer may have violated the Eighth Amendment, then he will deny summary judgment and your case will move forward to trial.

Summary judgment is different from a “motion to dismiss for failure to state a claim.” In a motion to dismiss for failure to state a claim, the judge only relies on your pleadings (allegations submitted to the court) to make a decision. However, when the defendant files a motion for summary judgment, the judge decides the motion based on affidavits submitted by both sides. This means that, if the defendant submits an affidavit in support of a summary judgment motion, you have the right to introduce

8. For a list of the seven defenses that may be made by motion under the Federal Rules of Civil Procedure, see FED. R. CIV. P. 12(b). For a list of comparable grounds on which a motion may be made in New York courts, see N.Y. C.P.L.R. 3211(a) (McKinney 2009). You must check the court rules for your particular state or federal court for a complete list of defenses.

9. See FED. R. CIV. P. 12(b)(6); N.Y. C.P.L.R. 3211(a)(7) (McKinney 2009).

10. See FED. R. CIV. P. 56 (the federal rule for summary judgment); N.Y. C.P.L.R. 3212 (McKinney 2009) (the New York rule for summary judgment).

11. See Chapter 16 of the *JLM* for a discussion of 42 U.S.C. § 1983.

12. See Chapter 24 of the *JLM* for an explanation of Eighth Amendment protections in assault cases.

affidavits to support your claim and oppose the defendant's motion.¹³ When you are opposing a motion for summary judgment, you should demonstrate in an affidavit that there are disputed facts that support your claim. You should also demonstrate that a reasonable person could believe your version of the story. For example, if you claim that a prison guard hit you, a reasonable person could not believe you if the prison guard shows that he was not at the prison when you claim that he hit you. If possible, you should seek to amend your complaint (or other introductory papers) to correct any possible errors.

(c) Motion for a More Definite Statement

In addition to attempting to have your case dismissed, the defendant may choose to file answering papers that require you to file more papers. These types of answers may include a "motion for a more definite statement" because your complaint was not specific enough.¹⁴ This type of motion may be granted in order to give the defendant a chance to understand and answer your claims. It may also be a delaying device used by your opponent to buy more time. If the judge grants this motion, you will have to amend your complaint to explain your claims in more detail.

(d) Counterclaim

A defendant may also file a "counterclaim" against you.¹⁵ This means that the defendant claims that you harmed him. For example, if you sue a prison guard for assaulting you, the prison guard may answer in turn with a claim that you injured him instead. If a defendant files a counterclaim, you must file a reply stating your version of the events.¹⁶

(e) Request for Extension

Finally, some issues may prevent the defendant from being able to respond to your charges within the time limits given to answer. If this happens, the defendant will probably request an extension from the court, which requires a showing of "good cause" (having a good reason).¹⁷ Courts usually grant these requests.

If the defendant does not file (1) an answer to your charges, (2) a motion attacking the validity of your charges, or (3) a motion for an extension of time, you have the right to request that the judge enter a "default judgment," which is a judgment in your favor.¹⁸ A default judgment assumes that your charges are true because the defendant did not respond to them. To get a default judgment, you must file a request that a default judgment be entered with the clerk of the court. You will later request the same court to order the relief (the help) you requested in your starting papers.

13. If you would like to introduce any documents to support your opposition to the motion, these must be "authenticated" by an affidavit unless they are already in the court's record. *See* FED. R. CIV. P. 56(c); *Martinez v. Am.'s Wholesale Lender*, 446 F. App'x 940, 943–944 (9th Cir. 2011) (holding that photocopies of deeds were not "self-authenticating," and therefore could not be considered for summary judgment); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (finding that unauthenticated documents in a report cannot be used when deciding a summary judgment motion). This means you should have someone who has knowledge of the documents swear that the documents are genuine and reliable. A person has the required knowledge to authenticate a document in an affidavit if he could authenticate a document during trial under the evidence rules. *See, e.g.*, FED. R. EVID. 901 (requiring that all evidence be authenticated). Also note that some documents, such as public records and newspapers, are "self-authenticating," which means that they are considered so trustworthy that they do not need to be sworn to in an affidavit. *See* FED. R. EVID. 902 (listing some documents that do not require additional evidence to be authenticated).

14. *See* FED. R. CIV. P. 12(e); N.Y. C.P.L.R. 3024(a) (McKinney 2009).

15. *See* FED. R. CIV. P. 13; N.Y. C.P.L.R. 3019(a) (McKinney 2009).

16. *See* FED. R. CIV. P. 7(a); N.Y. C.P.L.R. 3011 (McKinney 2009).

17. *See* FED. R. CIV. P. 6(b); N.Y. C.P.L.R. 2004 (McKinney 2009).

18. *See* FED. R. CIV. P. 55; N.Y. C.P.L.R. 3215 (McKinney 2009).

5. Your Reply to the Defendant's Answer

Once you receive the defendant's answer, you should read it closely. Carefully reading the defendant's answering papers will help you determine the arguments he will make as the case progresses. For example, a defendant might raise affirmative defenses in his answer, in which he agrees that an injury occurred, but claims that he has no legal responsibility. One example of an affirmative defense is a claim of contributory negligence, where the defendant claims that your carelessness somehow helped cause the injury, and therefore, that he is not fully responsible.¹⁹ Importantly, an affirmative defense can only be used at trial if the defendant raised it in the answer to the complaint. By carefully reviewing the answer and understanding the defendant's facts and arguments, you will be able to counter them effectively.

In some instances, such as when the defendant files a counterclaim in his answer, you may be required to respond to the charges. If the court requires a reply to the counterclaim and you do not file one, everything in the answer will be accepted as true by the judge and you will lose your lawsuit. Even if you are not required to reply to the defendant's answer, but the court allows you to do so, you should go ahead and prepare a well-thought-out reply to the defendant's statements. It is in your best interest to file and serve a written reply whenever it is possible to do so, because the clearer you make your argument to the court, the better chance you have of winning your lawsuit.

JLM Chapters 9–13, 15–17, and 20–22 explain in detail the types of claims you can bring and the kinds of documents you will need to maintain such actions. In each Chapter, there are examples of the papers you need to file. The table in Appendix A will help you become familiar with the names of the papers each suit requires.

C. Conclusion

If you are thinking about taking legal action, you should take the following steps:

- (1) identify the law that has been broken;
- (2) determine the type of lawsuit you need to file; and
- (3) prepare the necessary documents.

Appendix A of this Chapter lists types of lawsuits and forms the court requires for each type of suit. If you file a lawsuit, you will need:

- (1) papers to start a lawsuit;
- (2) papers supporting your lawsuit; and
- (3) other important papers required by the court.

After you have filed your lawsuit, the defendant should respond to your claim. If the defendant responds, you should reply. If the defendant does not respond, you should file papers with the court requesting a default judgment in your favor.

19. See FED. R. CIV. P. 8(c); N.Y. C.P.L.R. 3018(b) (McKinney 2009) (providing a partial list of affirmative defenses).

APPENDIX A

LEGAL DOCUMENTS TABLE

Type of Suit	Papers to Start Suit	Supporting Papers	Miscellaneous Papers	Answers	Replies
Criminal Appeal ²⁰	• Notice of Appeal ²¹	• Papers to Perfect Appeal ²²	• Poor Person's Papers ²³ • Bail Request Papers • Papers for Requesting Extension of Time	• Opposing Brief	• Reply Brief
Article 440 ²⁴	• Notice of Motion to Vacate Judgment ²⁵ • Notice of Motion to Set Aside Sentence ²⁶	• Affidavits	• Poor Person's Papers	• Answer	
Federal Habeas Corpus ²⁷	• Petition	• Affidavits	• Motion for Appointment of Counsel	• Answer	• Traverse ²⁸

20. See FED. R. APP. P. 3(a). This type of suit is brought by a criminal defendant who was found guilty in the lower court. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for information about criminal appeals.

21. See FED. R. APP. P. 3(a). The notice of appeal must be filed with the court within the time allowed by statute. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for information about criminal appeals.

22. See FED. R. APP. P. 10(a). In order to perfect the appeal, the court must have all the relevant documents that might play a role in the final determination, including the original papers and exhibits filed in the trial, a transcript of the proceedings, and a certified copy of the docket entries. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for information about criminal appeals.

23. See 28 U.S.C. § 1915. Upon filing these papers, the court may authorize a suit or appeal to be brought without prepayment of fees. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for information about criminal appeals.

24. See N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2009). This type of suit is brought as a motion by the losing party after the court has ruled. See Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence," for information on using Article 440.

25. See N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2009). This motion can be filed to ask the court to vacate (or remove) the judgment (decision) just entered at trial. See Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence," for information on using Article 440.

26. See N.Y. CRIM. PROC. LAW § 440.20 (McKinney 2009). This motion does not set aside the entire judgment, but asks the court to begin a new sentencing proceeding. See Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence," for information on using Article 440.

27. See 28 U.S.C. § 2255. A person incarcerated in federal custody can file a federal habeas corpus petition in order to get a court to review the validity of his imprisonment. See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for information on federal habeas corpus.

28. See 28 U.S.C. § 2243. A traverse can be filed if the incarcerated person wants to deny any of the facts claimed in the opposing party's answer. See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for information on federal habeas corpus.

State Habeas Corpus ²⁹	<ul style="list-style-type: none"> • Petition 	<ul style="list-style-type: none"> • Check requirements of your state 	<ul style="list-style-type: none"> • Notice of Time and Place of Hearing • Poor Person's Papers 	<ul style="list-style-type: none"> • Return 	<ul style="list-style-type: none"> • Reply
42 U.S.C. § 1983 ³⁰	<ul style="list-style-type: none"> • Summons • Complaint • Order to Show Cause and Temporary Restraining Order 	<ul style="list-style-type: none"> • Affidavit 	<ul style="list-style-type: none"> • Poor Person's Papers 	<ul style="list-style-type: none"> • Answer • Motion to Dismiss 	<ul style="list-style-type: none"> • Reply
Tort Action ³¹	<ul style="list-style-type: none"> • Notice of Intention to File Claim³² • Notice for Permission to File Late Claim³³ • Verified Tort Claim³⁴ 	<ul style="list-style-type: none"> • Affidavits 	<ul style="list-style-type: none"> • Affidavit to Request Reduction of Filing Fees³⁵ • Notice of Appeal 	<ul style="list-style-type: none"> • Demand for Bill of Particulars³⁶ 	<ul style="list-style-type: none"> • Bill of Particulars³⁷

29. See 28 U.S.C. § 2254. This petition provides the same type of remedy for state incarcerated people as the federal petition for federal incarcerated people, but the state habeas process must be exhausted before an incarcerated person can appeal to the federal courts. See Chapter 21 of the *JLM*, “State Habeas Corpus: Florida, New York, and Michigan,” for information on state habeas corpus.

30. See 42 U.S.C. § 1983. This type of action provides federal relief from state action that deprives an individual of his or her civil rights. See Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” for information on using Section 1983 to obtain relief from violations of federal law.

31. See N.Y. C.P.L.R. 103 (McKinney 2009). A tort action is a civil action where a plaintiff brings suit against a defendant for damages. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on tort actions.

32. See N.Y. Ct. CL. ACT § 10 (McKinney 2009). A Notice of Intention to File a Claim may be necessary depending on state law. You should carefully read the relevant sections in the applicable state code. In New York, this notice is necessary if a claim is brought against the state or state actors. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on tort actions.

33. See N.Y. Ct. CL. ACT § 10 (McKinney 2009). A Court has the jurisdiction to accept late claims if the claimant files this motion with the court and presents strong arguments concerning why the claim was not filed on time. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on tort actions.

34. See N.Y. C.P.L.R. 3020 (McKinney 2009). This is a statement under oath that the pleading is true to your best knowledge. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on tort actions.

35. See N.Y. C.P.L.R. 1101(d) (McKinney 2009). An affidavit showing that the filing fees cannot be paid must be prepared for the court if you wish to avoid significant court costs. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on tort actions.

36. See N.Y. C.P.L.R. 3042 (McKinney 2009). A demand for a bill of particulars may be made and must be complied with within thirty days. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on tort actions.

37. See N.Y. C.P.L.R. 3043 (McKinney 2009). A bill of particulars is a list of questions that must be answered in a personal injury action, such as the time of the incident and its location. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on tort actions.

Article 78³⁸	<ul style="list-style-type: none"> • Order to Show Cause³⁹ • Notice of Petition • Verified Petition • Request for Judicial Intervention • Application for an Index Number 	• Affidavits	• Affidavit to Request Reduction or Waiver of Filing Fees	• Answer	• Reply
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38. See N.Y. C.P.L.R. 7801 (McKinney 2009). This type of suit is used to challenge the action or inaction of state and local government officers and agencies, and goes by different names in different states. See Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice and Laws,” for information on how to challenge administrative decisions using Article 78.

39. See N.Y. C.P.L.R. 7804 (McKinney 2009) for more specifics regarding these forms. See Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice and Laws,” for information on how to challenge administrative decisions using Article 78.

APPENDIX B

SAMPLE MEMORANDUM OF LAW⁴⁰

This Appendix contains an example of a memorandum of law, or a brief. This particular memorandum was submitted to a federal district court in response to the defendants' motion for summary judgment. The plaintiff had filed a Section 1983 claim for excessive force in violation of the Eighth Amendment.⁴¹ We are including this in the *JLM* so that you may study the form and style of a brief. The names of all parties, witnesses, and facts have been changed. The footnotes have been added to clarify and explain things to you but should not go in your memorandum. In addition, you should not use the cases cited in this sample without verifying that they are still good law.⁴²

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	X	
Robert K. Simms,	:	
	:	
Petitioner, ⁴³	:	
	:	
	:	
- against -	:	97 Civ No. _____
	:	
Corrections Officer William D. Bennett,	:	
New York State Penitentiary, and Sergeant	:	
Paul J. Wright,	:	
	:	
Respondents. ⁴⁴	:	
	X	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Robert K. Simms ("Simms") respectfully submits this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.⁴⁵

PRELIMINARY STATEMENT

40. This memorandum of law is based on a submission drafted by Daniel M. Abuhoff and Nicole A. Ortsman-Dauer at Debevoise & Plimpton LLP.

41. For more information on how to bring a claim under 42 U.S.C. § 1983, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law." Chapter 24 of the *JLM*, "Your Right To Be Free from Assault by Prison Guards and Other Prisoners," discusses the law that applies to your right to be free from assault in prison.

42. See *JLM*, Chapter 2, "Introduction to Legal Research," for information on legal research.

43. A "petitioner" is a party who presents a petition to a court. Here, that person is Robert K. Simms.

44. A "respondent" is the party against whom an appeal is taken. Here, those persons are William D. Bennett and Paul J. Wright.

45. "Summary Judgment" is granted on a claim or defense about which there is no genuine issue of material fact and upon which the party asking for summary judgment is entitled to win as a matter of law. Here, Simms is arguing against Bennett and Wright's Motion for Summary Judgment. See FED. R. CIV. P. 56 for more information.

On January 17, 1990, defendant William D. Bennett (“Bennett”), a corrections officer at the New York State Penitentiary (“Penitentiary”), physically assaulted and threatened to beat and kill Robert Simms, an incarcerated person awaiting processing. Defendant Paul J. Wright (“Wright”), Bennett’s supervisor, knew of the attack and death threats, yet did nothing to intervene and protect Simms. Simms brings this lawsuit under 42 U.S.C. § 1983 against Officer Bennett for his malicious and sadistic use of excessive force, and against Sergeant Wright for his deliberate indifference to the attack and threats of beating and death.

Defendants have moved for summary judgment, arguing (i) Simms suffered *de minimis* physical injuries and unactionable psychological pain; (ii) the force used by Bennett, if any, was reasonable and necessary; and (iii) Wright did not act with deliberate indifference because he did not witness the physical attack and threats of beating and death. Defendants are wrong on both the law and the facts.

First, the use of force here was more than *de minimis*.⁴⁶ Bennett shoved Simms, pushed him into a wall, swung him around the search room, and punched him in the arms, legs, and face, while simultaneously screaming that he should shoot, stab, and beat him. As a result of the attack, Simms suffered more than *de minimis* physical and mental pain, sustaining not only bruises to his arms, legs, and face, but also serious and extensive mental pain lasting to the present. The Eighth Amendment’s prohibition on unnecessary and wanton infliction of pain encompasses both physical and mental pain.

Second, the evidence demonstrates that there was no need for force. Simms provoked no attack. He was not violent. He did not refuse to follow Officer Bennett’s instructions. As indicated by the content of Bennett’s threats, the attack—fueled by Bennett’s personal feelings of hatred and disgust—was malicious, sadistic, and for the very purpose of causing Simms harm.

Finally, the supervising officer, Sergeant Wright, was deliberately indifferent to Simms’ plight.⁴⁷ Wright admits to hearing noise from the search room. Indeed, Wright was told by Simms what was going on. Yet, Wright chose to do nothing to stop the attack.

Defendants’ motion for summary judgment should be denied.

1. STATEMENT OF FACTS

(a) Robert Simms’ Child Pornography Convictions

Plaintiff Robert Simms, a black male in his late forties, is a convicted child pornographer. The last conviction took place on January 10, 1990. As a result of that conviction, Simms was sentenced to five years of imprisonment, which he served at the New York State Penitentiary from January 17, 1990, to January 16, 1995. (Simms Aff. ¶ 3).⁴⁸

(b) Officer Bennett Attacks Robert Simms and Sergeant Wright Does Nothing

Simms arrived at the Penitentiary at approximately 9:30 a.m. on January 17, 1990. He was led into the bullpen holding cell and sat on a bench as he waited to be processed. In addition to Simms, there was only one other person in the bullpen. (Simms Aff. ¶ 5; Simms Dep. 20:12–13).

On the morning of January 17, 1990, defendant Officer Bennett and Officer Howard Lewis (“Lewis”) worked the 8:00 a.m. to 2:00 p.m. shift in the search area of the Penitentiary. (Bennett Dep. 35:25–27; Lewis Dep. 24:8–10). Sergeant Wright, working the same shift, was the supervisor on duty. (Wright Dep. 22:36–24:5).

Corrections officers at the Penitentiary all have the opportunity to learn incoming incarcerated people’s charges. Not only do corrections officers discuss, on occasion, incarcerated people’s charges, but officers working in the booking and search areas also have access to that information. (Bennett Dep. 43:15–19, 52:9–55:12, 62:24–

46. *De minimis* means so insignificant that a court may overlook it in deciding an issue. Here, Simms is arguing that the use of force used on him was not *de minimis*, or in other words, that it was significant.

47. “Deliberate indifference” means awareness and disregard for the risk of harm. Here, Simms is claiming that one of the defendants knew of the mistreatment and did nothing to stop it.

48. Citations to “Simms Aff. ¶ ___” refer to the Affidavit of Robert K. Simms, dated August 15, 1998. Citations to “___ Dep.” refer to the transcript of the deposition for the individual specified. Citations to “Compl.” refer to Simms’ Complaint. Citations to “Def. Mem.” refer to the Defendants’ Memorandum of Law. The symbol “¶” refers to a particular paragraph in that document. A citation that reads 20:12-13 indicates that the cited information can be found on page 20, lines 12 through 13 of the referenced document.

64:14; Lewis Dep. 27:7–15, 36:24–37:5). Simms sat on the bullpen bench for approximately one hour when he heard Officer Bennett shouting from inside the search room, located a few yards from the bullpen: “He’s pond scum. That low-life piece of trash kiddie porn lover deserves to be killed. Someone should kill him.” (Simms Aff. ¶ 12; Simms Dep. 21:15–24:7; Compl. Pt. II at 1).

In order to determine the source of and reason for the threats, Simms stood up from the bullpen bench and approached the bullpen bars. Bennett approached the bullpen, stood very close to Simms, and screamed: “You revolting cradle robber. Get the hell out of my face, you pedophile. You nauseate me! Get the hell away from the bars before I beat you senseless.” Simms was terrified and did not know how to respond. He had done nothing to provoke the threats. (Simms Aff. ¶ 12; Compl. Pt. II at 1).

Officer Bennett, becoming even more aggressive, continued his verbal attack for the next half hour. He screamed: “If I had a knife, I’d stab you in your chest right now. Get away from the bars you disgusting pond scum pervert!” Simms became very anxious. He thought he was going to be killed by Officer Bennett or by other incarcerated people to whom Bennett would reveal his charges. (Simms Aff. ¶ 13; Simms Dep. 24:7–13; Compl. Pt. II at 1–2).

A few minutes later, Simms was retrieved from the bullpen and escorted to the search room where Officer Bennett stood, glaring at him. (Simms Aff. ¶ 14; Simms Dep. 26:14–25; Compl. Pt. II at 6). Officer Lewis and approximately four to six other corrections officers—including Officer Felding, who booked Simms that morning and prepared his booking sheet containing his child pornography charges—also stood in the room, all staring at Simms and Bennett with expressions of expectation. (Simms Aff. ¶ 15; Compl. Pt. II at 4).

Officer Bennett slammed shut the search room door and pushed Simms from behind with two hands, towards the wall where the other officers stood. He pushed Simms approximately ten times and swung him around the room. Bennett slapped Simms’ face and body and again began to scream threats of beating and death at Simms. Bennett next shoved Simms into the wall next to the corrections officers while screaming: “You vile scumbag. I should kill you. If I had my knife, I’d carve you up. If I had my revolver, I’d blow you to shreds. You are a sick maggot.” Simms was terrified and kept still. (Simms Aff. ¶ 16; Simms Dep. 28:12–30:25; Compl. Pt. II at 3–4).

Officer Bennett continued to push Simms into the wall while yelling that he could not stand the sight of Simms. Simms finally asked Bennett what he had done to deserve this attack and reminded Bennett he did not know the details of Simms’ case. Bennett responded by yelling that he did not give “two hoots” about the circumstances of Simms’ case; he was going to carve him up anyway. Bennett pushed Simms. Simms ricocheted off the wall, and Bennett continued to scream obscenities and threats of beating and death. Officer Lewis and the others in the search room looked on with amusement. (Simms Aff. ¶ 17; Simms Dep. 29:15–30:10; Compl. Pt. II at 6–7).

At some point, Officer Bennett demanded that Simms stand in a particular spot in the search room. Each time Simms moved to the requested spot, Bennett taunted him and screamed, “No, this way!,” pointing to a different spot. He then swung Simms around the room, grabbing his arm and launching him off. Bennett repeated this several times. (Simms Aff. ¶ 18; Simms Dep. 28:7–29:6).

Eventually, Bennett screamed that Simms should strip. Simms complied and removed his shirt. He never refused or questioned Bennett’s order. When Simms put his shirt on an empty chair in the room, however, Bennett flew into a rage. He whipped Simms’ shirt around in the air above his head, screaming that Simms was a repulsive child pornographer. Bennett prepared to punch Simms again. Simms turned his body to avoid being hit and called out for the sergeant. (Simms Aff. ¶ 16; Simms Dep. 28:9–30:12, 33:14–20, 35:8–29).

Sergeant Wright heard “loud screaming” coming from the search room and went to investigate. (Wright Dep. 28:7–9, 30:22–25, 50:7–25). As Wright appeared at the door, Bennett acted as if nothing was wrong. Simms told Wright that he was glad Wright had arrived and that he needed Wright’s help. Wright cut Simms off and told him to “shut the hell up and take off your clothes,” to which Simms replied, “You’re in this too? This is unbelievable!” Simms did not question Wright’s order to strip. Rather, he took off his pants. Bennett strip-searched him. (Simms Aff. ¶ 20; Simms Dep. 30:21–32:12, 39:8–40:2; Compl. Pt. II at 8; Wright Dep. 32:20–23, 52:19–21; Bennett Dep. 49:4–20).

Once the strip search was completed, Simms told Wright that Bennett had physically assaulted him and threatened to beat, stab, and kill him. Wright responded, “Well, this is jail!” and walked out of the search room,

leaving Simms alone with Bennett and the other officers. (Simms Aff. ¶ 4; Davis Dep. 28:7–29:15; Wright Dep. 15:02–16:20 (testifying that Davis had a complaint about the officers)).

Once Sergeant Wright left the search room, Simms dressed and Bennett resumed threatening him. Bennett again shoved Simms, sending him flying across the search room. Bennett screamed, “You are a piece of crap! You are a disgusting kiddie porn loving animal who deserves to die. I am going to make sure someone’s going to kill you. Your days are numbered.” (Simms Aff. ¶ 18; Simms Dep. 40:15–42:30; Compl. Pt. II at 8). Bennett then led Simms out of the search room and screamed, “Send him to protective custody and get him out of my face. He gets off on little girls!” (Simms Aff. ¶ 20; Simms Dep. 41:18–22; Compl. Pt. II at 9). After spending approximately forty-five minutes in the search room, Simms was taken to a cell in protective custody where incarcerated people are kept alone in separate cells that are kept locked for most of the day. Simms did not want to be housed in protective custody after the assault. He feared he would be more vulnerable to attack by defendants or others because there would be no witnesses. (Simms Aff. ¶ 22; Simms Dep. 35:3–23, 40:21–42:3, 56:15–58:4; Compl. Pt. II at 10).

(b) Robert Simms’ Physical and Mental Pain Resulting from the Attack

As a result of the attack, Simms sustained bruises on his arms, legs, and face. He requested medical attention the day after the incident. By the time Simms saw a doctor—a week later—these injuries were no longer visible. (Simms Aff. ¶ 24; Simms Dep. 44:12–18, 48:23–50:2; Compl. Pt. II at 5).

In addition to the physical injuries, Simms suffered extreme and extensive mental pain. Not only was he humiliated and shocked by the search, but for the entire time he was housed at the Penitentiary, he was anxious and terrified that Bennett, Lewis, and Wright were going to beat or kill him—either by themselves or by encouraging other incarcerated people—and cover it up. Simms felt hopeless. He became depressed and contemplated suicide. To this day, Simms suffers from nightmares about the attack. (Simms Aff. ¶ 29; Simms Dep. 49:15–51:12, 52:14–15; Compl. Pt. II at 5).

On January 18 and 19, Simms made several visits to the Mental Health Clinic. He was depressed, aggravated, and in despair. He did not want to be housed in protective custody where no one could witness any possible further attack. (Mental Health Evaluation Sheet, dated January 18, 1990). One nurse specifically noted that the “problem” was that Simms was harassed by corrections officers because of his charge. (Mental Health Evaluation Sheet, dated January 18, 1990). Simms also received help for his psychological pain from Mark Denby, a Muslim mullah (religious leader) in Simms’ community, and Dr. Margaret Phillips, Simms’ therapist. These individuals visited Simms on numerous occasions while he was at the Penitentiary. After Simms finished serving his sentence in 1995, he continued to meet with Dr. Phillips, with whom he often spoke about the assault. (Simms Aff. ¶ 26; Simms Dep. 44:16–17, 53:18–19, 57:14–28; Compl. Pt. II at 5–7).

(c) Robert Simms’ Complaint and the “Investigation”

On January 19, two days after the attack, Simms wrote a letter to Warden Frank Boston detailing the physical abuse and death threats prompted by his child pornography charges. He also noted Sergeant Wright’s unconcerned reaction. (Simms Aff. ¶ 28). Captain Sharon Grant conducted an investigation, then wrote a report to Warden Boston on January 26. Of course, Grant concluded that there was no merit to Simms’ Claim. (Grant Report).

2. ARGUMENT

The standards for summary judgment⁴⁹ are well settled. The moving party⁵⁰ bears the burden of establishing that there are no genuine issues of material fact in dispute.⁵¹ See, e.g., *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir. 1993). This standard bars the court from resolving disputed issues of fact. If there are material factual issues, the court must deny summary judgment. See, e.g., *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). In evaluating whether there are factual issues, the court is to view the evidence in the light most favorable to the non-moving party⁵² and draw all permissible inferences⁵³ in the non-moving party's favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). However, assessments of credibility, conflicting versions of events, and the weight to be assigned to evidence are for the jury, not the court. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. Officer Bennett's Attack On Robert Simms Violated The Eighth Amendment

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain"⁵⁴ and is the source of claims for excessive force under Section 1983. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Analysis of an excessive force claim contains both objective and subjective inquiries.⁵⁵ An official's conduct violates the Eighth Amendment when (i) the conduct is "objectively, sufficiently serious," and (ii) the prison official acts with a "sufficiently culpable [guilty] state of mind." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted).

(a) Officer Bennett's Conduct Was Sufficiently Serious

Defendants argue that summary judgment should be granted because (i) Simms' physical injuries, if any, were *de minimis*,⁵⁶ and (ii) Simms' psychological injuries are not serious enough to justify continuing this Section 1983 case. As demonstrated below, however, the physical injuries and psychological pain suffered by Robert Simms were sufficiently serious to satisfy the Eighth Amendment standard.

(i) The Use of Force Was More Than *De Minimis*

The objective component of a claim for excessive force under the Eighth Amendment is satisfied if the injury suffered results from something more than a *de minimis* use of force. See *Hudson v. McMillian*, 503 U.S. 1, 9–10 (1992); *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir. 1994). Significant injury, that is, "injury that requires medical

49. "Summary judgment" is a legal term that means that a judge can decide the case in one party's favor without the case ever going to a jury because the facts are not in dispute and the judge can make a ruling on the law.

50. The "moving party" is the person who made the motion to the court asking the court to do something. In this case, the moving party is Officer Bennett, who is asking the court to decide the case in his favor at the summary judgment stage instead of going forward to a trial.

51. When a party claims that there are "no genuine issues of material fact in dispute," that means that all the parties agree about the facts, or that the facts are so clearly in one party's favor that a neutral third party would have to say that the facts seem to heavily favor one party's story over the other's as the real version of events.

52. The "non-moving party" is the person who did not make the motion to the court. Here, the non-moving party is Simms, who is opposing Officer Bennett's motion for summary judgment. Simms wants the case to go forward to a trial, instead of being decided in Officer Bennett's favor by a judge.

53. To "draw all permissible inferences" means that the court should take the facts and make any and all assumptions that the facts can support in a way that would favor the non-moving party, Simms. Essentially, because a judge ruling on summary judgment is ending the case before it goes to trial, the judge must give "the benefit of the doubt" to the party opposing summary judgment.

54. "Wanton infliction of pain" means excessive, cruel, or immoral infliction of pain.

55. "Objective" means as viewed by an independent outsider, sometimes referred to as the ordinary "reasonable person." "Subjective" means how a specific person felt, believed, or viewed the incident.

56. *De minimis* is a legal term that means something has occurred in such a small quantity that it is not significant, and there is therefore no legal remedy. Here, Officer Bennett is arguing that Simms' physical injuries were *de minimis*. This means Officer Bennett is trying to claim that Simms was not hurt badly enough for the law to take notice of his injuries.

attention or leaves permanent marks,” is not required. *Hudson v. McMillian*, 503 U.S. 1, 7–8, 13 (1992) (“The absence of serious injury is . . . relevant to the Eighth Amendment inquiry but does not end it.”).

As an initial matter, defendants contend that Officer Bennett never used force against Robert Simms or even had any physical contact with him. (Def. Mem. 7). This argument, however, is hotly disputed and thus summary judgment must be denied. *See, e.g., Allah v. Cox*, No. 96-CV-1225, 1998 WL 725939, at *2 n.2 (N.D.N.Y. Oct. 9, 1998) (summary judgment denied where corrections officer’s version of events is expressly contradicted by incarcerated person).

Alternatively, defendants contend that the force used by Bennett—which defendants dismiss as mere grabbing and pulling—was *de minimis*. (Def. Mem. 5–7). But the evidence shows that Simms was shoved, pushed into a wall, swung around the search room, and punched—all while being threatened with further beatings and death for approximately forty-five minutes in the search room. (Simms Aff. ¶ 12–13; Simms Dep. 25:24–26:16, 32:2–3; Simms Stmt., dated January 19, 1990).

Defendants cite a number of cases to support their argument that the use of force against Simms was *de minimis* as a matter of law. None of these cases is on point. They are either decided on grounds other than the use of force or involve momentary uses of force dramatically different from the repeated and continuous physical assault and death threats inflicted on Robert Simms. *See Reyes v. Koehler*, 815 F. Supp. 109, 114 (S.D.N.Y. 1993) (summary judgment granted for defendant where incarcerated person did not allege malice or intent to cause harm and where defendant’s pushing plaintiff against wall was “a momentary act, of such limited duration as to belie any inference of malicious or sadistic intent to cause harm”) (internal quotation marks omitted); *Harris v. Keane*, 962 F. Supp. 397, 408 n.12 (S.D.N.Y. 1997) (squeezing incarcerated person’s finger once is *de minimis*) (emphasis added); *Candelaria v. Coughlin*, 787 F. Supp. 368, 374–75 (S.D.N.Y. 1992) (use of force was *de minimis* where incarcerated person did not allege any “repeated or continuous grabbing” or any physical injury), *aff’d*, 979 F.2d 845 (2d Cir. 1992).

Simms suffered bruises to his arms, legs, and face. (Simms Aff. ¶ 20; Simms Dep. 54:10–24). Such visible injuries are more than sufficient to sustain an Eighth Amendment action. *See, e.g., Griffin v. Crippen*, 193 F.3d 89, 91–92 (2d Cir. 1999) (reversing district court’s determination that incarcerated person’s bruised shin and swelling over left knee were *de minimis* as a matter of law); *Smith v. Marcellus*, 917 F. Supp. 168, 171–73 (W.D.N.Y. 1995) (abrasion under left eye, small laceration near right ear, four superficial skin tears on upper calf, and slightly swollen wrist, resulting from attack by corrections officers, constitutes sufficient injury).

Defendants make much of the fact that plaintiff was not given medical treatment for his bruises. (Def. Mem. 7–8). However, Simms asked for treatment. (Simms Aff. ¶ 1). Defendants cannot be relieved of responsibility for the physical abuse of Robert Simms because they refused him medical treatment for at least a week after abusing him. The provision of medical treatment, in any event, is merely one factor to be weighed by the jury in assessing whether the physical force was more than *de minimis*. *See Robison v. Via*, 821 F.2d 913, 924 (2d Cir. 1987) (plaintiff’s failure to seek medical treatment for injuries not fatal to Section 1983 claim).

(ii) Simms Can Recover for His Psychological Pain

Were there any question as to Bennett’s use of more than *de minimis* physical force on Simms—and there should be none—Simms’ psychological pain provides a separate basis for recovery. The intentional infliction of psychological pain can form the basis of a Section 1983 claim where the pain suffered is more than *de minimis*. The Supreme Court has stated:

[T]he Eighth Amendment prohibits the unnecessary and wanton infliction of “pain,” rather than “injury.” “Pain” in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable⁵⁷ for constitutional purposes. *See Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (internal citation omitted); *see also St. Germain v. Goord*, No. 96-CV-1560 (RSP/DRH), 1997 WL 627552, at *3–4 (N.D.N.Y. Oct. 8, 1997) (incarcerated person’s misery, anguish, psychological pain, and fear found actionable).

57. “Cognizable” means that a court can recognize or identify something. Here, the Court declares that psychological pain is cognizable for constitutional purposes, meaning that psychological pain is something that the Court can take into account when considering a case alleging that a constitutional violation has taken place.

Defendants argue that verbal threats alone are not enough to bring a claim under Section 1983. But this is not a case about a verbal argument. Simms was threatened while he was being assaulted. Verbal threats, accompanied by some physical force or injury, can violate the Eighth Amendment. As the case law makes clear, when threats are accompanied by conduct that increases the credibility of the threats, an incarcerated person's constitutional rights are violated. *See Northington v. Jackson*, 973 F.2d 1518, 1522–24 (10th Cir. 1992) (alleged psychological injury resulting from sheriff's placement of revolver to incarcerated person's head, accompanied by threats to shoot, held to be more than *de minimis*); *Burton v. Livingston*, 791 F.2d 97, 100–01 (8th Cir. 1986) (guard drawing weapon and threatening to shoot while using racially offensive language held to be more than *de minimis* use of force); *Douglas v. Marino*, 684 F. Supp. 395, 397–98 (D.N.J. 1988) (allegation that prison employee brandished knife while threatening to stab incarcerated person stated Section 1983 claim).

It is clear even from the cases on which defendants rely that threats accompanied by physical conduct violate the Eighth Amendment. In *Jermosen v. Coughlin*, for example, the court held that verbal threats do not amount to a constitutional violation “*unless accompanied by physical force or the present ability to effectuate the threat.*” 878 F. Supp. 444, 449 (N.D.N.Y. 1995) (emphasis added). Similarly, in *McFadden v. Lucas*, the court stated, “*mere threatening language*” is not a constitutional violation where the “*plaintiff has nowhere alleged that he was physically assaulted [or that] any touching of his person occurred at all.*” 713 F.2d 143, 146 (5th Cir. 1983), *cert. denied*, 464 U.S. 998 (1983) (emphasis added); *see also Harris v. Keane*, 962 F. Supp. 397, 406 (S.D.N.Y. 1997) (“*Allegations of threats, verbal harassment or profanity, without any injury or damage, do not state a claim under Section 1983.*”) (emphasis added).

Unlike the cases cited by defendants—where the threats were unaccompanied by other conduct or the plaintiff was not physically abused—Robert Simms was threatened with beatings and death even as he was physically attacked. (Simms Aff. ¶ 12–13). The lack of any justification for these threats indicates that their purpose was to inflict psychological harm. *See infra* Part B. Simms' placement in protective custody, where he might be assaulted without witnesses, only bolstered the threats' credibility. *See Hudspeth v. Figgins*, 584 F.2d 1345, 1347–48 (4th Cir. 1978) (guard's threat that incarcerated person would be shot supported by subsequent transfer to work detail supervised by armed guards).

Simms' psychological pain was not *de minimis*. During the search process, he experienced humiliation, anxiety, and the terror of death or severe injury. Afterwards, fearing that Bennett, Lewis, and Wright were going to beat or kill him, Simms sank into a deep depression and contemplated suicide. Defendants' argument that Simms' suicidal thoughts should be disregarded because he could not actually kill himself misses the point that he suffered psychological pain. (Def. Mem. 6 n.1). He received psychological treatment from the Mental Health Clinic, which specifically noted that Simms had been harassed by corrections officers and that he was “depressed.” (Mental Health Evaluation Sheets). Simms also received counseling from Mullah Mark Denby and Dr. Margaret Phillips. To date, he suffers from nightmares of the incident. (Simms Aff. ¶ 22; Simms Dep. 43:15–44:2, 49:18–51:18; Simms letter, dated January 24, 1990). Thus, Simms' mental pain is actionable.

Defendants characterize Simms' psychological pain as not “rational” because (i) the threats were conditional; (ii) an investigation was conducted; and (iii) the threats of beatings and killing were never effectuated. (Def. Mem. 11–13). None of these arguments withstands close examination. First, defendants' suggestion that Simms' fear of beating and death would only be justifiable had Bennett phrased his threats in the present tense—“I'm going to kill you now”—and that Simms should have taken comfort from the use of the conditional perfect in Bennett's actual statement—“I should kill you”—assumes that Simms has a high-level understanding of grammar and an ability to identify different verb tenses under those circumstances.

Defendants' second point, that Simms' fear and terror during the assault on January 17, 1990, should have been made better by defendants' investigation taking place on January 26, 1990, is similarly far-fetched. Even after the attack, Simms could have derived little comfort from an internal investigation, given his previous experience with Penitentiary personnel. As to the merits of the investigation, the quality of internal reports rests on credibility—a jury issue. *See Payne v. Coughlin*, No. 82 Civ. 2284 (CSH), 1987 WL 10739, at *3 (S.D.N.Y. May 6, 1987).

Finally, as discussed above, verbal threats are indeed actionable when accompanied by physical force. It is not necessary for Simms to have actually been beaten, shot, stabbed, or killed to maintain this lawsuit. *See St. Germain*

v. Goord, No. 96-CV-1560 (RSP/DRH), 1997 WL 627552, at *3–4 (N.D.N.Y. Oct. 8, 1997) (holding actionable incarcerated person's mental pain and fear resulting from corrections officers' threats to "beat the hell out of plaintiff" which never materialized). Defendants rely on *Doe v. Welborn*, 110 F.3d 520 (7th Cir. 1997), in arguing that Simms' fear of beating and death are not compensable since the threats never materialized. That reliance is inappropriate. *Doe* is a conditions-of-confinement case; this is a case about excessive use of force. As *Doe* itself states: "What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends on the claim at issue." *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997). Thus, while the psychological harm of the plaintiff in *Doe* did not rise to "the extreme deprivations" required to make out a conditions-of-confinement claim, Simms' psychological injury is actionable because "a plaintiff in an excessive force case need not allege significant injury in order to survive dismissal." *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997) (internal citations and quotation marks omitted). Under the circumstances, the fear and other mental pain, which Simms suffered due to Bennett's threats of beating and death, accompanied by Bennett's aggressive physical actions, were clearly rational.

(b) Officer Bennett Acted Maliciously and Sadistically to Cause Harm

For claims of excessive force, the state of mind requirement turns on whether the prison official applied the force "maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)). In making that determination, the trier of fact is to consider the following factors: (i) "the extent of the plaintiff's injuries;" (ii) "the need for the application of force;" (iii) "the correlation [relationship] between that need and amount of force used;" (iv) "the threat reasonably perceived by the defendants;" and (v) "any efforts made by the defendants to temper [decrease] the severity of a forceful response." *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993) (citing *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)).

(i) Plaintiff Simms Suffered Physical and Mental Harm

As a result of Bennett's use of excessive force and threats of beating and death, Simms suffered physical and mental injury. See *supra* Sections 1(b) and (c).

(ii) There Was No Need for Force or Death Threats

Where, as here, there is evidence that an attack by a corrections officer is unprovoked or without sufficient justification, courts generally will deny summary judgment. See, e.g., *Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (reversing summary judgment where jury could find defendant initiated argument and struck incarcerated person without justification); *Moore v. Agosto*, No. 93 Civ. 4835, 1996 WL 125660, at *2 (S.D.N.Y. Mar. 20, 1996) (summary judgment denied where plaintiff maintained defendants initiated the confrontation), *aff'd*, 164 F.3d 618 (2d Cir. 1998).

Defendants claim Bennett was justified in using force because of Simms' "admitted" refusal to follow defendants' instructions to submit to a strip-search, stand away from the bullpen bars, stand where directed in the search room, and place his clothing in the designated place. (Def. Mem. 6–8).

Defendants' arguments are undermined by the simple fact that Bennett attacked Simms *prior* to the issuance of any of these instructions. The threats of violence began as Simms sat in the bullpen, and the physical attack began as soon as Simms entered the search room. (Simms Aff. ¶¶ 8, 11; Simms Dep. 19:20–20:3, 24:25–25:9, 25:14). Moreover, when Simms was ordered to strip, he complied. (Simms Aff. ¶¶ 15, 18; Simms Dep. 32:15–21; Simms letter dated January 24, 1990).

The other so-called "instructions" illustrate the malice and sadism motivating Bennett's attack. For example, Bennett's alleged "instruction" to stand away from the bullpen bars was in fact stated as follows:

You revolting cradle robber. Get the hell out of my face, you pedophile. You nauseate me! Get the hell away from the bars before I beat you senseless.

(Simms Aff. ¶ 9; Simms Dep. 21:2–15). In addition, the purported "instruction" to stand in a particular spot was nothing but a malicious taunt. Bennett indeed told Simms to stand in a particular spot. However, each time Simms moved to the place indicated, Bennett screamed, pointed to a different spot, grabbed Simms' arm, and swung him to the new location. (Simms Aff. ¶ 14; Simms Dep. 27:22–27:2).

The expressions of disgust and hatred, which continued throughout the beating and accompanied the death threats, were a product of Bennett's personal feelings, not a good faith effort to maintain discipline. The evidence is clear that Bennett knew Simms' charges prior to the attack:

- (1) Felding, the booking officer who prepared the booking sheet stating Simms' charges, stood in the search room while Simms was assaulted and searched (Booking Sheet; Bennett Dep. 31:10–25, 41:20–42:3, 49:3–7, 52:8–53:8; Def. Interrog. Resp. No. 7);
- (2) Bennett, Lewis, and Wright admitted to talking about incarcerated people's charges (Bennett Dep. 56:17–25; Lewis Dep. 26:2–18; Wright Dep. 41:16–19);
- (3) Bennett admitted that he had access to incarcerated people's charges (Bennett Dep. 53:2–54:8; see also Lewis Dep. 26:2–18); and
- (4) The threats are replete with references of Simms being a child pornographer (Simms Aff. ¶¶ 7, 8, 9, 11, 14, 18; Simms Dep. 19:14–25, 25:6–7).

The fact that malice motivated Bennett's acts against Simms are explained, in part, by Bennett's testimony that he finds sex offenses committed against minors more disgusting than other crimes committed by incarcerated people. (Bennett Dep. 58:3–10). Moreover, Bennett was emboldened by his "amused" audience of corrections officers in the search room. (Simms Aff. ¶ 12; Simms Dep. 27:23–28:2; Def. Interrog. Resp. No. 7).

Defendants contend that the force used was necessary to avoid the "potential" security risks associated with a backlog of detainees waiting to be processed. (Def. Mem. 8). However, the "potential" risk could never have been a reality here. The morning of January 17, 1990, only Simms and one other detainee were waiting to be processed. (Simms Aff. ¶ 6).

(iii) The Amount and Type of Force Used Were Disproportionate to the Need

There is no correlation here between the need for force and the amount of force used. Given that Simms offered no physical or verbal resistance nor refused any orders, Bennett's pushing, shoving, swinging, punching, and simultaneous threatening with death and severe injury were clearly excessive.

Even assuming *arguendo* (for the sake of argument) that Simms did refuse to strip, the circumstances would not require the amount of physical force that Bennett used. Bennett himself admitted that Simms was not violent during the strip-search. (Bennett Dep. 48:14). See *Martinez v. Rosado*, 614 F.2d 829, 831–32 (2d Cir. 1980) (violation of prison rule and refusal to obey direct order do not alone justify physical assault without evidence of physical resistance by incarcerated person or other indication that amount of force was proper); see also *Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (even where there is evidence that incarcerated person may have failed to follow an order, officer can still be found to have used excessive or gratuitous force). Moreover, it is hard to see how threatening to shoot, beat, and stab Simms would get Simms to perform the desired action of stripping. At a minimum, this is a question for the jury. See, e.g., *Trice v. Strack*, No. 94 Civ. 4470 (BSJ), 1998 WL 633807, at *3 (S.D.N.Y. Sept. 14, 1998) (whether force was applied maliciously and sadistically is left for jury to decide where defendants struck, tackled, and kicked plaintiff who may have precipitated conduct by waving underwear in one defendant's face).

(iv) Bennett Could Not Reasonably Have Perceived Simms as a Threat

It is clear that Bennett could not reasonably have seen Simms as a threat. On January 17, 1990, Simms was 5'4" and approximately 135 pounds, as compared to the taller, more muscular defendant Bennett. (Simms Aff. ¶ 8; Simms Dep. 19:6–9; Booking Sheet). In addition, while Bennett was accompanied by Lewis and four to six other corrections officers in the search room, Simms was the only incarcerated person present. (Bennett Dep. 39:9–14, 48:3–11; Def. Interrog. Resp. Nos. 2, 7).

(v) Bennett Has Demonstrated No Effort to Temper His Response

Finally, defendants have suggested no efforts by Bennett to temper the severity of the response. As noted above, Bennett assaulted and threatened Robert Simms *prior* to any peaceful request that Simms strip, and continued to do so for another 45 minutes.

B. Defendant Wright Evinced Deliberate Indifference When He Failed To Protect Robert Simms From Bennett's Physical Assault And Accompanying Death Threats

Defendants argue summary judgment should be granted for Sergeant Wright because (i) Wright did not participate in or witness the physical attack and death threats directed toward Simms, and (ii) Wright took adequate steps to ensure that Simms' constitutional rights were not violated. (Def. Mem. 5–6). However, summary judgment is not appropriate because Wright acted with deliberate indifference when he failed to protect Simms from Bennett's physical assault and death threats.

The legal standard is that a supervisor may be liable under Section 1983 for the actions of his supervisees where, as here, the supervisor exhibits "deliberate indifference" to an incarcerated person's safety. There is no requirement of direct participation in the constitutional violation. *See, e.g., Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994). Deliberate indifference exists where (1) there is a substantial risk of serious harm to an incarcerated person, and (2) the prison official knows of the risk and disregards it by failing to take steps to prevent harm to the incarcerated person. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996).

(a) Robert Simms Was at a Substantial Risk of Serious Harm

Here, the first requirement for a finding of deliberate indifference, "substantial risk of serious harm," is clearly met. A violent assault perpetrated without justification and solely for the purpose of causing harm creates a substantial risk of serious harm. *See supra* I.B.

(b) Wright Knew of and Disregarded the Harm to Simms by Not Acting to Prevent It

The second requirement of deliberate indifference, culpable intent, is also met. The evidence establishes that Wright had knowledge that Robert Simms faced a substantial risk of serious harm on the morning of January 17, 1990, regardless of whether Wright actually witnessed the physical abuse and death threats. Specifically:

- (1) Wright admitted in his deposition that he proceeded into the search room after hearing "loud screaming" coming from that room. (Wright Dep. 26:23–28:23, 48:23–25, 54:4–6). Wright's Incident Report, stating that Wright "heard noise" coming from the search room, confirms this. (Incident Report of Sgt. Wright).
- (2) Once the strip-search was completed, Simms told Wright that Bennett physically assaulted him and threatened him with his life. (Simms Aff. ¶ 16; Simms Dep. 37:13–22).
- (3) Wright admitted in his deposition that Simms had filed a complaint about Officer Bennett. (Wright Dep. 13:02–16:20).

The evidence further establishes that Wright disregarded the substantial risk of serious harm that he knew Simms faced. Even after hearing suspicious noises coming from the search room and being told that Bennett had attacked Simms, Wright did not immediately investigate the situation, reprimand (warn or punish) Bennett, or even stay in the search room until the booking and search process was complete. After Simms told Wright he needed Wright's help, Wright told Simms to "shut the hell up and take off your clothes." (Simms Dep. 38:18–20). Then, after specifically being informed of the abuse, Sergeant Wright merely told Simms, "Well, this is jail!" and walked out of the search room. (Simms Aff. ¶ 17; Simms Dep. 39:12–14; Simms letter, dated January 24, 1990). Given the evidence indicating that Wright had knowledge of the risk Simms faced, this indifferent response cannot be held reasonable as a matter of law.

That Wright failed to prevent any further harm to Simms is proven by the fact that Wright left Simms in the room with Bennett to suffer further abuse. Simms was indeed subjected to more abuse when Wright left the search room. Once Wright exited, Bennett shoved Simms, sending him reeling across the search room. Bennett screamed, "You are a piece of crap! You are a disgusting kiddie porn loving animal who deserves to die. I am going to make sure someone's going to kill you. Your days are numbered." (Simms Aff. ¶ 19; Simms Dep. 34:9–15; Compl. Pt. III at 6).

The failure to intervene to prevent harm to an incarcerated person constitutes deliberate indifference, subjecting the supervisor to liability. *See, e.g., Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (summary judgment denied where defendants were present but failed to intervene to prevent another prison official from firing a shotgun at incarcerated person); *Buckner v. Hollins*, 983 F.2d 119, 122–23 (8th Cir. 1993) (where defendant failed to prevent prison official from beating plaintiff, jury could find deliberate indifference for

defendant's failure to intervene); *see also Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 621 (2d Cir. 1996) (reversing summary judgment for corrections officers where plaintiff advised officer he was in danger prior to attack, and record revealed no protective measures taken); *Livingston v. Rivera*, No. 94-CV-5319, 1999 WL 26902, at *3 (E.D.N.Y. Jan. 20, 1999) (officer's statement and other circumstances, suggesting defendant had knowledge that incarcerated person was exposed to imminent serious harm, precluded summary judgment). Here, there is substantial evidence that Wright disregarded a clear and obvious risk of harm to Simms. As a result, Simms suffered further physical assault and threats of beating and death. Wright's failure to take any steps—much less any reasonable ones—to prevent this abuse makes him liable, and at minimum, precludes summary judgment in his favor.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied.

Dated: _____
<<date submitted>> <<City, State>>

Respectfully submitted,
<<Attorney Firm Name>>⁵⁸
By: _____
Rachel A. Felder (RF-XXXX)⁵⁹
<<Attorney's Address>>
<<City, State>>
<<Phone number>>
Attorney for Plaintiff
Robert K. Simms

58. If you are submitting your memorandum of law *pro se*, you should put your name here.

59. If you are submitting your memorandum of law *pro se*, you should put your name, address, and contact information (including your "inmate number," if applicable,) here.

CHAPTER 7

FREEDOM OF INFORMATION*

A. Introduction

This Chapter describes laws that allow you to request copies of government documents and files. There are several reasons why these documents might be useful to you: you may want to review copies of your files and rap sheets to make sure they are accurate and complete; you may want to get copies of internal memoranda and manuals that explain procedures prison officials must follow; and, if you are preparing to sue the government, you can use a Freedom of Information Request to gather support for your case.

All fifty states and the District of Columbia have passed some sort of state open records laws.¹ Many of these laws are modeled on the federal Freedom of Information Act, but this Act does not apply to state or municipal agencies, including state prison systems. Only *state* freedom of information laws grant access to state and local government records.

There are specific procedures that you must follow depending on the type of information you are requesting. Each agency has a different procedure for accessing information. It would be impossible in this Chapter to outline the procedures for every agency. Instead, this Chapter will give you an overview as to the law itself and what rights you have under the Freedom of Information Act (“FOIA”), the Privacy Act (“PA”), and the New York Freedom of Information Law (“FOIL”). Be sure to check the specific procedures for your particular request before filing an information request.

Part B of this Chapter outlines the laws that allow you to get documents from the federal government under FOIA. Part C discusses FOIL. Incarcerated people in other states should still read Part C to get an idea of the types of documents incarcerated people most often request and look carefully at the provisions of their state’s freedom of information statute. Part D contains an address for the Federal Citizen Information Center—if you need help figuring out which federal agency to contact, write or call the Federal Citizen Information Center for help. Appendix A contains a list of state freedom of information laws. Appendix B of this Chapter contains a form to use to request information from the Department of Justice (“DOJ”) and other federal agencies. Appendix C contains sample letters for filing a FOIA or PA request and/or appeal. Appendix D lists addresses of organizations and federal government agencies that can provide more help.

B. The Federal Freedom of Information Act

1. Overview & History

Your right to access the files of the United States government is established by two federal laws: the Freedom of Information Act² and the Privacy Act.³ These laws have been tremendously successful in enabling public access to government files. The Freedom of Information Act (“FOIA”) allows you to request all public documents, including records that relate to you. The Privacy Act (“PA”) deals only with personal files. It gives you the right not only to look at your own records, but to correct, change, or remove records that contain incorrect, irrelevant, or incomplete information about you. If your request is incorrectly denied or ignored, you can sue under both laws in federal court.

FOIA and the PA implement one of the basic principles of democracy—the public’s right to know what its government is doing. As written, FOIA gives access to all government records unless they fall

* This Chapter was written by Benjamin Van Houten based in part on previous versions by Laura Burdick, Geraldine R. Eure, Susan Widule, and Saleemah Ahamed.

1. See Appendix A.
2. 5 U.S.C. § 552.
3. 5 U.S.C. § 552a.

into one of nine categories of materials that agencies are allowed, but not required, to withhold.⁴ In practice, however, there are often administrative obstacles to getting records, and you will probably not get immediate access to everything you think you are entitled to.

2. What Agencies Are Covered & What Records Are Available

FOIA applies to documents held by agencies in the executive branch of the *federal* government. These agencies include:

- (1) Military departments;
- (2) Cabinet departments, including the Department of Justice (which controls both the Federal Bureau of Investigation (“FBI”) and federal prisons);
- (3) Departments of the Executive Branch (such as the Department of Defense);
- (4) Independent federal agencies (such as the Environmental Protection Agency (“EPA”));
- (5) Government-controlled corporations (such as the United States Postal Service (“USPS”)).

FOIA does not apply to documents held by federal courts or by Congress.⁵ FOIA also does not apply to documents held by “the President’s immediate personal staff or units within the Executive Office whose sole function is to advise and assist the President.”⁶ FOIA does not apply to state or local governments, including state prison systems; these are usually covered by separate laws.⁷

FOIA allows you to look at almost all records under a federal agency’s control.⁸ The Supreme Court has defined an “agency record” as a document that is (1) either created or obtained by the agency, and (2) under control of the agency at the time of the FOIA request.⁹ Agency records may include many different types of information, such as papers, reports, letters, films, computer tapes, photographs, and sound recordings in the possession, custody, or control of an agency. In 1996, Congress made clear that electronically stored information meets the definition of a “record” under FOIA.¹⁰ In addition, the agency must provide you records in any form or format you request, as long as the document is “readily reproducible” by it in that form or format, and the agency must make reasonable efforts to meet your request.¹¹

4. 5 U.S.C. § 552(b). These exemptions are discussed in Part B(3) of this Chapter.

5. 5 U.S.C. §§ 551(1)(A)–(B).

6. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156, 100 S. Ct. 960, 971, 63 L. Ed. 2d 267, 285 (1980), (quoting H.R. Rep. No. 93-1380, at 15 (1974) (Conf. Rep.) (finding that telephone notes taken by Secretary of State Kissinger in his capacity as presidential advisor did not constitute “agency records” under FOIA)); *see also* *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 228–229, 406 U.S. App. D.C. 440, 460–461 (D.C. Cir. 2013) (holding that logs of visitors to the Office of the President are not agency records covered by FOIA); *Sweetland v. Walters*, 60 F.3d 852, 855 (D.C. Cir. 1995) (holding that the Executive Residence is not an agency under FOIA as it does not exercise independent authority); *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993) (holding that the determination of whether an entity is an “agency” depends on how closely it operates with the President, the nature of its delegation from the President, and whether it has a self-contained structure).

7. State government records can be obtained using state freedom of information laws. The New York Freedom of Information Law is discussed in Part C of this Chapter. *See* Appendix A of this Chapter for a list of the freedom of information laws of all 50 states and the District of Columbia.

8. 5 U.S.C. § 552(a)(3)(A).

9. *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 144–145, 109 S. Ct. 2841, 2848, 106 L. Ed. 2d 112, 125 (1989) (holding that court opinions that were a part of the agency files are “agency records”) and should be made available under FOIA); *see also* *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 216–217, 406 U.S. App. D.C. 440, 448–449 (D.C. Cir. 2013) (explaining when files in control of an agency become “agency records”).

10. 5 U.S.C. § 552(f) reads: “For purposes of this section, the term ... ‘record’ and any other term used in this section in reference to information includes ... any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.” This language includes computer disks, CD-ROMs, microfiche, microfilm, and all other digital or electronic media.

11. *See Ancient Coin Collectors Guild v. U.S. Dept. of State*, 641 F.3d 504, 514, 395 U.S. App. D.C. 138, 148 (D.C. Cir. 2011) (holding that an agency “fulfills its obligations under FOIA ‘if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents’”); *Miller v. U.S. Dept. of State*,

FOIA does not allow you to demand answers to questions. The information must already be contained in an existing agency record. An agency is not obligated to create a new record, collect information it does not have, or research or analyze data to meet your request. Your requests for records must “reasonably describe” the material you want.¹² This does not mean you need to know a specific document or file number, but your request should be specific enough that a government agency employee familiar with the subject area of your request can locate the records with a reasonable amount of effort. Also, a records request under FOIA and the PA must be in writing and must include proper identification as listed.

The PA grants you the power to look at any record within an agency’s files that applies to you.¹³ Under the PA, as long as you are either a U.S. citizen or an alien lawfully admitted for permanent residence (“LPR”), you may apply to look at any records about yourself that are kept in the executive branch of the federal government.¹⁴ In other words, a U.S. citizen or LPR can look at any records that are filed according to his or her name, social security number, or some other personal identifier. Detailed information about how to access agency records can be found in Part B(4) of this Chapter, “How to Make Your Request.”

3. Exemptions to Record Availability Under FOIA and the PA

FOIA exempts nine categories of materials; in other words, the government does not need to disclose material fitting into any one of these nine categories. However, an agency may not withhold an entire file or document just because part of it is exempt. The agency can only withhold those parts of the record falling within the exemption.¹⁵ In addition, FOIA exemptions are not mandatory. Agency officials can choose to waive the exemptions and release the materials even if they fall within one of the nine categories, unless another statute specifically limits or prohibits disclosure of that kind of information.

Relevant FOIA exemptions include:¹⁶

- (1) Records that should be kept confidential in the interests of national defense or foreign policy;
- (2) Documents “related solely to the internal personnel rules and practices of an agency.” In practice, this is a very limited exemption because if a person outside the agency can show a legitimate interest in the records, the material cannot be of “solely” agency interest;¹⁷

779 F.2d 1378, 1383 (8th Cir. 1985) (noting that a department must only make reasonable, but not exhaustive, efforts to respond to a FOIA request); *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993) (holding that the agency should issue an affidavit that describes how the search was conducted and how the agency’s filing system would make further search difficult when the adequacy of an agency’s attempt to respond to a FOIA request is at issue.). The new statute rejects *Dismukes v. Dept. of the Interior*, where the court held that an agency has no obligation under FOIA to accommodate the plaintiff’s preference for a specific form or format of the records. *Dismukes v. Dept. of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984).

12. 5 U.S.C. § 552(a)(3)(A).

13. For exemptions, see 5 U.S.C. §§ 552a(j)–(k).

14. 5 U.S.C. § 552a(a)(2); 5 U.S.C. § 552a(d)(1). This is different from FOIA, which gives access rights to “any person” regardless of citizenship status. 5 U.S.C. § 552(a)(3).

15. 5 U.S.C. § 552(b).

16. 5 U.S.C. §§ 552(b)(1)–(7). The other two rarely used exceptions to FOIA concern government regulation of financial institutions and geological/geophysical information. Please refer to the statute, 5 U.S.C. §§ 552(b)(8)–(9), for more information.

17. *See Milner v. Dept. of Navy*, 562 U.S. 562, 581, 131 S. Ct. 1259, 1271, 179 L. Ed. 2d 268, 284–285 (2011) (holding that Exemption 2 “encompasses only records relating to issues of employee relations and human resources”); *Dept. of Air Force v. Rose*, 425 U.S. 352, 369–370, 96 S. Ct. 1592, 1603, 48 L. Ed. 2d 11, 26 (1976) (holding that Exemption 2 does not apply to matters of “genuine and significant public interest” and observing that Congress’ purpose in enacting Exemption 2 was “to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest”).

- (3) Matters “specifically exempted from disclosure” by other federal statutes. There are two ways that an agency can claim this exemption. First, they can say that a federal statute requires that the agency withholds this type of information. Second, the agency could also argue that a federal statute created requirements for withholding information, and that the agency has met those requirements. The agency must also show that the statute applies the material they are trying to withhold.¹⁸ Unfortunately, there is not a list of every statute that lets agencies withhold certain information. Additionally, some of these statutes have separate requirements for agencies’ disclosure of information. But, even if the statute has different procedures for disclosing documents, you should always make your request for records under FOIA.
- (4) “Trade secrets and commercial or financial information” given to the government with the expectation that they would be kept secret;
- (5) “Inter-agency or intra-agency memorandum or letters.” This exemption protects communications that are meant to be distributed only within the government and that contain advice, opinions, and recommendations that officials offer to each other. This exemption may not be used to withhold facts, agency decisions, or policies;
- (6) “Personnel and medical files and similar files” which could not be released to someone other than the subject of the file without resulting in an “unwarranted invasion of personal privacy.” The files must contain information about someone so intimate that the person could claim an invasion of privacy. Such information includes marital status, legitimacy of children, welfare payments, family fights and reputation,¹⁹ medical details and conditions,²⁰ “rap sheets,”²¹ and the incarceration of United States citizens in foreign prisons.²²
- (7) All “records or information compiled for law enforcement purposes.” In addition to federal law enforcement, this exemption may also apply to records compiled to enforce state law.

18. See *McDonnell v. United States*, 4 F.3d 1227, 1249 (3d Cir. 1993) (noting that the burden of showing that a document falls within the scope of a statute and is exempt rests on the government); see generally *ACLU of New Jersey v. F.B.I.*, 733 F.3d 526, 531 (3d Cir. 2013) (noting that the agency bears the burden of justifying the withholding of information under a FOIA exemption); *Church of Scientology of California v. U.S. Dept. of Army*, 611 F.2d 738, 742 (9th Cir. 1979) (explaining that the burden of showing a document is exempt from disclosure falls on the agency that is refusing to disclose).

19. See *Rural Hous. Alliance v. U.S. Dept. of Agric.*, 498 F.2d 73, 76–77 (D.C. Cir. 1974) (holding that an investigation report containing detailed personal and medical information of persons allegedly discriminated against by the Department of Agriculture were “within the class of similar files” and its disclosure depended on whether it would result in a “clearly unwarranted invasion of personal privacy”); but see *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 194 (2d Cir. 2012) (holding that “[w]here public interest favoring disclosure is no more than minimal, a lesser privacy interest suffices to outweigh it”).

20. See *Yonemoto v. Dept. of Veterans Affairs*, 686 F.3d 681, 696 (9th Cir. 2012) (finding that excluding information about the type of medical illness causing an employee to be absent from work was proper under Exemption 6); *McDonnell v. United States*, 4 F.3d 1227, 1254 (3d Cir. 1993) (noting that a “living individual” may have a “strong privacy interest in withholding his medical records” that outweighs a public request); *Rural Hous. Alliance v. U.S. Dept. of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (holding that Exemption 6 of FOIA covered a USDA report that included, among other things, individual’s medical condition and history); *Brown v. FBI*, 658 F.2d 71, 74–76 (2d Cir. 1981) (upholding denial of plaintiff’s request for FBI files that included an individual’s possible involvement with illegal drugs because that information falls within Exemption 6).

21. See *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780, 109 S. Ct. 1468, 1485, 103 L.Ed.2d 774, 800 (1989) (holding that a third-party request for an individual’s rap sheet when the request does not seek official information about a government agency is an unwarranted invasion of privacy).

22. See *Harbolt v. Dept. of State*, 616 F.2d 772, 774 (5th Cir. 1980) (holding disclosure of names and addresses of U.S. citizens imprisoned in foreign countries on narcotics offenses would be an unwarranted invasion of their privacy).

Exemption 7 covers many records.²³ For example, law enforcement manuals satisfy the requirements of Exemption 7 and may not be subject to disclosure. Other materials will fall under Exemption 7²⁴ if they:

- (1) Might “interfere with [law] enforcement proceedings.” This includes federal and state court proceedings. If release of records could, for example, reveal the government’s evidence or strategy in a criminal case, then that release can be properly excluded;²⁵
- (2) “Would deprive a person [other than yourself] a right to a fair trial”;
- (3) Might “constitute an unwarranted invasion of personal privacy.” The majority of courts have held the identities of law enforcement personnel are exempt unless you can show proven, significant misconduct on the part of the investigators.²⁶ In other words, the names of law enforcement personnel will usually not be revealed;
- (1) Might “disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis.” Confidential sources may include persons with a close relationship to you or the victim, or persons who have a reasonable fear of retribution.²⁷ If the information is confidential, given to the agency by one source only, and collected in the course of a criminal investigation, agencies are permitted to withhold all of the information provided by that source;
- (2) Would disclose investigative techniques, procedures, or guidelines for law enforcement investigations or prosecution that would create a risk of people circumventing the law. This exemption is limited to techniques, procedures, or guidelines not generally known to the public, or not generally known by the public to be useful, and applies even when the government only expects that disclosure would create a risk of people evading the law;²⁸

23. See 5 U.S.C. § 552(b)(7); see also *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9, 109 S. Ct. 1468, 1473 n.9, 103 L.Ed.2d 774, 785 n.9 (1989) (noting the shift “from ‘the would constitute’ standard to ‘the could reasonably be expected to constitute’ standard represents a considered congressional effort ‘to ease considerably a federal law enforcement agency’s burden in invoking [Exemption 7]’”) (citation omitted) (alterations in original).

24. See 5 U.S.C. § 552(b)(7) (listing instances where production of law enforcement records would be exempt).

25. See *Lynch v. Dept. of the Treasury*, No. 98-56358, 2000 U.S. App. LEXIS 1392, at *9–13 (9th Cir. Jan. 8, 2000) (stating that even though the agency that was party to the trial had closed its investigation, an ongoing interagency task force was sufficient reason for the Department of the Treasury to deny access to the information); *Manna v. U.S. Dept. of Justice*, 51 F.3d 1158, 1164–1165 (3d Cir. 1995) (affirming a district court’s finding that government records were properly denied under Exemption (b)(7)(A) because disclosure of such information would interfere with future prosecutions and deny sources confidentiality that they were assured).

26. See, e.g., *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 194 (2d Cir. 2012) (holding that “[w]here public interest favoring disclosure is no more than minimal, a lesser privacy interest suffices to outweigh it,” such as when the identities of federal employees may invade personal privacy); *Sutton v. IRS*, No. 05 C 7177, 2007 U.S. Dist. LEXIS 299, at *18, 99 A.F.T.R.2d (RIA) 387 (N.D. Ill. Jan. 4, 2007) (holding that the court should balance the public’s interest in disclosure against the interest in non-disclosure of personal information); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) (holding that government employees have a privacy interest in concealing their identities but that that interest must be balanced against the public interest in disclosure); *Anderson v. US Dept. of Justice*, No. 95-1888 (TFH), 1999 U.S. Dist. LEXIS 4731, at *8–9 (D.D.C. Mar. 31, 1999) (finding that the names of government witnesses clearly constitute information compiled for law enforcement purposes.)

27. See *Hale v. U.S. Dept. of Justice*, 226 F.3d 1200, 1202, 1204–1205 (10th Cir. 2000) (reaffirming test for confidentiality required case by case analysis, and holding that identity of witnesses properly withheld because they otherwise wouldn’t have spoken to the FBI); see also *Hodge v. F.B.I.*, 703 F.3d 575, 581–582, 403 U.S. App. (D.C. 255, 261–262 (D.C. Cir. 2013) (holding that names of witnesses were properly withheld where they had been assured that they would remain confidential).

28. See *Blackwell v. F.B.I.*, 646 F.3d 37, 42, 396 U.S. App. D.C. 164, 169 (D.C. Cir. 2011) (noting Exemption 7(E) sets a relatively low bar, and holding that documents containing information on FBI forensic examination procedures were properly excluded from FOIA request); see also *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193–1194, 385 U.S. App. D.C. 250, 254, 103 A.F.T.R.2d (RIA) 1799 (D.C. Cir. 2009) (affirming that the IRS did not have to disclose documents if revealing them could reasonably be expected to risk helping or training a person to break the law, especially because tax crimes involve a cost-benefit analysis).

- (3) Might “endanger the life or physical safety of any individual.” This is a frequently claimed exemption, because while it is similar to (7)(c), it does not require the court to consider the public interest in its decision.²⁹

While FOIA requesters are generally sent copies of the information they have requested, there may be instances when the agency may only allow you to see the documents. In *Tax Analysts v. United States Department of Justice*, one court noted that an agency does not need to respond to a FOIA request for copies of documents when the agency has provided another way of accessing the same information.³⁰ For example, if an agency makes the requested information available in a public reading room, this is enough to satisfy that agency’s obligation under FOIA.³¹ Therefore, if an agency itself declines to send you copies of the requested information, it must provide you with another form of access.³²

The Privacy Act (PA) also has exemptions to releasing documents. These exemptions are much broader than the FOIA exemptions. The nine PA exemptions are:³³

- (1) Material maintained by the Central Intelligence Agency (“CIA”);³⁴
- (2) Material maintained by a law enforcement agency. This includes police, corrections, and prosecutors’ offices;³⁵
- (3) Material that is “properly” secret in the interests of national defense or foreign policy;³⁶
- (4) Material gathered for criminal investigative law enforcement purposes by agencies whose principal function is not law enforcement;³⁷
- (5) Material contained in Secret Service record systems, relating to protection of the President and others whom the Secret Service protects;³⁸
- (6) Material required by statute to be maintained and used only as statistical records;³⁹

28. *Anderson v. U.S. Dept. of Justice*, No. 95-1888 (TFH), 1999 U.S. Dist. LEXIS 4731, at *10–11 (D.D.C. Mar. 31, 1999) (finding the incarcerated person could not obtain witness names from a police lineup because it could have subjected them to harassment and threats); *Ferreira v. Drug Enf’t Admin.*, 874 F. Supp. 15, 17 (D.C. Cir. 1995) (holding that the DEA properly withheld the names and identities of agents when the disclosure could reasonably be expected to endanger their life or physical safety).

30. *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, 1067, 269 U.S. App. D.C. 315, 322 (D.C. Cir. 1988), *aff’d*, 492 U.S. 136, 109 S. Ct. 2841, 106 L.Ed.2d 112 (1989) (holding an agency may satisfy its FOIA obligations by simply making extra copies of documents available in its public reading room; it does not have to mail copies of records).

31. *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, 1067, 269 U.S. App. D.C. 315, 322 (D.C. Cir. 1988) (holding an agency may satisfy its FOIA obligations by simply making extra copies of documents available in its public reading room; it does not have to mail copies of records), *aff’d*, 492 U.S. 136, 109 S. Ct. 2841, 106 L.Ed.2d 112 (1989); *see also* *Oglesby v. U.S. Dept. of the Army*, 920 F.2d 57, 70, 287 U.S. App. D.C. 126, 139 (D.C. Cir. 1990) (finding an agency is not required to mail information in response to a FOIA request when that information has been made available to the public in another format); *Grunfeld & Harrick v. U.S. Customs Serv.*, 709 F.2d 41, 42–43 (11th Cir. 1983) (holding an agency was not required to mail documents in response to a FOIA request when the documents were available for viewing and copying at the customhouse in Puerto Rico).

32. *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, 1067, 269 U.S. App. D.C. 315, 322 (D.C. Cir. 1988) (holding an agency may not avoid producing its records in response to a FOIA request by directing the requester to a public source outside the agency that has the same information).

33. 5 U.S.C. §§ 552a(j)–(k). *See, e.g.*, *Bassiouni v. FBI*, 436 F.3d 712, 724–725 (7th Cir. 2006) (where the FBI refused to amend a person’s file, which contained 25 to 30-year-old memoranda pertaining to his activities concerning the Middle East, the district court properly granted the FBI summary judgment on the person’s action under the Privacy Act because the memos were pertinent to the FBI’s law enforcement activity.)

34. 5 U.S.C. § 552a(j)(1).

35. 5 U.S.C. § 552a(j)(2). To be exempt, the record by an agency under this section must consist of information compiled to identify individual criminal offenders and alleged offenders; information compiled for criminal investigation, including reports of informants and investigators; or reports identifiable to an individual that were compiled at any stage of the process of enforcement of the criminal laws.

36. 5 U.S.C. § 552a(k)(1).

36. 5 U.S.C. § 552a(k)(2).

37. 5 U.S.C. § 552a(k)(3).

38. 5 U.S.C. § 552a(k)(4).

- (7) Material that identifies individuals who were promised that their identity would be kept secret when they provided information to the government as part of a background check for a job application;⁴⁰
- (8) Material related to testing or examination used only to determine individual qualifications for appointment or promotion in the federal service;⁴¹ or
- (9) Material that would identify individuals who were promised that their identity would be kept secret when they provided information used in promotion decisions for members of the armed forces.⁴²

You should always request information under both FOIA and the PA. Agencies may not hide the information from you when it is exempt under one statute, but not exempt under the other.⁴³ In other words, “[i]f a FOIA exemption covers the documents, but a Privacy Act exemption does not, the documents must be released under the Privacy Act; if a Privacy Act exemption but not a FOIA exemption applies, the documents must be released under FOIA.”⁴⁴

Do not let the exemptions stop you from making requests, as the records may be available under an agency or court interpretation. In addition, agencies are not required to keep the information from you just because a particular exemption *could* be applied. Agency officials can choose to not follow the exemptions and give you the materials you requested. If information is withheld, you can challenge that decision by writing an administrative appeal letter or filing a lawsuit.

4. How to Make Your Request for Information from the Department of Justice

As noted above, every agency has a very specific procedure that you must follow in order for your FOIA or PA request to be granted. This Subsection will only describe the procedures that you must follow if you are seeking to request information from the DOJ. To get information from other agencies, or if you do not know which agency holds the information you want, you can check up on any government directory or the “United States Government Manual.”

To order a \$33 copy of the “United States Government Manual,” send requests to:

Superintendent of Documents
P.O. Box 371954
Pittsburgh, PA 15250-7954,

Your mail order must include a check, money order, GPO Deposit Account, VISA, Master Card, or Discover payment. Cash is not accepted.

You can also call the Government Publishing Office at (202) 512-1800 or access <http://www.usgovernmentmanual.gov/> on the Internet to buy or download the manual.

In general, if you request information from the DOJ, you should try to send your request to the specific division that has the records you want.⁴⁵ If you are uncertain about which division to write to, you can send your request to the DOJ's FOIA/PA Mail Referral Unit, and someone in that division will forward your letter to the division they think most likely to have the information you want. All requests should be in writing.

Send requests to:

FOIA/PA Mail Referral Unit, Justice Management Division
Attn: FOIA Request

39. 5 U.S.C. § 552a(k)(5).

40. 5 U.S.C. § 552a(k)(6).

41. 5 U.S.C. § 552a(k)(7).

43. 5 U.S.C. § 552a(t)(1)–(2).

44. *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1184 (D.C. Cir. 1987) (denying disclosure of information requested by Appellee as such disclosure was exempted by both the PA and the FOIA).

45. See *Organizational Chart*, U.S. DEPT. OF JUSTICE, available at <https://www.justice.gov/agencies/chart> (last visited Jan. 27, 2019), for more information about each division. For a list of FOIA contacts at the DOJ, see *Find A FOIA Contact at DOJ*, U.S. DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/find-foia-contact-doj/list> (last visited Jan. 27, 2019).

Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
(301) 583-7354
Fax (301) 341-0772

The rest of this section addresses how to make a request for information from two divisions of the DOJ: the Federal Bureau of Prisons (“BOP”) and the FBI. It discusses the fees that you will be charged for making such requests, the types of responses you may receive from either the FBI or the BOP, and the appeals process, which may be useful if your request is denied.

(a) Requesting Information from the Federal Bureau of Prisons

The BOP maintains records on current and former prisoners of the federal penal and correctional institutions, as well as records relating to the administration of the agency. Part (i) of this Subsection describes how to request information from your institution and Part (ii) describes how to request information from the BOP under FOIA and the PA.

(i) Requesting Information from Your Institution⁴⁶

If you would like access to your Inmate Central File, the BOP encourages you to request this information from your institution. Many records within the Inmate Central File can be disclosed without you having to file a FOIA request. These include records relating to your sentence, detainer, participation in programs, classification data, parole information, mail, visits, property, conduct, work, release processing, and general correspondence. You can also request access to some medical records from your institution.

The Warden of your institution should have selected a staff member to receive requests for access to these records. In order to request access to your Inmate Central File or medical records, you should submit a request to this person, who must promptly schedule a time for you to review your file.

Staff members must tell you if there are documents in your Inmate Central File or medical records withheld from you. If you would like access to these withheld documents, you will need to make a FOIA and PA request.

(ii) Requesting information from the BOP under the FOIA and the PA

To file a request for information from the BOP under FOIA, including any information withheld from your review of your Inmate Central File or your medical records, or any other records, your request should:⁴⁷

- (1) Be in writing;
- (2) Be clearly marked “Freedom of Information Act/Privacy Act Request” on the front of the letter *and* the envelope;
- (3) Clearly describe the records you seek, including the approximate dates covered by the records; you do not need to know the name of the records, but being as specific as possible helps the DOJ to locate your records.

46. Information regarding making requests from your institution can be found in BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT NO. 1351.05, RELEASE OF INFORMATION (Sept. 19, 2002, revised Mar. 9, 2016), *available at* https://www.bop.gov/policy/progstat/1351_005_CN-2.pdf (last visited Jan. 27, 2019).

47. *See* BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT NO. 1351.05, RELEASE OF INFORMATION (Sept. 19, 2002, revised Mar. 9, 2016), *available at* https://www.bop.gov/policy/progstat/1351_005_CN-2.pdf (last visited Jan. 27, 2019); *IV. How to Make a FOIA Request*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, *available at* <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

- (4) Include your full name, current address, date of birth, place of birth, and social security number (if you have one); and
- (5) Include your federal register number and institution where last housed.

You must also verify your identity in one of the following ways:

- (1) Complete and sign Form DOJ-361 (See Appendix B);
- (2) Have the signature on the request witnessed by a notary; or
- (3) Include the following statement before the signature on the requested letter: "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date]."

The DOJ has stated that "[i]f you request information about yourself and do not follow one of the procedures [described above], your request cannot be processed."⁴⁸ If you are seeking personal information, make sure that you provide the necessary identification information.

If you are requesting information about someone other than yourself, the information will not be given to you unless:

- (1) You provide a statement by the other person specifically authorizing the release of information; the statement must be signed by that person and either witnessed by a notary or include a declaration made under penalty of perjury; or
- (2) You provide evidence that the subject of the request is deceased, such as a death certificate, or some comparable proof of death such as a newspaper obituary.

Having completed these steps, you may mail your request to⁴⁹:

FOIA/PA Section
Office of General Counsel, Room 924
Federal Bureau of Prisons
320 First Street, N.W.
Washington, DC 20534

If you have access to the internet, you may also submit a request online through the BOP website. The website can be accessed at <https://www.bop.gov/foia/#tabs-5> The FOIA Requester Service Center can be reached by telephone at (202) 616-7750, and the FOIA Public Liaison can be reached at (202) 616-7750.

(b) Requesting Information from the FBI

The FBI collects evidence in legal cases in which the United States is, or may be, an interested party and investigates violations of certain federal statutes.⁵⁰ Requests for information under FOIA and/or under the PA from the FBI should be addressed to:

Record/Information Dissemination Section
Federal Bureau of Investigation
Department of Justice
170 Marcel Drive
Winchester, VA 22602-4843

To request any information from the FBI, under either FOIA or the PA, your request must:

- (1) Be in writing;

48. *IV. How to Make a FOIA Request*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

49. *Freedom of Information Act*, BUREAU OF PRISONS, available at <https://www.bop.gov/foia/#tabs-5> (last visited Jan. 27, 2019).

50. See 28 U.S.C. §§ 535, 540–540b (describing various crimes that the FBI is authorized to investigate, for example, crimes involving government officers and employees and killing of state or local law enforcement officers).

- (2) Provide your full name;
- (3) Provide your date and place of birth; and
- (4) Either be notarized by a notary public, or include the following statement before the signature on the letter: "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date]."

Call FOIA Requester Service Center at (540) 868-1535 to access recorded information on how to submit a new FOIA/PA request to the FBI. Call (540) 868-4593 about the status of an existing FOIA/PA request to the FBI.

If you are requesting information about someone else and that person is alive, your request must include a waiver signed by that person and verified by a notary public. You must also include the person's full name as well as his or her date and place of birth. If you are requesting information about someone who is deceased, you must provide that person's name and proof of death, either in the form of an obituary, death certificate, or published record that indicates the person is actually dead.⁵¹

(c) Fees

Within a reasonable amount of time after your request, staff should provide you with copies of the disclosable documents from your Inmate Central File and/or medical records. Copies cost ten cents per page. In addition, you will be charged a fee for the search time required to process your request. The cost of search time is \$2.25 per fifteen minutes for clerical staff, \$4.50 per fifteen minutes for professional staff, and \$7.50 per fifteen minutes for managerial staff. You will not be charged for the first 100 pages of copies or the first two hours of search time, and you will only be charged for fees that total above \$8.00.⁵²

When you file either a FOIA or PA request with the DOJ, the Department assumes that you are willing to pay fees up to \$25. Most of the time, no fees are ever charged.⁵³ However, if you cannot, or do not want, to pay \$25, you should state how much you can pay in your request letter. If the DOJ estimates that your fees will be more than \$25, they will let you make a cheaper request or ask you to agree to pay the estimated amount before they process your request. According to the DOJ website, "[y]ou ordinarily will not be required to actually pay the fees until the records have been processed and are ready to be sent to you."⁵⁴

You can also request a fee waiver. To get a fee waiver, you must show you are requesting the information to benefit the public, not your own interests. Because you are requesting records about yourself, you will probably not meet this standard.⁵⁵ You cannot get a fee waiver just because you cannot pay for it.⁵⁶ If you are entirely without a way to pay, you can ask for a fee waiver for that reason, but the DOJ usually denies such requests.

51. *Requesting FBI Records*, FBI, available at <https://www.fbi.gov/services/information-management/foipa/requesting-fbi-records> (last visited Jan. 27, 2019).

52. See BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT NO. 1351.05, RELEASE OF INFORMATION 21-22 (Sept. 19, 2002, revised Mar. 9, 2016), available at https://www.bop.gov/policy/progstat/1351_005_CN-2.pdf (last visited Jan. 27, 2019).

53. VII. *Fees*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

54. VII. *Fees*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

55. VIII. *Fee Waivers*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019) (stating that requests for fee waivers from individuals who are seeking records pertaining to themselves usually do not meet this standard).

56. VIII. *Fee Waivers*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

(d) Initial Response to Requests

Once a division of the DOJ has processed your request and any fee issues have been resolved, the division will send you a response. This response may either be (1) the information you requested, (2) some of the information you requested and a letter explaining why part of your request was denied, or (3) a letter explaining why your entire request was denied. If information is being withheld, the letter will tell you whether the information is being withheld because of one of the exemptions to the PA or FOIA. Also, note that in some cases you may receive the documents a short time after you receive this response.

The BOP should respond to your request within twenty business days, not counting Saturdays, Sundays, and legal holidays. The twenty-day period begins when the BOP's FOIA office receives your request. The BOP may extend the initial response time an additional ten business days when one of the following applies:

- (1) Records must be collected from field offices;
- (2) A "voluminous" (large) quantity of records must be located, compiled, and reviewed in response to the request; or
- (3) The request requires that the BOP consult with another agency that has a substantial interest in the information, or among two or more other DOJ Divisions.

When the BOP needs more time to process your request, they will inform you in writing and give you the opportunity to modify your request.⁵⁷

5. What to Do if Your Request is Denied

If your initial request is denied, you should first file an administrative appeal with the agency from which you are requesting information. If your administrative appeal is also denied, you can file a lawsuit.

(a) Filing an Appeal

You should file an appeal if you are not satisfied with the response you have received to your FOIA request. Your appeal should be:

- (1) In writing;
- (2) Marked "Freedom of Information Act Appeal"—both on the front of the envelope and on the appeal itself;
- (3) Received within sixty days of the date on the DOJ's initial letter; and
- (4) Addressed to:

Office of Information Policy
United States Department of Justice
Attn: Freedom of Information Act Appeal
Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001

Your appeal should include the name of the Component (office within the agency) that denied your request, the initial request number the Component assigned to the request, and the date of the BOP's action. If no request number has been assigned, you should try to enclose a copy of the BOP's determination letter with your appeal. You should also explain your reasons for disagreeing with the BOP's denial of your request. Do not attach specific documents unless they are directly related to a

57. *IV. How to Make a FOIA Request*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

point you are making in the appeal.⁵⁸ Once your appeal has been received, it will be reviewed by an attorney in the Office of Information Policy (“OIP”). At that point, the OIP will either (1) affirm the BOP’s decision, (2) affirm part of the BOP’s decision and release other information requested, or (3) reverse or modify the original decision and send the request to the BOP to reprocess the request.⁵⁹

(b) Filing a Lawsuit

If the appeal does not get you the information you requested, you can file a lawsuit to force the agency to release the documents. You have up to six years after the date on which your administrative appeal was denied to file a lawsuit,⁶⁰ but you should try to file as soon as possible to show the court that you need the information.

Filing a FOIA complaint should be relatively cheap and simple.⁶¹ Sometimes, as soon as the complaint is filed, the government will release the documents without further litigation. If you are denied documents that you think are clearly covered by FOIA, you may wish to draft and file your own short-form complaint. In addition, you should consider filing a “Motion for a *Vaughn* Index” using the sample *Vaughn* motion reproduced in Appendix C-5 at the end of this Chapter.⁶² This is a routine motion under which the government agency will be required to give you an detailed list describing the documents it is withholding and the reason it claims for withholding each.

After you file your complaint, the burden is on the government to come forward and justify why it is withholding the information.

C. Conclusion

While FOIA can be a great tool to get documents related to your case or your life, it is important to follow the procedural rules. Of note, many states have passed their own Freedom of Information laws, with their own procedures for requesting documents. If you are considering filing a Freedom of Information request to a state agency under a state law, make sure you read the relevant state laws—some states do not have a fee waiver provision like the federal Freedom of Information Act. Also, know that it can take many months to receive a final response to your FOIA request. However, if you believe that FOIA information will be helpful for you or your case, it never hurts to file one just in case.

58. *X. Administrative Appeals*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

59. See 28 C.F.R. § 16.8(c) (2018); *X. Administrative Appeals*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

60. 28 U.S.C. § 2401(a).

61. Various resources are available to help jailhouse lawyers filing FOIA lawsuits. The names of several organizations that will advise, though usually not represent, FOIA litigants can be found in Appendix D-1 of this Chapter.

62. This procedure was adopted in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (instructing trial court to provide itemized index of disclosable and exempt documents, with justifications for exemptions).

CHAPTER 8

OBTAINING INFORMATION TO PREPARE YOUR CASE: THE PROCESS OF DISCOVERY*

A. Introduction

This Chapter is an overview of the general rules of discovery. Discovery is the process that allows you to ask your opponent for information he may have that you think you should present in your case. Your opponent can also use the discovery process to get information from you. Discovery also allows you to get information from other sources, like co-defendants or potential witnesses. Discovery usually takes place before the trial begins. In a civil action¹, the process starts after the “complaint” (document that begins a suit) has been filed. In a criminal action, it generally starts after the defendant has been “arraigned” (brought before the court to plead to the charge brought against him).

Discovery is governed by a fairly complicated set of rules.² It is important for you to know the rules for two reasons. First, you need discovery to get the information you need to fully prepare your case for trial. Second, you must know how to respond to your opponent’s requests for information. Discovery is a privilege and a responsibility; when you file a suit, you have the right to obtain information from your opponent, but you also must respond to your opponent’s requests for discovery. If you refuse to comply with proper discovery requests from the other side, your lawsuit may be dismissed.

Discovery rules differ depending on the type of case (civil or criminal) and the type of court in which you are appearing (state or federal). Civil discovery is very broad and has relatively few restrictions. Criminal discovery, on the other hand, is quite different and limited. Regardless of the information given in this Chapter, you must always check the appropriate rule yourself, in addition to any cases interpreting the rule. You should also “Shepardize” (or check that they are still valid) the rules and the cases, since the rules change quite frequently. Chapter 2 of the *JLM*, “Introduction to Legal Research,” explains Shepardizing and other methods of legal research.

Discovery is intended to:

- (1) narrow and clarify the issues that will be presented to the court;
- (2) find out the claims of each party;
- (3) find out the important facts and details of your case and your opponent’s case;
- (4) get testimony from witnesses while their memories are fresh, because they might forget details or become otherwise unable to testify later; and

* This Chapter was revised by Paula M. McManus and Roslyn R. Morrison based in part on previous versions by Colleen Romaka, David Lamoreaux, and members of the 1977–78 *Columbia Human Rights Law Review*.

1. A civil action is a private dispute between two or more individuals or parties. For example, a lawsuit about a car accident could be a civil action. In a criminal action, a person is charged with a crime by the government.

2. In federal court, the Federal Rules of Civil Procedure (FED. R. CIV. P.) are used in civil cases, and the Federal Rules of Criminal Procedure (FED. R. CRIM. P.) are used in criminal cases. New York state courts use the Civil Practice Law and Rules (N.Y. CIV. PRAC. LAW & R. or N.Y. C.P.L.R.) in civil cases and the Criminal Procedure Law (N.Y. CRIM. PROC. LAW) in criminal cases. N.Y. CRIM. PROC. LAW is also commonly referred to as C.P.L. Each set of rules contains discovery procedures for the appropriate type of case. For other states, you can find rules of civil and criminal procedure in the state’s Annotated Code or Annotated General Statutes. Also, for most states, West and LexisNexis publish a yearly volume for the state that contains current rules of civil and criminal procedure. West’s publication is *Rules of Court–State*. (For example, if you are looking for information on Connecticut, look to West’s 2014 *Rules of Court–Connecticut*.) LexisNexis’ publication is called *Court Rules Annotated*. (For example, if you are looking for information on New Hampshire, look to LexisNexis’ 2014 *New Hampshire Court Rules Annotated*.) You can often request the volume you need through inter-library loan if your library does not carry it.

- (5) prevent the surprise and delay that would occur if each party knew nothing about the other side's case until the trial happened.

You will know much more about what you will have to prove and disprove to win your case once you have completed the discovery process. You will also know what information you still need in order to be successful.

This Chapter gives you an overview of the discovery rules. Part B addresses the discovery rules for civil lawsuits, while Part C focuses on the discovery rules for criminal cases. Each of these Parts is further divided into two sections: discovery in federal cases and discovery in New York state cases.

B. Civil Discovery

1. Introduction

In a civil case, the defendant (sometimes called “respondent”) is the party being sued. The plaintiff (sometimes called “petitioner”) is the party who filed the suit. Specific rules of civil procedure govern the various ways discovery is conducted in civil cases.³ They vary depending on whether you bring your case in federal or state court.⁴ The federal rules governing civil discovery are discussed in Part B(2) of this Chapter; the New York State rules are discussed in Part B(3). Although the basic ideas are the same, it is important to know the specific rules of the court where you bring your claim. Otherwise, your case may be dismissed early. Also, individual courts and judges can set their own special procedural rules, so you should try to find out if your judge has a special system that you are expected to follow. You can do this by writing to the clerk of the court. The addresses of the federal and state courts in New York are listed in Appendices I and II at the end of the *JLM*.

There is no required form for filing a discovery request, but you should clearly state the information you are seeking and the rule under which you are making your request. Many legal form books contain examples of the many different types of discovery requests.⁵ Selected federal forms are provided in the Appendix at the end of this Chapter. *Do not tear them out of the book*; you must copy them onto your own paper and then fill them out yourself.

2. Federal Discovery Procedures

(a) Introduction

In a civil action in federal court, discovery is governed by the Federal Rules of Civil Procedure, Rules 26–37.⁶ The rules are fairly straightforward and should be relatively easy to follow. There is one basic rule you should keep in mind: *you should always explain how the material you seek is relevant*

3. See FED. R. CIV. P. 26–37 (Depositions and Discovery) (Federal Courts); N.Y. C.P.L.R. 31 (McKinney 2009) (Disclosure) (New York State Courts). Different rules apply depending on whether you are bringing your case federally or at the state level. Although the federal and state rules have different titles, they deal with the same issues. These rules of civil procedure also apply to attacks on a conviction after it is appealed, such as federal or state habeas corpus petitions, and Article 440 motions in New York. See *JLM* Chapters 13, 20, and 21 for information on habeas corpus and Article 440. Note that discovery in a habeas proceeding is only available for a reason the court feels is adequate (“good cause”) and is not automatic. See R. Governing Sec. 2254 Cases in the U.S. Dist. Courts 6(a), *available at* <http://www.uscourts.gov/file/rules-governing-section-2254-and-section-2255-proceedings> (last visited Nov. 28, 2020) (allowing the judge to authorize discovery “for good cause” where the incarcerated person is in state custody); R. Governing Sec. 2255 Proceedings for the U.S. Dist. Courts 6(a), *available at* <http://www.uscourts.gov/file/rules-governing-section-2254-and-section-2255-proceedings> (last visited Nov. 28, 2020) (allowing the judge to authorize discovery “for good cause” where the incarcerated person is in federal custody).

4. Useful summaries of the law governing discovery in federal courts include CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 577–637 (7th ed. 2011) and 6, 7 JAMES WILLIAM MOORE ET. AL., *MOORE’S FEDERAL PRACTICE* Ch. 26–37A (3d ed. 2015).

5. See, e.g., 6, 7 JAMES WILLIAM MOORE, *MOORE’S FEDERAL PRACTICE* Ch. 26–37A (3d ed. 2015).

6. Note that habeas corpus rules differ slightly from discovery rules. See Chapter 13 of the *JLM*, “Federal Habeas Corpus,” and 28 U.S.C. §§ 2246, 2247 (discussing rules about obtaining discovery through depositions and affidavits and admissibility of other documentary evidence).

to your case. Courts will not look kindly on you if you deliberately harass your opponent with irrelevant requests that require a great deal of time or money to respond to. The judge may impose penalties on anyone who abuses the discovery process in this way.⁷ At the same time, the discovery rules are usually applied generously so that each side can get relevant information necessary to pursue his case.

(b) Scope of Discovery

In a civil action, information must be relevant to your case for it to be discoverable.⁸ Furthermore, certain types of information are “privileged,” which means that the information is not subject to discovery and may be kept secret even if it is relevant.

One category of privileged information is communication between people in specific relationships that the law protects and keeps private.⁹ Examples of privileged relationships include those between lawyer and client, doctor and patient, priest and confessor, and spouses (such as husband and wife).¹⁰ Information shared within these relationships is generally privileged. However, the court will balance your privacy interest against the strong public interest in pursuing the truth (because the court will be deprived of the information that could have been provided by the privileged evidence).¹¹ Generally, though, if your opponent requests copies of your personal correspondence, you will not have to give him letters that you wrote to your spouse, lawyer, etc. Of course, this also means that your opponent can withhold such privileged material from you.

Another category of privileged material is trial preparation material, also called “attorney work product.”¹² The work product rule is complicated and not discussed at length in this Chapter. Generally, the rule covers information, analysis, arguments, and opinions prepared by attorneys for trial. You may be able to get access to some factual information if you can show you have a “substantial need”¹³ for it—that is, if you cannot get the information anywhere else and it would be unfair if you did not have it—but the opposing lawyer’s opinions and analyses related to the case will still be protected.¹⁴

If you feel that your opponent has requested privileged material from you, you are responsible for showing the court that the requested material is privileged. If you refuse to respond to a discovery request because you think the information is privileged, you must explain why you think that information is privileged. During this process, however, you should also try to avoid “giving away” the information by describing it in too much detail. This could allow your adversary to gain an advantage over you. Even if you think one discovery request involves privileged material, you must still respond to other discovery requests that do not ask for privileged material. The court may order you to turn over the material if it decides it is not privileged.

7. FED. R. CIV. P. 37(a)(5)(B). Sanctions (penalties) are discussed in FED. R. CIV. P. 37(b)(2).

8. FED. R. CIV. P. 26(b)(1).

9. 81 AM. JUR. 2D *Witnesses* § 272 (2015).

10. See 81 AM. JUR. 2D *Witnesses* § 318 (2015) (describing attorney-client privilege); 81 AM. JUR. 2D *Witnesses* § 398 (2015) (describing doctor-patient privilege); 81 AM. JUR. 2D *Witnesses* § 466 (2015) (describing priest-confessor privilege); 81 AM. JUR. 2D *Witnesses* § 281 (2015) (describing marital privilege).

11. See 81 AM. JUR. 2D *Witnesses* § 276 (2015) (describing the scope of the confidentiality privilege and the court’s ability to balance privacy interest against public interest in disclosure of truth); 81 AM. JUR. 2D *Witnesses* § 274 (2015) (explaining the limitations of the court in expanding or narrowing the confidentiality privileges accepted by the legislature).

12. The rule protecting attorney work product is also called the “Hickman-Taylor rule” because it is based upon the Supreme Court case *Hickman v. Taylor*, 329 U.S. 495, 500–514, 67, S. Ct. 385, 388–397, 91 L. Ed. 451, 456–466 (1947).

13. See, e.g., *In re Grand Jury Subpoena* Dated July 6, 2005, 510 F.3d 180, 188 (2d Cir. 2007) (finding “substantial need” for the documents requested because they were unique evidence that could not be obtained through other means).

14. You cannot, for example, ask your opponent to tell you in advance the argument that he will make at trial. Work product privilege is covered in FED. R. CIV. P. 26(b)(3), which you should read if work product protection becomes an issue in your case.

A second requirement for discovery is that the material requested be “relevant” to the case. Information is relevant when it supports or undermines a fact that either side is trying to prove. Imagine, for example, that you have filed a civil lawsuit for police misconduct at the time of your arrest.¹⁵ In order to prove misconduct, you must identify the officer who you believe was abusive during your arrest. The arrest record will directly support your case on this point because it will state the officer’s name. Therefore, it is fair to say that the arrest record is relevant to your case, and you can ask for it in discovery. However, the officer’s high school report card is probably irrelevant to your case. If you ask for it and the other side objects, the judge will probably rule that the report card cannot be obtained in discovery.

Information is also relevant when it *may lead* to other relevant information. You may request information if there is any reasonable possibility that it will lead you to admissible evidence that you can present at trial.¹⁶ Still using the police misconduct example above, assume that you have found out the officer’s name and are suing the officer personally. You might request the names and addresses of other members of the police department, because these other officers *might* know whether the officer has a violent personality or a history of abusive work practices. You should be able to find out these other officers’ names and possibly ask them questions in a formal setting, which is called “deposing” them (depositions are discussed in Part B(2)(d)(i) of this Chapter). Even though you might not find any useful or admissible information, the discovery rules allow you to try to build your case by obtaining information that may uncover relevant information.

(c) Mandatory Discovery: Rule 26

Rule 26 of the Federal Rules of Civil Procedure is designed to make it easy for you and your opponent to exchange basic information. The rule requires you to meet with your opponent early on and exchange certain information. Below is a brief overview of the rule’s requirements. Since the rule is fairly detailed, you should read the complete text of Rule 26 if you are involved in a federal civil suit. Local courts may suspend some Rule 26 requirements, so you should always check with the court clerk to determine what your exact responsibilities are.

Under Rule 26(f), you and your adversary must meet “as soon as practicable” to discuss your case. The goal of this meeting is to see if you can settle the case without a trial. In addition, the Rule requires the parties to create a “discovery plan.” This means you and your opponent need to set deadlines for discovery.

Within fourteen days after the Rule 26(f) meeting, Rule 26(a)(1)(A) requires you and your adversary to exchange certain basic information such as the names, addresses, and phone numbers of any people who might have discoverable information. (Remember, except for privileged information, any information that is relevant to your case is discoverable.) Your adversary is automatically entitled to Rule 26(a)(1) information, which means you are required to send this information and he does not have to request it. Therefore, you should read this Rule carefully to know what information you are required to send and to determine if your adversary has given you all the information to which you are entitled. For example, Rule 26(a)(2) requires any party who plans to call an expert witness to turn over basic information about the expert’s opinions, experience, and qualifications.¹⁷ In addition, Rule

15. Files from a police officer’s personnel file may be helpful to proving police misconduct. But many states have laws that make it hard to obtain records from a police officer’s personnel file. Even if you bring your lawsuit in *federal* court, the judge might consider the state police-privacy law in deciding whether to release records from an officer personnel file in discovery. For example, in *Cody v. N.Y. State Div. of State Police*, 2008 WL 3252081, at *2 (E.D.N.Y. 2008), the court held that while N.Y. CIV. RIGHTS L. § 50-a (which says a police officer’s personnel files may only be turned over if the officer consents or if a judge issues an order requiring the release of these records) does not apply in federal court, it does not mean files will always be turned over if requested. The court said that federal judges must balance the interests for and against keeping the records confidential during the discovery phase of a trial.

16. FED. R. CIV. P. 26(b) advisory committee’s note to 1970 amendment.

17. This includes: (1) the expert’s name and qualifications, (2) the opinions the expert will express along with any facts, data, or exhibits that support those opinions, (3) how much the expert is being paid to testify, and

26(a)(3) requires you and your opponent to exchange your list of trial witnesses and summaries of any evidence that you plan to introduce. The exchange of information under Rule 26(a)(3) must take place at least thirty days before trial.

Lastly, Rule 26(e) requires each party to provide additional information or correct any information already exchanged if the party later realizes that the initial information is incomplete or inaccurate. Under Rule 26(g), you must sign and write your address on all information that you supply to your adversary. By doing so, you indicate that to the best of your knowledge, the information is complete and true.

(d) Additional Methods of Obtaining Information

(i) Depositions: Rules 27, 28, 30, 31, and 32

In a “deposition,” someone who may have useful information is asked a series of questions, usually by the attorney for the party seeking the information. An oral deposition is similar to a witness examination at trial. Basically, a meeting is set up with the person you want to depose,¹⁸ the opposing lawyer, and a stenographer.¹⁹ Under Rule 26(d), depositions (as well as any other forms of discovery) may be sought only after the initial mandatory meeting with your opponent, unless the court gives permission to do so before the meeting.²⁰ Rule 30(a)(2)(A) limits the number of depositions, so each side may only take up to ten depositions. Nevertheless, if you feel that you need to take more than ten depositions, you may ask for the court’s permission to do so. In deciding whether to grant your request for more depositions, the court will consider several factors, including (1) whether the information you are seeking is unreasonably cumulative or duplicative,²¹ or if it can be obtained more conveniently from another source; (2) whether you have already had the opportunity to get the information you are seeking; and (3) whether the burden or expense of the proposed discovery outweighs the likely benefit.²² Overall, the court wants to make sure that requests for extra depositions are reasonable and worth the inconvenience they cause the other party.

At the deposition, you may ask a broad range of questions. Depositions are particularly useful because they give you the opportunity to obtain an unplanned, honest response from the “deponent”²³ and to have face-to-face contact, unlike with other discovery methods.

The problem with depositions, however, is that they tend to be time-consuming and expensive. If you depose someone, you usually have to hire a stenographer and pay to have the stenographer’s notes typed out. Both parties, their attorneys, and the witness must arrange a suitable time and place for the deposition. Rule 29 of the Federal Rules of Civil Procedure offers some relief by providing for the use of “stipulations” (a “stipulation” is a document signed by both parties stating that they agree to a certain fact, rule, or way of proceeding). If you and your opponent agree to a stipulation, you can hold the deposition in a place convenient for you (such as the jail or prison), and you can tape-record the deposition instead of hiring a stenographer.

(4) how many other cases he has testified in over the past four years. FED. R. CIV. P. 26(a)(2).

18. The person questioned in a deposition is called the “deponent.”

19. The “stenographer” (sometimes called the “court reporter”) is a professional secretary who types in shorthand everything said during the deposition.

20. FED. R. CIV. P. 26(d)(1).

21. A “cumulative” request is a request that is overly broad and includes so much material that it is difficult or impossible to meet within a reasonable time period. An example of such a request may be requesting the records of all policyholders from an insurance company for the last 40 years. A “duplicative” request is one that asks for the same records asked for in an earlier discovery request, without any good reason to request those records again. An example may be requesting many paper copies of files which you already received electronic copies of. FED. R. CIV. P. 26(b)(2)(C)(i).

22. FED. R. CIV. P. 26(b)(2)(C)(iii).

23. As noted above, the “deponent” is the person who is questioned in the deposition. The deponent may not be as well prepared by his attorney as he will be at the trial, and his attorney will not have an opportunity to review the deponent’s responses before you receive them.

If your opponent is unwilling to sign a stipulation allowing alternative methods of taking a deposition, you can make a motion to the court to order him to cooperate. You should be prepared to show specific reasons for your request (for example, that you cannot afford a stenographer). Another option is to obtain written depositions. If you choose to use written depositions, you should refer to Rule 31 for the exact procedure.²⁴ However, you should keep in mind that the use of written depositions does not allow you to get the un-coached answers that you can get with oral depositions.

(ii) Interrogatories: Rule 33

“Interrogatories” are written questions that must be answered in writing under oath. Unlike depositions, interrogatories are not performed in person. Only parties to the lawsuit must respond to interrogatories. Outside witnesses do not need to respond to interrogatories. Putting aside this important limitation, interrogatories are very useful because they are inexpensive. Rule 33(a) limits the number of questions you may ask each party to twenty-five questions.²⁵ Nonetheless, if you feel you need to ask more than twenty-five questions, you may ask the court for special permission.²⁶ To determine whether to grant your request, the court will consider (1) whether the information you are seeking is unreasonably repetitive, (2) whether you have already had the opportunity to obtain the information, and (3) whether the burden or expense of the additional interrogatories would outweigh their likely benefit.²⁷ You may send interrogatories as soon as you and your opponent have attended the mandatory meeting under Rule 26(f).²⁸ You should note that many local courts and individual judges have their own special rules for handling interrogatories, so you should check with the clerk of the court to find out if any special rules apply to you.

After you send the interrogatories, your opponent must answer within thirty days. One exception is if the court has ordered a shorter or longer period of time or you and the other party have agreed to a shorter or longer time.²⁹ As with depositions, your questions must be relevant to the case, cannot ask for privileged material, and cannot be unreasonably burdensome to the other side. If you are suing a prison official for assault, for example, you might ask the following questions in your interrogatory:

- (1) Were you on Block 8 at or around 8:00 P.M. on January 30, 2019?
- (2) Why were you on Block 8 at 8:00 P.M. on January 30, 2019?
- (3) At 8:00 P.M. on January 30, 2019, did you hear any noise coming from the east dayroom?
- (4) Did you go inside the east dayroom shortly after 8:00 P.M. on January 30, 2019?

In order to obtain specific answers, you must ask specific questions. If you want to get as much information as possible from these interrogatories, do not phrase your questions in a manner that allows only a “yes” or “no” answer. Questions (1), (3) and (4) above are types of questions that would be answered with only a “yes” or “no.” Question (2), because it asks ‘why,’ cannot be answered with a “yes” or “no,” and may therefore elicit more information.

If you have trouble getting answers to your interrogatories and there is no legitimate reason for your opponent’s failure to respond, then you can submit a motion for an order “compelling” (forcing) discovery under Rule 37(a)(3)(B). However, a court will grant your motion only if you can show that you made every possible effort to get the answers from your opponent yourself before asking the court for help. If the judge does grant your motion, the court will penalize your opponent if he does not respond to your interrogatories. Some judges are very careful about issuing orders compelling discovery, so you should read the Federal Rules of Civil Procedure closely and prepare an argument to show why you need the requested information and why you have a right to receive it.

24. FED. R. CIV. P. 31.

25. FED. R. CIV. P. 33(a).

26. FED. R. CIV. P. 26(b)(2)(A).

27. FED. R. CIV. P. 26(b)(2)(C).

28. FED. R. CIV. P. 26(f). See Part B(2)(c) of this Chapter for more detail.

29. FED. R. CIV. P. 33(b)(2).

(iii) Production of Documents: Rule 34

Rule 34 of the Federal Rules of Civil Procedure enables you to obtain documents and other physical objects in your opponent's possession. Once again, you may only get materials that are relevant to your case and that are not privileged. Like other forms of discovery, the court's permission is not generally required, and it is assumed that the parties will cooperate in exchanging the necessary material. Remember that requests to produce documents are also subject to the limits of Rule 26(b). This means that requests cannot be cumulative or duplicative, they cannot have been available to you by other means, and the burden on the other party cannot outweigh the benefit of the information.

You can request materials after you have met with your opponent under Rule 26(f), or you can ask the court for permission to request materials sooner. As with interrogatories, there is a thirty-day period in which to respond. If your opponent refuses to cooperate with a reasonable request, you can file an order to compel (force) discovery under Rule 37(a)(3)(B). If your opponent does not comply with the order, you can make a motion asking the court to sanction your opponent under Rule 37(b). A "sanction" is a penalty or coercive measure that results from failing to comply with a law, rule, or order (usually, sanctions are monetary fines, but they can also lead to imprisonment or dismissal of the lawsuit).³⁰

A request for production must describe the name and date of each document or object as specifically as possible. You should try to find out as much as you can about the documents or objects your opponent has that might be useful to you. Note that when prison officials provide documents in discovery, they often "redact," or remove, information they think is secret or sensitive. If you think your opponent is hiding information that you need and are entitled to see, you can move for an order compelling discovery under Rule 37(a)(3)(B).

Rule 34 does not limit you to requesting documents that might be found in an official file; you can ask for books, accounts, memoranda, letters, photographs, charts, physical evidence, or any other object you can describe specifically.³¹ If you request material that your opponent must send you copies of, you should be prepared to pay copying costs or ask the court to pay them under a "poor person's order." A "poor person's order" is a statement signed under oath and submitted to the court that requests a waiver of court costs and states that the applicant is financially unable to pay.³²

(iv) Subpoenas: Rule 45

Subpoenas under Rule 45 allow you to compel (force) witnesses who are not parties to attend a deposition or trial. With a subpoena, you can also ask the witness to bring documents or other discoverable materials that fall under Rule 34. A subpoena to a third party requesting such documents is often called a "subpoena *duces tecum*." If you serve a subpoena on a third party—either to testify or to produce documents—and the party refuses to comply, the court may hold that party in contempt for failure to comply. In order to file a subpoena, you may write to the clerk with your request.³³

30. See Part B(2)(f) of this Chapter for more detail.

31. FED. R. CIV. P. 34(a).

32. See N.Y. C.P.L.R. 1101 (McKinney 2009) (stating that the motion for poor person's relief may be filed through a form affidavit available in the clerk's office. This affidavit should be filed with the summons and complaint. If you are an inmate, the affidavit should include "the name and mailing address of the facility at which [you are] confined along with the name and mailing address of any other federal, state or local facility at which [you were] confined during the preceding six month period." Your case will be given an index or case number. After a judge receives your case, the court will receive your trust fund account statement from the institution holding you. § f(1). When filing as an inmate, poor person's relief only entitles you to a reduced filing fee rather than a complete exemption. § f(2)).

33. FED. R. CIV. P. 45(a). An attorney may also issue and sign a subpoena in some instances. FED. R. CIV. P. 45(a)(3).

(v) Admissions: Rule 36

Rule 36 allows you to serve a written “request for admission” to your opponent. A request for admission is similar to an interrogatory, except that you must prepare a list of statements for your opponent to either admit or deny. Requests for admission are primarily intended to resolve issues that are not central to the lawsuit. Some examples are issues related to the facts of your case, how the law applies, and whether any documents that have been provided are genuine. If you ask your opponent to admit a fact that presents a “genuine issue for trial,” he must respond by admitting or denying the fact, or saying the fact is either true or false. Your opponent may deny that the admission is true until evidence is presented. A “genuine issue for trial” is a fact which your claim relies on to succeed. If you and your opponent disagree about a fact that can determine the success of your case, it will need to be decided by the court. For example, if you ask your opponent to admit that you were not carrying anything when you were arrested, there would be a genuine issue for trial if your opponent has evidence or witnesses stating that you were carrying something.

You do not need the court’s permission to serve this request, but you must wait until after you attend the Rule 26(f) meeting with your opponent. Your opponent must submit a written denial within thirty days or the court will consider the statements admitted.³⁴

Here are some statements that you might include in a request for admission, using the prison assault example presented above in Part B(2) of this Chapter:

- (1) Admit that you were in Block 8 at 8:00 P.M. on January 30, 2019.
- (2) Admit that you heard noises coming from the east dayroom at 8:00 P.M. on that evening.
- (3) Admit that you went inside the east dayroom shortly after 8:00 P.M. on that evening.
- (4) Admit that the attached copy of the incident report is a true and accurate copy of the original on file.

Note that in requests for admission, you cannot make open-ended information requests like those in question (2) of the interrogatory examples in Part B(2)(d)(ii) above. If you make a request for admission of a fact and your opponent refused to admit it, but you later prove it was true, your opponent may be required to pay some of your attorney’s fees under Rule 37(c)(2).

(e) Protective Orders

Both parties have the right to discover important information from the other side, and both parties must help make discoverable material available. However, if you believe that your opponent has made an unreasonable request—for example, he or she asks for privileged information or seeks information to intimidate you or waste your time and money—you can move for a protective order under Rule 26(c)(1) instead of preparing a response to the request.

In a motion for a protective order, you must give the judge a good reason why your opponent’s request for information was improper or unreasonable. You must also show that you made every effort to resolve the issue with your opponent before you sought help from the court (for example, you told your opponent that you thought his request was unreasonable and he refused to make any changes). If the judge grants a protective order, your opponent’s request will either be thrown out (in which case you will not have to respond) or be limited (in which case you will only have to respond to part of the request).

(f) Sanctions: Rule 37

Rule 37 allows the court to issue sanctions (monetary fines) against any person who fails to comply with the rules of discovery. This provides a way for the court to enforce discovery rules.

If your opponent has not responded to your request for discovery and you have made every effort to get him to respond, you can move for an order demanding your opponent to comply with your request. If your motion is granted but your opponent still does not comply, the court may hold your opponent in contempt of court, and your opponent may face fines or even imprisonment. On the other

34. FED. R. CIV. P. 36(a)(3).

hand, if you refuse to comply with discovery requests, the court may dismiss the lawsuit. All of these punishments are available under Rule 37. Often, parties will be encouraged to comply with discovery requests if they find out that their opponent has moved for sanctions.

3. New York Discovery Procedure

(a) Introduction

For the most part, the rules governing discovery procedures in civil suits brought in New York state courts are similar to the federal rules discussed above. The following is a brief description of the New York statutes, noting some differences between federal and New York state rules. If you have a case in a New York state court, you will need to carefully examine these rules and the cases that apply them. This Section should help you get started.³⁵

New York statutes use the term “disclosure” instead of “discovery,” but the procedures are basically the same. The statutes governing disclosure are contained in Article 31 of the New York Civil Practice Law and Rules (“N.Y. C.P.L.R.”).

A major difference between New York disclosure and federal discovery is that under the New York rules, parties are not required to meet or give out information voluntarily.³⁶ As a result, you must request any information that you want from your opponent, and your opponent must request any information he wants from you. Also, you and your opponent do not need to wait until after you meet to begin making requests for information. Generally, information can be requested after a complaint is filed and the defendant has responded (or after the time period for the defendant’s response has expired, whichever comes sooner).

The New York and federal discovery processes also differ in how they deal with difficulties that arise during the discovery process. Under N.Y. C.P.L.R. 3104, you may request that the court appoint a referee to oversee the process and make recommendations to the judge. This may be helpful if you have difficulty getting your opponent to cooperate. However, if you make this request, the court can make you pay the referee’s expenses. If you are thinking about this option, you may wish to write to the clerk of the court to see how your particular judge generally handles situations like yours. Keep in mind, under N.Y. C.P.L.R. 3114, you may need to provide language translations for all questions and answers if a witness does not understand English. The party seeking the information must pay for this translation and the associated costs. Therefore, if you need information from a person who needs a translator and you cannot afford one, you should check with the court to see if you have other options.

(b) Methods of Obtaining Information

(i) Depositions

Depositions in New York state court require twenty days’ notice unless the court orders otherwise.³⁷ Unlike in federal courts, if you want to depose someone who is not a party to the proceeding, New York courts require that you get a subpoena.³⁸ As with the federal rules, any material that you request through disclosure in New York courts must be relevant and not privileged. If you think information that you want to request or information requested from you may be privileged, refer to N.Y. C.P.L.R. 3101, which details what types of information are privileged and what information may be requested through discovery.

35. Jack B. Weinstein et al., *NEW YORK CIVIL PRACTICE LAW AND RULES MANUAL* (3d ed. 2010) (“Weinstein/Korn/Miller Manual”), provides a great deal of information on New York civil procedure and disclosure. Its organization follows the structure of the N.Y. C.P.L.R., so you can simply consult the section of the Weinstein/Korn/Miller Manual that corresponds to the N.Y. C.P.L.R. section you want to research.

36. This is different from the federal system. *See* Fed. R. Civ. P. 26(a).

37. N.Y. C.P.L.R. 3107 (McKinney 2019).

38. N.Y. C.P.L.R. 3106(b) (McKinney 2019). Note that the subpoena must be served 20 days before the examination.

Section 3106(c) of the N.Y. C.P.L.R. requires the court's permission before a deposition can be taken from a person in prison. This rule affects both parties: it applies if you need to depose a fellow incarcerated person and it also applies to your opponent if he wishes to depose you. If your opponent does depose you, section 3116(a) requires you to read and sign your statement after the deposition to confirm that everything in the deposition is true and correct to the best of your knowledge. If you feel that a change needs to be made, you may write in the change at the end of the deposition. You must also state the reasons for making the change.³⁹ Once your deposition is finished, you are allowed to keep a copy under section 3101(e). It is always a good idea to request a copy so that you have a record of your testimony.

(ii) Interrogatories

The practice and form for interrogatories are similar to those used in the federal courts. However, there are some differences. Under New York law, without a court order, a *plaintiff* may not serve a defendant with an interrogatory until after the time limit for the defendant to answer the plaintiff's complaint has expired. A *defendant* can serve interrogatories on any other party, whether or not he has answered the plaintiff's complaint. In other words, after receiving the complaint, the defendant may immediately serve an interrogatory.⁴⁰ In New York, the answering party has only twenty days to answer the interrogatory or to object to the questions.⁴¹

(iii) Requests for Production

In New York, requests for production of documents and other materials are similar to requests in federal court under the Federal Rules of Civil Procedure. New York also allows you to obtain discovery of materials in the custody and control of non-parties with the court's permission.⁴²

New York courts require requests for production to be reasonable and not overly burdensome. This means that you must know what you are seeking and it must be relevant to the case. Requests for discovery should not be overbroad.⁴³ An example of an overbroad discovery request would be what courts often refer to as a "fishing expedition." A "fishing expedition" is when a party requests a huge range of information in the hopes that something will turn out to be useful, without any specific reason to believe that it will be. An example of a "fishing expedition" would be a discovery request for the entire file of every police officer who worked in the precinct where you were arrested. This kind of discovery request is consistently rejected. Your requests must be relevant and described with "reasonable particularity." In the context of a request for production, "reasonable particularity" means that your request must be sufficiently specific to enable the other party to identify what documents you are requesting without having to turn over all of their files.⁴⁴ Your request must not impose an undue burden on the opposing party. Your request must also be specific enough that the court can determine if the documents you are requesting are appropriate to the case.⁴⁵ As a result, when writing a request for production, you should avoid terms like "all," "all other," or "any and all" unless you are requesting all documents within a small, specific, and identifiable set.⁴⁶

39. N.Y. C.P.L.R. 3116(a) (McKinney 2019).

40. N.Y. C.P.L.R. 3132 (McKinney 2001).

41. N.Y. C.P.L.R. 3133(a) (McKinney 2019).

42. N.Y. C.P.L.R. 3111, 3120(1) (McKinney 2001).

43. *Konrad v. 136 East 64th Street Corp.*, 209 A.D.2d 228, 228, 618 N.Y.S.2d 632, 633 (1st Dept. 1994) (finding that an overbroad discovery request constituted an undue burden).

44. *State v. De Groot*, 35 A.D.2d 240, 241, 315 N.Y.S.2d 310, 311 (3d Dept. 1970); N.Y. C.P.L.R. 3120(2) (McKinney 2019).

45. *Anello v. Turner Constr. Co.*, 96 Misc. 2d 208, 210, 408 N.Y.S.2d 845, 846 (Sup. Ct. N.Y. County 1978).

46. *Agric. & Indus. Corp. v. Chem. Bank*, 94 A.D.2d 671, 672, 462 N.Y.S.2d 667, 668 (1st Dept. 1983).

(iv) Subpoenas

New York rules regarding subpoenas are very similar to the federal rules. New York also allows the “subpoena *duces tecum*”. A “subpoena *duces tecum*” is an order for a witness to appear and bring specified documents. In certain proceedings, a judge must issue a subpoena *duces tecum*.⁴⁷

(v) Admissions

New York rules regarding admission are very similar to the federal rules.⁴⁸ A request for admission is similar to an interrogatory. But, an admission must include a list of statements for your opponent to either admit or deny. The plaintiff may serve a request for an admission after the defendant has answered the complaint or twenty days after service of the summons. The plaintiff may not serve a request for an admission within twenty days before trial. The person receiving a request for an admission has twenty days to deny the allegation or give a detailed explanation of why he cannot admit or deny the allegation.⁴⁹

(vi) Motions to Compel Disclosure and Sanctions

If you are having difficulty obtaining information to which you are entitled, you may move the court to compel disclosure under N.Y. C.P.L.R. 3124. If the court grants your motion and your opponent still does not provide you with the information, the court may impose penalties under N.Y. C.P.L.R. 3126. You should also keep in mind that N.Y. C.P.L.R. 3101(h) requires all persons to amend or supplement information they have submitted if, at any time, they obtain or remember new information that makes their original statements incomplete or wrong. If this requirement is not followed, the court is authorized under N.Y. C.P.L.R. 3101(h) to make “whatever order may be just.” This may mean that the court will not allow into the trial any evidence concerning the topic that should have been supplemented.

N.Y. C.P.L.R. 3103 allows the court to issue orders “designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” If you feel your opponent obtained information improperly,⁵⁰ you may make a motion to the court under N.Y. C.P.L.R. 3103(c). In response, the court may prevent that information from being used as evidence at trial.

This is only a brief overview of the New York Rules. Although they are generally similar to the Federal Rules, be sure to study the relevant sections of the N.Y. C.P.L.R. noted above before bringing a lawsuit in New York state court.

4. Electronic Discovery (“eDiscovery”)

(a) Introduction

The government now electronically stores many of the documents and much of the information that will be useful to your case. For example, many Departments of Corrections maintain useful statistics on their websites. Your own records might be kept in electronic form as well, including medical records, intake forms, and disciplinary hearing records. Finally, if prison officials communicate with one another via email, some of those communications could be relevant to your case. They could show, for example, that prison officials were aware of unsafe conditions in the prison that harmed you.

47. N.Y. C.P.L.R. 2301–2308 (McKinney 2019).

48. See N.Y. C.P.L.R. 3123 (McKinney 2019); Fed. R. Civ. P. 36.

49. N.Y. C.P.L.R. 3123 (McKinney 2019). For a more detailed explanation of an admission, see Part B(2)(d)(v) of this Chapter.

50. For an example of information obtained in an “improper manner,” see *Levy v. Grandone*, 8 A.D.3d 630, 631, 779 N.Y.S.2d 558, 558 (2d. Dept. 2004), where the plaintiff obtained documents without notifying the defendant’s attorney. The court held that the documents were improperly obtained, but because the defendant was not prejudiced by the plaintiff’s action, decided that suppression of the evidence was not warranted.

The process of requesting electronic documents is called “eDiscovery.” You can use the same set of discovery tools to request all sorts of electronic documents, including emails, internet browsing history, and even electronic documents that have been deleted but still exist on backup disks.⁵¹ Mandatory disclosure rules apply to eDiscovery. Your opponent must hand over copies or descriptions of relevant electronic information before you even submit a discovery request.⁵² eDiscovery is subject to the same limitations as paper discovery. Privileged communications are still private, even if they took place over email or another electronic medium of communication.⁵³

(b) Tools and Strategies

If you think you will want to seek digital evidence, you should come up with a clear plan even before meeting with your opponent. Take steps to preserve what evidence you can, such as useful statistics and information on websites. Download, save, and print the content whenever possible so that even if the content is removed, you will have copies in your possession.

The next step is to send a “preservation letter.” A “preservation letter” is a way of telling your opponent to save evidence and prevent your opponent from deleting or tampering with electronic evidence. The letter should describe the data you seek and demand that all digital evidence be separated and preserved. The letter should state that your opponent must not take steps to destroy the digital evidence. The letter should tell your opponent to stop any routine processes that result in the destruction of the specified digital files. You should send a preservation letter before your suit begins, if possible, and well before any voluntary disclosures by you or your opponent.

(c) Federal eDiscovery Rules⁵⁴

The Federal Rules of Civil Procedure apply to digital documents in the same way they apply to paper-based records.⁵⁵ If the parties disagree about the scope of eDiscovery, the court will determine whether an eDiscovery request should be granted. The court must consider whether the potential benefits of the proposed eDiscovery will outweigh its costs.⁵⁶ If the court determines that the expense of eDiscovery outweighs its likely benefit, it may make the party requesting the eDiscovery material pay for its production.⁵⁷

51. For cases declaring electronically stored information discoverable, see *Aguilar v. Immigration & Customs Enforcement*, 255 F.R.D. 350, 354–355 (S.D.N.Y. 2008) (discussing metadata); *Sec. Exch. Comm’n v. Beacon Hill Asset Mgmt LLC*, 231 F.R.D. 134, 145 (S.D.N.Y. 2004) (discussing email attachments); *Rowe Entm’t, Inc. v. The William Morris Agency*, No. 98 Civ. 8272(RPP), 205 F.R.D. 421, 428 (S.D.N.Y. 2002) (discussing electronically stored information); *Delta Fin. Corp. v. Morrison*, 13 Misc. 3d 604, 609, 819 N.Y.S.2d 908, 912 (Sup. Ct. Nassau County 2006) (discussing backup tape data).

52. FED. R. CIV. P. 26(a); *In re Bristol Myers-Squibb Securities Litigation*, 205 F.R.D. 437, 441 (D.N.J. 2002) (noting that the Advisory Committee for the Federal Rules of Civil Procedure requires mandatory disclosure of relevant electronic evidence but holding that it only applies to evidence in electronic form at the time mandatory disclosure is to be made); 1 JAY E. GRENIG & WILLIAM C. GLEISNER, *EDISCOVERY & DIGITAL EVIDENCE* § 2:1 (2013) (stating that courts generally treat electronic evidence the same as non-electronic evidence).

53. *Baptiste v. Cushman & Wakefield, Inc.*, No. 03Civ.2102(RCC)(THK), 2004 U.S. Dist. LEXIS 2579, at *5–9 (S.D.N.Y. Feb. 20, 2004).

54. Fed. R. Civ. P. 33, 34.

55. FED. R. CIV. P. 33, 34 (see Advisory Committee’s Note to 2006 amendment for additional details regarding electronic documents).

56. *Jones v. Goord*, No. 95 CIV. 8026(GEL), 2002 U.S. Dist. LEXIS 8707, at *16–19 (S.D.N.Y. May 16, 2002) (finding that the court should decide costs and benefits of forcing a party to produce eDiscovery on a case by case basis).

57. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318, 323–324 (S.D.N.Y. 2003) (In order to decide which party should pay for the cost of producing the full eDiscovery, the court found that a sample of the eDiscovery materials should be produced so the court can more effectively weigh the costs against the benefits).

(d) New York eDiscovery Rules⁵⁸

New York has adopted the Uniform State Laws addressing eDiscovery.⁵⁹ These rules are similar to the Federal Rules and deal mainly with electronic information during the early stages of discovery. The main rule relating to eDiscovery is Uniform Rule section 202.12. Section 202.12 requires parties to address eDiscovery during all preliminary conferences.⁶⁰ At preliminary conferences, the parties may discuss where key electronic data is preserved and in what form it will be turned over to the requesting party.⁶¹

In New York, the requesting party often bears the costs of producing electronically stored information, although this varies.⁶² As with the Federal Rules, New York courts will balance the parties' competing interests. The courts weigh the need for requested eDiscovery against the burden it imposes upon the producing party.⁶³ As with other discovery requests, the court will reject overly broad requests.⁶⁴

C. Criminal Discovery

The rules governing discovery in a criminal prosecution differ from those that govern a civil proceeding. In general, discovery in criminal cases is more limited.

Part C(1) below discusses criminal discovery in federal cases. It explains that in all criminal cases, the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution requires the prosecutor to turn over certain materials to the defendant. Part C(2) reviews the discovery rules that apply in New York criminal cases. Finally, there is a brief note about federal discovery procedures, which are similar to New York's procedures because the New York rules were modeled on them. Remember that this Part does not cover the criminal discovery rules in detail. If you are involved in a criminal case, you should refer to the applicable rules and research any cases that apply those rules.

1. Federal Constitutional Requirements

Under *Brady v. Maryland*, a prosecutor may not refuse your request for evidence that is "exculpatory"⁶⁵ and "material"⁶⁶ to either guilt or punishment.⁶⁷ You may be entitled to a new trial if the prosecutor withholds such evidence, even by mistake.⁶⁸

58. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12 (2018); N.Y. C.P.L.R. 3120, 3111 (McKinney 2019).

59. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7 App. A (2018).

60. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12 (2018).

61. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(c)(3) (2018).

62. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1074–1076, 895 N.Y.S.2d 643, 653–654 (Sup. Ct. N.Y. Cty. 2010).

63. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7 App. A; *Moore v. Publicis Groupe*, 287 F.R.D. 182, 192–193 (S.D.N.Y. 2012).

64. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1069, 1077, 895 N.Y.S.2d 643, 649, 655 (Sup. Ct. N.Y. Cty. 2010).

64. "Exculpatory" evidence tends to prove the defendant is not guilty.

66. Evidence is "material" where there is a reasonable probability that its disclosure would have produced a different result at trial. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995); *see also* *United States v. Bagley*, 473 U.S. 667, 674–675, 105 S. Ct. 3375, 3379, 87 L. Ed. 2d 481, 488–489 (1985); *United States v. Agurs*, 427 U.S. 97, 104, 96 S. Ct. 2392, 2398, 49 L. Ed. 2d 342, 350 (1976) (holding that "a fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.").

67. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963). For specific examples of various applications of the *Brady* rule, *see* 2 BARRY KAMINS, GORDON MEHLER, ROBERT HILL SCHWARTZ, & JAY SHAPIRO, *NEW YORK CRIMINAL PRACTICE* § 17.03[8] (Matthew Bender ed., 2d ed. 2020).

68. *Kyles v. Whitley*, 514 U.S. 419, 421–422, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) (awarding a new trial after finding *Brady* violation); *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972) (noting that "suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'"). Note that when the police *lose* evidence that is potentially exculpatory and therefore cannot comply with *Brady*, the defendant must show that they acted in bad faith in order to win a new

Brady applies to evidence that supports your claim of innocence and also evidence that weakens the prosecution's case.⁶⁹ One example is any evidence that undermines the credibility of a government witness. This evidence is called "impeachment evidence." The prosecution may also be required to turn over the statements made by a witness before trial if the statements are inconsistent with the testimony that witness plans to give at trial.⁷⁰

In general, *Brady* requires a prosecutor to disclose *all* evidence that might be favorable to you. Federal courts have created several limitations to the *Brady* rule. The prosecutor is required to turn over evidence only if it is "material." The Supreme Court considers evidence to be "material" if there is a "reasonable probability" that this evidence will affect whether you will be found guilty or not guilty at trial.⁷¹ This means that evidence that would probably not affect the final verdict does not have to be disclosed. The court will likely not order a new trial if the prosecutors withheld evidence that was not material.

Second, *Brady* does not require the prosecution to turn over evidence if you knew it existed or if you should have been able to take advantage of it without the prosecution's help.⁷² In one case, the prosecution told the defense attorney to interview a witness instead of handing over the witness's pretrial statement. The federal court held that even though the prosecution withheld the statement, it had not "suppressed" the evidence under *Brady*.⁷³

Third, even though *Brady* requires prosecutors to turn over evidence that might help to show the your innocence, it does not give you "unsupervised authority to search through the [state's] files" in search of exculpatory material.⁷⁴ "[T]he state decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision" not to disclose cannot be challenged.⁷⁵

Brady represents the standard of discovery guaranteed by the U.S. Constitution in *all* criminal cases in the United States. Thus, the states are required to provide a criminal defendant with this material as well. However, *Brady* is only the *minimum* constitutional requirement guaranteed to criminal defendants. State discovery rules may give you a right to more discovery than this basic constitutional standard.

trial. *Arizona v. Youngblood*, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988).

69. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)) (noting that there is no difference between exculpatory and impeachment evidence for *Brady* purposes); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972) (holding that "evidence affecting credibility" falls within the *Brady* disclosure rule).

70. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972).

71. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L. Ed. 2d 40, 57 (1987) (noting that "the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment" and defining "material" as a "reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed) (citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985)).

72. *See, e.g., United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) (holding that the government was not required to provide allegedly exculpatory grand jury testimony when the defendant knew or should have known the essential facts); *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987) (holding that "no *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence").

73. *See United States v. Salerno*, 868 F.2d 524, 542 (2d Cir. 1989) (rejecting defendant's argument that the government should have turned over the grand jury testimony of a potential witness when the defendant could have interviewed the witness himself). Note that in New York, witnesses' pretrial statements must be disclosed even if they are not *Brady* material. N.Y. Crim. Proc. Law §240.45(1)(a) (McKinney 2012); *see also* *People v. Rosario*, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450 (1961) (finding that justice entitles the defendant to see a witness' prior statement "as long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential").

74. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40, 58 (1987).

75. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40, 59 (1987).

2. New York Procedures

(a) Introduction

New York leads a movement to give criminal defendants more access to information. Though there are still limits on the information that criminal defendants can obtain before trial, New York has broadened discovery under Article 240 of the New York Criminal Procedure Law (“N.Y. Crim. Proc. Law”).⁷⁶ Article 240 is based on Rule 16 of the Federal Rules of Criminal Procedure. So, if you run into a discovery problem and find a federal case interpreting Rule 16 in your favor, the New York state courts usually will consider the case as persuasive (that is, supportive of your case) for interpreting Article 240.⁷⁷

Below is a general overview of discovery rules found in Article 240 of the N.Y. Crim. Proc. Law. If you run into specific problems, you should refer to the statutory provisions themselves and any accompanying notes.⁷⁸

(b) Scope of Discovery

(i) Discovery Between the Accused and the Prosecutor

Article 240 allows you to inspect, photograph, copy, or test certain types of property⁷⁹ that are material⁸⁰ to your case.

Any written, recorded, or oral statement you made to the police (or to a person acting under police direction) that was not made during “the criminal transaction” is discoverable material.⁸¹ You can request this material, as well as similar statements made by a co-defendant who will be tried jointly with you.⁸² This generally applies if you or a co-defendant made a statement following arrest, such as a statement made at the police station. Notice that this does not cover statements made *during* “the criminal transaction.”⁸³ For example, the prosecution usually does not have to give you a copy of conversations between you and an undercover officer if the conversation occurred during a drug transaction. An exception exists where the statement is recorded electronically. If a statement made during the criminal transaction is recorded on tape, you are entitled to it through discovery.⁸⁴ This can be very helpful in setting up certain defenses, such as entrapment. In an entrapment defense, you need to show that the police got you to commit a crime you would not have committed if they had left you alone.⁸⁵

Any statement made to the police or to a person acting under police direction *before* the criminal transaction took place is also discoverable. Such evidence might be used to establish a motive or intent to commit the crime. For instance, if you made a statement before a homicide indicating that you hated

76. N.Y. CRIM. PROC. LAW §§ 240.10–240.90 (McKinney 2019).

77. *People v. Copicotto*, 50 N.Y.2d 222, 226, 406 N.E.2d 465, 468, 428 N.Y.S.2d 649, 652 (1980) (stating that the criminal discovery procedure in Article 240 was adopted from FED. R. CRIM. P. 16).

78. Chapter 17 of Waxner’s *New York Criminal Practice* also provides helpful information about New York criminal discovery. *See also* 2 BARRY KAMINS, GORDON MEHLER, ROBERT HILL SCHWARTZ, & JAY SHAPIRO, *NEW YORK CRIMINAL PRACTICE* § 17 (Matthew Bender ed., 2d ed. 2020).

79. N.Y. CRIM. PROC. LAW § 240.20(1) (McKinney 2009). Property is defined as “any existing tangible personal or real property, including, but not limited to, books, records, reports, memoranda, papers, photographs, tapes or other electronic recordings, articles of clothing, fingerprints, blood samples, fingernail scrapings or handwriting specimens, but excluding attorneys’ work product.” N.Y. CRIM. PROC. LAW § 240.10(3) (McKinney 2009).

80. N.Y. CRIM. PROC. LAW § 240.40(1)(c) (McKinney 2009).

81. N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 2009).

82. N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 2009); *People v. Arthur*, 175 Misc. 2d 742, 768, 673 N.Y.S.2d 486, 506 (Sup. Ct. N.Y. County 1997) (holding that statements of a codefendant are subject to discovery and must be turned over).

83. N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 2009).

84. N.Y. CRIM. PROC. LAW § 240.20(1)(g) (McKinney 2009).

85. N.Y. PENAL LAW § 40.05 (McKinney 2009).

the victim, it could be used to prove motive to kill them. Therefore, it is important that you discover if any material of this sort exists.

Another type of discoverable material is a transcript of testimony that you or a co-defendant made before a grand jury.⁸⁶ A transcript of your testimony could reveal weaknesses in your case because it could show whether you gave any damaging testimony. It might also help you maintain a consistent version of your story. If, for instance, you make a statement at trial inconsistent with the testimony you gave before the grand jury, the prosecution could point this out and weaken your credibility with the judge or jury. You will want to anticipate and, if possible, prevent this.

Article 240 also allows you to discover scientific evidence.⁸⁷ This evidence might include a written report based on a physical or mental examination or a scientific test or experiment related to the crime for which you are charged.⁸⁸

Tapes or electronic recordings are yet another type of discoverable property.⁸⁹ The prosecutor must disclose any tape or electronic recording that he intends to introduce at trial if you request such material, even if that “recording was made during the course of the criminal transaction.” You are also entitled to reports that reveal “[t]he approximate date, time, and place of the” crime and of the arrest.⁹⁰ This information may be useful to help you establish an alibi. You also may discover “any other property obtained” from you or from a co-defendant.⁹¹ This might include weapons, clothing, drugs, tools, cars, or other items. Discovery of this type of property can help you prepare your case by giving you insight into what the prosecutor will present at trial to link you to the crime.

(ii) Discovery Between the Accused and Third Parties: Subpoena *Duces Tecum*

The “subpoena *duces tecum*” is a process where the court orders a witness to bring documents relevant to the court proceedings with him when he comes to testify.⁹² It is frequently used when information is in the hands of third parties (meaning, someone who is not the prosecution and is not the defendant).⁹³ The subpoena *duces tecum* is the only method prosecutors and defendants can use to discover third party materials. Under Article 240, they cannot use a “demand to produce” or “motion for discovery” (as demands to produce are also called) to obtain information from third parties.⁹⁴

In order to obtain a subpoena *duces tecum* for pretrial discovery purposes under N.Y. Crim. Proc. Law §610.20(3) (McKinney 2009 & Supp. 2014), you must show the following in your motion:⁹⁵

- (1) The materials are relevant and evidentiary;
- (2) The request is specific;
- (3) The materials are not otherwise reasonably obtainable before trial by the exercise of due diligence;

86. N.Y. CRIM. PROC. LAW § 240.20(1)(b) (McKinney 2009).

87. N.Y. CRIM. PROC. LAW § 240.20(1)(c) (McKinney 2009).

88. N.Y. CRIM. PROC. LAW § 240.20(1)(c) (McKinney 2009).

89. N.Y. CRIM. PROC. LAW § 240.20(1)(g) (McKinney 2009).

90. N.Y. CRIM. PROC. LAW § 240.20(1)(i) (McKinney 2009).

91. N.Y. CRIM. PROC. LAW § 240.20(1)(f) (McKinney 2009).

92. N.Y. CRIM. PROC. LAW § 610.10(2), (3) (McKinney 2009).

93. *See State ex rel. Everglades Cypress Co. v. Smith*, 139 So. 794, 795, 104 Fla. 91, 93 (Fla. 1932) (stating that “the process of subpoena *duces [t]ecum* is applicable to witnesses other than the adverse party to the case”).

94. N.Y. CRIM. PROC. LAW § 240.10(1) (McKinney 2009) (only allowing a “demand to produce” to be used on a party to a criminal case).

95. The requirements for a *duces tecum* in New York are explained in *People v. Price*, 100 Misc. 2d 372, 379, 419 N.Y.S.2d 415, 420–421 (Sup. Ct. Bronx County 1979) and *People v. Morrison*, 148 Misc. 2d 61, 67–68, 559 N.Y.S.2d 1013, 1018 (Crim Ct. N.Y. County 1990). Federal Courts use the same standard. *See United States v. Nixon*, 418 U.S. 683, 698–700 (1974) (adopting Judge Weinfeld’s formulation in *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952) as the appropriate standard for federal judges to use in evaluating a subpoena *duces tecum*).

(4) You cannot properly prepare for trial without inspecting the material before trial, and not having the information might unreasonably delay the trial; and

(5) The application is made in good faith and is not intended to be a general “fishing expedition.” In addition, your motion for a subpoena *duces tecum* should indicate a specific time and place for inspection of the desired materials.

(c) Non-discoverable Material

The two types of material that are generally not discoverable under Article 240 are (1) attorney’s work product, and (2) records of any statement made during the criminal transaction, with the exception of any electronic recordings that the prosecutor intends to introduce at trial.⁹⁶ “Attorney’s work product” is defined in the statute as “property to the extent that it contains the opinions, theories, or conclusions of the prosecutor, defense counsel or members of their legal staffs.”⁹⁷ The prosecutor is not required to turn over memoranda or other documents containing his legal theories or opinions. Similarly, you are not required to produce such documents of your own if a prosecutor demands them. For example, you do not need to give the prosecutor a copy of notes that you took about a defense you plan to raise at trial. This rule is very similar to the work product rule found in civil discovery.

(d) Procedures to Obtain Information

Under N.Y. Crim. Proc. Law § 240.20(1), you may obtain access to any discoverable material before the trial begins by serving a “demand to produce” on the prosecutor.⁹⁸ A demand to produce is a written notice that you may serve on your adversary without having to first get permission from the court. It should include information on what property you want to inspect, and provide reasonable notice of the time at which you hope to conduct the inspection. Be specific in your demands. You are not permitted to go on a “fishing expedition” by requesting to inspect property in very general terms. For example, it would be improper for you to demand inspection of any and all information in the prosecutor’s files that might be material to the case.

You must file a demand to produce within thirty days of your arraignment.⁹⁹ However, if you are unrepresented (that is, you have no lawyer), the thirty-day period does not start until a lawyer first appears in court on your behalf. You must have requested an adjournment to obtain a lawyer’s assistance.

Discovery is not limited to the defendant. The prosecutor, too, may take advantage of reciprocal discovery under N.Y. Crim. Proc. Law § 240.30.¹⁰⁰ In addition to discovery, you may also be ordered to provide non-testimonial evidence, such as appearing in a lineup, providing a handwriting sample, fingerprinting, posing for photographs (so long as they are not a re-enactment of the crime), or submitting to a reasonable physical or medical inspection.¹⁰¹ As a defendant, you must respond to the

96. N.Y. CRIM. PROC. LAW § 240.10(2), (3) (McKinney 2009) (excluding “Attorneys’ work product”); N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 2009) (excluding statements made during the “criminal transaction”).

97. N.Y. CRIM. PROC. LAW § 240.10(2) (McKinney 2009). Police reports, notes and memoranda created for internal use are generally not made available for discovery, unless they contain exculpatory material or material that the D.A. intends to use at trial. *See* *People v. Finkle*, 103 Misc. 2d 985, 986, 427 N.Y.S.2d 374, 375 (Sup. Ct. Sullivan County 1980). However, routine police records containing information that must be filed in the normal course of business may be discovered. Such determinations are to be made by the court on an *ad hoc* basis. *People v. Simone*, 92 Misc. 2d 306, 312–313, 401 N.Y.S.2d 130, 134 (Sup. Ct. Bronx County 1977).

98. *See* N.Y. CRIM. PROC. LAW §§ 240.80, 240.90, 255.20 (McKinney 2009) for information on filing a motion for an order of discovery.

99. For an example of a demand form, see 2 BARRY KAMINS, GORDON MEHLER, ROBERT HILL SCHWARTZ & JAY SHAPIRO, *NEW YORK CRIMINAL PRACTICE*, Form No. 17:1 (Matthew Bender ed., 2d ed. 2020).

100. However, unless the court orders otherwise, the prosecutor may only ask for material that is similar in kind and character to the material you are asking for from him. *See* N.Y. CRIM. PROC. LAW § 240.40(2)(b) (McKinney 2009); *People v. Copicotto*, 50 N.Y.2d 222, 227–228, 428 N.Y.S.2d 649, 653–654, 406 N.E.2d 465, 469–470 (1980).

101. N.Y. CRIM. PROC. LAW § 240.40(2)(b) (McKinney 2009); *see also* *People v. Sirmons*, 242 A.D.2d 883, 884–885, 662 N.Y.S.2d 645, 646–647 (4th Dept. 1997).

prosecutor's demands by either providing the desired information or filing a written refusal of demand under N.Y. Crim. Proc. Law § 240.35.

Discovery does not end once the trial begins. Under N.Y. Crim. Proc. Law § 240.45, certain materials can still be discovered at the beginning of a trial. These materials can be very important to your case. After the jury has been sworn and before the prosecutor's opening address,¹⁰² the prosecutor must turn over to you the following documents or information:

- (1) Any statement (including testimony before a grand jury or a videotaped examination) made by a person the prosecutor plans to call as a witness that relates to the subject matter of the witness' testimony;¹⁰³
- (2) Any conviction record of a witness to be called at trial if the prosecutor is aware of the record; and
- (3) Information about any pending criminal action against any witness the prosecution intends to call, if the prosecutor is aware of such action.

Note that you have the same duty to give this information to the prosecutor before presenting your case.¹⁰⁴

This information may help you attack the credibility of prosecution witnesses. For example, if you find out that a potential witness for the prosecution has been previously convicted of perjury (lying under oath), you may be able to use this information during cross-examination of the witness to try to "impeach" him (attack his credibility). Revealing this fact during cross-examination may make jurors doubt the truth of what the witness says in his testimony. By attacking the credibility of the witness, you may help your case.

(e) Duty to Disclose

Throughout the entire discovery process, there is a duty to disclose properly requested information. This means that both the prosecutor and the defendant must give the other side any important documents or information that the other side has requested. Do not ignore the prosecutor's demands for discoverable material, because you could face sanctions (penalties) by the court.¹⁰⁵

Despite the general duty to disclose, a prosecutor or defendant may refuse to reveal requested information in some situations. The main requirement for refusing to disclose is that you must have a reasonable belief that the requested material is not discoverable. For example, material may not be discoverable where it is irrelevant, privileged, or subject to a protective order (explained further below).¹⁰⁶ When refusing to comply with a demand, you must do so in writing and explain the reasons for your refusal.¹⁰⁷ This must be done within fifteen days from the time you are served with the demand unless you can show good cause for why you need more time.¹⁰⁸ Your refusal must be served upon the demanding party and a copy of it must be filed with the court.¹⁰⁹

If the prosecutor demands information from you and you refuse, the court may order you to disclose the material anyway.¹¹⁰ Similarly, if the prosecutor refuses to provide information that you demand, but the court finds the prosecutor's refusal unjustified, it will order the prosecutor to give you the

102. In the case of a non-jury trial (or "bench trial"), the information must be turned over before the offering of evidence. N.Y. CRIM. PROC. LAW §240.45(1) (McKinney 2009).

103. This is commonly called *Rosario* material. See *People v. Rosario*, 9 N.Y.2d 286, 289–290, 173 N.E.2d 881, 882–883, 213 N.Y.S.2d 448, 450–451 (1961) (codified at N.Y. CRIM. PROC. LAW § 240.45(1)(a)). In federal practice, these documents are governed by the Jencks Act, 18 U.S.C. § 3500.

104. N.Y. CRIM. PROC. LAW § 240.45(2) (McKinney 2009).

105. N.Y. CRIM. PROC. LAW § 240.70 (McKinney 2009).

106. N.Y. CRIM. PROC. LAW § 240.35 (McKinney 2009). For examples of privileged material, see Part B(2)(b) of this Chapter.

107. N.Y. CRIM. PROC. LAW § 240.35 (McKinney 2009).

108. N.Y. CRIM. PROC. LAW § 240.80(2) (McKinney 2009).

109. N.Y. CRIM. PROC. LAW § 240.35 (McKinney 2009).

110. N.Y. CRIM. PROC. LAW § 240.40(2)(a) (McKinney 2009).

material you requested.¹¹¹ The court may also order discovery of any other materials the prosecutor intends to use at trial if you show that such property is material to your case and that the request is reasonable.¹¹²

If you feel there is good reason for refusing to turn over some of your material, you can apply for a **protective order**, which will deny or limit discovery. The prosecutor can apply for a protective order as well, and the court can even issue one on its own initiative (without anyone asking for one).¹¹³ Even other “affected person[s]” impacted by your case can apply for a protective order if they think there is a good reason not to turn over information.¹¹⁴

The court will grant you a protective order if you show good cause for requesting the order. Good cause may be (1) constitutional limitations; (2) the danger that physical evidence may be destroyed or damaged; (3) substantial risk of physical harm to someone; (4) the possibility of intimidation, economic harm, or bribery to someone; (5) a risk of unjustified annoyance or embarrassment to any person; (6) any potential negative effects on the legitimate needs of law enforcement, such as protection of informants; or (7) any other factor that outweighs the usefulness of discovery.¹¹⁵ When filed, a motion for a protective order suspends discovery of the particular matter.¹¹⁶ Suspension means that you or (the prosecutor) won’t be forced to hand over the disputed material until the judge makes a decision on your request for the protective order.

If you refuse to disclose information requested by the prosecutor, you must be sure that you have good cause. If you do not, the court may order sanctions or “take any other appropriate action.”¹¹⁷ Sanctions might include prohibiting you from using specific evidence or witnesses at your trial. The court can also take any other appropriate action that it thinks is reasonable to sanction you. Therefore, it is important that you pay special attention to the procedures involved, particularly to the time limits (deadlines for filing certain motions and requests) found throughout N.Y. Crim. Proc. Law § 240.

It is also important to remember that there is a continuing duty to disclose any additional information subject to discovery.¹¹⁸ This means that if you requested certain material and the prosecutor later receives information that is covered by your original request, the prosecutor must turn over that information to you. Similarly, you must give the prosecutor material you later become aware of if it is covered by the prosecutor’s earlier discovery request.

(f) Summary

This description of discoverable materials and information is meant to give you only a very general picture of the tools available to you in a criminal proceeding. To use these tools in your case, you should read Article 240 of the N.Y. Crim. Proc. Law carefully. Pay close attention to the sections of the statute that relate to types of discoverable material. You should also look at the case law interpreting the statute, particularly if you are looking for the answer to a very specific question. You can find a lot of the case law by looking in the annotations to the New York statutes, which are listed directly after the statute provisions. Supplemental treatises may also be helpful.

3. Federal Discovery

If your criminal case is in federal court, you should refer to Rule 16 of the Federal Rules of Criminal Procedure instead for the discovery rules. Since Article 240 of N.Y. Crim. Proc. Law is based on Rule 16 of the Federal Rules of Criminal Procedure, the rules are very similar. Federal Rule 16 provides for

111. N.Y. CRIM. PROC. LAW § 240.40(1)(a) (McKinney 2009).

112. N.Y. CRIM. PROC. LAW § 240.40(1)(c) (McKinney 2009).

113. N.Y. CRIM. PROC. LAW § 240.50(1) (McKinney 2009).

114. N.Y. CRIM. PROC. LAW § 240.50(1) (McKinney 2009); *see* *People v. Mileto*, 290 A.D.2d 877, 878–879, 737 N.Y.S.2d 170, 173 (3d Dept. 2002).

115. N.Y. CRIM. PROC. LAW § 240.50(1) (McKinney 2009).

116. N.Y. CRIM. PROC. LAW § 240.50(3) (McKinney 2009).

117. N.Y. CRIM. PROC. LAW § 240.70(1) (McKinney 2009).

118. N.Y. CRIM. PROC. LAW § 240.60 (McKinney 2009).

basically the same types of discoverable material¹¹⁹ and has similar rules for limiting the discovery process by protective orders.¹²⁰ There are also provisions for sanctions if a party does not follow the Rule¹²¹ or violates the continuing duty to disclose.¹²²

Note, however, that Federal Rule 16 and Article 240 of the N.Y. Crim. Proc. Law are applied differently in practice, even though they are very similar in form. Discovery is harder to get in federal courts than in New York state courts, which makes it more difficult for you to get information from the prosecutor. This is because federal courts allow the prosecutor to make more decisions about what to disclose to you and will generally support those decisions.

When you make a specific request or motion in federal court, be sure to cite the relevant subsections of Rule 16 to support your specific request or motion. If you need to subpoena a third party to produce documents or evidence (subpoena *duces tecum*), refer to Rule 17(c) of the Federal Rules of Criminal Procedure.

D. Conclusion

Discovery allows you and your opponent to find out important information from each other about the case. The rules of discovery govern what information to request or disclose, as well as when to request or disclose it. These rules differ depending on whether your case is civil or criminal and whether you are in state or federal court. It is important to know the rules of discovery that apply to your case because failure to comply may result in penalties, including having your case thrown out of court.

119. See FED. R. CRIM. P. 16(a)–(b).

120. See FED. R. CRIM. P. 16(d)(1).

121. See FED. R. CRIM. P. 16(d)(2).

122. See FED. R. CRIM. P. 16(c).

APPENDIX A

SAMPLE DISCOVERY DOCUMENTS

A-1	Sample Request For Production of Documents
A-2	Sample Request For Admission
A-3	Sample Notice of Interrogatory
A-4	Sample Notice of Motion for Order Compelling Discovery

Selected legal forms for conducting discovery in federal court follow. ***Do not tear these forms out of the book.*** You must copy them onto your own paper, filling in appropriate information that applies to you. You may be able to adapt these forms to state procedure if your state's discovery law is similar to that contained in the Federal Rules of Criminal Procedure. In that case, you should replace the federal rule cited with the applicable state law or rule. But you should always consult a legal form book for your state if you are not sure that these forms match your state's procedure.

A-1. SAMPLE REQUEST FOR PRODUCTION OF DOCUMENTS¹²³

[proper case caption]¹²⁴

Plaintiff [*your name*] requests defendant [*defendant's name*] to respond within [*number*] days to the following requests, namely that:

Defendant produce and permit plaintiff to inspect and to copy each of the following documents: [You should list the documents either individually (for example, minutes of a prison disciplinary hearing) or by category (for example, personnel files of one of the defendants) and describe each of them.].

[You should also state the time, place, and manner of making the inspection and of making the photocopies. You may wish to request that the defendants send copies of the documents to you at your prison facility. You should also request that the defendants send a list of all of the documents they are sending so that you can make sure that none of the documents were lost in transit.]

Defendant produce and permit plaintiff to inspect and to photograph, test, or sample each of the following objects: [list the objects either individually (baton used by guard) or by category (blood and hair samples of the guard or the samples obtained from you during a medical examination)].

[Again, you should ask the defendants to send the evidence to you, unless you are concerned that the objects will be interfered with before they reach you at the prison. You may wish to request specifically that the objects are sent in sealed containers so that you can see if they are tampered with before they reach you. However, if they are tampered with before they reach you, you may have no remedy.]

Defendant permit plaintiff [or name someone who will get the information for you] to enter [describe property to be entered] and to inspect, photograph, test or sample [describe the portion of property and the objects to be inspected. Since you will not be able to leave your facility to visit a property, you should ask someone else to visit the cell block or other area where the incident that you are complaining about occurred.].

[You should also state the time, place, and manner of making the inspection and performance of any related acts.]

123. Adapted from Roger S. Haydock & David F. Herr, *Discovery Practice* app. B-26 (5th ed. 2009) (Form D-1).

124. Chapter 6 of the *JLM*, "An Introduction to Legal Documents," includes examples of what case captions look like.

Dated:
[date] [city, state]

Signed,
[your name & address]
Plaintiff, *pro se*.

A-2. SAMPLE REQUEST FOR ADMISSION¹²⁵

[proper case caption]

Plaintiff [*your name*] requests defendant [*defendant's name*], within [*number*] days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following documents, exhibited with this request, is genuine:

[Here list the documents and describe each document that you have so that the defendant will be able to verify that it is the actual document and not something that has been changed.].

That each of the following statements is true:

[Here list the statements that you would like the defendant to admit. If you believe that the defendant may not want to admit certain things, you may not want to include those things in a request for admission, but in an interrogatory.].

Dated:

[date] [city, state]

Signed,
[your name & address]
Plaintiff, *pro se*.

A-3. SAMPLE NOTICE OF INTERROGATORY¹²⁶

[proper case caption]

To: [Each party and the attorney for each party]

PLEASE TAKE NOTICE that pursuant to Rule 31, Fed. R. Civ. P., the following interrogatories are to be propounded on behalf of [*party seeking answers*] to [*name and address of deponent*] by [*name and title of deposition officer*] pursuant to notice served herewith.

[Set out interrogatories in numerical order.]

Dated:

[date] [city, state]

Signed,
[your name & address]
Plaintiff, *pro se*.

125. Adapted from Roger S. Haydock & David F. Herr, *Discovery Practice* app. B-30 (5th ed. 2009) (Form F-1).

126. Adapted from Roger S. Haydock & David F. Herr, *Discovery Practice* app. B-23 (5th ed. 2009) (Form B-9).

A-4. SAMPLE NOTICE OF MOTION FOR ORDER COMPELLING DISCOVERY¹²⁷

Note: This motion seeks to compel production of documents. This form may also be used if your opponent has refused to comply with a different discovery request (for example, failing to respond to interrogatories). Simply change the language referring to a request for production of documents to indicate the type of discovery you are seeking.

[proper caption]

[*Plaintiff/defendant*] moves this court for an order pursuant to Rule 37 of Fed. R. Civ. P. [*describe relief sought*]. A copy of a proposed order is attached to this motion. The reasons supporting this motion include [*explain reasons such as the defendant's failure to answer your interrogatories, to produce records, or to allow you to perform discovery in a way that was practical for you*].

[*Plaintiff/defendant*] further moves the court for an order seeking reasonable attorney's fees and costs and expenses incurred in this proceeding. There exists substantial justification for seeking fees, costs and expenses, because [*explain reasons, such as defendant's ignoring your requests or defendant's telling you that your case was worthless because you are an incarcerated person*].

This motion is based upon the notice, pleadings, records, and files in this action, and the attached supporting affidavits [*or declarations*] of [*party, witness, attorney—persons who can state that they know that the defendant did not produce the documents or that you did not receive them*] and the attached memorandum of law [*if necessary or appropriate*], and oral and documentary evidence to be presented at the hearing on the motion [*if you think a hearing will be necessary*].

Dated:

[date] [city, state]

Signed,
[your name & address]
Plaintiff, *pro se*.

127. Adapted from Roger S. Haydock & David F. Herr, *Discovery Practice* app. B-34 (5th ed. 2009) (Form G-1).

CHAPTER 9

APPEALING YOUR CONVICTION OR SENTENCE*

A. Introduction

This Chapter explains how you can get your conviction undone or your sentence reduced if something was done incorrectly at your trial or hearing. To do so, you “appeal” to an “appellate court,” which has the power to overrule a lower court’s decision. You, as the “appellant,” get the chance to argue that the trial court’s judgment against you was wrong because of harmful legal errors that occurred in deciding your case.¹

This Chapter deals specifically with the laws of New York State. If you have been convicted or sentenced in a federal court or in another state’s court, your appeal will be governed by federal law or by the law of that other state and so you should use your prison’s law library to find information about the law that applies to your appeal. Even if New York law does not apply to your appeal, however, you may find it useful to read this Chapter for important background information about appeals in general.

For your appeal, you should get a lawyer to assist you as soon as possible. The Constitution guarantees that you can have a lawyer for your appeal, even if you can’t pay for one.² You must act quickly because there are time limits for filing an appeal. These time limits are strictly enforced, and are therefore very important. Once they expire, it may be impossible for an appellate court to consider your appeal, *even if* your appeal would otherwise have been successful. See Part B(1) for information about time limits.

You should make sure you have a lawyer because, among other reasons, many issues that could win your appeal are difficult to recognize by yourself. Because of the time limits, appealing by yourself is risky: you may lose the chance to raise an issue before you learn enough to even notice it. See Part C(1) for information on how you can get a lawyer.

Part A of this Chapter (the part you are reading now) is the introduction. Part B discusses limitations on your right to appeal, including time limits and restrictions that apply if you pleaded guilty. Part C describes what you can do before you appeal or while your appeal is pending, including how to get a lawyer and how to request release on bail. Part D explains what an appellate court can do when it considers your appeal. Part E explains how to actually file papers for your appeal. Part F discusses the possibility of continuing your appeal if the first appellate court decides against you.³ Part G explains what you can do if your appellate lawyer is not providing “effective assistance of appellate counsel.” Part H is a brief conclusion.

At the end of this Chapter, Appendix A helps you figure out where you should file your appeal. Appendix B provides sample papers for appeals, including papers needed to get a lawyer without cost, to get released on bail pending appeal, and to get an extension of time to file your appeal. These forms

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1. A judgment means your conviction (the entry of a guilty plea or a guilty verdict) and your sentence. See N.Y. CRIM. PROC. LAW § 1.20(13)–(15) (McKinney 2009).

2. See *Douglas v. California*, 372 U.S. 353, 356–358, 83 S. Ct. 814, 816–817, 9 L. Ed. 2d 811, 815–817 (1963) (establishing that the Constitution requires the state to pay for a lawyer for a defendant who cannot afford one for his first appeal). See also *Halbert v. Michigan*, 545 U.S. 605, 605, 125 S. Ct. 2582, 2583, 162 L. Ed. 2d 552, 556 (2005) (explaining that, assuming state law allows for any criminal appeal at all, the *Douglas* right applies to a first appeal even if the appeal requires permission under state law, but does not apply to second appeals that require permission).

3. See Melvin Bressler et al., *Appeals in Criminal Cases*, in New York Criminal Practice Handbook 651, 651 (Lawrence N. Gray ed., 2d ed. 1998 & Supp. 2007). Bressler has been an important resource in the writing of this Chapter of the *JLM*. We strongly recommend it for a detailed, chronological discussion of the criminal appellate process in New York State.

are only samples: you or your lawyer must write your own versions of these papers. Ideally, you should read the entire Chapter before you file any papers. If you file papers incorrectly or just tear these papers out of the book and send them to a court, the court may ignore them and you may lose your chance to appeal.

Finally, before starting your appeal, you should be realistic about your chances of winning an appeal. Very few criminal appeals are granted in the end. However, if you think a mistake was made in your case, or something else went wrong, you should always do what you can. It is possible you may succeed.

B. Limits on Your Right to Appeal

When deciding whether you should appeal, you should first determine whether there are any limits on your right to do so. This is an important first step because you may have already lost all or part of your right to appeal. You could have waived (given up) or forfeited (lost) your right to appeal in several ways. For example, if you pleaded guilty, you might have agreed to waive your right to appeal as part of a plea bargain. A plea bargain takes place when the prosecutor and the accused negotiate a resolution of the case subject to court approval, without a trial.⁴ Even if you did not waive your right to appeal, your right to appeal may be limited if you missed certain deadlines or failed to raise certain objections in the trial court. Also, based on which court convicted or sentenced you, and what specifically your conviction or sentence was, you may only be able to file your appeal with certain courts.

This Part will help you to identify if there are any potential limits on your right to appeal. If limits on your right to appeal exist, this Part will also help you determine whether it is possible for you to get your right to appeal reinstated (to get it back).

If you're unsure whether an appeal is possible for you, you should promptly go ahead and file your notice of appeal and get a lawyer anyway. Your appeal may be denied in the end, or you or your appellate lawyer may choose not to continue the appeal, but you'll be no worse off—and if you *are* eligible to appeal, waiting may cause you to lose your chance.

1. Time Limits

The general rule is that you will lose your right to appeal if you wait too long after your sentencing to file a notice of appeal. To preserve your right to appeal, you must file two copies of a notice of appeal with the clerk of your trial court within thirty days of the date you were sentenced.⁵ You must count thirty days from your *original* sentencing, even if you were re-sentenced later. However, if you were re-sentenced after the deadline to appeal passes, then you may count from the date of the new sentence, but only if you want to appeal that new sentence.⁶ Within the same thirty-day period, you must also serve a copy of the notice of appeal on the District Attorney of the county in which your trial was held.⁷ See Part E for information on preparing and filing your papers. This thirty-day period is a critical period, and you have a constitutional right to counsel during this time.⁸ **THESE TIME LIMITS ARE EXTREMELY IMPORTANT.**

If you don't file a notice of appeal within thirty days, you usually lose your right to appeal entirely. However, you may be able to recover your right to appeal by filing a motion for a time extension.⁹ Your

4. For more information on waiving your right to an appeal as a result of entering into a plea bargain, see Chapter 40 of the *JLM*.

5. N.Y. CRIM. PROC. LAW § 460.10(1)(a) (McKinney 2009 & Supp. 2012).

6. N.Y. CRIM. PROC. LAW § 450.30(3) (McKinney 2009 & Supp. 2012).

7. N.Y. CRIM. PROC. LAW § 460.10(1)(b) (McKinney 2009 & Supp. 2012).

8. See *People v. Montgomery*, 24 N.Y.2d 130, 133, 247 N.E.2d 130, 133, 299 N.Y.S.2d 156, 160 (1969) ("It is apparent that the 30-day period in which an appeal must be docketed is a critical time for the defendant. It cannot be successfully argued that an indigent defendant does not have the right to counsel at this stage of his proceedings.").

9. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012). The extension may be for no more than 30 days, counting from the date of the decision to grant the extension.

motion for a time extension must be within *one year* of the original deadline for filing a notice of appeal.¹⁰ In addition, you must show that there was “excusable neglect or good cause” as to why you missed your deadline.¹¹ Exactly what “excusable neglect or good cause” actually means is different depending on what state you are in.

Here are some examples of what some courts around the country have decided are “excusable neglect or good cause”:

- (1) Your lawyer abandoned you and failed to tell both you and the court that he is no longer your lawyer;¹²
- (2) Your lawyer cannot find you because you’ve been moved around different prisons;¹³
- (3) You tell your lawyer you want to appeal, but your lawyer does not file the right papers and appeal on your behalf;¹⁴
- (4) Your lawyer fails to communicate with you at all during the window when you are supposed to file your appeal.¹⁵

Under New York State law, the following exceptions have been recognized to allow filing an appeal after the deadline:¹⁶

- (1) A public servant behaved improperly (for example, if a prosecutor intentionally acted to prevent your good-faith efforts to file on time from succeeding¹⁷);
- (2) Your lawyer behaved improperly, died, or became disabled (examples of improper conduct include your lawyer’s failure to inform you in writing of your right to appeal,¹⁸

10. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012). Although this one-year time limit for making a motion for an extension of time cannot be extended, an appellate court might decide not to enforce the one-year time limit in extremely rare circumstances. *See People v. Thomas*, 47 N.Y.2d 37, 42–43, 389 N.E.2d 1094, 1096, 416 N.Y.S.2d 573, 575–576 (1979) (holding that, in the interest of justice, the district attorney could not enforce the one-year time limit to file a 460.30 motion when the defendant had made an honest effort to appeal within the appropriate time limit, and action by the district attorney had contributed to the failure of the defendant’s timely attempt to appeal).

11. FED. R. APP. P. 4(b)(4). *But see Espinal v. State*, 159 Misc. 2d 1051, 1054–1057, 607 N.Y.S.2d 1008, 1010–1012 (Ct. Cl. 1993) (Court of Claims held that in New York, the statutes governing filing and service of the papers initiating Court of Claims actions “do not approximate” FED. R. APP. P. 4, because the New York legislature had enacted enough procedures to protect incarcerated *pro se* litigants. The “mailbox” filing rule, in which a filing is deemed timely if deposited if the inmate deposits the filing in institution’s internal mailing system on time, was rejected.).

12. *See Maples v. Thomas*, 565 U.S. 266, 283, 132 S. Ct. 912, 924, 181 L. Ed. 2d 807 (2012) (granting defendant habeas corpus relief where defense counsels had both quit the law firm representing the defendant and forgot to inform the court and the defendant that they were no longer able to represent him).

13. *See United States v. Smith*, 60 F.3d 595, 596 (9th Cir. 1995) (granting an extension of time where the defendant and his lawyer “attempted to contact each other regarding whether to file a notice of appeal, but that it was difficult . . . [because the defendant] was moved to prisons in different states three times during the period immediately following entry of the judgment.”).

14. *See Kent v. United States*, 423 F.2d 1050, 1051 (5th Cir. 1970) (granting an extension of time where the defendant “desired an appeal and made this desire known to counsel and counsel declined to take and prosecute the appeal”).

15. *See Corral v. United States*, 498 F.3d 470, 475 (7th Cir. 2007) (granting an extension of time where even though defendant did not want to appeal at first but counsel had not been discharged, court never gave counsel permission to withdraw, counsel did not return phone calls made by defendant’s wife during appeal period requesting assistance, and defendant’s phone calls to counsel made during the appeal period from prison were blocked).

16. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012).

17. *See, e.g., People v. Johnson*, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325 (1987) (allowing an appeal after the deadline because defendant’s prior, timely attempts to appeal had been prevented by actions of the state).

18. *See People v. Nunez*, 178 A.D.2d 1029, 1029, 578 N.Y.S.2d 780, 781 (4th Dept. 1991) (granting extension of time to appeal because defense counsel failed to provide defendant with written notice of right to appeal).

- failure to inform you of your right to apply for leave to appeal as a poor person,¹⁹ and failure to start your appeal after being informed of your desire to appeal²⁰); or
- (3) You were unable to communicate with your lawyer about whether to appeal before the filing deadline had passed. To win an extension based on an inability to communicate with your lawyer, the inability to communicate must have been (a) because you were in prison and (b) through no fault of your attorney's or of your own (meaning that this was not because you or your attorney made a mistake).²¹

Unless you can satisfy both of these requirements—specifically, (1) making your motion for an extension within one year after your original thirty days to appeal has passed and (2) showing you missed your original deadline to appeal due to one or more of the three allowable factors—then you will not be granted a time extension. However, if more than a year and 30 days have passed, and your claim involves your attorney's unreasonable failure to file an appeal, you can file a “writ of error *coram nobis*”²² with the Appellate Division to claim ineffective assistance of counsel, as described in Part G(3) of this Chapter.²³ This is different from a 460.30 motion for a time extension, which is discussed below.

If you think that you may satisfy these requirements, then you should send your motion for a time extension to the appropriate appellate court.²⁴ See Form B-5 in Appendix B of this Chapter for an example of a motion for time extension, and see Appendix A of this Chapter to figure out which court you should send your motion to. The motion must be in writing and must contain a sworn statement of the facts that make you eligible for a time extension. Additionally, you must also notify the District Attorney in your jurisdiction of your motion so that the District Attorney can file papers opposing your motion.²⁵

If there are questions about the facts underlying your request for an extension—for example, whether you were really unable to communicate with your lawyer or simply did not do so—the appellate court may order the trial court to hold a hearing on these issues.²⁶ Once the facts are clarified and resolved, or if there were no factual questions to begin with, the appellate court will rule on your motion for an extension, and either grant or deny it.

If the appellate court grants you a time extension, it will give you no more than thirty days from the day of its decision to file your appeal.²⁷ If an intermediate appellate court denies your motion for an extension, you may appeal that denial only if both (1) the intermediate appellate court states that it based its decision solely on the law without finding facts, and (2) a judge on the Court of Appeals gives you permission to appeal.²⁸ Additionally, you may not appeal a decision denying an extension if your appeal would always have required permission of the same court that denied the extension (that is, if the appeal was not of right but rather required permission of the court. In short, if you cannot get

19. See *People v. Lord*, 181 A.D.2d 1076, 1076, 582 N.Y.S.2d 305, 305 (4th Dep't. 1992) (granting extension of time to appeal where defense counsel, among other mistakes, gave defendant “improper advice concerning the manner of applying for leave to appeal as a poor person”).

20. See *People v. Lord*, 181 A.D.2d 1076, 1076, 582 N.Y.S.2d 305, 306 (4th Dep't. 1992) (granting extension of time to appeal where defense counsel, among other mistakes, had failed to carry out defendant's request to appeal).

21. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012).

22. A writ of error *coram nobis* is an order by an appeals court demanding that the lower court consider facts which might have changed the outcome of the lower court case if known at the time of trial. *Coram nobis* is a Latin term meaning the “error before us.” See *Error Coram Nobis*, Black's Law Dictionary (10th ed. 2014).

23. See *People v. Watson*, 49 A.D.3d 570, 570, 853 N.Y.S.2d 581, 581 (2008) (stating that “the proper procedure for addressing” a claim of ineffective counsel “is an application of a writ of error *coram nobis* addressed to this Court”).

24. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012). See Form B-5 in Appendix B of this Chapter for a sample notice of a motion for extension of time.

25. N.Y. CRIM. PROC. LAW § 460.30(2) (McKinney 2009 & Supp. 2012).

26. N.Y. CRIM. PROC. LAW § 460.30(5) (McKinney 2009 & Supp. 2012).

27. N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2009 & Supp. 2012).

28. N.Y. Crim. Proc. Law § 460.30(6) (McKinney 2009 & Supp. 2012).

an extension without the approval of the court that denied your motion, you cannot appeal them denying your motion for extension of time.).²⁹

2. Plea Agreements³⁰

If you pleaded guilty, your right to appeal is limited in certain ways. If you pleaded guilty as part of a plea bargain or negotiated sentence, you automatically forfeited (lost) your right to appeal certain matters. This is true even if your plea agreement does not say so. Moreover, many plea agreements contain terms in which you waive (give up) the right to appeal even more matters, which would be listed in the agreement. The next two subsections explain these limits on your right to appeal.

Be aware that if you successfully appeal from a guilty plea, you will still have to face all the original charges against you. If you then negotiate a new plea agreement, or if you go to trial and are convicted, your new sentence could actually be *worse* than the sentence you received under your earlier plea. Thus, unless you have already received the worst possible sentence, there is some risk involved in appealing a guilty plea.

(a) Rights Automatically Forfeited by Your Guilty Plea

If you pleaded guilty, you automatically forfeited the right to appeal many types of errors, even if your plea agreement does not specify them.³¹ You can plead guilty to many different things. You may plead guilty to the entire charge/indictment. If you have been charged with only one crime, you may plead guilty only to a lesser included offense (*defined in glossary*). This requires the consent of the court and the District Attorney. If you have been charged with two or more offenses, you may: (1) plead guilty to one or more but not all of the offenses charged, or (2) plead guilty to a lesser included offense corresponding to any of the offenses charged, or (3) plead guilty for any combination of the offenses charged and their corresponding lesser included offenses.³² In general, by pleading guilty, you give up

29. See *People v. Nealy*, 82 N.Y.2d 773, 773, 624 N.E.2d 175, 176, 603 N.Y.S.2d 991 (1993) (holding that defendant may not appeal the appellate division's denial of an extension of time to request permission to appeal to that appellate division).

30. For more information on entering into plea bargains, see Chapter 40 of the *JLM*.

31. See generally N.Y. CRIM. PROC. LAW § 220.10 (McKinney 2009 & Supp. 2012); *People v. Hansen*, 95 N.Y.2d 227, 231 n.3, 738 N.E.2d 773, 776 n.3, 715 N.Y.S.2d 369, 372 n.3 (2000) (listing claims that are forfeited by guilty plea); *People v. Gerber*, 182 A.D.2d 252, 259–260, 589 N.Y.S.2d 171, 174–175 (2d Dept. 1992) (listing claims that are forfeited by guilty plea).

32. N.Y. CRIM. PROC. LAW § 220.10(4)(a)–(c) (McKinney 2009 & Supp. 2012.).

the right to argue the factual issue of guilt.³³ Additionally, you give up the right to raise problems with discovery or other pretrial matters.³⁴ You may not appeal the following issues if you pleaded guilty:

- (1) The insufficiency of the evidence before the grand jury;³⁵
- (2) The insufficiency of instructions given to the grand jury;³⁶
- (3) The refusal of the trial court to try you separately from a co-defendant;³⁷
- (4) The denial of your right to a jury trial;³⁸
- (5) The denial of your right of confrontation;³⁹
- (6) The suppression of evidence, if you pleaded without obtaining an explicit ruling on this;⁴⁰
- (7) The limits on your privilege against self-incrimination;⁴¹
- (8) The expiration of a statute of limitation (a time limit for bringing charges);⁴²
- (9) The lack of a factual basis for a plea to a lesser charge;⁴³
- (10) The absence of counsel during certain proceedings; and⁴⁴
- (11) Your *statutory* (as opposed to constitutional) right to a speedy trial.⁴⁵

By pleading guilty, however, you did not forfeit your entire right to appeal. Generally, you still have the right to appeal about the following errors (and others⁴⁶):

- (1) You were denied your *constitutional* right to a speedy trial,⁴⁷
- (2) You were charged in violation of your *constitutional* right against double jeopardy,⁴⁸
- (3) You were not competent to stand trial,⁴⁹
- (4) The statute under which you were convicted is unconstitutional,⁵⁰
- (5) Your sentence was illegal,⁵¹
- (6) Your plea was not voluntary or knowing,⁵²
- (7) Jurisdiction was not proper in the trial court,⁵³
- (8) Your conviction was based entirely upon evidence the prosecutor knew was false,⁵⁴
- (9) You were improperly denied a motion to suppress evidence,⁵⁵ or
- (10) The trial court based your sentence on an improper determination of your prior-felon status.⁵⁶

Even though you did not automatically give up your right to appeal the issues listed above by pleading guilty, you may have given up the right to appeal these issues by other means. You could

33. See *People v. Garcia*, 216 A.D.2d 36, 36–37, 627 N.Y.S.2d 666, 667 (1st Dept. 1995) (“By pleading guilty, the defendant has waived his right to litigate the issue of his guilt.”).

34. See *People v. Berezansky*, 229 A.D.2d 768, 771, 646 N.Y.S.2d 574, 577 (3d Dep’t. 1996) (holding that a defendant who waives indictment and pleads guilty “waives all discovery and all other pretrial and trial matters.”).

35. See *People v. Caleca*, 273 A.D.2d 476, 476, 711 N.Y.S.2d 743, 744 (2d Dept. 2000) (“By pleading guilty, the defendant waived his claim that the evidence submitted to the Grand Jury was not sufficient to support the indictment.”).

36. See *People v. Palo*, 299 A.D.2d 871, 871, 749 N.Y.S.2d 452, 452 (4th Dept. 2002) (“The contention of defendant that the prosecutor improperly instructed the grand jury does not survive his plea of guilty.”).

37. See *People v. Shepphard*, 177 A.D.2d 668, 668, 576 N.Y.S.2d 368, 368 (2d Dept. 1991) (“The defendant’s plea of guilty constituted a waiver of the right to seek appellate review of the denial of his severance motion”).

38. See *People v. Walls*, 129 A.D.2d 751, 751, 514 N.Y.S.2d 513, 513 (2d Dept. 1987) (holding that a guilty plea waives the right to appeal issues relating to both the right to a jury trial and the right to confront witnesses); see also *People v. Taylor*, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) (“[A] guilty plea signals defendant’s ‘intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including . . . the right to trial by jury.’” (quoting *People v. Lynn*, 28 N.Y.2d 196, 201–202, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78) (1971))).

39. See *People v. Taylor*, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) (“[A] guilty plea signals defendant’s ‘intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including the right to confrontation.’” (quoting *People v. Lynn*, 28 N.Y.2d 196, 201–202, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78) (1971))); see also *People v. Pacherille*, 25 N.Y.3d 1021, 1023, 32 N.E.3d 393, 394, 10 N.Y.S.3d 178, 179 (2015).

40. See *People v. Smith*, 304 A.D.2d 677, 677, 757 N.Y.S.2d 491, 491 (2d Dep’t. 2003) (“By pleading guilty before making a motion to suppress evidence . . . the defendant waived her claim”).

41. *See* *People v. Taylor*, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) (“[A] guilty plea signals defendant’s ‘intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including ... the privilege against self-incrimination.’” (quoting *People v. Lynn*, 28 N.Y.2d 196, 201–202, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78) (1971))).

42. *See* *People v. Parilla*, 8 N.Y.3d 654, 659, 870 N.E.2d 142, 145, 838 N.Y.S.2d 824, 827 (2007) (holding that a guilty plea waives the right to a statute of limitations defense).

43. *See* *People v. Clairborne*, 29 N.Y.2d 950, 951, 280 N.E.2d 366, 367, 329 N.Y.S.2d 580, 581 (1972) (“A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed.”).

44. *See* *People v. Reiblein*, 200 A.D.2d 281, 283, 613 N.Y.S.2d 789, 790 (3d Dept. 1994), *appeal denied*, 84 N.Y.2d 831, 641 N.E.2d 172, 617 N.Y.S.2d 151 (3d Dep’t. 1994) (holding that, by pleading guilty, defendant waived right to appeal on the grounds that defense counsel was not present at psychiatric interview).

45. *See* *People v. Smith*, 272 A.D.2d 679, 681, 708 N.Y.S.2d 485, 487 (3d Dept. 2000) (“By pleading guilty, defendant waived appellate review of his statutory right to a speedy trial.”); *see generally* N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2009 & Supp. 2012). A statutory right is a right created by an ordinary law passed by the legislature. A constitutional right is a right guaranteed by the state or federal constitution. Courts are usually less willing to decide that constitutional rights—which are often more fundamental and important—have been waived.

46. *See* N.Y. CRIM. PROC. LAW § 220.10 nn.241–97 (McKinney 2009) (notes of decision discussing waivers resulting from guilty plea); N.Y. CRIM. PROC. LAW § 470.15 n.18 (McKinney 2009 & Supp. 2015) (note of decision discussing preservation of issues on appeal); N.Y. CRIM. PROC. LAW § 710.70 n.69 (McKinney 2009 & Supp. 2015) (note of decision discussing waiver of right to appeal following a guilty plea). *See also* *People v. Hansen*, 95 N.Y.2d 227, 230–31, 738 N.E.2d 773, 776, 715 N.Y.S.2d 369, 372 (2000) (describing the issues that survive a guilty plea, such as jurisdictional matters).

47. *See* *People v. Campbell*, 97 N.Y.2d 532, 535, 769 N.E.2d 1288, 1289, 743 N.Y.S.2d 396, 397–398 (2002) (noting that the constitutionally protected right to a speedy trial is required for a fundamentally fair trial and to protect the integrity of criminal proceedings, and therefore cannot be waived); *People v. Smith*, 272 A.D.2d 679, 681, 708 N.Y.S.2d 485, 487 (3d Dept. 2000) (“[D]efendant’s right to raise his constitutional right to a speedy trial survives both his guilty plea and the waiver of his right to appeal.”) (citations omitted); *People v. Hansen*, 95 N.Y.2d 227, 230–31 n.2, 738 N.E.2d 773, 776 n.2, 715 N.Y.S.2d 369, 372 n.2 (2000) (listing speedy trial right among constitutional claims that survive a guilty plea).

48. *See* *Menna v. New York*, 423 U.S. 61, 62–63, 96 S. Ct. 241, 242, 46 L. Ed. 195, 197–98 (1975) (holding that a guilty plea does not waive a claim that the charges amounted to unconstitutional double jeopardy); *People v. Prescott*, 66 N.Y.2d 216, 218, 220–221, 486 N.E.2d 813, 814–816, 495 N.Y.S.2d 955, 956–958 (1985) (holding that a defendant’s constitutional double jeopardy claim survives a guilty plea and may be raised for the first time on appeal). But note that you may not raise your *statutory* right against double jeopardy under § 40.20 of the New York Criminal Procedure Law if you have pleaded guilty. *See* *People v. Prescott*, 66 N.Y.2d 216, 219–220, 486 N.E.2d 813, 815, 495 N.Y.S.2d 955, 957 (1985) (holding that a guilty plea results in forfeiture of statutory double jeopardy claim, even if presented to the court prior to the plea); *see also* *People v. Gray*, 300 A.D.2d 696, 697, 752 N.Y.S.2d 731, 733 (2d Dep’t. 2002) (holding that a constitutional double jeopardy claim survives a guilty plea but that a statutory claim does not).

49. *See* *People v. Lopez*, 6 N.Y.3d 248, 255, 844 N.E.2d 1145, 1148, 811 N.Y.S.2d 623, 626 (2006) (noting that a “challenge to a defendant’s competency . . .” is not waived by pleading guilty and waiving the right to appeal); *People v. Callahan*, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S. 46, 50 (1992) (noting the same); *People v. Armlin*, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975) (holding that a guilty plea does not waive right to a mandated competency hearing); *People v. Bennefield*, 306 A.D.2d 911, 911, 761 N.Y.S.2d 906, 907 (4th Dept. 2003) (noting that “issues relating to defendant’s competency survive” a guilty plea and a waiver of a right to appeal).

“Competency to stand trial” is a technical phrase that means the defendant is able to stand trial because he understands the charges against him, the severity of the charges, the potential punishments that he can be sentenced to if found guilty, the proceedings that are occurring, and is capable of assisting in his own defense. *See* *Competency*, *Black’s Law Dictionary* (10th ed. 2014).

50. *See* *Gesicki v. Oswald*, 336 F. Supp. 371, 374 n.3 (S.D.N.Y. 1971), *aff’d*, 406 U.S. 913, 92 S. Ct. 1773, 32 L. Ed. 2d 113 (1972) (holding that a guilty plea does not waive the right to contest the constitutionality of the statute under which a defendant was convicted); *see also* *People v. Lee*, 58 N.Y.2d 491, 493, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418 (1983) (“A defendant by a plea of guilty does not forfeit the right on appeal from the conviction to challenge the constitutionality of the statute under which he was convicted.”).

51. *See* *People v. Lopez*, 6 N.Y.3d 248, 255–56, 844 N.E.2d 1145, 1148–1149, 811 N.Y.S.2d 623, 626–627 (2006) (noting that, while a claim challenging the legality of a sentence cannot be waived by a guilty plea, explicit

have specifically given up (waived) your right to appeal in your plea agreement or you may have given up your right to appeal by failing to preserve the issues at trial (that is, failing to object when the mistakes were first made). Waiver and preservation are discussed in Part B(2)(b) and Part B(3) of this Chapter, respectively.

(b) Rights You Waive by Agreement

In addition to pleading guilty, you may also have agreed to waive your right to appeal as part of a plea bargain or negotiated sentence.⁵⁷ If your plea included an agreement to waive your right to appeal,

waiver of the right to appeal *does* waive the right to appeal on the basis of the severity of the agreed-upon sentence); *People v. Seaberg*, 74 N.Y.2d 1, 9, 541 N.E.2d 1022, 1025, 543 N.Y.S.2d 968, 972 (1989) (finding that a claim challenging the legality of the sentence cannot be waived by a guilty plea). For an example of a clearly illegal sentence, see *People v. Williams*, 14 N.Y.3d 198, 212–13, 925 N.E.2d 878, 886–887, 899 N.Y.S.2d 76, 84–85 (2010) (holding that a determinate sentence that did not include mandatory post-release supervision, as was required by applicable statutory law, was illegal).

52. See *People v. Catu*, 4 N.Y.3d 242, 244–245, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005) (reversing conviction on the basis that guilty plea was not “voluntary and intelligent” since defendant was not told he would be subject to post-release supervision); *People v. Gerber*, 182 A.D.2d 252, 261, 589 N.Y.S.2d 171, 176 (2d Dept. 1992) (“[A] defendant who pleads guilty is entitled to raise appellate contentions regarding ... the voluntary and knowing nature of his plea . . .”). See also *JLM*, Chapter 9, Part D(1)–(2) for guilty pleas or plea agreements that do not meet constitutional requirements of “knowing, voluntary, and intelligent.” You can argue involuntariness on direct appeal if the involuntariness is apparent on the record and you moved to withdraw your plea before sentencing. See *People v. Brown*, 14 N.Y.3d 113, 897 N.Y.S.2d 674 (2010) (withdrawing a guilty plea for involuntariness where the defendant made the plea under duress because the plea bargain granted him a furlough to see his seriously ill child and his previous requests to visit his child had been previously denied). If you did not move to withdraw, courts may refuse to consider the issue as “unpreserved.” See Part B(3) of this Chapter for more on the preservation requirement. There is an important exception to this requirement: if something in the plea allocution shows that you did not understand what you were pleading guilty to, and the court did not ask any questions to make sure, you can argue on appeal that the plea was not knowing and voluntary, even though you did not move to withdraw it. *People v. McNair*, 13 N.Y.3d 821, 822–823, 920 N.E.2d 929, 930, 892 N.Y.S.2d 822, 823 (2009) (holding that trial court must ask further questions where defendant’s remarks “cast significant doubt” on guilt). If the involuntariness has to do with matters outside the record, such as ineffectiveness of trial counsel, file a 440.10 motion instead of an appeal. For information on Article 440 appeals, see *JLM*, Chapter 20.

53. See *People v. Konieczny*, 2 N.Y.3d 569, 573, 813 N.E.2d 626, 628, 780 N.Y.S.2d 546, 548 (2004) (recognizing that jurisdictional issues survive a guilty plea and are exceptions to the forfeiture rule); *People v. Taylor*, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) (“A guilty plea does not forfeit the right to raise a jurisdictional defect . . .”).

54. See *People v. Pelchat*, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984) (finding that a defendant who pleaded guilty was allowed to challenge a conviction when the prosecutor knowingly based the charges on false evidence); *People v. Whitehurst*, 291 A.D.2d 83, 88, 737 N.Y.S.2d 152, 156 (3d Dept. 2002) (recognizing that a defendant does not waive right to bring “a challenge based upon a guilty plea to an accusatory instrument which is void because of the prosecutor’s knowledge that the only evidence to support it is false” (quoting *People v. Pelchat*, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984))).

55. See N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 2009); N.Y. CRIM. PROC. LAW § 710.70 nn. 14, 69 (McKinney 2009.) A motion to suppress is “a request that the court prohibit the introduction of illegally obtained evidence at a criminal trial.” *Motion to Suppress*, BLACK’S LAW DICTIONARY (10th ed. 2014).

56. See *People v. Lacend*, 140 A.D.2d 243, 244, 528 N.Y.S.2d 832, 833 (1st Dep’t. 1988) (modifying status of defendant, who had pleaded guilty, from predicate violent felon to predicate felon and remanding for re-sentencing).

57. A waiver generally covers any aspect of a case that does not fall within certain exceptions. For example, you may have waived and given up the right to appeal your conviction on the grounds that your lawyer failed to raise certain defenses. See *People v. Parilla*, 8 N.Y.3d 654, 659–660, 870 N.E.2d 142, 145–146, 838 N.Y.S.2d 824, 827–828 (2007) (holding that a waiver of the right to appeal as part of a plea agreement prevented the defendant from raising the issue of a statute of limitations defense on appeal). For information on how other states address the issue of waivers by agreement, see Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 *Hastings Const. L. Q.* 127, 135–46 (1995).

you still have several options. First, you may claim your waiver was invalid. A waiver is considered invalid if you did not knowingly, intelligently, and voluntarily agree to waive your right to appeal.⁵⁸

Second, there are some claims that can never be waived by plea agreement because they are considered very important to society. This means that even if you waived your right to appeal in a plea

58. *See* *People v. Seaberg*, 74 N.Y.2d 1, 11, 541 N.E.2d 1022, 1026–1027, 543 N.Y.S.2d 968, 972–973 (1989) (“A waiver, to be enforceable, must not only be voluntary but also knowing and intelligent.”). A waiver is not voluntary, knowing, and intelligent (and therefore is not valid) if the trial record does not demonstrate that the trial court made certain that the defendant understood the meaning of the waiver before agreeing to it. *See* *People v. Billingslea*, 6 N.Y.3d 248, 257, 844 N.E.2d 1145, 1149–1150, 811 N.Y.S.2d 623, 627–628 (2006) (holding that trial court’s statement that “when you plead guilty you waive your right of appeal” was not sufficient for the waiver to be knowing since the court did not explain that the defendant was agreeing to waive rights beyond those that are automatically forfeited by any guilty plea). However, a waiver that is adequately explained in writing and signed by the defendant may be valid even if the trial court does not fully explain the terms of the waiver to the defendant. *See* *People v. Ramos*, 7 N.Y.3d 737, 738, 853 N.E.2d 222, 222, 819 N.Y.S.2d 853, 853 (2006) (holding that the trial record established that the “defendant knowingly, intelligently and voluntarily waived his right to appeal” based on a written waiver agreement, even if the trial court’s explanation to the defendant was unclear). *See also JLM*, Chapter 9, Part D(1)–(2) for guilty pleas or plea agreements that do not meet constitutional requirements of “knowing, voluntary, and intelligent.”

agreement or as part of a negotiated sentence, you still have a right to appeal certain types of claims.⁵⁹ These claims include:

- (1) a challenge to a death sentence,⁶⁰
- (2) a claim that you were denied your constitutional right to a speedy trial,⁶¹
- (3) a challenge to the legality of court-imposed sentences,⁶²
- (4) a challenge to the constitutionality of the statute outlawing the conduct to which you pleaded guilty,⁶³
- (5) a claim regarding your competency to stand trial,⁶⁴ or
- (6) a claim that ineffective assistance of counsel affected the voluntariness of your guilty plea.⁶⁵

Please note that there may be other claims that society has a strong interest in, including double jeopardy as you were informed of the potential maximum sentence.⁶⁶ Finally, while you cannot waive

59. See *People v. Callahan*, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (noting that there are “several categories of appellate claims that may not be waived because of a larger societal interest in their correct resolution.”). See generally Preiser, McKinney Practice Commentary, N.Y. CRIM. PROC. LAW § 450.10 at 160–164 (2005); Donnino, Preiser, McKinney Supplemental Practice Commentaries, N.Y. CRIM. PROC. LAW § 450.10 at 80–83 (2015) (Supplemental Practice Commentaries).

60. N.Y. CRIM. PROC. LAW § 470.30(2) (McKinney 2009) (“Whenever a sentence of death is imposed, the judgment and sentence shall be reviewed on the record by the court of appeals.”).

61. See *People v. Wright*, 119 A.D.3d 972, 974, 989 N.Y.S.2d 180, 182 (2014) (concluding that the practice of conditioning a plea on a waiver of the constitutional right to a speedy trial was “inherently coercive”); *People v. Blakley*, 34 N.Y.2d 311, 313, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 461 (1974) (holding where a plea is attempted based on a waiver of the constitutional right to a speedy trial, the plea must be vacated); *People v. Callahan*, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (holding that a waiver of right to appeal does not prevent appeals based on denial of a defendant’s constitutional right to a speedy trial).

62. See *People v. Francabandera*, 33 N.Y.2d 429, 434 n.2, 310 N.E.2d 292, 294 n.2, 354 N.Y.S.2d 609, 612 n.2 (1974) (noting that the legality of a sentence is always appealable after a guilty plea); see also *People v. Callahan*, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (listing the legality of a sentence as among the issues that remain appealable even where a defendant attempts waiver). The right to appeal the legality of a sentence includes the right to appeal an unreasonable delay in sentencing. *People v. Campbell*, 97 N.Y.2d 532, 533, 769 N.E.2d 1288, 1288, 743 N.Y.S.2d 396, 396 (2002) (holding that a general waiver of the right to appeal does not waive a claim of “unreasonable delay in sentencing” as the claim challenges the legality of the sentence).

63. See *People v. Lee*, 58 N.Y.2d 491, 493–494, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418–419 (1983) (holding defendant’s guilty plea did not forfeit his ability to challenge the constitutionality of the statute under which he was convicted); *People v. Beaumont*, 299 A.D.2d 657, 659, 749 N.Y.S.2d 612, 614 (3d Dept. 2002) (noting that the defendant’s right to appeal the constitutionality of the statute under which he was convicted survived his valid waiver of his right to appeal but finding that the defendant did not preserve the issue by raising it at trial).

64. See *People v. Armlin*, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975) (holding that defendant’s guilty plea did not waive rights to competency proceedings, and that the issue can be raised on appeal). See *People v. Armstrong*, 49 A.D.3d 960, 960, 853 N.Y.S.2d 219, 220 (3d Dept. 2008) (holding that a guilty plea does not provide a ground to waive the requirement for a competency examination as required by statute by two psychiatric examiners once ordered by court.) See *People v. Green*, 75 N.Y.2d 902, 908–909, 554 N.Y.S.2d 821, 825, 553 N.E.2d 1331, 1335 (1990) (holding that a defendant may not waive the right to challenge his competency to stand trial because these rights are recognized as a matter of fairness to the accused).

65. See *People v. Johnson*, 288 A.D.2d 501, 502, 732 N.Y.S.2d 137, 138 (3d Dept. 2001) (stating that “to the extent that a claim of ineffective assistance of counsel impacts on the voluntariness of a defendant’s guilty plea, the claim survives a waiver of the right to appeal ...” but noting that the “claim must ordinarily be preserved by a motion to withdraw the plea or a motion to vacate the judgment of conviction”) (citations omitted).

66. For example, in *People v. Allen*, the Court of Appeals held that a defendant may expressly waive the right to appeal a constitutional double jeopardy ruling in a plea bargain. The defendant in that case pleaded guilty just before the start of a second trial after a mistrial had been declared during the first trial. When he later attempted to appeal his conviction, the Court of Appeals ruled that he had validly waived the right to a double jeopardy defense in his plea bargain. The court determined that society’s interest in the right to a double jeopardy defense was not as strong as, for example, its interest in the right to a speedy trial. Therefore, while you cannot

your right to challenge an illegal sentence, you can waive your right to challenge your sentence as too harsh or excessive.⁶⁷ This applies as long as you were informed of the potential maximum sentence and even if your plea agreement did not contain the promise of a specific sentence.⁶⁸

3. Failure to Protest (the “Preservation Requirement”)

Appellate courts generally are not willing to decide questions that the trial court had no chance to consider. Therefore, an error usually must be “preserved” by pointing it out to the trial court at a time when the trial court had the opportunity to fix it. This applies whether you pleaded guilty or not.

To preserve a legal error for appellate review, you (or more likely your lawyer) generally must have objected to the mistake when it occurred or at a later time when the trial court still had the chance to correct the error.⁶⁹ In other words, you usually are not allowed to raise an issue for the first time on appeal. Instead, you must have raised the issue at your trial so that the trial court could have addressed it before it became a problem. By doing so, you have “saved” this objection in the record, notifying the appellate court that you pointed out the error when it occurred.

In general, you must have identified the specific legal basis for your objection at trial in order to preserve the error for appellate review.⁷⁰ In other words, it is not enough to have objected without explaining at the time of the objection why you were objecting. However, an appellate court will also review an error on legal grounds that you did not specify at trial if the trial court expressly decided the particular issue in response to an objection by a party.⁷¹ You may also have preserved errors for

waive the right to a speedy trial, you can waive the right to a double jeopardy defense if you agree to do so in your plea bargain. *People v. Allen*, 86 N.Y.2d 599, 603, 658 N.E.2d 1012, 1015, 635 N.Y.S.2d 139, 142 (1995); *see also* Preiser, McKinney Practice Commentaries, N.Y. CRIM. PROC. LAW § 220.10 (2009). The Court of Appeals later held that the right to appeal a constitutional double jeopardy ruling may be waived as part of a general waiver of the right to appeal even if the waiver agreement does not specifically state that the right to appeal on the basis of double jeopardy is being waived. *People v. Muniz*, 91 N.Y.2d 570, 575, 696 N.E.2d 182, 186, 673 N.Y.S.2d 358, 362 (1998) (finding that there is “no principled basis upon which to conclude that a defendant cannot impliedly waive a claim of double jeopardy . . .” when the waiver agreement allows the defendant to appeal from all non-waivable aspects of the case).

67. *See People v. Espino*, 279 A.D.2d 798, 799, 718 N.Y.S.2d 729, 730 (3d Dept. 2001) (noting a defendant may waive the right to appeal a sentence as harsh and excessive but never the right to appeal the legality of a sentence).

68. *See People v. Hidalgo*, 91 N.Y.2d 733, 737, 698 N.E.2d 46, 48, 675 N.Y.S.2d 327, 329 (1998) (finding that a defendant’s general waiver of the right to appeal prevented her from appealing her sentence as harsh and excessive).

69. If you make no protest, the intermediate appellate court cannot review the error as a “question of law.” N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009). But, an appellate court nonetheless may decide to review the error “in the interest of justice.” N.Y. CRIM. PROC. LAW § 470.15(6)(a) (McKinney 2009). The “in the interest of justice” exception to the preservation requirement is discussed in Part (b) of this Section.

70. *See People v. Hawkins*, 11 N.Y.3d 484, 492, 900 N.E.2d 946, 950, 872 N.Y.S.2d 395, 399 (2008) (holding that a motion must be “specifically directed” at the error to preserve it); *People v. Dien*, 77 N.Y.2d 885, 886, 571 N.E.2d 69, 70, 568 N.Y.S.2d 899, 900 (1991) (holding that because the defendant made only a general objection, he failed to preserve his argument for appellate review); *People v. Rivera*, 73 N.Y.2d 941, 942, 537 N.E.2d 618, 618, 540 N.Y.S.2d 233, 233 (1989) (holding that defendant’s general objection did not preserve his argument for appellate review). *But see People v. Vidal*, 26 N.Y.2d 249, 254, 257 N.E.2d 886, 889, 309 N.Y.S.2d 336, 340 (1970) (finding an exception to the rule that a general objection is insufficient to preserve an argument for appellate review and holding that “[i]f the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to be sufficient.”).

71. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009) (a question is preserved “if in response [sic] to a protest by a party, the [trial] court expressly decided the question raised on appeal”). *See People v. Johnson*, 144 A.D.2d 490, 491, 534 N.Y.S.2d 207, 209 (2d Dept. 1988) (holding that an issue was preserved even without objection because the trial court expressly decided the question raised by the appeal); *see generally* Preiser, Practice Commentaries, Book 11A, N.Y. Crim. Proc. Law § 470.05 (McKinney 2009) (summarizing New York Criminal Procedure Law § 470.05, which explains when an appeal will be allowed).

review on appeal through a request, rather than an objection.⁷² This means that if you asked the judge for a particular ruling or instruction but he refused, you may challenge the trial court's refusal even if you did not formally object.⁷³ However, if you want to challenge an error in the ruling or instruction that the trial court chose to give instead of your instruction, you must have objected.⁷⁴ In any event, the issue must have been brought to the trial court's attention.⁷⁵

(a) Errors Not Subject to the Preservation Requirement

If you did not object to an error at your trial and the court did not consider the specific issue, an appellate court will usually refuse to consider the error on appeal. But, you may still be able to appeal if the error deals with a fundamental aspect of the fairness of your trial. Errors like this fall into two categories: errors reviewed “in the interest of justice” and errors that disrupt the “mode of proceedings.”

Any unpreserved error may be reviewed in the interest of justice by New York's Appellate Division courts (the intermediate appellate courts).⁷⁶ Thus, if something happened that was so unfair that it may have affected your conviction, but it was not objected to or otherwise preserved, you can still argue that the Appellate Division should consider it in the interest of justice. That is, even if the error you wish to appeal is generally subject to the preservation requirement, you may ask an Appellate Division

72. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009). *See also* *People v. Leisner*, 73 N.Y.2d 140, 147, 535 N.E.2d 647, 650, 538 N.Y.S.2d 517, 520 (1989) (holding that a trial court's failure to give the jury the requested jury instruction was an error preserved for appellate review since there was no “clear intent” by the defense to abandon the request).

73. “Instruction” refers to what the judge tells the jury it should or should not consider as well as what questions the jury must answer when it is deciding the verdict in your case.

74. *See People v. Narayan*, 54 N.Y.2d 106, 112–113, 429 N.E.2d 123, 125, 444 N.Y.S.2d 604, 606 (1981) (holding that where the defense requested to speak to his client on the second day of an order that prohibited such conversation, but had not made the same request on the first day, only the refusal on the second day is preserved for appeal because of that request, not the order itself or its application to the first day). If the trial court grants the instruction that you (or your lawyer) requested but makes a mistake or otherwise gives an instruction different than the instruction that you requested, this error is not preserved for appeal unless you objected to it. *See People v. Whalen*, 59 N.Y.2d 273, 280, 451 N.E.2d 212, 215, 464 N.Y.S.2d 454, 457 (1983) (“Inasmuch as defendant's request was initially granted and his comments after the charge did not alert the [t]rial [j]udge to the error so as to afford an opportunity to correct himself, defendant must be deemed to have waived any objection to the alibi instruction.”).

75. *See* Gary Muldoon, *Handling a Criminal Case in New York* § 18:188 (2015). This requirement applies to appeals brought by the prosecution too. *See People v. Santiago*, 80 N.Y.2d 916, 917, 602 N.E.2d 1118, 1118, 589 N.Y.S.2d 302, 303 (1992).

76. N.Y. CRIM. PROC. LAW § 470.15(3)(c), (6)(a) (McKinney 2009). *See, e.g., People v. Jones*, 81 A.D.2d 22, 42, 440 N.Y.S.2d 248, 261 (2d Dept. 1981) (saying “the failure to adequately preserve an issue in this manner would not, however, preclude our court from reviewing the matter in a proper case ‘[a]s a matter of discretion in the interest of justice’”) (internal citation omitted), *People v. DeRennzio*, 25 A.D.2d 652, 653, 268 N.Y.S.2d 542, 543 (1st Dept. 1966) (saying “[w]e recognize our right to reverse in the interests of justice.”). *But see People v. Morris*, 111 A.D.2d 414, 414, 489 N.Y.S.2d 610, 611 (2d Dept. 1985) (saying “our interests of justice powers do not authorize review of issues waived by a plea of guilty”) (internal quotations and citations omitted).

court to consider your appeal.⁷⁷ Note that if you did not preserve an issue, an appellate court may review it, but is not required to do so.⁷⁸

The Court of Appeals (the highest court), by contrast, is limited by the New York State Constitution and can only review “questions of law.”⁷⁹ This means that an issue must have been preserved by objection.⁸⁰ But errors that disrupt the organization of the court or the mode of proceedings are treated as questions of law even without preservation by objection. So, if the error you wish to appeal falls into the limited class of errors that affect the organization of the court or the mode of proceedings, you can appeal even if you did not preserve the error or agreed at trial to accept the

77. N.Y. CRIM. PROC. LAW § 470.15(3)(c), (6)(a) (McKinney 2009).

78. *Compare* People v. Benton, 196 A.D.2d 755, 756, 601 N.Y.S.2d 918, 919 (1st Dept. 1993) (exercising court’s judgment to review an incorrect decision that classified the defendant as a second violent felony offender), with People v. Walton, 309 A.D.2d 956, 957, 766 N.Y.S.2d 93, 94 (2d Dept. 2003) (declining to review defendant’s unpreserved claim that he had been wrongly deemed a second violent felony offender). *See also* People v. Gray, 86 N.Y.2d 10, 19–20, 22, 652 N.E.2d 919, 921–923, 629 N.Y.S.2d 173, 175–177 (1995) (holding that a claim of legal insufficiency of the evidence must be preserved for review as a “question of law,” but noting that an intermediate appellate court may decide to review such a claim “in the interest of justice” even if it was not preserved). *See generally* Preiser, Practice Commentaries, Book 11A, N.Y. CRIM. PROC. LAW § 470.05 (McKinney 2009).

If a court declines to hear your non-preserved claims, one strategy is to include them in an ineffective assistance claim. For guidance on how to make this type of claim, see Chapter 12, Part B of the *JLM*.

79. N.Y. CONST. art. VI, § 3(a) (“The jurisdiction of the court of appeals shall be limited to the review of questions of law [subject to certain exceptions].”).

80. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009) (“For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered.”).

error.⁸¹ These errors are considered so fundamental that they are not subject to the preservation requirement at all.

In either situation, successful appeals are generally based on a violation of trial procedure rules or a violation of your “fundamental constitutional rights.”⁸² Errors that can be raised for the first time on appeal include the following scenarios:

- (1) You were tried twice for the same offense in violation of your rights against double jeopardy guaranteed by the New York State or U.S. Constitutions⁸³ (this protection does not apply to rights against double jeopardy provided by statute rather than a constitution);⁸⁴
- (2) You were deprived of your right to a lawyer;⁸⁵
- (3) You were deprived of your right to be present at an important stage of the trial⁸⁶ or other important court proceedings;⁸⁷
- (4) Your lawyer was not told of the contents of a note the judge received from the jury before the judge answered the jury’s questions;⁸⁸
- (5) You were deprived of your right to have your trial supervised by a judge;⁸⁹ or
- (6) Your sentence, or the way in which it was determined, was illegal.⁹⁰

(b) Errors Subject to the Preservation Requirement

Errors that do not fall into the categories that were presented in Section (a) above will not be reviewed by the appellate court unless it was preserved in the trial court.⁹¹ Errors that will only be reviewed when preserved at the trial court include:

- (1) You want to withdraw a guilty plea or want the judgment of conviction vacated;⁹²
- (2) A challenge to the constitutionality of a statute;⁹³
- (3) Deprivation of your right to confront a witness;⁹⁴
- (4) Admissibility of evidence;⁹⁵
- (5) Comments or conduct of counsel, or of the court;⁹⁶
- (6) Severance or joint trials. A joint trial occurs when only one trial is held but the case involves more than one defendant. A severance allows a defendant to be tried separately from the other defendants in the case on one or more counts;⁹⁷
- (7) Jurisdiction and venue. Jurisdiction is the state and court that the case is in, while venue is the county;⁹⁸
- (8) Jury selection;⁹⁹ or
- (9) Excessive or harsh sentences.¹⁰⁰

Note that because most errors are not preserved for appeal, this is an incomplete and partial list. You should assume that an error will be subject to the preservation requirement, and needs to be raised at trial in order to be argued on appeal.

4. Which Courts Will Consider Your Appeal

If you decide to appeal, you must submit your appeal to the correct court in order for it to be considered. There are two types of courts to which appeals can be made: (1) an intermediate appellate

81. See *People v. Mehmedi*, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987) (holding that a violation of defendant’s right to be present at all material stages of the trial was automatically preserved for appeal even though defendant did not make an objection at trial and “even though counsel may have consented to the procedure”); *People v. Patterson*, 39 N.Y.2d 288, 295, 347 N.E.2d 898, 902, 383 N.Y.S.2d 573, 577 (1976), *aff’d*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (“A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by law.”).

82. The general rule is that even violations of constitutional rights must be preserved. See *People v. Kelly*, 5 N.Y.3d 116, 119–120, 832 N.E.2d 1179, 1181, 799 N.Y.S.2d 763, 765 (2005) (“[I]n a very narrow category of cases, we have recognized so-called ‘mode of proceedings’ errors that go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted.”); *People v. Gray*, 86 N.Y.2d 10, 19–22, 652 N.E.2d 919, 921–923, 629 N.Y.S.2d 173, 175–177 (1995) (holding that an objection is necessary for a constitutional error to be reviewed as a matter of law unless the error is among the very narrow class of “mode of proceedings” errors); *People v. Voliton*, 83 N.Y.2d 192, 195–196, 630 N.E.2d 641, 643, 608 N.Y.S.2d 945, 947 (1994) (declining to review

on appeal a defendant's constitutional challenge to a seizure by the police because the issue was not preserved and did not "impair the essential validity of the criminal proceedings"); *Ulster County Court v. Allen*, 442 U.S. 140, 151 n.10, 99 S. Ct. 2213, 2221, n.10, 60 L. Ed. 2d 777, 788 n.10 (1979) (quoting *People v. McLucas*, 15 N.Y.2d 167, 172, 204 N.E.2d 846, 848, 256 N.Y.S.2d 799, 802 (1965)) ("[T]he New York Court of Appeals has developed an exception to the State's contemporaneous-objection policy that allows review of unobjected-to errors that affect 'a fundamental constitutional right.'").

83. U.S. CONST. amend. V; N.Y. CONST. art. I, § 6; *see People v. Prescott*, 66 N.Y.2d 216, 219, 486 N.E.2d 813, 814, 495 N.Y.S.2d 955, 956 (1985) (holding that a claim of double jeopardy can be raised for the first time on appeal because it is a "fundamental principle of our legal system that a defendant may not be twice placed in jeopardy for the same offense"); *People v. Michael*, 48 N.Y.2d 1, 7, 394 N.E.2d 1134, 1137, 420 N.Y.S.2d 371, 374 (1979) (*per curiam*) (holding that a defendant's constitutional double jeopardy claim presents a question of law reviewable on appeal despite the defendant's failure to raise the claim in the trial court). However, a claim of double jeopardy cannot be raised on appeal if the circumstances surrounding the defendant's failure to object amounted to a waiver of the right to appeal on double jeopardy grounds, or if the defendant has waived the right to appeal by a waiver agreement. *See People v. Muniz*, 91 N.Y.2d 570, 574, 696 N.E.2d 182, 185, 673 N.Y.S.2d 358, 361 (1998) (holding that a claim of constitutional double jeopardy may validly be waived by a defendant); *People v. Michallow*, 201 A.D.2d 915, 916, 607 N.Y.S.2d 781, 783 (4th Dept. 1994) (noting that constitutional double jeopardy protections are "so fundamental that they are preserved despite the failure to raise them" by objecting, but holding that defendant's active participation in discussions relating to the court's declaration of a mistrial was implied consent to the mistrial and thus a waiver of her right against double jeopardy). For a discussion on waiver of the right to appeal, including waiver of the right to appeal a claim of double jeopardy, see Part (B)(2) of this Chapter.

84. *See People v. Biggs*, 1 N.Y.3d 225, 231, 803 N.E.2d 370, 374, 771 N.Y.S.2d 49, 53 (2003) (stating that unlike state and federal constitutional double jeopardy claims, which are reviewable even if not preserved at the trial court level, an unpreserved statutory double jeopardy claim is not reviewable).

85. For you to raise this claim for the first time on appeal, you have to show that your trial court record on its own makes it clear that you were deprived of your right to a lawyer. *See People v. McLean*, 15 N.Y.3d 117, 121, 931 N.E.2d 520, 522, 905 N.Y.S.2d 536, 538 (2010) (holding that a defendant may make a deprivation-of-counsel claim for the first time on appeal only where the trial court record makes it completely clear that the defendant was deprived of a lawyer); *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) (finding a valid deprivation-of-counsel claim when police questioned the defendant, without counsel present, the morning after a lawyer had visited him in prison).

86. *See People v. Mehmedi*, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987) (affirming reversal of defendant's conviction on the basis that instructions were given to the jury in defendant's absence, even though defendant's trial counsel did not object to defendant's being absent); *see also People v. Kelly*, 11 A.D.3d 133, 142–143, 781 N.Y.S.2d 75, 84 (1st Dept. 2004), *aff'd*, 5 N.Y.3d 116, 832 N.E.2d 1179, 799 N.Y.S.2d 763 (2005) (acknowledging that a violation of the right of a defendant to be present at the material stages of the trial is preserved for appellate review even without an objection, but finding that defendant's right to be present had not been violated).

87. *See People v. McAdams*, 22 A.D.3d 885, 885–886, 802 N.Y.S.2d 531, 532 (3d Dept. 2005) (finding that a denial of defendant's right to be present at sidebar conferences with potential jurors, including one conference about possible juror bias, constitutes a denial of defendant's right to be present at a material stage of the proceeding and is a reversible error on appeal even though defendant did not object at trial). You may, however, waive your right to be present if you knowingly, voluntarily, and intelligently make the waiver. *See People v. Keen*, 94 N.Y.2d 533, 538–539, 728 N.E.2d 979, 982, 707 N.Y.S.2d 380, 383 (2000) (holding that defendant's waiver of his right to be present for certain court proceedings was effective); *People v. Williams*, 92 N.Y.2d 993, 996, 706 N.E.2d 1187, 1189, 684 N.Y.S.2d 163, 165 (1998) ("The right to be present during sidebar questioning of prospective jurors on matters of bias or prejudice may be waived by a voluntary, knowing, and intelligent choice.") (citation omitted); *People v. Antommarchi*, 80 N.Y.2d 247, 250, 604 N.E.2d 95, 97, 590 N.Y.S.2d 33, 35 (1992) (holding that a defendant has a right to be present at sidebar questioning of jurors when the questioning explores prospective jurors' backgrounds and relates to their ability to weigh the evidence objectively, but not when questioning relates to physical impairment, family obligations, or work commitment); *People v. Dokes*, 659, 595 N.E.2d 836, 838, 584 N.Y.S.2d 761, 763 (1992) (finding that a defendant's statutory right to be present at trial includes the right to be present during the selection of the jury, the introduction of evidence, the closing argument of counsel, and the court's charge to the jury).

88. *See People v. Tabb*, 13 N.Y.3d 852, 853, 920 N.E.2d 90, 90, 891 N.Y.S.2d 686, 686 (2009) (reversing conviction because the absence of any record that the judge showed a jury note to the defense was a mode of proceedings error); *People v. O'Rama*, 78 N.Y.2d 270, 276–280, 579 N.E.2d 189, 192–194, 574 N.Y.S.2d 159, 162–164 (1991) (holding that court's failure to read a jury note to defense counsel before giving the jury a charge was

reviewable by Court of Appeals “notwithstanding that defense counsel did not object to the court’s procedure until after the supplementary charge had been given”); *People v. Kisoan*, 23 A.D.3d 18, 22–23, 801 N.Y.S.2d 69, 72 (2d Dept. 2005) (holding court’s failure to give defendant’s attorney a complete reading of jury’s question was preserved for appellate review even without an objection at trial); *but see People v. Williams*, 38 A.D.3d 429, 430–431, 833 N.Y.S.2d 29, 30–31 (1st Dept. 2007) (holding that where judge talked to jury foreperson to tell her he would address her question when defendant, counsel, and jury were all present, this conversation was not significant and would not have required input from the defense attorney, and thus that error was not preserved since it was not objected to by the defense).

89. *See People v. Ahmed*, 66 N.Y.2d 307, 311–312, 487 N.E.2d 894, 896–897, 496 N.Y.S.2d 984, 986–987 (1985) (reversing defendant’s conviction where the trial judge had, with defendant’s consent, been absent for part of the jury deliberations, leaving a law clerk to answer two questions from jurors). *Cf. People v. Hernandez*, 94 N.Y.2d 552, 556, 729 N.E.2d 691, 693–694, 708 N.Y.S.2d 34, 36–37 (2000) (holding that the fact that the judge was not in the courtroom during a mechanical readback of trial testimony does not constitute a violation of the defendant’s right to judge supervision of trial).

90. *See People v. Samms*, 95 N.Y.2d 52, 55–56, 731 N.E.2d 1118, 1120–1121, 710 N.Y.S.2d 310, 312–313 (2000) (discussing which illegal sentence claims can be raised for the first time on appeal); *People v. Callahan*, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (noting that among the “appellate claims that may not be waived” are “challenges to the legality of court-imposed sentences”); note, however, that this applies to sentences that are illegal (that is, not allowed by law) and not merely harsh or excessive, which are within the legal sentence that the trial court was allowed to impose). *See Part D(2) of this Chapter for a discussion of the difference between illegal and excessive sentences. Also, note that a claim that the verdict is against the “weight of the evidence” is a question of law that does not need to be preserved in order to be raised on appeal. See People v. Roman*, 217 A.D.2d 431, 431, 629 N.Y.S.2d 744, 745 (1st Dept. 1995) (finding that an appellate claim that the verdict was against the weight of the evidence need not have been raised before the trial court because a trial court has no authority to make a decision on this type of claim); *People v. Bleakley*, 69 N.Y.2d 490, 493–495, 508 N.E.2d 672, 674–675, 515 N.Y.S.2d 761, 762–763 (1987) (describing “weight of the evidence” analysis).

91. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009).

92. *See People v. Douglas*, 38 A.D.3d 1063, 1063, 831 N.Y.S.2d 585, 586 (3d Dept. 2007) (holding that defendant could not challenge the validity or voluntariness of his guilty plea because the issues were unpreserved for review since he did not move to withdraw the plea or vacate the judgment); *People v. Tuper*, 256 A.D.2d 636, 636, 681 N.Y.S.2d 808, 809 (3d Dept. 1998) (holding that defendant could not contend his guilty plea should not have been accepted because he had neither moved to withdraw the plea before sentencing nor moved to vacate the judgment after conviction).

93. *See People v. Davidson*, 98 N.Y.2d 738, 739, 780 N.E.2d 972, 972–973, 751 N.Y.S.2d 161, 161–162 (2002) (holding that defendant’s constitutional challenge to loitering statute was not properly preserved because it was raised for the first time on motion to set aside verdict); *People v. Navas*, 114 A.D.2d 425, 426, 494 N.Y.S.2d 141, 142 (2d Dept. 1985) (holding that the defendant’s constitutional challenge to the second violent felony offender statute was not preserved for appellate review because it was not raised prior to sentencing).

94. *See People v. Hickman*, 60 A.D.3d 865, 866, 875 N.Y.S.2d 530, 531–532 (2d Dept. 2009) (finding that defendant could not raise the issue of Sixth Amendment right of confrontation on appeal when he failed to move to strike witness’ testimony at trial); *People v. Mack*, 14 A.D.3d 517, 517, 787 N.Y.S.2d 397, 398 (2d Dept. 2005) (holding that issue of right to confrontation could not be raised on appeal because defendant did not specify confrontation rights as the grounds for objecting to witness testimony and motion for a mistrial).

95. *See People v. Meeks*, 56 A.D.3d 800, 801, 868 N.Y.S.2d 287, 288 (2d Dept. 2008) (“The defendant’s contention that the Supreme Court erred in admitting into evidence three photographs of the victim’s injuries is partially unpreserved for appellate review, as the defendant did not object to the admission of the first and third photographs.”); *People v. Metellus*, 54 A.D.3d 601, 602, 864 N.Y.S.2d 408, 409 (1st Dept. 2008) (holding that defendant could not raise claim of constitutional right to introduction of extrinsic evidence because such a right was never raised at trial).

96. *See People v. West*, 86 A.D.3d 583, 584, 926 N.Y.S.2d 659, 661 (2d Dept. 2011) (holding that defendant could not make argument on appeal that prosecutor’s remarks during summation were improper and deprived him of a fair trial because defendant did not object during trial or made unspecified, general objections); *People v. Bey*, 71 A.D.3d 1156, 1157, 898 N.Y.S.2d 189, 190 (2d Dept. 2010) (same); *People v. Davenport*, 38 A.D.3d 1064, 1066, 831 N.Y.S.2d 587, 589 (3d Dept. 2007) (ruling that objection to trial judge’s caustic remarks as showing bias was not preserved because objection was not made at trial); *People v. Maxam*,

court¹⁰¹ or (2) the Court of Appeals of the State of New York, which is the highest state court.¹⁰² In most cases, you will need to file an appeal with an intermediate appellate court before the Court of Appeals will consider hearing your case. If you have been sentenced to death, however, you have the right to appeal directly to the Court of Appeals without having to go through an intermediate appellate court.¹⁰³

Note that there are many intermediate appellate courts, so unless you are appealing directly to the Court of Appeals, you need to figure out appellate court is the right one for your case. This will depend on where you were convicted.¹⁰⁴ For example, if you were convicted of a felony in a New York Supreme Court, you must appeal to the appellate division of the department in which you were convicted.¹⁰⁵ Appendix A at the end of this Chapter can help you figure out where to file your appeal.

You will also need to figure out if you need permission to file your appeal. In general, you do not need permission if you are appealing: (1) the trial court's judgment against you,¹⁰⁶ (2) your sentence,¹⁰⁷

301 A.D.2d 791, 793, 753 N.Y.S.2d 599, 601 (3d Dept. 2003) (finding that defendant's argument that court was biased and should have recused itself was unpreserved for review because never raised at trial).

97. See *People v. Walker*, 71 N.Y.2d 1018, 1020, 525 N.E.2d 748, 749, 530 N.Y.S.2d 103, 103 (1988) (holding that defendant's request for severance was not preserved for appeal when made before first trial that resulted in a mistrial, but not the second, subsequent trial); *People v. Ahmr*, 22 A.D.3d 593, 594, 804 N.Y.S.2d 331, 333 (2d Dept. 2005) ("The defendant failed to preserve for appellate review his contention that the Supreme Court erroneously denied the severance motion of a codefendant, since he did not join in the codefendant's motion nor did he made any such motion on his own behalf.").

98. See *People v. Rote*, 28 A.D.3d 868, 869, 812 N.Y.S.2d 191, 192 (3d Dept. 2006) (finding that defendant had not preserved for review the argument that his failure to enter a plea deprived the court of personal jurisdiction); *People v. Cornell*, 17 A.D.3d 1010, 1011, 794 N.Y.S.2d 226, 227 (4th Dept. 2005) (holding that, by not moving to dismiss or get a jury charge for improper venue on the count of rape that occurred in a different county, defendant did not preserve the issue for review).

99. See *People v. Hicks*, 6 N.Y.3d 737, 739, 843 N.E.2d 1136, 1138, 810 N.Y.S.2d 396, 398 (2005) (holding that defendant could not challenge juror's qualification to serve nor the adequacy of the court's questioning because no objection was made at trial); *People v. Jones*, 11 A.D.3d 902, 903, 782 N.Y.S. 2d 322, 323 (4th Dept. 2004) (finding that defendant's argument of prosecutorial misconduct from comments during *voir dire* was unpreserved for appellate review).

100. See *People v. Stokes*, 28 A.D.3d 592, 592, 813 N.Y.S.2d 503, 503 (2d Dept. 2006) ("The defendant's contention that the sentencing court should have adjudicated him a youthful offender is unpreserved for appellate review, since he failed to object or to move to withdraw his plea on this ground."); *People v. Jones*, 136 A.D.2d 740, 740–41, 524 N.Y.S.2d 79, 81 (2d Dept. 1988) (holding that defendant failed to preserve the argument that he was entitled to receive the benefit of the lesser sentence of sexual misconduct instead of rape in the first degree by not raising it at trial).

101. See generally N.Y. CRIM. PROC. LAW § 450.60 (McKinney 2009). An intermediate appellate court is any court that hears appeals other than the Court of Appeals. There are two kinds of intermediate appellate courts: the appellate division and the appellate term. The appellate terms are created by the appellate divisions to also hear appeals and ease the workloads of the appellate division. Appellate terms are located in the First and Second Departments only. For a diagram of New York's courts, see the inside back cover of the *JLM*.

102. See generally N.Y. CONST. art. VI. New York is somewhat unusual in that its highest court is not called the "Supreme Court." (In fact, a "supreme court" is a type of trial court in New York.) For a diagram of New York's courts, see the inside back cover of the *JLM*.

103. N.Y. CRIM. PROC. LAW § 450.70(1) (McKinney 2009).

104. N.Y. CRIM. PROC. LAW § 450.60 (McKinney 2009).

105. N.Y. CRIM. PROC. LAW § 450.60(1) (McKinney 2009).

106. N.Y. CRIM. PROC. LAW § 450.10(1) (McKinney 2009). Though a trial court may make many orders and rulings during your trial, you generally cannot appeal these rulings until there is a final judgment. See, e.g., *People v. Boyd*, 91 A.D.2d 1045, 1046, 458 N.Y.S.2d 643, 644 (2d Dept. 1983) (holding that any objection to an intermediate order denying a motion to suppress evidence is reviewable only on an appeal from judgment); *People v. Pollock*, 67 A.D.2d 608, 608, 412 N.Y.S.2d 12, 12 (1st Dept. 1979), *aff'd*, 50 N.Y.2d 547, 550, 407 N.E.2d 472, 473, 429 N.Y.S.2d 628, 629 (1980) (stating no separate appeal is available for an order denying a motion to set aside a verdict).

107. N.Y. CRIM. PROC. LAW § 450.10(2) (McKinney 2009). Note that the statute says it excludes appeals of

or (3) an order granting the District Attorney's motion under Section 440.40 of the Criminal Procedure Law to set aside your sentence to impose a longer sentence.¹⁰⁸ This is because New York law grants everyone the *right* to appeal these decisions to an intermediate appellate court.

For other challenges, however, you may need to get permission before you file an appeal. For example, if you have already made a motion to vacate your judgment under Section 440.10 of the New York Criminal Procedure Law or a motion to set aside your sentence under Section 440.20, and the court has denied your motion, you will need to ask the court for permission to appeal the court's denial.¹⁰⁹ Note that if you need to ask for permission to appeal, this means that a court may decline to consider your appeal, whereas a court *must* consider your appeal if you have the right to appeal on that issue.

If an intermediate appellate court reviews your case and makes a decision, and you are unsatisfied with the decision, you may ask for permission to appeal the decision to the Court of Appeals. However, you do not have a *right* to appeal an appellate court's decision to the Court of Appeals. Note that the Court of Appeals will only consider one application for permission to appeal per case, including applications addressed to a justice of the appellate division.¹¹⁰ If the Court of Appeals decides to hear your case, it will issue a certificate of leave to appeal.¹¹¹ Part F explains this process in more detail.

Finally, keep in mind that filing an appeal is not the only way to challenge your conviction or your sentence. You may be able to file a motion to vacate the judgment against you¹¹² or to set aside your sentence.¹¹³ Such a motion, called an Article 440 motion, can be filed before, after, or at the same time as an appeal. A motion differs from an appeal in that an appeal must be based only on matters already on the record (things that were said in trial court or in papers previously given to the trial court). A motion, on the other hand, involves matters not on the record, such as advice your attorney gave you or evidence that was never brought up in court. Thus, when the record from your trial does not contain the necessary facts for a court to decide the issue that you want to raise, you should file an Article 440

allegedly excessive sentences if you agreed to the sentence as part of a plea bargain. But the Court of Appeals decided that this part of the statute is unconstitutional because the legislature does not have the power to prevent the appellate division from hearing these appeals. *See People v. Pollenz*, 67 N.Y.2d 264, 270, 493 N.E.2d 541, 543, 502 N.Y.S.2d 417, 419 (1986) (holding that the legislature could not prohibit the appellate division from hearing appeals based on excessive sentences). § 450.10(2) of the New York Criminal Procedure Law may still be applicable in cases where the intermediate appellate court is an appellate term. *See Preiser*, Practice Commentaries, N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2009). Note also that, though the statute itself may not prevent an appeal of an allegedly excessive sentence, you may have voluntarily waived your right to appeal your sentence or conviction as part of a plea or negotiated sentence. For more information, see Part B(2) of this Chapter.

108. N.Y. CRIM. PROC. LAW § 450.10(4) (McKinney 2009).

109. *See* N.Y. CRIM. PROC. LAW § 450.15 (McKinney 2009). If you obtain permission, you can appeal a sentence that you could not otherwise appeal under § 450.10(1) and (2) of the New York Criminal Procedure Law. You can also appeal the denial of your § 440 motion to vacate a judgment or set aside a sentence. See Form B-2 in Appendix B at the end of this Chapter for a sample application for permission to appeal. You may make only one such application, so do so carefully. The procedure for requesting leave to appeal under § 460.15 varies depending on which intermediate court you are applying to. N.Y. CRIM. PROC. LAW § 460.15(2) (McKinney 2009). *See generally* N.Y. COMP. CODES R. & REGS. tit. 22, § 640.1(c) (2020), N.Y. COMP. CODES R. & REGS. tit. 22, §§ 731.1(c), 732.1 (2020) (describing these procedures).

110. *See People v. Liner*, 70 N.Y.2d 945, 945, 519 N.E.2d 619, 619, 524 N.Y.S.2d 673, 673 (1988) (dismissing appeal made by defendant's lawyer on ground that court could not hear appeal after defendant had already made *pro se* application for appeal to the appellate division); *People v. Nelson*, 55 N.Y.2d 743, 743, 431 N.E.2d 640, 640–41, 447 N.Y.S.2d 155, 155–56 (1981) (dismissing appellate division's grant of permission to appeal while prior application was pending in Court of Appeals).

111. *See* N.Y. CRIM. PROC. LAW § 460.20 (McKinney 2009); *see also* N.Y. CRIM. PROC. LAW § 450.90 (McKinney 2009) (providing for taking an appeal after a certificate granting leave to appeal has been issued). If you are appealing an appellate division's order, a judge from the same department of the appellate division may grant you a certificate of leave to appeal before the Court of Appeals. N.Y. CRIM. PROC. LAW § 460.20(2)(a) (McKinney 2009).

112. *See* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2009).

113. *See* N.Y. CRIM. PROC. LAW § 440.20 (McKinney 2009).

motion.¹¹⁴ For a more detailed description of when you can file an Article 440 motion and which claims you may raise in an Article 440 motion, see Chapter 20 of the *JLM*.

C. What You Can Ask the Courts to Do *Before* Your Appeal is Heard

Before an appellate court hears your appeal, you can ask the court system to help you with several things, including finding a lawyer and getting a transcript of your trial. You can also ask the appellate court to stay your judgment and release you on bail. This part discusses each of these things in more detail.

1. Getting a Lawyer

You have a constitutional right to a lawyer on direct appeal.¹¹⁵ This means if you cannot afford a lawyer, upon request, the appellate court will appoint a lawyer to represent you at no cost.¹¹⁶ Your right to a lawyer applies when you or the government appeals a trial court's final judgment. When you were sentenced, your lawyer was supposed to advise you of the following: that you can appeal, how to appeal, and how to get a new lawyer for your appeal. Your lawyer should also have asked you if you wanted to appeal. If you said yes, he also should have filed the initial paperwork for you.¹¹⁷ To get a lawyer for your appeal, you will need to show proof that you do not have enough money to hire an attorney and pay the expenses of your appeal.¹¹⁸ Appendix B provides samples of the papers you should file to make this request.

If you decide that you do not want a lawyer to represent you on appeal, you may be able to prepare your appeal and appear in court on your own. This is called appearing "*pro se*." Note, however, that you do *not* have a constitutional right to represent yourself on appeal—the court may choose not to allow you to represent yourself.¹¹⁹

2. Requesting a Transcript

You can ask the trial court to provide you with a free transcript of your trial. In addition, you may ask for permission to appeal on "the original record." You should do this if your appeal will be based

114. See *People v. Harris*, 109 A.D.2d 351, 353, 491 N.Y.S.2d 678, 682 (2d Dept. 1985) (explaining that an Article 440 motion is designed to "inform a court of facts not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the judgment.").

115. *Anders v. California*, 386 U.S. 738, 741–744, 87 S. Ct. 1396, 1398–1400; 18 L. Ed. 2d 493, 496–497 (1967) (holding that an indigent person has the right to appellate representation); *Douglas v. California*, 372 U.S. 353, 357–358, 83 S. Ct. 814, 816–817; 9 L. Ed. 2d 811, 814–815 (1963) (holding that the 14th Amendment requires states to provide indigent persons representation on their appeals as of right); *People v. Garcia*, 93 N.Y.2d 42, 46, 710 N.E.2d 247, 249, 687 N.Y.S.2d 601, 603 (1999) ("[O]n a People's appeal, a defendant has the right to appellate counsel of defendant's choice and the right to seek appointment of counsel upon proof of indigency.").

116. Usually the court will appoint a new lawyer on appeal. See, e.g., *People v. Rhodes*, 245 A.D.2d 844, 845, 666 N.Y.S.2d 355, 356–357 (3d Dept. 1997) ("Concluding that it is necessary that independent counsel take a fresh look at this proceeding so as to assess whether any non-frivolous issues, including a claim of ineffective assistance in connection with the representation of defendant before the sentencing court, should be raised, we hereby relieve defense counsel of this assignment.").

117. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 606.5(b), 671.3(a), 821.2(a) (2020).

118. See N.Y. COMP. CODES R. & REGS. tit. 22, § 671.5 (2020); see *generally* *People v. West*, 100 N.Y.2d 23, 28, 789 N.E.2d 615, 619, 759 N.Y.S.2d 437, 441 (2003) (holding that "[r]equiring a defendant to apply for legal representation and providing instructions on how to do so" is constitutionally acceptable without providing counsel to assist in that application).

119. See *Martinez v. Court of Appeal of California*, 528 U.S. 152, 163, 120 S. Ct. 684, 692, 145 L. Ed. 2d 597, 607 (2000) ("Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*").

on something that happened at trial or a hearing. If the trial court grants this request, the appellate court and the prosecution will be given copies of the record.¹²⁰

3. Requesting a Stay

After filing and serving notice of your appeal, you can request a judge to “stay” your judgment. A stay delays or interrupts the carrying out of your sentence until after your appeal. If you are appealing a death sentence, or a judgment including a death sentence, filing a notice of appeal automatically stays the carrying out of your sentence.¹²¹ Note that you may file only one stay application after filing a notice of appeal, so prepare your application carefully.¹²²

If you decide to apply for a stay, you will need to figure out which court to ask for the stay. This will depend on which court tried and sentenced you and which court will hear your appeal. For example, if you are appealing to an appellate division from the judgment of a supreme court, you may apply for a stay from any appellate division or supreme court judge in the county where the judgment was entered.¹²³ See Appendix A at the end of this Chapter for help selecting the right court.

4. Requesting Release from Jail

While you are waiting for your appeal to be heard, you can request for a judge to release you on bail or on your own “recognizance.” To be released on your own recognizance means that a court will permit you to leave jail on the condition that you will appear in court whenever your attendance is required, and that you will comply with the orders and processes of the court.¹²⁴

You do not have a right to bail or recognizance while waiting for appeal.¹²⁵ But, depending on your offense, a judge may be able to grant your request for bail or recognizance. In many cases, a judge has discretion to determine whether to release you. This means that the law does not require that the judge keep you in custody or release you, and you may not appeal the judge’s decision on this matter.¹²⁶ However, there are some cases where the judge does not have this discretion and the law alone determines whether you must be held in custody.¹²⁷ For example, if you were convicted of a Class A

120. See Appendix B-3 of this Chapter for sample papers to request free trial transcripts and copies of the record.

121. N.Y. CRIM. PROC. LAW § 460.40(1) (McKinney 2009).

122. N.Y. CRIM. PROC. LAW § 460.50(3) (McKinney 2009).

123. N.Y. CRIM. PROC. LAW § 460.50(2)(a) (McKinney 2009).

124. N.Y. CRIM. PROC. LAW § 510.40(2) (McKinney 2009). To determine which court can grant your application for a stay, see N.Y. CRIM. PROC. LAW § 460.50(2) (McKinney 2009).

125. Numerous cases have indicated that you do not have a right to bail or recognizance after having been convicted. See, e.g., *Gold v. Shapiro*, 62 A.D.2d 62, 65, 403 N.Y.S.2d 906, 907 (2d Dep’t. 1978), *aff’d*, 45 N.Y.2d 849, 850 382 N.E.2d 767, 410 N.Y.S.2d 68, 68 (1978) (“[T]here is no constitutional right to bail after conviction.”); see also *People v. Hinspeter*, 190 Misc.2d 614, 617, 740 N.Y.S.2d 591, 593, (Sup. Ct. Westchester County 2002). You do have the constitutional right to ensure that the court does not exercise its discretion unreasonably or arbitrarily and that bail is not excessive. U.S. CONST. amend. VIII; N.Y. Const. art. 1, § 5; see also *Finetti v. Harris*, 609 F.2d 594, 595 (2d Cir. 1979) (“Only if there is no rational basis in the record to support the denial of bail [pending appeal] may there be a violation of a state prisoner’s constitutional rights.”).

126. See generally Preiser, Practice Commentaries, N.Y. CRIM. PROC. LAW § 460.50 (McKinney 2009); see also *United States ex rel. Siegal v. Follette*, 290 F. Supp. 636, 638 (S.D.N.Y. 1968) (stating that New York law “permits [a judge] to grant or deny bail in his discretion after weighing the facts he considers significant”). Although an order denying bail is not appealable, it may be reviewed on habeas corpus grounds. For more information, see Chapter 21 of the *JLM*, “State Habeas Corpus.”

127. N.Y. CRIM. PROC. LAW §§ 510.30(1), 530.10 (McKinney 2009) (explaining when a court is required to order bail or recognizance and when it may do so at its discretion). Bail must not violate the New York state constitution’s restriction on excessive bail. See *People ex rel. Calloway v. Skinner*, 33 N.Y.2d 23, 33, 300 N.E.2d 716, 720, 347 N.Y.S.2d 178, 184 (1973) (citing N.Y. CONST. art. I, § 5); *People ex rel. Shapiro v. Keeper of City Prison*, 290 N.Y. 393, 398, 49 N.E.2d 498, 500 (1943) (“Our State Constitution does not decree a right to bail, but merely proscribes ‘excessive bail.’”).

felony, a judge could not release you because the law requires you to be held in custody for that type of offense.¹²⁸

If your offense does not automatically require you to be held in custody, a judge will consider the following factors, among others, to decide whether to grant your request for release:¹²⁹

- (1) Your character, reputation, habits, and mental condition;
- (2) Your employment and financial resources;
- (3) Your family ties and length of residence in the community;
- (4) Your criminal record, if any;
- (5) Your previous record as a juvenile delinquent or youth offender, if any;
- (6) Your previous record of responding to court appearances when required; and, above all,
- (7) The likelihood that the judgment against you will be reversed on appeal.

A judge may refuse to release you on bail if he thinks an appellate court is unlikely to reverse the judgment against you.¹³⁰ Therefore, when you submit a request for bail, you should include a brief statement that explains your appellate claims and demonstrates that there is a reasonable possibility of reversal.

In general, you should petition for bail if there is any chance it will be granted. If you are released on bail, it will be easier to prepare your appeal than if you are held in jail. Keep in mind, though, that the amount of bail may be more than you can afford. Additionally, note that you will not receive credit for time served during the time that you are out on bail.

Note also that if you are released on bail while your appeal is pending, the order releasing you will expire if your appeal is not “perfected” within 120 days after the order is given.¹³¹ Generally, to perfect an appeal you must deliver a specified number of copies of the trial record and your brief to the appellate court and the opposing party.¹³² If your appeal is not perfected within 120 days, you should request a time extension to file an appeal, explicitly asking the court to extend the 120-day period.¹³³

D. What You Can Ask the Court to Do in Your Appeal

In an appeal, you ask the appellate court to correct the trial court’s judgment. The appellate court will make one of three decisions. First, it might “reverse” the trial court’s judgment, which means it declares the entire judgment invalid. Second, it might “affirm” the trial court’s judgment, which means it upholds the entire judgment. Finally, it might “modify” the trial court’s judgment, which means it reverses part of the judgment and affirms another part of the judgment.¹³⁴ If the appellate court reverses or modifies the judgment, it will also take some action to correct the judgment, such as reducing your sentence or dismissing your indictment.¹³⁵

Sometimes the appellate court might determine that it does not have enough information to decide your appeal right away. If this happens, the appellate court may suspend your appeal and send the matter to a lower court for additional proceedings.¹³⁶ This means that the appellate court will not

128. N.Y. CRIM. PROC. LAW § 530.50 (McKinney 2009).

129. N.Y. CRIM. PROC. LAW § 510.30(2) (McKinney 2009).

130. N.Y. CRIM. PROC. LAW § 510.30(2)(b) (McKinney 2009).

131. N.Y. CRIM. PROC. LAW § 460.50(4) (McKinney 2009). Under this statute, an order granting release will expire if your appeal has “not been brought to argument in or submitted to the intermediate appellate court” within 120 days. Courts have interpreted this statute to mean that such an order will expire if your appeal is not perfected within 120 days. *See, e.g.,* *People v. Higgins*, 177 A.D.2d 1052, 1052, 578 N.Y.S.2d 70, 71 (4th Dept. 1991) (stating that defendant “bore the burden of surrendering himself after the 120-day stay expired before his appeal was perfected”).

132. *See* Part E(3) of this Chapter for information on perfecting your appeal.

133. N.Y. CRIM. PROC. LAW § 460.50(4) (McKinney 2009). The intermediate appellate court itself must grant the extension, regardless of who issued the order. *See* Preiser, *Practice Commentaries*, N.Y. CRIM. PROC. LAW § 460.50 (McKinney 2009).

134. *See* N.Y. CRIM. PROC. LAW § 470.15(2) (McKinney 2009).

135. *See* N.Y. CRIM. PROC. LAW § 470.20 (McKinney 2009).

136. This process is called “remitting.” *See, e.g.,* *People v. Hasenflue*, 24 A.D.3d 1017, 1018, 806 N.Y.S.2d

decide whether to affirm, modify, or reverse the judgment until the lower court has held another hearing.

An intermediate appellate court must base its decision to reverse or modify the trial court's judgment on one of three things (or some combination of them): the law, the facts, or the "interest of justice."¹³⁷

1. Appealing Your Conviction

If you appeal your conviction "on the law," you will argue that legal errors in the trial deprived you of a fair trial or that the evidence used to convict you was legally insufficient. If you appeal your conviction "on the facts," you will argue that your conviction was against the weight of the evidence.

(a) "On the Law"

You can ask an appellate court to reverse the judgment "on the law" on the basis of: (1) legal errors that deprived you of a fair trial, or (2) legally insufficient evidence to support your conviction.¹³⁸

You may seek reversal on the law on grounds of legal errors that deprived you of a fair trial. In order to seek a reversal on the law due to legal errors, you must have properly preserved these errors for review, unless the error you are appealing is one that is not subject to the preservation requirement, as explained above in Section B(3). Some categories of legal errors that may support reversal include: (1) erroneous evidentiary rulings,¹³⁹ (2) prosecutor's misconduct,¹⁴⁰ (3) improper jury instructions,¹⁴¹ or (4) improper influence on the jury.¹⁴² For example, in *People v. Brown*, the court's judgment was reversed because a juror conducted an experiment outside of court to evaluate testimony, which was an improper influence on the jury.¹⁴³ The witness claimed to have viewed the incident through the driver's van window, so the juror tested the visibility of her own (similar) van and told the jury she "could see that [the crime] was plausible."¹⁴⁴ Note that there are many other potential legal errors, and spotting them requires thorough familiarity with relevant bodies of law, including evidence law,

766, 768 (3d Dept. 2005) (withholding decision and sending matter back to trial court to look at the defendant's competency to stand trial); *People v. Britt*, 231 A.D.2d 581, 583, 647 N.Y.S.2d 527, 529 (2d Dept. 1996) (sending matter back for trial court to make clear whether trial court followed the proper three-step procedure to make sure preemptory strikes, which are used to keep certain people off of a jury, were not used to keep people off the jury because of their race).

137. See N.Y. CRIM. PROC. LAW § 470.15(3) (McKinney 2009).

138. Note, however, that "on the law" reversals are not limited to these two instances. See N.Y. CRIM. PROC. LAW § 470.15(4) (McKinney 2009) (noting "upon the law" determinations "include, but are not limited to," these bases).

139. See, e.g., *People v. Boughton*, 70 N.Y.2d 854, 855, 517 N.E.2d 1340, 1341, 523 N.Y.S.2d 454, 455 (1987) (reversing conviction because trial judge wrongly allowed prosecutor to introduce confession without giving sufficient notice); *People v. Reilly*, 19 A.D.3d 736, 737–738, 796 N.Y.S.2d 726, 727–728 (3d Dept. 2005) (ordering new trial because judge allowed evidence that was very prejudicial but not very probative, meaning the evidence was not useful for deciding the verdict fairly).

140. See, e.g., *People v. Collins*, 12 A.D.3d 33, 42, 784 N.Y.S.2d 489, 496 (1st Dept. 2004) (ordering new trial because prosecutor's concluding remarks deprived defendant of a fair trial).

141. See, e.g., *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106, 110 (1965) (reversing conviction because judge improperly commented during jury instructions on defendant's decision not to testify); *People v. Goldblatt*, 98 A.D. 3d 817, 822, 950 N.Y.S.2d 210, 215–216, (3d Dept. 2012) (reversing conviction because court did not properly instruct the jury "as to what was required to find that defendant was recklessly driving his automobile."); *People v. Richardson*, 234 A.D.2d 952, 952, 652 N.Y.S.2d 173, 174 (4th Dept. 1996) (reversing conviction because court did not give proper instructions as required by statute.).

142. See, e.g., *Parker v. Gladden*, 385 U.S. 363, 363–365, 87 S. Ct. 468, 470, 17 L. Ed. 2d 420, 422 (1966) (reversing conviction where bailiff made statements to jurors that defendant was a wicked and guilty person, because this behavior violated the 6th Amendment); *People v. Stanley*, 87 N.Y.2d 1000, 1001, 665 N.E.2d 190, 191, 642 N.Y.S.2d 620, 621 (1996) (reversing conviction because jurors visited crime scene and conducted an experiment in order to evaluate a witness' credibility and so became "unsworn witnesses" themselves).

143. *People v. Brown*, 48 N.Y.2d 388, 394–395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979).

144. *People v. Brown*, 48 N.Y.2d 388, 394–395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979).

criminal procedure, and state and federal constitutional law. It is not possible for this Chapter or the *JLM* to discuss every possible error. This is a big reason that you should get a lawyer for your appeal: even if you do legal research beyond the *JLM*, you will likely not be able to learn enough law in time to notice errors and present them to the court as effectively as an appellate lawyer could. *See* Section C(1) above for how to get a lawyer.

If the appellate court does reverse your judgment because of legal errors, the court must order a new trial on the counts of the original indictment.¹⁴⁵ You cannot be retried, however, on (1) counts dismissed on appeal or in a post-judgment order, or (2) counts or offenses of which you were effectively acquitted. For example, if you were charged with first-degree murder, but convicted only of second-degree murder, you would be considered acquitted of first-degree murder. This means that you could be retried only for second-degree murder.¹⁴⁶

You may also seek reversal on the law on grounds of legal insufficiency. Legal insufficiency means that the evidence presented by the prosecution was not enough (not sufficient) to prove all the necessary elements of the crime for which you were convicted.¹⁴⁷ For example, in order to convict a defendant of driving while intoxicated, the prosecution must prove both that the defendant was drunk and that he was driving a car. If the prosecution did not introduce any evidence that the defendant was driving a car, the evidence would be insufficient. In determining whether the evidence presented is legally sufficient, the appellate court will weigh whether any valid reasoning or inferences could lead a rational person to the conclusion that the jury reached, viewing the evidence in the light most favorable to the prosecution.¹⁴⁸ Note that showing that evidence is legally insufficient is different from showing a verdict to be against the weight of the evidence, which is discussed in Subsection (b) below.

Like any legal error, a claim of legal insufficiency must be preserved for it to be reviewed on appeal¹⁴⁹ or else it may only be reviewed “in the interest of justice” by the Appellate Division.¹⁵⁰ (See Part B(3) of this Chapter for more on the preservation requirement.) If a court grants your appeal by finding legal insufficiency, the court must dismiss those counts of your indictment that the court determines to be supported by legally insufficient evidence.¹⁵¹ The Double Jeopardy Clause of the Fifth Amendment¹⁵² prohibits the prosecution from retrying any count that has been dismissed for legal insufficiency.¹⁵³ Thus, if the appellate court reverses every count in your indictment for legal

145. N.Y. CRIM. PROC. LAW § 470.20(1) (McKinney 2009).

146. *See, e.g.,* People v. Graham, 36 N.Y.2d 633, 639, 331 N.E.2d 673, 677, 370 N.Y.S.2d 888, 894 (1975) (holding that defendant could not be retried for murder in the second degree after the appellate division reduced the conviction to manslaughter in the first degree).

147. *See generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.15(4) (2009).

148. *See* People v. Taylor, 94 N.Y.2d 910, 911–912, 729 N.E.2d 337, 337–338, 707 N.Y.S.2d 618, 618–619 (2000) (stating that “whether inferences of guilt could be rationally drawn” from the evidence is the standard for evaluating sufficiency of the evidence).

149. When the prosecution rested, the defense should have moved for a dismissal and stated exactly why the prosecution’s case was legally insufficient. *See* People v. Hawkins, 11 N.Y.3d 484, 493, 900 N.E.2d 946, 951, 872 N.Y.S.2d 395, 400 (2008) (holding that a general objection that prosecution failed to prove its case does not preserve the issue of whether evidence was legally sufficient to support a particular element).

150. In fact, some courts have said that evaluating legal insufficiency is “necessarily” part of weighing evidence, which Appellate Division courts routinely do. Thus, a claim of legal insufficiency may succeed even if the issue was not preserved, if the claim is presented as the verdict being against the weight of the evidence. *See, e.g.,* People v. Scott, 67 A.D.3d 1052, 1054, 889 N.Y.S.2d 279, 281 (3d Dept. 2009) (“[W]e will necessarily consider [legal insufficiency] in reviewing the weight of the evidence[.]”); People v. Loomis, 56 A.D.3d 1046, 1046–1047, 867 N.Y.S.2d 772, 773 (3d Dept. 2008) (considering sufficiency of evidence, although not preserved, while considering weight of evidence). Furthermore, if a defendant requests, “the Appellate Division must conduct a weight of the evidence review.” People v. Danielson, 9 N.Y.3d 342, 348, 880 N.E.2d 1, 4, 849 N.Y.S.2d 480, 484 (2007).

151. N.Y. CRIM. PROC. LAW §§ 470.20(2), (3) (McKinney 2009).

152. U.S. CONST. amend. V (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”).

153. *See* *McDaniel v. Brown*, 558 U.S. 120, 131, 130 S. Ct. 665, 672, 175 L. Ed. 2d 582, 589 (2010); *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150–2151, 57 L. Ed. 2d 1, 14 (1978) (finding that if a court finds

insufficiency, you will be set free. By contrast, if the reversal is due to an error in the trial, and not because of legal insufficiency, double jeopardy will not apply and you may be retried for the same crime.¹⁵⁴

An appellate court may modify a judgment by dismissing one or more counts based on legal insufficiency, but affirming other counts for which there was legally sufficient evidence. In this situation, the appellate court has two options: (1) it can either affirm the sentence that the trial court imposed for the counts that were not dismissed¹⁵⁵ or, (2) it can “remand” (send the case back to the trial court) for re-sentencing.¹⁵⁶

An appellate court may also modify the judgment to change your conviction to a “lesser included offense.”¹⁵⁷ A lesser included offense exists when no one could possibly commit the greater crime without, by the same conduct, committing the lesser offense.¹⁵⁸ Petit larceny, for example, is a lesser included offense of third-degree robbery because petit larceny is stealing property¹⁵⁹ and third-degree robbery is stealing property through the use of force¹⁶⁰ or threat of force.¹⁶¹ Since both offenses require you to steal property, you cannot commit third-degree robbery without also committing petit larceny. Thus, if an appellate court concludes that the prosecutor failed to prove that you used force, your robbery conviction is legally insufficient. However, if the prosecutor did prove that you stole property, the appellate court may change your conviction to petit larceny without holding a new trial. If the appellate court determines that the evidence proved a lesser included offense, the court will send you back to the trial court for re-sentencing,¹⁶² unless you have already served the maximum sentence possible for the lesser crime.¹⁶³

(b) “On the Facts”

You can ask an appellate court for reversal “on the facts” by arguing that your guilty verdict was against the weight of the evidence.¹⁶⁴ In other words, the appellate court can reverse a case if it finds that the evidence was not strong enough to convict the person originally. In evaluating the weight of the evidence, an intermediate appellate court must determine whether a jury could reasonably have acquitted you based on the information it had. If the appellate court concludes that a jury could reasonably have acquitted you, the court must weigh the evidence used at trial to be sure the jury gave the evidence the weight it deserved. If the appellate court then decides that the jury did not give the evidence proper weight, the court may set aside the jury’s guilty verdict.¹⁶⁵ For instance, as you recall

evidence legally insufficient, there must be a judgment of acquittal under the Double Jeopardy Clause).

154. See *Lockhart v. Nelson*, 488 U.S. 33, 40–42, 109 S. Ct. 285, 291, 10 L. Ed. 2d 265, 273–274 (1988) (holding that the Double Jeopardy Clause does not prohibit retrying a case overturned for improper sentencing unless the sum of the evidence was insufficient to sustain a guilty verdict); see *generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.20(1) (McKinney 2009).

155. N.Y. CRIM. PROC. LAW § 470.20(3) (McKinney 2009).

156. N.Y. CRIM. PROC. LAW § 470.20(3) (McKinney 2009).

157. N.Y. CRIM. PROC. LAW § 470.15(2)(a) (McKinney 2009).

158. N.Y. Crim. Proc. Law § 1.20(37) (McKinney 2009).

159. N.Y. PENAL LAW § 155.25 (McKinney 2009).

160. N.Y. PENAL LAW § 160.05 (McKinney 2009).

161. See *People v. Rychel*, 284 A.D.2d 662, 663, 728 N.Y.S.2d 211, 213 (3d Dept. 2001) (holding evidence legally sufficient for third-degree robbery where evidence established that force was threatened); *People v. Smith*, 278 A.D. 2d 75, 75, 718 N.Y.S.2d 305, 305 (1st Dep’t. 2000) (holding evidence legally sufficient for third-degree robbery where evidence established that force was threatened through “relatively polite behavior”).

162. N.Y. CRIM. PROC. LAW § 470.20(4) (McKinney 2009).

163. See *People v. McBride*, 248 A.D.2d 641, 642, 669 N.Y.S.2d 952, 952 (2d Dept. 1998) (holding that there is no need to remand for re-sentencing since defendant had already served the maximum sentence for the reduced offense).

164. N.Y. CRIM. PROC. LAW § 470.15(5) (McKinney 2009).

165. See *People v. Bailey*, 94 A.D.3d 904, 904–905, 942 N.Y.S.2d 165, 167–168 (2d Dept. 2012) (holding that the attempted murder in the second degree conviction must be set aside because it was against the weight of the evidence).

from the example above, evidence of drunk driving is not enough if the prosecution did not introduce any evidence that the defendant was driving a car. If a prosecution witness had said that she saw the defendant driving a car, but this was the only evidence and there were strong reasons to not believe the witness, then the verdict would likely be against the weight of the evidence—there is some evidence, but the jury weighed it incorrectly.

Only the Appellate Division can review a weight of the evidence claim. In doing so, it sits as “a thirteenth juror.”¹⁶⁶ In contrast, neither the trial court nor the Court of Appeals can review weight of the evidence or make its own decision about whether a witness was credible.¹⁶⁷ A “weight of the evidence” claim does not need to have been preserved at trial,¹⁶⁸ but you should raise it clearly on appeal to be sure that the Appellate Division will consider it.

If the appellate court sets aside your verdict as “against the weight of the trial evidence,” the appellate court must dismiss the charge against you.¹⁶⁹ According to New York law, you cannot be prosecuted again on the same charge.¹⁷⁰ Thus, if the court sets aside all of the charges against you as “against the weight of the evidence,” the court will order your release from custody. If one or more, but not all, of the charges against you are dismissed as against the weight of the evidence, the court may modify the judgment as described above in Part D(1)(a).

2. Appealing Your Sentence

You can appeal your sentence on the ground that the sentence is either: (1) unlawful or (2) unduly harsh or excessive.¹⁷¹

(a) Unlawful Sentence

A sentence is invalid as a matter of law when its terms are not authorized by statute or when the sentencing court considers inappropriate factors, like whether you decided to exercise certain rights.

166. *People v. Danielson*, 9 N.Y.3d 342, 348–349, 880 N.E.2d 1, 5, 849 N.Y.S.2d 480, 484 (2007) (noting that weight of the evidence review essentially requires the court to sit as a thirteenth juror and decide which facts were proven at trial).

167. There are very rare exceptions to this rule. One is that if the witness is so unreliable that it would not be fair for the jury to believe what he is saying. In this case, the court says the witness is “incredible as a matter of law.” *People v. Heath*, 214 A.D.2d 519, 520–521, 625 N.Y.S.2d 540, 541 (1st Dept. 1995) (“The arresting officer’s testimony that he observed defendant exchanging a 2-inch glass vial with a dark top, from a distance of approximately 74 feet, from a moving patrol car, after dark, is, in our view, contrary to common experience and, as such, was incredible as a matter of law and did not support the verdict.”); *see, e.g.*, *People v. Foster*, 64 N.Y.2d 1144, 1147–1148, 480 N.E.2d 340, 342, 490 N.Y.S.2d 726, 728 (1985) (finding the evidence insufficient to establish one defendant’s guilt beyond a reasonable doubt by testimony from a witness who is either morally or mentally irresponsible); *People v. Quinones*, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 197 (1st Dept. 1978) (rejecting as a matter of law police officer testimony that strongly appeared to have been fabricated to conceal constitutional violations). Another exception is if the witness himself might be credible, but he is the only witness, and his testimony contradicts itself. *See People v. Delamota* 18 N.Y.3d 107, 114–115, 960 N.E.2d 383, 387–389, 936 N.Y.S.2d 614, 618–619, 2011 N.Y. Slip Op. 08225, 4–5 (2011) (discussing how courts have treated this standard since the 1970s).

168. *See People v. Danielson*, 9 N.Y.3d 342, 349–350, 880 N.E.2d 1, 5–6, 849 N.Y.S.2d 480, 484–485 (2007) (noting that a court must consider whether there is evidence that the elements of a crime have been satisfied when weighing the sufficiency of the evidence, even without the issue having been preserved at trial).

169. N.Y. CRIM. PROC. LAW § 470.20(5) (McKinney 2009).

170. The prosecution cannot retry any count that was reversed because it was against the weight of the evidence. N.Y. CRIM. PROC. LAW. § 470.20(5) (McKinney 2009). This is based solely upon New York statute and *not* on constitutional protection from double jeopardy. *See Tibbs v. Florida*, 457 U.S. 31, 32, 102 S. Ct. 2211, 2213, 72 L. Ed. 2d 652, 655 (1982) (holding that the Double Jeopardy Clause of the Constitution does not bar the retrial of an accused when an earlier conviction was reversed based on the weight, as opposed to the sufficiency, of the evidence); *People v. Romero*, 7 N.Y.3d 633, 644 n.2, 859 N.E.2d 902, 909 n.2, 826 N.Y.S.2d 163, 170 (2006) (explaining that, in New York, “our Legislature has erected a statutory bar preventing a defendant from being retried after a conviction is reversed based on the weight of the evidence”).

171. N.Y. CRIM. PROC. LAW § 450.30(1) (McKinney 2009). You may be able to appeal your sentence on the ground that the sentence is unduly harsh or excessive even if you negotiated your sentence in exchange for a

For example, a sentence of thirty years for first-degree assault, a class B violent felony, is unlawful, since the maximum penalty allowed for a class B violent felony is twenty-five years.¹⁷² A sentence may also be unlawful if it is based on an incorrect determination that you had a prior conviction,¹⁷³ or if your sentences were improperly ordered to run consecutively (one after the other), instead of concurrently (at the same time).¹⁷⁴ A sentence is also illegal if it constitutes “cruel and unusual” punishment.¹⁷⁵

(b) Unduly Harsh or Excessive Sentence

A sentence is excessive if the law allows the sentence, but is unfair based on the facts of your case.¹⁷⁶ An appellate court may take into account, for example, the circumstances of your crime, the probability of your rehabilitation, your background, and your criminal record.¹⁷⁷ You may appeal your sentence as unduly harsh if anything over the minimum legal sentence was imposed. A court may also consider whether the sentences you received are to run consecutively (one after the other) or concurrently (at the same time). Even if the appellate court rejects all of your arguments regarding

guilty plea. *See* *People v. Pollenz*, 67 N.Y.2d 264, 267–268, 493 N.E.2d 541, 542, 502 N.Y.S.2d 417, 418 (1986) (holding that Art. Six, § 4(k) of the New York Constitution prohibits the legislature from limiting the appellate division’s jurisdiction by prohibiting appeals on the issue of excessive sentences); *see also* N.Y. CRIM. PROC. LAW § 470.15(6)(b) (McKinney 2009) (providing that an appellate court may use its discretion to reverse or modify a sentence as unduly harsh or severe). *See* Part D(1) of this Chapter for a discussion of possible waiver of your right to appeal the issue of whether your sentence was unduly harsh or excessive.

172. N.Y. PENAL LAW § 70.02(3)(a) (McKinney 2009).

173. *See* *People v. Cabassa*, 186 Misc. 2d 200, 213, 717 N.Y.S.2d 487, 496–497 (Sup. Ct. N.Y. County 2000) (holding that there must be a resentencing proceeding where a previous federal conviction that was voided under constitutional grounds was considered in the sentencing, although the underlying facts of the federal case may be considered); *People ex rel. Furia v. Zelker*, 70 Misc. 2d 167, 169, 332 N.Y.S.2d 310, 311 (Sup. Ct. Dutchess County 1971) (finding that where defendant’s 1959 conviction had been set aside before he was convicted on this offense in 1966, the fact that he was convicted again in 1970 for the 1959 crime did not make him a “multiple felony offender” in 1966); *People v. Foster*, 57 N.Y.S.2d 737, 738 (Sup. Ct. Cayuga County 1945) (finding a sentence unlawful because it had been increased to reflect a prior felony, although no prior felony had been included in the indictment).

174. *See, e.g.*, N.Y. PENAL LAW § 70.25(2)(g) (McKinney 2009) (requiring that certain sentences run concurrently). The Constitution does not prevent a trial judge (instead of a jury) from deciding whether facts exist that require a consecutive sentence. *Oregon v. Ice*, 555 U.S. 160, 163–165, 129 S. Ct. 711, 714–715, 172 L. Ed. 2d 517, 522 (2009) (holding that Oregon’s system—which, like New York’s, generally requires concurrent sentences for multiple convictions at the same time unless certain factors exist—is constitutional even though judges rather than juries decide whether those factors exist).

175. *See* U.S. CONST. amend. VIII; *People v. Diaz*, 179 Misc. 2d 946, 956–957, 686 N.Y.S.2d 595, 601–602 (Sup. Ct. N.Y. County 1999) (holding that defendant’s sentence of 15 years to life was “grossly disproportionate” as applied to him and therefore constituted “cruel and unusual punishment,” and re-sentencing defendant to 10 years to life).

176. When an appellate court decides whether a sentence is excessive or unduly harsh, it is said to be exercising its “in the interest of justice” jurisdiction. N.Y. CRIM. PROC. LAW § 470.15(6)(b) (McKinney 2009). *See* Part B(3)(a) of this Chapter for a discussion of “in the interest of justice” jurisdiction.

177. *See, e.g.*, *People v. Yanus*, 13 A.D.3d 804, 805, 786 N.Y.S.2d 264, 265 (stating the court considered the nature of the crime, the investigation report, and defendant’s following arrests and found no abuse of discretion in sentencing); *People v. Sieber*, 26 A.D.3d 535, 536, 809 N.Y.S.2d 613, 614 (3d Dept 2006) (upholding a sentence as well within the discretion given the defendants failure to accept responsibility for the offense); *People v. Bankowski*, 204 A.D.2d 802, 803, 611 N.Y.S.2d 712, 713–714 (3d Dept. 1994) (holding that the harshest available sentence for manslaughter and drunk driving was not excessive where the defendant had a prior conviction for drunk driving); *People v. Pugh*, 194 A.D.2d 863, 865, 599 N.Y.S.2d 317, 319 (3d Dept. 1993) (holding that the defendant’s full and intentional participation in brutally violent crimes made the sentence appropriate, even though the defendant was young and did not have any previous criminal record).

errors that occurred during your trial, it may use its “in the interest of justice” discretion to order your sentences to run concurrently instead of consecutively.¹⁷⁸

An intermediate appellate court may substitute its own discretion for that of the trial court in reviewing and modifying your sentence.¹⁷⁹ If an intermediate appellate court decides to change your sentence because it is unduly harsh or excessive, then the court itself must impose some lawful lesser sentence.¹⁸⁰ If this happens, the court changes only your sentence and the rest of the judgment (your conviction) is otherwise affirmed.¹⁸¹

In a death sentence appeal, the Court of Appeals must focus upon the individual circumstances of your case in determining whether your sentence is unjust.¹⁸² Under New York law, the Court of Appeals is required to consider the potential influence of the jury’s passion or prejudice (including race-based prejudice) upon your sentence, the penalty imposed in similar cases, and the weight of the evidence in support of your sentence.¹⁸³ An appellate court has three options when it reviews a death penalty sentence: (1) it can affirm the death sentence, (2) it can remand the case for re-sentencing with the possibility of the death sentence, or (3) it can remand the case for re-sentencing without the possibility of a death sentence.¹⁸⁴

Although these appellate procedures for death penalty cases are still valid, there is currently no constitutionally valid death penalty statute on the books in New York.¹⁸⁵ This means that there will not be any death penalty appeals in New York in the near future.

3. Types of Errors

When appealing your conviction (see Part D(1)) or your sentence (see Part D(2)), you argue that the trial court allowed errors to take place. Some errors are considered so serious that they are always enough to justify the reversal of your judgment without the need to prove how they harmed you. Other errors have the potential to be serious enough to warrant reversal, but they do not necessarily justify reversal. The court analyzes these errors under the “harmless error test.” This means that the court will not reverse or modify a judgment if the error is harmless. The court will decide that an error is

178. See, e.g., *People v. Evans*, 212 A.D.2d 626, 627, 623 N.Y.S.2d 4, 6 (2d Dept. 1995) (modifying a sentence in which the defendant would serve four terms of “25 years to life” consecutively to a sentence in which the defendant could serve the four terms concurrently); *People v. Quinitchett*, 210 A.D.2d 438, 439, 620 N.Y.S.2d 430, 431 (2d Dep’t. 1994) (modifying a sentence in which the defendant would serve three terms of “25 years to life” consecutively to a sentence in which the defendant could serve the three terms concurrently).

179. See *People v. Wiggins*, 24 A.D.3d 263, 263, 806 N.Y.S.2d 496, 497 (1st Dept. 2005) (reducing sentence on appeal as a matter of discretion in the interest of justice); *People v. Delgado*, 80 N.Y.2d 780, 783, 599 N.E.2d 675, 676, 587 N.Y.S.2d 271, 272 (1992) (noting that “[a]n intermediate appellate court has broad, plenary power to modify a sentence that is unduly harsh or severe” and that the court could exercise this power “if the interest of justice warrants, without deference to the sentencing court”); see also N.Y. CRIM. PROC. LAW. § 470.15(6)(b) (McKinney 2009). But see *People v. Hoyle*, 211 A.D.2d 973, 975, 621 N.Y.S.2d 756, 759 (3d Dept. 1995) (refusing to modify the sentence because the lower court did not abuse its discretion in sentencing defendant).

180. N.Y. CRIM. PROC. LAW § 470.20(6) (McKinney 2009).

181. N.Y. CRIM. PROC. LAW § 470.15(2)(c) (McKinney 20109).

182. See *Gregg v. Georgia*, 428 U.S. 153, 155, 96 S. Ct. 2909, 2935, 49 L. Ed. 859, 887 (1976) (observing that concerns that a court might impose the death penalty in an “arbitrary and capricious manner” are “best met by a system . . . [in] which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information”).

183. N.Y. CRIM. PROC. LAW § 470.30(3) (McKinney 20109).

184. N.Y. CRIM. PROC. LAW § 470.30(5) (McKinney 20109).

185. See *People v. LaValle*, 3 N.Y.3d 88, 99, 817 N.E.2d 341, 344, 783 N.Y.S.2d, 485, 488 (2004) (holding that the current New York death penalty statute is unconstitutional); see also *People v. Taylor*, 9 N.Y.3d 129, 155–156, 878 N.E.2d 969, 984, 848 N.Y.S.2d 554, 568 (2007) (vacating the sentence of the last incarcerated person on death row in New York); Alan Feuer, *Death Penalty Is Thrown Out in Wendy’s Killings*, N.Y. TIMES (Oct. 23, 2007), available at <https://www.nytimes.com/2007/10/23/nyregion/23cnd-death.html> (last visited Feb. 22, 2019) (noting that John Taylor, the defendant in the last cited case, “was the last remaining inmate on New York State’s death row”).

harmless if the court believes you would have received the same conviction and/or sentence even if the error had not occurred.

Note that to appeal on the basis of most of these errors, even those that are always considered harmful when your appeal is evaluated, you must have “preserved” the error by objecting at trial. Some errors are not subject to this requirement, however. For information about the preservation requirement, see Part B(3).

(a) Errors That Are Always “Harmful”

Some errors are considered so harmful that their occurrence always means that you were denied a fair trial and are entitled to a new one. These errors have such a significant effect that they are themselves enough to justify reversal of your conviction.¹⁸⁶ For example, errors in which the court

186. *See generally* Preiser, Practice Commentary, McKinney’s Cons Laws of NY, Book 11A, N.Y. Crim. Proc. Law § 470.05 (2009).

misstates the prosecution's burden of proof on an issue should result in reversal.¹⁸⁷ Other examples of errors justifying reversal include:

- (1) You were deprived of your right to counsel,¹⁸⁸ which includes a denial of your right to a lawyer of your choosing,¹⁸⁹ or if you were represented only by a person pretending to be a lawyer;¹⁹⁰
- (2) You chose to represent yourself at trial but the court failed to inform you of the dangers of proceeding without a lawyer;¹⁹¹
- (3) You were denied your right to represent yourself;¹⁹²
- (4) Your judge was biased;¹⁹³
- (5) Your judge gave an incorrect instruction about reasonable doubt to the jury, in violation of your Fifth and Sixth Amendment rights;¹⁹⁴
- (6) Your judge gave an instruction to the jury that defined two alternative reasons for conviction, one of which was legally erroneous, and the appellate court now cannot say with absolute certainty that the jury based its verdict on legally correct reasoning;¹⁹⁵
- (7) You were denied your right to be present at certain stages of the trial;¹⁹⁶
- (8) The prosecutor wrongly excluded potential jurors on the basis of their race or sex;¹⁹⁷
- (9) A juror was improperly removed from the jury;¹⁹⁸
- (10) Your judge was absent during part of your trial;¹⁹⁹
- (11) During the selection of jurors, your judge improperly denied your claim that a juror should not be included in the jury, and this refusal was based on the judge's incorrect conclusion that you or your lawyer were discriminating on the basis of race or gender;²⁰⁰ or
- (12) During the selection of jurors, your judge improperly denied your claim that a juror should not be included because the juror expressed doubt about his or her ability to decide the

187. See *People v. McLaughlin*, 80 N.Y.2d 466, 471–472, 606 N.E.2d 1357, 1359–1360, 591 N.Y.S.2d 966, 968–9969 (1992) (reversing convictions on counts for which the judge gave an erroneous charge to the jury).

188. See *Gideon v. Wainwright*, 372 U.S. 335, 339–343, 83 S. Ct. 792, 794–796, 9 L. Ed. 2d 799, 802–804, (1963) (reversing conviction because defendant was not appointed counsel); *People v. Hilliard*, 73 N.Y.2d 584, 586–587, 540 N.E.2d 702, 702–703, 542 N.Y.S.2d 507, 507–508 (1989) (reversing conviction because trial court did not allow defendant to contact his attorney for thirty days following his arraignment, and stating that it does not matter whether this affected the outcome). In contrast to denial of effective assistance of counsel at trial, harmless error analysis *is* applicable to denial of effective counsel at a pre-indictment preliminary hearing. See *People v. Wicks*, 76 N.Y.2d 128, 133, 556 N.E.2d 409, 411, 556 N.Y.S.2d 970, 972 (1990) (holding that the deprivation of a defendant's right to counsel at a hearing to determine whether the defendant could be held over for action by the grand jury is subject to harmless error analysis); *People v. Wardlaw*, 18 A.D.3d 106, 112, 794 N.Y.S.2d 524, 529 (4th Dept. 2005) (holding that the deprivation of a defendant's right to counsel at a pretrial suppression hearing is subject to constitutional harmless error analysis).

189. See *Powell v. Alabama*, 287 U.S. 45, 52–53, 53 S. Ct. 55, 58, 77 L. Ed. 158, 162 (1932) (reversing conviction because, among other reasons, defendants were appointed lawyers before being given an opportunity to hire their own); *People v. Knowles*, 88 N.Y.2d 763, 768–769, 673 N.E.2d 902, 905–906, 650 N.Y.S.2d 617, 620–621 (1996) (overturning conviction because retained lawyer was not permitted to take part in defense trial); *People v. Arroyave*, 49 N.Y.2d 264, 270–273, 401 N.E.2d 393, 396–398, 425 N.Y.S.2d 282, 285–288 (1980) (remanding to the trial court for a hearing regarding whether the department of corrections unconstitutionally prevented the defendant from retaining the counsel of his choice by failing to deliver the lawyer's letter in a timely manner).

190. See *People v. Felder*, 47 N.Y.2d 287, 291, 391 N.E.2d 1274, 1275, 418 N.Y.S.2d 295, 296 (1979) (holding that the conviction of a defendant who had been represented by a non-lawyer pretending to be a lawyer “must be set aside without regard to whether [defendant] was individually prejudiced by such representation”). However, not every instance in which a person who is not licensed to practice law participates as a lawyer for the defendant will require automatic reversal. See *People v. Jacobs*, 6 N.Y.3d 188, 190, 844 N.E.2d 1126, 1127, 811 N.Y.S.2d 604, 605 (2005) (holding that where one of defendant's two-person defense team was a non-lawyer pretending to be a lawyer, reversal was not appropriate unless defendant was actually harmed); *People v. Kieser*, 79 N.Y.2d 936, 937–938, 591 N.E.2d 1174, 1175, 582 N.Y.S.2d 988, 989 (1992) (holding that where defendant is represented by a lawyer who is temporarily not entitled to practice law for some “technical” reason, such as failure to pay bar dues, reversal is not appropriate unless defendant was harmed).

191. See *People v. Arroyo*, 98 N.Y.2d 101, 103–104, 772 N.E.2d 1154, 1156, 745 N.Y.S.2d 796, 798 (2002) (reversing a conviction because the trial court allowed defendant to represent himself without adequate inquiry into defendant's understanding of the choice).

192. *See Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581–582 (1975) (holding that refusal to let a “literate, competent, and understanding” defendant represent himself violated the 6th and 14th Amendments). However, the U.S. Supreme Court has held that a court has the discretion to deny the request if the defendant is found to lack competence to represent himself, and it can force an incompetent defendant to accept the aid of a lawyer. *See Indiana v. Edwards*, 554 U.S. 164, 178, 128 S. Ct. 2379, 2388, 171 L. Ed. 2d 345, 357 (2008) (“[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves”).

193. *See Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749, 754 (1927) (holding that trial under a judge with a personal financial interest in the defendant’s conviction violated defendant’s 14th Amendment rights).

194. *See Sullivan v. Louisiana*, 508 U.S. 275, 278–282, 113 S. Ct. 2078, 2081–2083, 124 L. Ed. 2d 182, 188–191 (1993) (holding that constitutionally-deficient reasonable doubt instruction required reversal).

195. *See Griffin v. United States*, 502 U.S. 46, 52–55, 112 S.Ct. 466, 470–472, 116 L. Ed. 2d 371, 378–380 (1991) (summarizing precedent stating that a verdict must be set aside if it could have been decided on multiple grounds and one of the possible grounds was unconstitutional or illegal); *People v. Martinez*, 83 N.Y.2d 26, 35, 628 N.E.2d 1320, 1325, 607 N.Y.S.2d 610, 615 (1993) (reversing because judge told the jury it could return a guilty verdict based on either of two theories, one of which was illegal, and the jury did not say which theory it used to reach the guilty verdict).

196. *See, e.g., People v. Antommarchi*, 80 N.Y.2d 247, 249–250, 604 N.E.2d 95, 96–97, 590 N.Y.S.2d 33, 34–35 (1992) (reversing because defendant was not present at bench conferences with jury candidates regarding their ability to weigh evidence objectively and to hear evidence impartially); *People v. Dokes*, 79 N.Y.2d 656, 660–662, 595 N.E.2d 836, 839–840, 584 N.Y.S.2d 761, 764–765 (1992) (reversing because defendant was not present at hearing about impeaching him with prior acts).

197. *See Batson v. Kentucky*, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d. 69, 79 (1986) (holding that challenging potential jurors on the basis of race violates the defendant’s equal protection rights); *see also Snyder v. Louisiana*, 552 U.S. 472, 476–486, 128 S. Ct. 1203, 1207–1212, 170 L. Ed. 2d 175, 180–186 (2008) (granting a new trial because the prosecutor had improperly excluded black jurors in a case where the defendant was black, and noting that a close examination of why the prosecutor excluded jurors was necessary where racial motives were not acknowledged). The 14th Amendment prohibits discrimination in jury selection on the basis of gender as well as race. *See J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 129, 114 S. Ct. 1419, 1421, 128 L. Ed. 2d 89, 97 (1994) (stating that gender discrimination by the state violates Equal Protection Clause). The law no longer requires that you be a member of the same group as the wrongfully excluded jurors for the error to be considered fundamental. *See Powers v. Ohio*, 499 U.S. 400, 416, 111 S. Ct. 1364, 1373–1374, 113 L. Ed. 2d 411, 429 (1991) (reversing conviction of white defendant because black jurors were improperly not selected for the jury).

198. *See, e.g., People v. Anderson*, 70 N.Y.2d 729, 730–731, 514 N.E.2d 377, 377–378, 519 N.Y.S.2d 957, 957–958 (1987) (reversing conviction because trial court did not conduct proper inquiry before discharging a juror, and noting that such an error is not subject to harmless error analysis); *People v. Jones*, 210 A.D.2d 430, 431, 620 N.Y.S.2d 124, 125 (2d Dept. 1994) (holding same).

199. *See People v. Ahmed*, 66 N.Y.2d 307, 311–312, 487 N.E. 2d 894, 896, 496 N.Y.S.2d 984, 986 (1985) (reversing conviction because absence of judge during jury deliberations violated defendant’s right to jury trial).

200. *See People v. Richie*, 217 A.D.2d 84, 89, 635 N.Y.S.2d 263, 267 (2d Dept. 1995) (“The explanations based on crime-victim status, familial relationship to a correction officer, or prior jury service are not ‘pretextual on their face’ and are not ‘implausible’, ‘silly’, or ‘superstitious’. That there was less than complete uniformity in the application of these factors does not establish that these factors were pretextual” (citations omitted)).

case fairly, and you or your lawyer eventually used up all of your challenges to the jury composition.²⁰¹

Note that the questions of whether the harmless error test applies (as opposed to automatic reversal) and what standard to apply are issues evolving on both the state and federal levels.²⁰² This means that you should research what law applies to your case.

(b) Errors That May be “Harmless”

If the error that occurred in your proceedings was not necessarily enough to warrant reversal of your judgment, the court will examine the error to the harmless error test. Once the court decides that the error occurred, it must decide if the error harmed you. If the court finds that your conviction had an error but the error did not impact your conviction (you would have been convicted and sentenced in the same way even if the error had not happened), then it will find that the error was “harmless.” The specific test that New York appellate courts apply to determine whether an error is harmless depends on whether the error is a constitutional or non-constitutional error.

A non-constitutional legal error does not violate rights guaranteed by the U.S. Constitution or the New York State Constitution. Rather, these types of errors generally violate rights guaranteed by state statutes or common law. A non-constitutional legal error is harmful if (1) there was not overwhelming proof of your guilt at trial (apart from any wrongly admitted evidence) *and* (2) there is a “significant probability” that the jury would have acquitted you had it not been for the error.²⁰³

For example, the trial judge may improperly examine a witness (for instance, by asking a witness questions in a way that gives the jury an impression that the judge does not find the witness to be credible or trustworthy).²⁰⁴ If the appellate court holds that the trial judge improperly examined a witness, it will use the harmless error test to determine if your judgment should be modified or reversed. In general, the stronger the evidence against you, the more likely a court will find a non-constitutional error harmless (and therefore affirm the judgment against you).²⁰⁵

A constitutional error is a legal error that violates rights guaranteed by the U.S. Constitution or the New York State Constitution. Appellate courts apply a standard that is more favorable to the

201. See *People v. Johnson*, 94 N.Y.2d 600, 614–615, 730 N.E.2d 932, 939–940, 709 N.Y.S.2d 134, 141–142 (2000) (reversing conviction because trial court failed to either excuse or demand unconditional assurances from jurors who openly admitted that they doubted whether they could be fair in the case); *People v. Johnson*, 17 N.Y.3d 752, 753, 952 N.E.2d 1008, 1009, 929 N.Y.S.2d 16, 17 (2011) (reversing conviction because trial court failed to follow up with questioning after a juror expressed uncertainty about her ability to fairly consider a major issue in the case); *People v. Giuliani*, 47 Misc. 3d 31, 33, 6 N.Y.S.3d 382, 385 (2d Dept., 9th & 10th Jud. Dists. 2014) (reversing trial court’s refusal to excuse juror, thus requiring the defendant to use his last peremptory strike, who admitted that she could not decide a DWI case without relying on her professional knowledge as a nurse); *People v. Russell*, 116 A.D.3d 1090, 1093–1094, 983 N.Y.S.2d 105, 108–109 (2014) (holding that failure to make further inquiries into jurors who had shared inability to be unbiased required new trial).

202. For example, in 1991, the U.S. Supreme Court ruled that the harmless error test applies to the admission of coerced confessions. See *Arizona v. Fulminante*, 499 U.S. 279, 311–312, 111 S. Ct. 1246, 1265–1266, 113 L. Ed. 2d 302, 332–333 (1991). This was a change in the previous standard, in which admission of a coerced confession was always considered harmful. See *Payne v. Arkansas*, 356 U.S. 560, 568, 78 S. Ct. 844, 850, 2 L. Ed. 2d 975, 981 (1958). Although many of the cases cited in this Section are New York state cases, you should be aware that federal cases (such as cases decided by the Supreme Court and the Second Circuit) may apply to you.

203. See *People v. Ayala*, 75 N.Y.2d 422, 431, 553 N.E.2d 960, 964, 554 N.Y.S.2d 412, 416 (1990) (alteration in original) (citing *People v. Crimmins*, 36 N.Y.2d 230, 242, 326 N.E.2d 787, 794, 367 N.Y.S.2d 213, 222 (1975)) (“[T]he standard for nonconstitutional error, which is governed solely by State law, requires reversal if the properly admitted evidence was not ‘overwhelming’ *and* there is a ‘significant probability ... that the jury would have acquitted the defendant had it not been for the error or errors which occurred.’”).

204. See *People v. Mendez*, 225 A.D.2d 1051, 1051–1052, 639 N.Y.S.2d 219, 219–220 (4th Dept. 1996) (granting defendant a new trial because the trial judge skeptically questioned a defense witness).

205. See *People v. Kello*, 96 N.Y.2d 740, 743–744, 746 N.E.2d 166, 166–168, 723 N.Y.S.2d 111, 112–114 (2001) (holding that there was no significant probability that entering the excluded 911 tapes into evidence at trial would have led to the defendant’s acquittal given the testimony offered at trial, and therefore finding the error harmless).

defendant when reviewing constitutional errors than they do when reviewing statutory errors. In general, a constitutional error is harmful unless there is no reasonable possibility that the error might have contributed to your conviction (as in the error is harmless beyond a reasonable doubt).²⁰⁶

E. Preparing Your Papers for Your Appeal

1. What and Where to File

This Part will help you determine what papers you need to file and how to file them.

If you have a right to appeal and are appealing “as a matter of right,”²⁰⁷ you must file two copies of a written notice of appeal with the clerk of the court where you were sentenced.²⁰⁸ You must also serve a copy of your notice of appeal upon, or give a copy to, the district attorney of the county where your trial court is located.²⁰⁹ The notice of appeal should state the following information: (1) your name; (2) your desire to appeal; (3) the court to which you plan to appeal; (4) a description of the judgment, sentence, or order you wish to appeal; and (5) your indictment number or your docket number if your proceedings occurred in the criminal court.²¹⁰ If your notice of appeal contains mistakes in the description of the judgment, sentence, or order to be appealed, the appellate court may, in the interest of justice, excuse your mistakes and treat your notice as valid.²¹¹ However, you should try to make your legal papers as correct as possible.

If you are challenging a decision for which there is no right to appeal without permission—for example, a trial court’s denial of your Article 440.10 or Article 440.20 motion—you must first seek permission to appeal. To do this, you must file an application for a certificate granting leave (permission) to appeal in the intermediate appellate court.²¹² If you do not file the application and simply appeal without permission, the court will not consider your appeal, and by the time the problem comes to light it might be too late to get permission. If your application is granted, the court will issue a certificate to you granting leave (permission) to appeal. You must file both this certificate and a notice of appeal with your trial court within fifteen days.²¹³ If the appeal is from a local criminal court and a court stenographer or reporter did not record your proceedings, you may submit an affidavit of

206. See *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710–711 (1967) (noting that on appeal the prosecution must “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained” for a conviction to be sustained despite a constitutional error); see also *People v. Ayala*, 75 N.Y.2d 422, 431, 553 N.E.2d 960, 964, 554 N.Y.S.2d 412, 416 (1990) (“Constitutional error... must lead to reversal unless there is no reasonable possibility that the error might have contributed to the conviction.”). The harmless error test for constitutional errors in habeas corpus proceedings is different from the standard in direct appeals. See *JLM*, Chapter 13, “Federal Habeas Corpus” on federal habeas corpus proceedings and *JLM*, Chapter 21, “State Habeas Corpus: Florida, New York, and Michigan” on New York State habeas corpus proceedings.

207. See Part B(4) of this Chapter, which explains when you have a right to appeal without asking permission.

208. See N.Y. CRIM. PROC. LAW § 460.10(1)(a) (McKinney 2009). This section applies to appeals as a matter of right to an intermediate appellate court or directly to the Court of Appeals. If there is no clerk of the trial court, you must file one copy of your notice of appeal with the judge of the trial court and a second copy with the clerk of the appellate court to which you plan to appeal. See N.Y. CRIM. PROC. LAW § 460.10(2) (McKinney 2009). If a transcript of your trial was not made because there was no court reporter at your trial, you may file an affidavit of errors with the trial court instead of a notice of appeal. If you file a notice of appeal, you must also file an affidavit of errors within thirty days of filing your notice of appeal. See N.Y. CRIM. PROC. LAW § 460.10(3) (McKinney 2009). See Part E(2) of this Chapter for deadlines for filing.

209. See N.Y. CRIM. PROC. LAW § 460.10(1)(b), (3)(b) (McKinney 2009).

210. See Forms B-1, B-2, and B-3 in Appendix B of this Chapter.

211. See N.Y. CRIM. PROC. LAW § 460.10(6) (McKinney 2009).

212. See N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2009 & Supp. 2009) (describing procedure for seeking leave to appeal to an intermediate court). See also Appendix B, Form B-2, for a sample application for a certificate granting leave to appeal. Note, each appellate division has its own rules for applying for a certificate. See *JLM*, Chapter 20, for information on 440 motions.

213. See N.Y. CRIM. PROC. LAW § 460.10(4)(b) (McKinney 2009).

errors in place of the notice of appeal. Please note that these procedures apply to appeals by permission to the intermediate appellate court (usually the appellate division). For information on seeking permission from the Court of Appeals, see Part F.

In either case, once you have filed a notice of appeal, you should order copies of the trial transcript from the court reporter. You will need copies of the transcript to “perfect your appeal.”²¹⁴ You will generally need to pay a fee when you order copies of the transcript. If you cannot afford the transcripts, you may request that the appellate court give you a free transcript, or request to appeal on the original record. To do either, you must send the appellate court: (1) a letter stating your request, and (2) an affidavit (a sworn statement witnessed by a notary public) setting forth your request, the amount and sources of your income, and facts showing that you are unable to pay the relevant expenses.²¹⁵ This affidavit to proceed as a poor person on appeal, or for partial poor person relief, is called an “*in forma pauperis* affidavit.” You should also send copies of the letter and affidavit to the district attorney of the county where your trial court is located. Appendix B of this Chapter explains exactly how to fill out poor person’s papers. The same procedure can be used to ask the court to appoint a lawyer for you if you cannot afford one.

2. When to File

If your appeal is a matter of right, you must file and serve your notice of appeal within thirty days of your sentencing date.²¹⁶ If you want to appeal, you should file even if you are unsure of the details of your appeal. Filing does not force you to complete your appeal, but if you do not file you will probably lose your right to appeal when the thirty-day deadline passes. You can get a lawyer to help you with the rest of your appeal. See Part C(1) above for how to get a lawyer.

If your appeal is a matter of right and you are appealing directly to the Court of Appeals, the deadline for filing your notice of appeal is the same as for an appeal as of right to an intermediate appellate court. Also, you must file and serve your jurisdictional statement, that is, why you are able to appeal to a given court, within ten days of filing your notice of appeal.

If you must seek permission to appeal, an application for a certificate granting leave to appeal to an intermediate appellate court must be filed within thirty days after you or your lawyer at trial received a copy of the order or judgment you wish to appeal.²¹⁷ If the court gives you a certificate granting permission to appeal, you must file the certificate and notice of appeal within fifteen days from the time the court created the certificate.²¹⁸

3. How to Perfect Your Appeal

In addition to filing a notice of appeal, you must “perfect” your appeal.²¹⁹ Generally, to perfect an appeal, you must deliver a specified number of copies of the trial record and your brief to the appellate court and to the opposing party. The exact steps necessary to perfect an appeal vary in each appellate

214. See Part E(3) of this Chapter on how to perfect an appeal.

215. Under the rules of the four appellate divisions, the procedure for seeking relief as a poor person in criminal appeals is the same as that in civil cases. For an explanation of this procedure, see N.Y. C.P.L.R. 1101 (McKinney 2009). See also *Anders v. California*, 386 U.S. 738, 741, 87 S. Ct. 1396, 1398, 18 L. Ed. 2d 493, 496 (1967) (holding that an indigent person has the right to appellate representation equal to that of a nonindigent person); *Douglas v. California*, 372 U.S. 353, 355, 83 S. Ct. 814, 815–816, 9 L. Ed. 2d 811, 813–814 (1963) (holding that the 14th Amendment requires states to provide indigent persons representation on their appeals as of right); *People v. Garcia*, 93 N.Y.2d 42, 46, 710 N.E.2d 247, 249, 687 N.Y.S.2d 601, 603 (1999) (“[O]n a People’s appeal, a defendant has the right to appellate counsel of defendant’s choice and the right to seek appointment of counsel upon proof of indigency.”).

216. See N.Y. CRIM. PROC. LAW § 460.10(1)(a) (McKinney 2009). If you file the notice, but fail to serve a copy on the district attorney within the 30-day period, the appellate court may allow you to serve the notice after the deadline, provided that you have a good reason. See N.Y. CRIM. PROC. LAW § 460.10(6) (McKinney 2009).

217. See N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2009).

218. See N.Y. CRIM. PROC. LAW § 460.10(4)(b) (McKinney 2009).

219. See generally N.Y. CRIM. PROC. LAW § 460.70 (McKinney 2009).

court. For details, you should consult the rules of the appellate division or appellate term to which you are appealing.²²⁰

4. How to Prepare for Your Appeal

Once you have properly taken your appeal, you or your lawyer will need to review the record and begin to prepare a brief. The brief is a legal memorandum, which is a paper that informs the appellate court of the facts of your case, identifies the trial court's errors, and explains why these errors require the appellate court to reverse or modify your conviction or sentence.²²¹ The brief is "served upon" or officially given to the court and your opponent (the prosecution). If your lawyer prepares the brief, you should read a copy to be sure that it contains all the arguments that you believe the appeals court should consider in deciding your case.

If you have been assigned a lawyer, you do not have the right to insist that the lawyer include arguments in the brief that your lawyer believes should not be presented to the appellate court.²²² You may, however, request permission to file a *pro se* supplemental brief (an additional brief of your own) to raise issues your lawyer left out of the original brief. The appellate court will likely (but not necessarily) accept your *pro se* brief, provided that you request to file it in a timely fashion, usually by writing for permission to the appellate court where your appeal will be heard, and provided you specifically identify in your request the issues that you intend to raise in the *pro se* brief. You must request this permission in writing within thirty days of the date that your attorney files the brief. You should make sure that your request is not too late or too general.²²³ The rules for when you must file your request can be found in the rules of the court to which you are appealing.²²⁴

In response to your brief, your opponent (the prosecution) will almost certainly file a brief that argues that the trial court's judgment should stand. After the appellate court receives your opponent's brief, it will set a calendar date for oral argument.²²⁵ After your opponent files his brief, you also have the right to file a reply brief within a few days. A reply brief gives you the opportunity to point out factual errors in the respondent's brief, or to mention relevant court decisions that have been issued since you submitted your initial brief. You are not allowed to raise new issues in your reply.²²⁶

In an oral argument, your lawyer has about fifteen minutes to discuss the merits of your appeal directly with the appellate court.²²⁷ The purpose of the oral argument is to focus the judges' attention

220. See Appendix A of this Chapter to determine where you should direct your appeal. See generally N.Y. COMP. CODES R. & REGS. tit. 22, §§ 600.9, .11 (2020) for 1st Dept. Appellate Division; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 640.3, .5, .6(b) (2020) for 1st Dept. Appellate Term; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 670.9–.11 (2020) for 2d Dept. Appellate Division; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 731.1, .4(c) (2020) for 2d Dept. Appellate Term; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 850.1, .5, .9, .11 (2020) for 3d Dept. Appellate Division; N.Y. COMP. CODES R. & REGS. Tit. 22 § 1000.1, .7–.9, .11 (2020) for 4th Dept. Appellate Division.

221. Part B of Chapter 6 of the *JLM* describes briefs (memorandum of law) and other legal papers in more detail.

222. See *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987, 993 (1983) (holding that a defendant does not have the right to insist that his lawyer raise every possible argument that has some merit); *People v. White*, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (holding same).

223. See *People v. White*, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (holding that while it would be "better practice" for appellate courts to accept timely supplemental *pro se* briefs, the denial of an application to accept a *pro se* brief is within the court's discretion).

224. In the second department of the appellate division, for example, if you want to file a *pro se* brief, you must do so within 30 days from the date your attorney filed her brief. For more information about the rules of the court to which you are applying, see *JLM*, Chapter 5.

225. Some appeals may take place without oral argument. Check the rules of the appellate court to which your appeal is directed. See N.Y. CRIM. PROC. LAW § 460.80 (McKinney 2009).

226. See, e.g., *State Farm Fire & Cas. Co. v. LiMauro*, 103 A.D.2d 514, 521, 481 N.Y.S.2d 90, 95 (2d Dept. 1984) ("It is beyond cavil that raising a new substantive issue of law for the first time in a reply brief is improper...."); see also JONATHAN M. PURVER & LAWRENCE E. TAYLOR, *HANDLING CRIMINAL APPEALS* § 128.12 (1960), Westlaw HANDCRIMAPP (database updated Mar. 2018) ("[T]he petitioner-appellant must not raise new issues in the reply brief.").

227. The rules of the individual appellate courts set the amount of time allowed for oral argument. See N.Y.

on important points of your case and answer any questions or doubts they have about your claims. You should discuss with your lawyer any particular points that you would like emphasized in oral argument, since it is your lawyer's final chance to convince the appellate court to rule in your favor. In some cases, you and your lawyer may decide that it is best not to argue your case orally. For example, your lawyer may believe an oral argument will add little to the arguments presented in your written brief. Keep in mind that there are risks involved in such a decision. In some cases, the court may consider waiving the oral argument as an admission that your case is weak. An oral argument also provides an important chance to clarify and expand on issues raised in your brief. You and your lawyer should consider the matter carefully before making a decision on how to proceed.

Appellate court judges will decide your case after they read the briefs and hear the oral argument. The court may or may not explain in writing the reasons for its decision.²²⁸ Keep in mind that the whole process—from the time you file a notice of your appeal to the date the judges hand down their decision—is very time consuming and may be subject to delays. Despite the strict time limits for starting an appeal, the entire process can take several years to conclude. Each step may take several months—including gathering the necessary documents, preparing the brief, obtaining the respondent's brief, getting a calendar date, and, finally, waiting for a decision.

Throughout your appeal, you should take an active role even if you have a lawyer. This includes communicating frequently with your lawyer, suggesting issues for your lawyer to include in your briefs, and requesting copies of documents relating to your appeal.

F. Continuing Your Appeal

If your first appeal is not successful, you may be able to pursue your claim in a higher court or by an alternative procedure. This Part discusses how you can take an appeal that has been denied by an intermediate appellate court to the Court of Appeals. It also discusses alternatives that you may consider if the Court of Appeals denies your appeal.

If the intermediate appellate court denies your appeal, you may continue pursuing your claim by appealing the intermediate appellate court's order to New York's highest court, the Court of Appeals. You can appeal an intermediate appellate court decision affirming or modifying a trial court decision against you only if: (1) the decision is based on the law alone or (2) the remedy ordered is illegal. Unlike the intermediate appellate courts, the Court of Appeals cannot vacate a conviction solely on the basis that the evidence does not sufficiently support the facts.

Keep in mind that you do not have a right to appeal an intermediate appellate court decision to the Court of Appeals; you may do so only if you obtain a certificate granting leave (permission) to appeal.²²⁹ You must apply for this certificate within **thirty days** after you are served with the appellate court order that you wish to appeal.²³⁰ **THIS THIRTY-DAY TIME LIMIT IS EXTREMELY IMPORTANT.** You may seek permission to continue your appeal if the appellate court affirms the trial court judgment, sentence, or order against you, or if you are dissatisfied with the appellate court's modification of the judgment, sentence, or order.²³¹

The specific procedure for obtaining permission to appeal depends upon the particular intermediate appellate court from which you are appealing. If you are appealing from any court other than the appellate division, you must seek permission from a judge of the Court of Appeals. However, if you are appealing from a decision of the appellate division, you may request a certificate of leave to

CRIM. PROC. LAW § 460.80 (McKinney 2009).

228. The practice of affirming a decision without a written explanation (known as "summary affirmance") has been criticized by lawyers, but appellate courts sometimes do it nonetheless. See 21 C.J.S. *Courts* § 232, Westlaw (database updated Feb. 2019) (noting that "no more may be read into the court's action [in affirming a lower court decision without opinion] than is essential to sustain that judgment").

229. See N.Y. CRIM. PROC. LAW § 450.90(1) (McKinney 2009). Form B-2 in Appendix B is a sample application for a certificate granting leave to appeal.

230. See N.Y. CRIM. PROC. LAW § 460.10(5)(a) (McKinney 2009).

231. See N.Y. CRIM. PROC. LAW § 450.90(1) (McKinney 2009).

appeal from either a judge of the Court of Appeals or a justice of the appellate division in the same department that handed down the decision that you are appealing.²³² Many appellate division judges are hesitant to grant leave to appeal, however, because they know that the Court of Appeals likes to decide for itself what cases it will hear. You can file only one application, so you may wish to seek a certificate directly from the Court of Appeals. However, if an appellate division judge dissented from the majority in your case, you may decide to apply to that judge for a certificate of leave to appeal instead of going directly to a judge of the Court of Appeals. In sum, you must get permission to file another appeal. The permission must come from a judge in the appellate division of the Court of Appeals your case was heard in. You may choose to submit the request for permission to file an appeal directly to a judge you think will grant it to you. Or if you are unsure if any particular judge will give you permission, you may file for permission to appeal from the Court of Appeals generally.

To request a certificate from a judge of the Court of Appeals, you must send an application to the clerk of the Court of Appeals. The application should be addressed to the chief judge, who will appoint one judge of the Court of Appeals to consider your application.²³³ Your application must include copies of the appellate briefs filed by you (or your lawyer) and by the prosecution, the appellate division decision, any other relevant documents you will rely upon, and a letter explaining why your case needs further review. You must also include relevant transcripts that demonstrate that your appeal is based on a question of law (which usually requires that you preserved the right to appeal when the error was made).²³⁴ Further review might be considered appropriate if your case presents a novel issue of law (that is, an issue that the court has never decided before), if the lower court did not follow established precedent, or if the appellate divisions differ in their approaches to the issue involved. For an example of an application to the Court of Appeals, see Form B-2 in Appendix B at the end of this Chapter. If the judge grants your application and issues a certificate, your appeal is taken. You may proceed to prepare your brief and oral argument.

If the Court of Appeals denies permission to appeal, but you think you have “extraordinary and compelling reasons” for them to reconsider that denial, you may contest their decision. To do so, serve a request for reconsideration on the District Attorney, then send that same request and proof of its service on the District Attorney to the clerk of the court within thirty days of the issuance of the certificate denying permission. Your application will be reassigned to the same judge who originally ruled on it.²³⁵ Be aware that very few cases heard at the intermediate level reach the Court of Appeals.²³⁶

If the Court of Appeals hears your appeal, it will affirm, reverse, or modify the intermediate appellate court order.²³⁷ If it reverses or modifies the intermediate appellate court, it will also take or direct the appellate court to take some appropriate corrective action.²³⁸

If the Court of Appeals does not hear your appeal, or if it hears your appeal but rules against you, you may still have other opportunities for relief. First, if your case involves issues of federal law,²³⁹

232. See N.Y. CRIM. PROC. LAW § 460.20(2)(a) (McKinney 2009). If you are appealing from the decision of an intermediate appellate court other than the appellate division (i.e. the appellate term), you must request the certificate from a judge of the Court of Appeals. See N.Y. CRIM. PROC. LAW § 460.20(2)(b) (McKinney 2009).

233. See N.Y. CRIM. PROC. LAW § 460.20(3)(b) (McKinney 2009).

234. See *generally* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.20 (2013).

235. See N.Y. COMP. CODES R. & REGS. tit. 22, § 500.20(d) (2013).

236. In 2017, the Court of Appeals decided 62 criminal appeals. See JOHN P. ASIELLO, N.Y. COURT OF APPEALS, 2017 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 5 (2017), *available at* <https://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2017.pdf> (last visited Feb. 4, 2019); see also N.Y. Crim. Proc. Law § 450.90 practice cmts. (McKinney 2009) (discussing appellant’s hurdles to reaching appeals court).

237. See N.Y. CRIM. PROC. LAW § 470.35(3) (McKinney 2009).

238. See N.Y. CRIM. PROC. LAW § 470.40(1) (McKinney 2009).

239. For example, violations of the U.S. Constitution present issues of federal law. See 28 U.S.C. § 1331 (2012).

you can apply for a writ of certiorari.²⁴⁰ This would allow you a final appeal on those federal issues to the United States Supreme Court, but the Supreme Court very rarely grants such permission.²⁴¹ Second, in certain circumstances, you may seek to challenge your conviction or sentence through a different post-conviction proceeding, such as an Article 440 motion, a petition for state habeas corpus, or a petition for federal habeas corpus. See *JLM* Chapters 20, 21, and 13, respectively, for explanations of these remedies.

G. Three Options for Dealing with Ineffective Assistance of Appellate Counsel

When you appeal your conviction, you have the right to effective assistance from your appellate lawyer.²⁴² This Part addresses what to do if you believe that your appointed attorney is not raising all the issues that should be pursued on appeal or is otherwise failing to represent you appropriately. Note that you also have a right to receive effective assistance from your trial lawyer, and if you did not receive effective assistance at your trial this could itself be grounds for appeal. For information about effective assistance from your trial lawyer, see *JLM* Chapter 12, “Appealing Your Conviction Based on Ineffective Assistance of Counsel.”

This Part will discuss three particular strategies that may be valuable for you: (1) responding to an *Anders* brief submitted by your attorney, (2) filing supplemental briefs along with those of your attorney, and (3) applying for a writ of error *coram nobis* for relief from ineffective counsel.

1. *Anders* Briefs

You may encounter a situation in which the attorney appointed for your criminal appeal asks the court for permission to withdraw from your case by filing a motion known as an “*Anders* brief.” An attorney files an *Anders* brief if she or he reviews your case and decides, that there are no non-frivolous, or substantial and important, claims you could make on appeal. However, in the *Anders* brief your attorney must reference the trial record and identify any issues that are supported by legal authority and arguable if the case is appealed.²⁴³ After reviewing the *Anders* brief, a court will grant

240. The Supreme Court has rules governing petitions for writs of certiorari. See SUP. CT. R. 12–16. A writ of certiorari is a petition requesting that the Supreme Court review a lower court’s decision. Supreme Court Rules 12–16 outline the steps of requesting a writ of certiorari. Rule 12 outlines how many copies of a petition must be filed, steps for notifying people involved, and the timeline and steps for the Clerk to certify and transmit the record. Rule 13 outlines the timeline for filing a writ of certiorari after a judgment from a lower court or denial of a request for discretionary review. Rule 14 outlines what a writ of certiorari must contain, including items such as a short and clear question, a short and clear set of facts, a list of all people or groups involved, and a date of the judgment or order. Rule 15 outlines the opposing person’s or group’s right to submit a brief stating why a writ of certiorari should not be granted, the contents of such a brief, and the timeline for filing this brief. Rule 16 outlines the Court’s procedures for granting or denying the petition.

241. From October 1, 2016, through September 30, 2017, just 29 petitions for certiorari were granted (that is, had a hearing in the Supreme Court) in criminal cases, and 1,360 were denied or dismissed. That is a success rate below 3%. See *Judicial Business 2017*, U.S. COURTS, tbl. B-2, available at https://www.uscourts.gov/sites/default/files/jb_b2_0930.2017.pdf (last visited Feb. 4, 2019).

242. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) (holding that fairness of the appellate process requires that a defendant receive more than nominal representation from counsel); *Douglas v. California*, 372 U.S. 353, 357, 83 S. Ct. 814, 816, 9 L. Ed. 2d 811, 814–16 (1963) (holding that the state requirement that requires indigent defendants to make a preliminary showing of merit prior to assignment of appellate counsel was unconstitutional).

243. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967) (holding that “[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.”). But see *Smith v. Robbins*, 528 U.S. 259, 272, 120 S. Ct. 746, 756–57, 145 L. Ed. 2d 756, 771–72 (2000) (holding that states may adopt procedures that differ from that described in *Anders*, so long as the underlying goal of adequate appellate review required by the 14th Amendment is met). However, “the procedures adopted by New York courts closely parallel and are clearly modeled upon the procedure set forth by the Supreme Court in *Anders*.” *People v. Stokes*, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.S.2d 217, 219 (2001) (describing the procedures for *Anders* briefs that New York courts have adopted and holding that the *Anders* brief filed by assigned counsel was insufficient because it did

your attorney's request to withdraw from handling your appeal if it determines that your attorney has fulfilled the obligation to thoroughly examine the trial record for arguably appealable issues. If the court agrees that there are not any non-frivolous claims you could make on appeal, it will affirm the lower court's judgment that you are trying to appeal and dismiss your appeal. But, if the court concludes there *are* non-frivolous claims on which you could base an appeal (whether or not it thinks you will actually prevail), the court will appoint you a new attorney to help with your appeal.²⁴⁴

The fact that your attorney files an *Anders* brief does not in itself constitute ineffective assistance of counsel.²⁴⁵ However, your attorney's duty in the matter of your appeal is to be an "active advocate," and his or her *Anders* brief must be more than a simple assertion that there are not any non-frivolous claims that you could make on appeal. It must show that your attorney made an independent and thoughtful examination of the record for the purposes of your appeal.²⁴⁶ You may disagree with your attorney over whether certain issues of your case should be appealed. Your attorney must raise all issues that, in his or her professional judgment, have arguable merit, but he is not obligated to raise every non-frivolous issue you request.²⁴⁷

If you believe that there are non-frivolous issues that should be pursued on appeal, but your attorney refuses to do so and instead files an *Anders* brief, you will generally have the opportunity to file a *pro se* supplemental brief on any issues you believe to have merit (deserving consideration by the court).²⁴⁸ You should review the rules of the court to which you are appealing to determine whether you must first apply for permission to submit your brief and whether there are any criteria the court may have set out for the format of your brief. Your attorney is required to inform you of the fact that he has filed an *Anders* brief that will likely result in an affirmation of your conviction, and he must also inform you of your right to file a *pro se* supplemental brief.²⁴⁹ Your attorney must also provide you with a copy of the brief.²⁵⁰

You should file a supplemental brief or else you may waive other rights unrelated to your direct appeal. If you do not file your own brief in response to your attorney's *Anders* brief, you could be prevented from successfully pursuing habeas relief on issues that could have been raised on appeal, including ineffective assistance of counsel. For example, to obtain federal habeas relief, a petitioner

not adequately advocate available non-frivolous arguments on defendant's behalf).

244. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967) (describing appointed attorneys' duties to handle appeals); *see also* *People v. Stokes*, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.2d 217, 219 (2001) (describing procedures New York courts have adopted for *Anders* briefs and holding that the *Anders* brief filed by assigned counsel was insufficient because it did not adequately present available non-frivolous arguments).

245. *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 444, 108 S. Ct. 1895, 1904–05, 100 L. Ed. 2d 440, 456–57 (1988) (upholding constitutionality of a state requirement that when counsel filed a no-merit brief, he must include an explanation of why an issue lacked merit); *see also* *Anim v. United States*, 2013 U.S. Dist. LEXIS 113462, at *18–19, 2013 WL 4056211, at *7 (S.D.N.Y. Aug. 12, 2013) (holding the "filing of an *Anders* brief does not in itself constitute ineffective assistance of counsel").

246. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1386, 1400, 18 L. Ed. 2d 493, 498 (1967) (stating that if after a conscientious review of the case, counsel finds it to be frivolous, he may request permission to withdraw along with "a brief referring to anything in the record that might arguably support the appeal").

247. *Jones v. Barnes*, 463 U.S. 745, 751–54, 103 S. Ct. 3308, 3312–14, 77 L. Ed. 2d 987, 993–95 (1983) (holding that appellate counsel fulfilled duty of representing client to the best of his ability even though counsel did not raise every non-frivolous issue).

248. *United States v. Gomez-Perez*, 215 F.3d 315, 320 (2d Cir. 2000) (stating that "[i]f counsel subsequently determines that an *Anders* brief is appropriate and thereafter files such a brief, this Court must . . . afford the defendant an opportunity to raise *pro se* any issues he feels merit discussion.") (*citing* *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967)).

249. *United States v. Gomez-Perez*, 215 F.3d 315, 321 n.2 (2d Cir. 2000) (stating that an attorney should "adhere to standard procedure by including with his *Anders* brief an affidavit certifying" that he has informed his client of the filing of the brief, which will likely result in the affirmation of the client's conviction).

250. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967) (stating that "[a] copy of counsel's brief should be furnished" to the defendant).

must exhaust state remedies and show that his constitutional rights were violated.²⁵¹ If you do not raise issues in a *pro se* brief, a court may find that you did not exhaust state remedies and stop you from bringing a federal habeas petition.²⁵² Further, where your attorney has submitted an *Anders* brief rejecting issues in your supplemental brief as frivolous, New York courts may assign new counsel for your appeal.²⁵³

Finally, note that *Anders* is only binding law in federal court.²⁵⁴ That being said, citing *Anders* in state appeals is only persuasive since state courts must follow an *Anders*-like analysis to ensure that your Fourteenth Amendment rights are upheld and since New York's procedures "closely parallel" *Anders*.²⁵⁵

2. Filing Supplemental Briefs

Though you do not have an absolute right to file briefs to supplement the arguments made by your appeals attorney in his or her brief, many appellate courts allow you to do so.²⁵⁶ You should first apply to the court to which you are appealing for permission to file. Permission will usually be granted if you request permission within thirty days of the date your appeals attorney has filed his or her brief AND you specifically identify the issues you intend to raise in the *pro se* brief. You should consult the specific Department's rules and regulations for what your request should include.²⁵⁷ It is important to follow the timeliness and specificity requirements, because if you do not, the court will likely deny permission to file.

3. Applying for Writ of Error *Coram Nobis*

If you want to challenge an appellate court's affirmation of your conviction on the grounds that you received ineffective assistance of appellate counsel, you may do so by filing a writ of error *coram nobis*.²⁵⁸ A writ of error *coram nobis* is a way to challenge your conviction because of fundamental

251. See *JLM* Chapter 13, "Federal Habeas Corpus," for more information on federal habeas and exhaustion.

252. See *Marone v. United States*, 10 F.3d 65, 67 (2d Cir. 1993) ("In order to raise a claim that could have been raised on direct appeal, a § 2255 petitioner must show cause for failing to raise the claim at the appropriate time and prejudice from the alleged error.").

253. See, e.g., *People v. Pertillar*, 15 A.D.3d 679, 679–80, 789 N.Y.S.2d 921, 922 (2d Dept. 2005) (relieving attorney who had filed *Anders* brief and assigning new counsel to represent defendant on appeal).

254. *Smith v. Robbins*, 528 U.S. 259, 265, 120 S. Ct 746, 753, 145 L. Ed. 2d 756, 767 (2000) (holding that states may adopt procedures that differ from those described in *Anders*, so long as the underlying goal of adequate appellate review required by the 14th Amendment is met).

255. See *People v. Stokes*, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.S.2d 217, 219 (2001) (noting that the "procedures adopted by New York courts closely parallel and are clearly modeled upon the procedure set forth by the Supreme Court in *Anders*.").

256. See *People v. White*, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (finding while it would be "better practice" for appellate courts to accept timely supplemental *pro se* briefs, courts can decline to accept them).

257. For more information about the rules of the court to which you are applying, see *JLM* Chapter 5, "Choosing a Court and a Lawsuit: An Overview of the Options".

258. *People v. Bachert*, 69 N.Y.2d 593, 594, 509 N.E.2d 318, 319, 516 N.Y.S.2d 623, 624 (1987) (holding claims of ineffective assistance of counsel in the intermediate appellate court will be determined through the writ of error *coram nobis*).

errors at trial or on appeal. For example, you can use a writ of error *coram nobis* if your appellate lawyer failed to prosecute an appeal or to raise all issues effectively.²⁵⁹

You should direct the petition to the appellate division “where the allegedly deficient representation occurred.”²⁶⁰ Note, if you wish to challenge your conviction’s affirmance, or upholding by the appellate court, because of ineffective assistance of appellate counsel in New York state, the only way to do so is a writ of error *coram nobis*. You may not challenge it with a motion to vacate judgment under New York Criminal Procedure Law Section 440.10.²⁶¹ If your petition is granted, the appellate court may allow you (most likely with a new lawyer) to re-argue your original appeal.²⁶² If your petition is denied, you may appeal that decision to the Court of Appeals.²⁶³

A form for writs of error *coram nobis* can be found in Appendix B-7. In the *coram nobis* brief, you must explain the particular actions your appellate counsel took and the actions you believe your attorney should have taken. Your statements—both of the facts and arguments—should be as clear and specific as possible. Also, be sure to look up and review the rules of the particular jurisdiction for additional deadlines and requirements that you must follow. Note that you also have the right to effective assistance from your trial lawyer. For information about how to challenge your trial lawyer’s assistance, see *JLM* Chapter 12, “Appealing Your Conviction Based on Ineffective Assistance of Counsel”.

H. Conclusion

If you believe a harmful error occurred at your hearing or trial, you may be able to appeal and have the error corrected. The first step in this process is determining whether your appeal is prevented by time, plea agreements, failure to protest, or various other reasons. If your appeal is not prevented and you are eligible to appeal, you should begin the process and get a lawyer. You have the right to a lawyer, and without one you risk making a mistake that will waste your limited opportunity to appeal. Next, your lawyer or you will need to decide the specific legal basis for your appeal and file the correct appeals papers at the proper times to the right court. The appeals process can feel overwhelming and complicated, but by following the steps in this Chapter, you should be able to appeal your conviction.

259. *People v. Forsythe*, 105 A.D.3d 1430, 1430, 964 N.Y.S.2d 363, 364 (4th Dept. 2013) (granting motion for writ of error *coram nobis* where defendant had not been represented, nor informed of his right to be represented, on the People’s appeal); *People v. Shegog*, 23 A.D.3d 1158, 1158, 807 N.Y.S.2d 764, 764–765 (4th Dept. 2005) (granting motion for writ of error *coram nobis* where the court found merit in defendant’s contention that “counsel failed to raise an issue on direct appeal that would have resulted in reversal”); *People v. Bachert*, 69 N.Y.2d 593, 598, 509 N.E.2d 318, 321, 516 N.Y.S.2d 623, 626 (1987) (“[A] motion for a writ of error *coram nobis* lies where it was asserted that a court-appointed lawyer failed to prosecute an appeal”) (*citing* *People v. De Renzio*, 14 N.Y.2d 732, 199 N.E.2d 172, 250 N.Y.S.2d 76 (1964)).

260. *People v. Bachert*, 69 N.Y.2d 593, 599, 509 N.E.2d 318, 322, 516 N.Y.S.2d 623, 627 (1987) (“[T]he natural venue for *coram nobis* review of ineffective assistance of appellate counsel claims is in the appellate tribunal where the allegedly deficient representation occurred.”).

261. *People v. Bachert*, 69 N.Y.2d 593, 595–596, 509 N.E.2d 318, 319, 516 N.Y.S.2d 623, 624 (1987) (“[A] common-law *coram nobis* proceeding brought in the proper appellate court is the only available and appropriate procedure and forum to review a claim of ineffective assistance of appellate counsel.”).

262. *People v. Walton*, 40 A.D.3d 1258, 1259, 836 N.Y.S.2d 442, 443 (3d Dept. 2007) (granting *coram nobis* relief in part and reinstating defendant’s appeal as to certain issues).

263. *People v. Stultz*, 2 N.Y.3d 277, 281–85, 810 N.E.2d 883, 885–86, 778 N.Y.S.2d 431, 433–34 (2004) (explaining that an intermediate appellate court’s decision regarding a petition for a writ of error *coram nobis* may be appealed to the Court of Appeals and defining the Court of Appeal’s “meaningful representation” standard of review for such an appeal).

APPENDIX A

THE COURT TO WHICH YOU SHOULD APPEAL

Please also refer to the inside back cover of the *JLM*, which shows the structure of the New York court system.

Crime	Court Where You Were Convicted²⁶⁴	Court Where Appeal May be Heard
Misdemeanor	Local criminal court outside New York City	County court of the county where you were convicted; or the Appellate Term of the New York State Supreme Court in the Second, Third, or Fourth Departments, if the appellate division of that department so directs. ²⁶⁵
Misdemeanor	New York City Criminal Court in New York or Bronx Counties	Appellate Term for the New York State Supreme Court of the First Department.
Misdemeanor	New York City Criminal Court in Kings, Queens, or Richmond Counties	Appellate Term for the New York State Supreme Court of the Second Judicial Department.
Misdemeanor	County court	Appellate division of the department where you were convicted; or the Appellate Term of the New York State Supreme Court in the Second, Third, or Fourth Departments, if the appellate division of the department so directs.
Felony	County court	Appellate division of the department where you were convicted.
Any Offense	New York State Supreme Court	Appellate division of the department where you were convicted.

264. This is also the court where you file your notice of appeal.

265. N.Y. CRIM. PROC. LAW § 450.60 (McKinney 2005). The Appellate Division of the Second Department

APPENDIX B

SAMPLE PAPERS FOR A CRIMINAL APPEAL²⁶⁶

This Appendix contains the following materials:

- B-1. Notice of Appeal as of Right to an Intermediate Appellate Court²⁶⁷ from a Superior Court²⁶⁸ Judgment, Sentence, Judgment and Sentence, or Order
- B-2. Notice of Application for a Certificate Granting Leave to Appeal to an Intermediate Appellate Court or to the Court of Appeals
- B-3. Papers Needed to Obtain the Services of a Lawyer Without Cost on Appeal, or Other Poor Person Relief
 - a. Notice of Motion to Proceed as a Poor Person
 - b. Affidavit in Support of Motion to Proceed as a Poor Person on Appeal
- B-4. Papers Needed to Get Release on Bail Pending Appeal
 - a. Notice of Motion for Recognizance or Bail Pending Appeal
 - b. Affidavit in Support of Motion for Recognizance or Bail Pending Appeal
- B-5. Notice of Motion for Extension of Time in Which to Take an Appeal Pursuant to New York Criminal Procedure Law Section 460.30
- B-6. Affidavit in Support of Motion for Extension of Time to Take Appeal
- B-7. Petition for Writ of Error *Coram Nobis*

DO NOT TEAR THESE FORMS OUT OF THE *JLM*. If you simply tear these papers out of the *JLM* and send them to the court, the court will ignore the papers. Write your own versions of these forms, and fill them out according to the facts of your particular case. The endnotes following the sample documents tell you how to fill in the necessary information. Consult Parts A through F of this Chapter and Chapter 6 of the *JLM*, “An Introduction to Legal Documents,” for assistance in preparing your case. The name and address of the court to which you should send these papers are contained in Appendices I and II of the *JLM*.

does direct certain classes of cases to the appellate term. Rules of the Second Department that discuss this matter may be found in McKinney’s New York Rules of Court. *See* N.Y. CRIM. PROC. LAW § 730.1 (McKinney 2005); *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 730.1 (2020).

266. These forms are based in part upon McKinney’s Forms, a useful resource providing sample forms for almost any action you may wish to bring. The samples we have provided are broad and general, while the McKinney’s Forms are specific and correspond to the statute underlying your action. *See generally* 18B West’s McKinney’s Forms Criminal Procedure Law §§ 450–70 (2015).

267. New York law uses the term “intermediate appellate court” to refer to the appellate courts in each county that decide the defendant’s first appeal. These courts are the appellate division and the appellate term.

268. New York law uses the general term “superior court” to include both the supreme court and certain county courts in different counties that have jurisdiction over both felonies and misdemeanors.

**B-1. NOTICE OF APPEAL AS OF RIGHT TO AN INTERMEDIATE APPELLATE
COURT FROM A SUPERIOR COURT JUDGMENT, SENTENCE, JUDGMENT
AND SENTENCE, OR ORDER**

Supreme Court of the State of New York

County of _____

-----x

The People of the State of New York,
Plaintiffs,

- against -

_____,
Defendant.

-----x

:
:
:
:
:
:
:

Notice of Appeal

Indictment No. _____

PLEASE TAKE NOTICE, that defendant, _____, hereby appeals pursuant to section 450.10, subdivision (1), of the Criminal Procedure Law of the State of New York to the Appellate Division of the Supreme Court, _____ Judicial Department, from the _____, _____ judgment made and entered by Hon. _____, convicting [him/her] of the class ____ felony of _____ and that this appeal is taken from said judgment and from each and every part thereof and every intermediate order made therein.

Dated: _____, New York

Attorney for Defendant

_____ Street

_____ New York

Telephone Number: _____

To: Hon. _____
District Attorney |

_____ County

_____ Street

_____, New York

Clerk

Supreme Court of the State of New York

_____ County

_____ Street

_____, New York

B-2. NOTICE OF APPLICATION FOR A CERTIFICATE GRANTING LEAVE TO APPEAL TO AN INTERMEDIATE APPELLATE COURT OR TO THE COURT OF APPEALS

Court of Appeals of the State of New York
-----x

The People of the State of New York,	:	
Plaintiffs-Respondents, :	:	Notice of Application
	:	
- against -	:	Indictment No. _____
	:	
_____ ,	:	
Defendant-Appellant. _____	:	
-----x		

PLEASE TAKE NOTICE, that upon the annexed affidavit, the above named defendant-appellant makes application to _____ to determine the application hereby made for a certificate, pursuant to section 460.20 of the Criminal Procedure Law of the State of New York, certifying that this case involves a question of law that ought to be reviewed by the Court of Appeals and granting leave to appeal to the Court of Appeals from __[date]____, __[year]__ order of the Appellate Division _____ Judicial Department which affirmed the __[date]__, __[year]__, Supreme Court, _____ County, judgment convicting defendant of the class _____ felony of _____ and sentencing defendant to an indeterminate term of imprisonment at _____.

Dated: _____

Attorney for Defendant-Appellant
[Address and phone number]

To: Clerk
Court of Appeals of the State of New York
Court of Appeals Hall
20 Eagle Street
Albany, New York

To: [Name of District Attorney]
District Attorney, [name of county] County
[PO Address]²⁶⁹

269. Fill in the name and address of the District Attorney of the county in which you were tried. Include this information on both the copy you are sending to the District Attorney and on the two copies you are sending to the trial court, so that the clerk of the trial court will know that you have notified the District Attorney. *See* Appendix III of the *JLM* for a list of addresses of New York district attorneys.

B-3. PAPERS NEEDED TO OBTAIN THE SERVICES OF A LAWYER WITHOUT COST ON APPEAL, OR OTHER POOR PERSON RELIEF

These papers will allow you to obtain a free copy of the trial transcript, as well as a lawyer. Remember that these papers (like all in this Chapter) are for an appeal under the law of New York State. They are not the correct papers to file if you are filing a poor person's action in federal court or in another state's court.

a. Notice of Motion to Proceed as a Poor Person

Supreme Court of the State of New York,
Appellate Division,

_____ Judicial Department

-----x

The People of the State of New York, :
Plaintiffs-Respondents, :

- against - :

_____, :

Defendant-Appellant. :

-----x

Notice of Motion to Proceed
As a Poor Person Upon Appeal

Indictment No. _____

PLEASE TAKE NOTICE, that upon the affidavit of _____, sworn to on the _____ day of _____, _____, a motion pursuant to New York Civil Practice Law and Rules 1101 will be made at a term of this court, for an order permitting defendant-appellant to prosecute this appeal from the judgment entered in this action on the _____ day of _____, _____ as a poor person, directing that [he/she] be furnished a copy of the stenographic transcript of the trial of this action without fee, and granting permission to appeal on the original record, upon the ground that said defendant-appellant has insufficient income and property to enable [him/her] to pay the costs, fees, and expenses to prosecute said appeal, and for such other and further relief as this Court may deem just and proper.

Dated: _____

Defendant-Appellant

To: _____

District Attorney
[Address]

- or -

Clerk
Appellate Division, _____ Judicial Department
[Address]

b. Affidavit in Support of Motion to Proceed as a Poor Person on Appeal

Supreme Court of the State of New York
Appellate Division,

_____ Judicial Department

-----x

Defendant-Appellant,

- against -

The People of the State of New York
Plaintiffs-Respondent.

-----x

:
:
:
:
:
:
:

Affidavit in Support of
Motion to Proceed as a
Poor Person Upon Appeal

Indictment No. _____

State of New York

County of _____

_____, being duly sworn, deposes and says:

1. I am the petitioner in the above-captioned case, and I make this affidavit in support of the attached motion to proceed *in forma pauperis*.

2. I am presently in the custody of the Superintendent of _____ at _____ pursuant to a judgment of the Supreme Court of the State of New York, _____ County, rendered on _____, _____, convicting me of _____, in the _____ degree, and sentencing me to _____ years' imprisonment.

3. A notice of appeal pursuant to [section 450.10, subdivision (1) – or subdivision (2) – of the Criminal Procedure Law of the State of New York] was served upon attorney for plaintiff-respondent, on *[date of service of notice of appeal]*, and that notice was filed in the office of the Clerk of the County of *[name of county]* on *[date of filing of notice of appeal]*.

3. I am unable because of my indigence to pay the costs, fees, and expenses necessary to prosecute this appeal. I am currently incarcerated and am earning \$_____ per week in income. I own \$_____ worth of property. No other person has a beneficial interest in the outcome of this appeal.

4. During the trial I was represented by _____.

5. I believe in good faith that I am entitled to the relief that I am seeking in this case.

WHEREFORE, I respectfully ask for an order permitting me to prosecute this appeal as a poor person and that I be furnished with the stenographic transcript of this action without fee and that I

be assigned an attorney to represent me on appeal and for such other and further relief as may be proper and equitable.

Defendant-Appellant

Sworn to before me
this _____ day of _____, _____

Notary Public

B-4. PAPERS NEEDED TO GET RELEASE ON BAIL PENDING APPEAL

a. Notice of Motion for Recognizance or Bail Pending Appeal

Supreme Court of the State of New York

_____ Judicial Department

-----x

The People of the State of New York :

Plaintiffs-Respondents, :

- against - :

Defendant-Appellant. :

-----x

Motion for
Recognizance or Bail

Indictment No. _____

PLEASE TAKE NOTICE, that upon the annexed affidavit of _____ sworn to on the _____ day of _____, ____ and upon all proceedings in this case, a motion pursuant to section 510.20 of the Criminal Procedure Law of the State of New York is made to this Court for an order revoking the order committing _____ to the custody of the _____ and releasing me in my own recognizance or on bail, on the grounds set forth in the annexed affidavit, and for such other and further relief as to the court may seem just and proper.

Dated: _____

Defendant-Appellant

To: _____

District Attorney

[Address]

- or -

Clerk

Appellate Division, ____ Judicial Department

[Address]

B-5. NOTICE OF MOTION FOR EXTENSION OF TIME IN WHICH TO TAKE AN APPEAL PURSUANT TO NEW YORK CRIMINAL PROCEDURE LAW § 460.30

Supreme Court of the State of New York
Appellate Division _____ Department

-----x

The People of the State of New York :

Plaintiffs-Respondents,

: Notice of Motion For

: Extension of Time to

: Appeal Pursuant to

- against -

: CPL § 460.30

:

: Indictment No. _____

Defendant-Appellant.

:

-----x

PLEASE TAKE NOTICE, that upon the annexed affidavit of _____ sworn to on the ____ day of _____, _____, and upon all the proceedings in this case, a motion pursuant to section 460.30 of the Criminal Procedure Law of the State of New York is made to this Court for an order reinstating the time for taking an appeal from the [judgment/sentence/order] imposed by the Supreme Court of the County of _____ rendered on the _____ day of _____, _____ upon conviction of the above named defendant of the crime of _____, in the _____ degree upon the ground that said defendant's failure to file a notice of appeal in timely fashion resulted from

_____, and for such other and further relief as the Court may deem just and proper.

Dated: _____

Defendant-Appellant

To: Hon. _____
District Attorney
[Address]

Clerk

Appellate Division

Judicial Department
[Address]

B-6. AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO TAKE APPEAL

Supreme Court of the State of New York
Appellate Division _____ Department

-----x
The People of the State of New York :
Plaintiffs-Respondents, : Affidavit in Support of
 : Motion for Extension of
- against - : Time to Appeal Pursuant
 : to CPL § 460.30
 :
 : Indictment No. _____
Defendant-Appellant. :
-----x

_____, being duly sworn, deposes and says:

That I am the defendant herein and submit this affidavit in support of my application for leave to serve a notice of appeal within thirty days after the granting of an order permitting me to file pursuant to Section 460.30 of the Criminal Procedure Law of the State of New York.

On _____, _____, I was convicted of _____ in the _____ degree. (Trial Judge _____.) I received a sentence of _____ years on _____, _____. (Judge _____.)

I desire to take an appeal to this Court from that conviction and sentence, but have failed to file a Notice of Appeal within the prescribed thirty-day period. That period expired on the [date of expiration of period. I failed to file my Notice of Appeal within thirty days because:

_____.

WHEREFORE, I respectfully urge this Court to extend the time within which a notice of appeal may be served and filed pursuant to section 460.30 of the Criminal Procedure Law of the State of New York and issue an order granting this application permitting me to serve and file a notice of appeal within thirty days from the date of said order and for such other relief as this Court may deem just and proper.

Defendant-Appellant²⁷⁰

Sworn to before me
this _____ day of _____, _____.

Notary Public

²⁷⁰. Do not sign until the notary is present.

B-7. PETITION FOR WRIT OF ERROR *CORAM NOBIS*

Supreme Court of the State of New York
Appellate Division _____ Department

-----x

The People of the State of New York, :

Plaintiffs-Respondents, :

Petition for Writ of Error

Coram Nobis

:

- against -

:

Indictment No. _____

:

:

_____,
Defendant-Petitioner:

-----x

PLEASE TAKE NOTICE that above-named defendant-petitioner hereby moves the court for an issuance of a writ of error *coram nobis* on the ground that defendant-petitioner was convicted of _____ in _____ on _____, and appealed to this court which affirmed his conviction and that the representation of _____, defendant-petitioner's attorney on appeal, was ineffective according to the standards of representation set out in the Sixth Amendment of the United States Constitution.

The representation afforded to defendant-petitioner was defective in the following ways:

_____.

This motion is made and based on this petition and the affidavit of defendant-petitioner, and on the appellate briefs and the Appellate Division decision, copies of which are attached and served, and on the pleadings, papers, records, and files of this action.

Defendant-petitioner requests assignment of new appellate counsel for assistance in presentation of the writ moved for herein.

Dated: _____

Defendant-Appellant

[Address and phone number]

To:

Clerk

Supreme Court of the State of New York

Appellate Division, ____ Department

CHAPTER 10

APPLYING FOR RE-SENTENCING FOR DRUG OFFENSES*

A. Introduction

Federal and New York law have been changed so that some incarcerated persons who were convicted of drug crimes may apply for re-sentencing. If you were convicted of a federal drug crime, you should read Part B of this Chapter to learn about federal re-sentencing for drug crimes. If you were convicted of a state drug crime in New York, you should read Part C of this Chapter for information on re-sentencing in New York. Appendix A contains sample forms that you may need to apply for re-sentencing for federal drug crimes. Appendix B contains forms that you may need to apply for re-sentencing in New York State.

B. Re-Sentencing for Federal Drug Crimes

1. Introduction

The Federal Sentencing Commission (“the Commission”) has recently changed the United States Sentencing Guidelines (“the Guidelines”) for some drug offenses. The Commission has made changes that lower the sentencing recommendations for crimes involving crack cocaine (also called cocaine base). The new crack sentencing Guidelines took effect on November 1, 2014.¹ The Commission decided to apply the new sentencing Guidelines “retroactively.” This means that some incarcerated persons who were sentenced for certain federal drug offenses under the old, harsher Guidelines can apply for re-sentencing under the new Guidelines. So, if you were sentenced for a federal offense involving crack cocaine or some other eligible drug offenses (such as those involving Percocet or live marijuana plants), you might be eligible to apply for re-sentencing.

This Chapter describes who can apply for re-sentencing and explains the re-sentencing process. Section 2 explains who is allowed to apply for re-sentencing. Section 3 explains how to apply for re-sentencing and the possible results of your re-sentencing application. Appendix A at the end of the Chapter provides sample forms you can use if you decide to apply for re-sentencing.

2. Eligibility: Who Is Allowed to Apply?

If you are serving time for a federal drug offense and wish to apply for re-sentencing, you must first determine whether you may do so. Not all incarcerated persons serving time for federal drug offenses are able to apply for re-sentencing.

In order for changes in the Guidelines to apply to incarcerated persons who were sentenced under the *old* Guidelines (before November 1, 2014), the changes must be passed *retroactively*. Section 1B1.10 of the Guidelines shows which changes in the law are retroactive.² Section 1B1.10 says that you can apply for re-sentencing if one of the amendments listed in Section 1B1.10(d) of the Guidelines lowers the sentencing range for your offense.³ The only amendments listed in Section 1B1.10(d) that apply to drug offenses are Amendments 126, 130, 484, 488, 499, 505, 516, 591, 657, 706 (as changed by 711, 715, and 750, parts A and C only), and 782 (subject to subsection (e)(1)).⁴ To decide if you can

* This Chapter was revised by Susan Reid, based on a previous version written by Sydney Bird and revised by Nathan Piper. Special thanks to William Gibney of the New York Legal Aid Society for his valuable comments.

1. U.S. SENTENCING COMMISSION GUIDELINES MANUAL §1B1.10 (U.S. SENTENCING COMM’N 2014), *available at* <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Sep. 19, 2020).

2. U.S. SENTENCING COMMISSION GUIDELINES MANUAL §1B1.10(a)(1) (U.S. SENTENCING COMM’N 2014), *available at* <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Sep. 19, 2020).

3. U.S. SENTENCING COMMISSION GUIDELINES MANUAL §1B1.10 (U.S. SENTENCING COMM’N 2014), *available at* <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Sep. 19, 2020).

4. U.S. SENTENCING COMMISSION GUIDELINES MANUAL §1B1.10 (U.S. SENTENCING COMM’N 2014), *available at* <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Sep. 19, 2020).

apply for re-sentencing, you must first see if any of these amendments affects the sentencing Guidelines for your offense.

You should remember that if any of the other Amendments from Section 1B1.10(d) listed above applies to your case and would lower the Guidelines sentencing range for your offense, then you may also be eligible for re-sentencing. For example, Amendment 516 changes the Guidelines for cases involving more than fifty “marijuana plants.” In the Guidelines, a marijuana plant is defined as a marijuana cutting with roots, a rootball, or root hairs.⁵ Amendment 516 lowers the amount of marijuana each plant is expected to produce from one kilogram (KG) to 100 grams (G), making the offense less serious.⁶ So, if you were sentenced for an offense involving more than fifty marijuana plants before Amendment 516 was passed, you might be eligible for re-sentencing. Similarly, Amendment 657 changes the way that the weight of the drug Oxycodone is calculated for sentencing purposes. This change usually results in shorter sentences for offenses involving Percocet and OxyContin pills.⁷ So, if you were sentenced for an offense involving possession of Percocet or OxyContin, you should check to see if the new standards would lower your Guidelines range, making you eligible for re-sentencing.

(a) Determining Eligibility for Re-Sentencing for an Offense Involving Crack Cocaine

Amendment 706 (as changed by Amendments 711, 715, and 750) changes the Guidelines for crack cocaine offenses. It also changes the way you figure out the “base offense level” for crimes involving possession of both crack cocaine and one or more other drugs. The base offense level is a number given to a type of crime and is a starting point for determining its seriousness. More serious crimes, such as kidnapping, have higher base offense levels than less serious crimes, such as trespass. The base offense level is used to help calculate the range of sentences in the Guidelines that a court may give for a particular crime.⁸

If you are currently serving time for an offense committed before November 1, 2007 involving only crack cocaine, you will probably be able to apply for re-sentencing. Before 2007, the sentencing Guidelines said that 150KG of powder cocaine was the same as 1.5KG of crack cocaine (cocaine base) for sentencing purposes.⁹ This meant that if you were convicted of possessing a certain amount of crack cocaine, your sentence would be the same as if you were convicted of possessing 100 times as much powder cocaine. This was known as the “100:1 cocaine sentencing disparity.” There is an important difference between changes to mandatory minimum laws, which are created by Congress, and changes to the Guidelines, which are created by the United States Sentencing Commission. The Guidelines give recommended sentencing ranges for offenses based on drug quantity. At one time, the 100:1 difference for cocaine sentencing was in both the Guidelines and the laws about mandatory minimum sentences. This Chapter primarily focuses on the Guidelines because their amendments (changes) have been made retroactive, which means that even though you were sentenced under the old Guidelines, you may be able to apply for re-sentencing under the new ones.

5. U.S. SENTENCING COMMISSION GUIDELINES MANUAL §2D1.1 (U.S. SENTENCING COMM’N 2014), *available at* <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Sep. 19, 2020).

6. AMENDMENTS TO THE GUIDELINES MANUAL APP. C, AMEND. 516 (U.S. SENTENCING COMM’N 2003), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/Appendix_C_Vol_I.pdf (last visited Sep. 19, 2020).

7. AMENDMENTS TO THE GUIDELINES MANUAL APP. C, AMEND. 657 (U.S. SENTENCING COMM’N 2003), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/Appendix_C_Vol_II.pdf (last visited Sep. 19, 2020).

8. U.S. SENTENCING COMMISSION, An Overview of the Federal Sentencing Guidelines, 1, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/Overview_Federal_Sentencing_Guidelines.pdf (last visited Sep. 19, 2020).

9. AMENDMENTS TO THE GUIDELINES MANUAL APP. C, AMEND. 706 (U.S. SENTENCING COMM’N 2011), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/Appendix_C_Vol_III.pdf (last visited Sep. 19, 2020).

The 100:1 disparity between the sentences for crack offenses and the sentences for cocaine offenses has received a lot of criticism. Many people in the legal community thought that it was unfair to have such tough sentences for crack cocaine and much lighter sentences for powder cocaine. Some judges even began thinking about this unfair difference when sentencing defendants for crack cocaine offenses, stating that the unfair difference was a reason to give the defendants shorter sentences than the sentencing Guidelines called for.¹⁰

In 2007, the United States Sentencing Commission issued a report to Congress calling for reform of the federal cocaine sentencing disparity.¹¹ The report said that members of the legal community and the public were very concerned about the unfair sentencing policy that gave higher sentences for crack cocaine offenses than for powder cocaine offenses.¹²

The Guidelines were amended in 2007 and again in 2014, and these changes were made retroactive. Amendment 706, which came into effect on November 1, 2007, reduces the difference between sentences for crack (cocaine base) and powder cocaine. The old version of Section 2D1.1(c)(1) stated that 150KG of powder cocaine was the same as 1.5KG of crack cocaine. Amendment 706 adjusted this, changing Section 2D1.1(c)(1) so that 150KG of powder cocaine is now the same as 4.5KG of crack cocaine. Although there is still a significant disparity between sentences for crack and powder cocaine, this amendment has led to lower sentences for crack cocaine than under the old version of the Guidelines.

The following table illustrates the changes in Section 2D1.1(c) for calculating the base offense level for crack cocaine offenses. Level 38 is the most severe base level sentence that can be given for a drug offense (not taking into account sentencing enhancements).¹³

10. *See Spears v. U.S.*, 555 U.S. 261, 265–266, 129 S. Ct. 840, 843–844, 172 L. Ed. 2d 596, 601 (2009) (“... we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines”); *Kimbrough v. United States*, 552 U.S. 85, 91, 128 S. Ct. 558, 564, 169 L. Ed. 2d 481, 488 (2007) (holding that sentencing judges may think about the difference between sentences for powder and crack cocaine when deciding not to use the sentences recommended by the Guidelines and impose a lighter sentence); *see also Gall v. United States*, 552 U.S. 38, 47, 128 S. Ct. 586, 595, 169 L. Ed. 2d 445, 455 (2007) (holding that appeals courts cannot require “extraordinary circumstances” if sentencing judges move away from the Guidelines to give a lighter sentence); *United States v. Booker*, 543 U.S. 220, 245, 125 S. Ct. 738, 756–757, 160 L. Ed. 2d 621, 651 (2005) (holding that the Guidelines are advisory rather than mandatory, that judges may use their discretion (make their own decision) when deciding to depart from the Guidelines, and that sentencing decisions can only be overturned by appeals courts for “abuse of discretion” even if the sentencing judge did not follow the Guidelines).

11. U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (U.S. SENTENCING COMM’N 2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (last visited Sep 19, 2020).

12. The Commission has repeatedly recommended that Congress correct the disparity between mandatory minimum sentences for crack and powder cocaine. *See* U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6–9 (U.S. SENTENCING COMM’N 2007), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (last visited Sep. 19, 2020). In 2010, Congress finally passed the Fair Drug Sentencing Act, which changed mandatory minimum sentences for crack cocaine, increasing the amount of cocaine that triggers a five-year mandatory minimum from 5G to 28G. This adjustment reduced the mandatory minimum sentencing disparity from 100:1 to about 18:1. However, the change has not been made retroactive, which means that as of now, this new law probably does not provide a basis for you to apply for re-sentencing. Fair Sentencing Act of 2010, Pub. L. No. 111-20, §§ 2–3, 124 Stat. 2372, 2372 (to be codified at 21 U.S.C. 841(b)(1), 844(a)) (reducing the quantity thresholds triggering mandatory minimum sentences for crack cocaine and eliminating mandatory minimums for possession-only offenses).

13. AMENDMENTS TO THE GUIDELINES MANUAL APP. C, AMEND. 505 (U.S. SENTENCING COMM’N 2003), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/Appendix_C_Vol_I.pdf (last visited Sep 19, 2020).

Base Offense Level	Amount of drug (pre-Amendment 706) [Old Guideline] ¹⁴	Amount of drug (post-Amendment 706) [New Guideline] ¹⁵¹⁶
38	150KG or more of cocaine or 1.5 KG or more of cocaine base (crack)	450KG or more of cocaine or 25.2KG or more of cocaine base
36	50KG–150KG cocaine or 500G–1.5KG cocaine base	150KG–450KG cocaine or 8.4KG–25.2KG cocaine base
34	15KG–50KG cocaine or 150G–500G cocaine base	50KG–150KG cocaine or 2.8KG–8.4KG cocaine base
32	5KG–15KG cocaine or 50G–150G cocaine base	15KG–50KG cocaine or 840G–2.8KG cocaine base
30	3.5KG–5KG cocaine or 35G–50G cocaine base	5KG–15KG cocaine or 280G–840G cocaine base
28	2KG–3.5KG cocaine or 20G–35G cocaine base	3.5KG–5KG cocaine or 196G–280G cocaine base
26	500G–2KG cocaine or 5G–20G cocaine base	2KG–3.5KG cocaine or 112G–196G cocaine base
24	400G–500G cocaine or 4G–5G cocaine base	500G–2KG cocaine or 28G–112G cocaine base
22	300G–400G cocaine or 3G–4G cocaine base	400G–500G cocaine or 22.4G–28G cocaine base
20	200G–300G cocaine or 2G–3G cocaine base	300G–400G cocaine or 16.8G–22.4G cocaine base
18	100G–200G cocaine or 1G–2G cocaine base	200G–300G cocaine or 11.2G–16.8G cocaine base
16	50G–100G cocaine or 500MG–1G cocaine base	100G–200G cocaine or 5.6G–11.2G cocaine base
14	25G–50G cocaine or 250MG–500MG cocaine base	50G–100G cocaine or 2.8G–5.6G cocaine base
12	Less than 25G cocaine or less than 250MG cocaine base	Less than 50G cocaine or less than 2.8G cocaine base

Sentences for cocaine under the new Guidelines are usually one level lower than the old guidelines. In general, sentences for crack cocaine under the new Guidelines are usually about four levels lower than sentences under the old Guidelines, especially for lower amounts. This can mean that you might be able to get a reduction in your sentence if you were convicted of a crack cocaine offense committed before the new Guidelines came into effect on November 1, 2014.

14. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 2D1.1(c) at 129–147 (U.S. SENTENCING COMM’N 2003), *available at* http://www.ussc.gov/Guidelines/2003_guidelines/Manual/CHAP2-2.pdf (last visited Sep. 19, 2020).

15. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 2D1.1(c) at 141–167 (U.S. SENTENCING COMM’N 2014), *available at* <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Sep. 19, 2020).

16. It should be noted that the new ranges are retroactive. Meaning the ranges and base offense levels apply to all prison sentences, either currently being served or being served in the future. Language in the new Guidelines prevented the courts from releasing you if your sentence would be reduced until November 1, 2015. As November 1, 2015 has now passed, you may petition under the new Guidelines seeking a reduced sentence.

(b) Determining Eligibility for Re-Sentencing for an Offense Involving Crack Cocaine and at Least One Other Drug

Amendment 706, as changed by Amendments 711, 715, and 750, also reformed the way that the base offense level is calculated for crimes involving crack cocaine and at least one other drug.¹⁷ Under the old Guidelines, the base offense level for offenses involving more than one drug was calculated by converting all the drugs involved to their equivalent amounts of marijuana using the “Drug Equivalency Tables.”¹⁸ These amounts were then added together, and the total was used to find the correct base offense level using the “Drug Quantity Table.”¹⁹

This calculation can be a little confusing, so an example may be helpful: Imagine you were convicted of selling 80G of cocaine, 30G of cocaine base, and 1KG of marijuana. In order to calculate the base offense level, you would look at the Drug Equivalency Tables to determine that 1G of cocaine is equal to 200G of marijuana, and 1G of cocaine base is equal to 20KG of marijuana. So, the cocaine sold is equal to 16,000G (or 16KG) of marijuana (80G x 200G/1G = 16,000G). The cocaine base is equal to 600KG of marijuana (30G x 20KG/1G = 600KG). The total offense, therefore, involves the equivalent of 617KG of marijuana (16KG + 600KG + 1KG). Looking now at the Drug Quantity Table, we can see the 617KG of marijuana corresponds to a Level 28 base offense level.

Amendment 715 doesn't change the old method of calculating the base offense level for multiple-drug offenses. However, it says that whenever the offense involves *crack cocaine and at least one other drug*, the base offense level you get using the method above should be lowered by two levels.²⁰ So, under the new Guidelines, your base offense level would be calculated exactly as it was under the old Guidelines (as demonstrated in the example above), *but* the base offense level would then be reduced by two levels. So, in the example above, the base offense level would actually be Level 26 (Level 28 – 2 levels = Level 26).

This means that if you were convicted of an offense involving crack cocaine and at least one other drug, you are probably eligible to apply for re-sentencing under the new Guideline because your offense is most likely two levels lower than it was under the old Guidelines.²¹ You should be aware, however, that Amendment 715 provides three exceptions to the two-level reduction in cases involving crack cocaine. The two-level reduction will not apply if: 1) your offense involved 4.5KG or more of crack cocaine; 2) your offense involved less than 250MG of crack cocaine, or; 3) the base offense level after the two-level reduction would be lower than the base offense level for the same offense involving only the other drugs and not the cocaine base.²² If one of these three exceptions applies to your case, you probably will not be eligible for re-sentencing.

17. AMENDMENTS TO THE GUIDELINES MANUAL APP. C, AMEND. 715 (U.S. SENTENCING COMM'N 2003), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/Appendix_C_Vol_III.pdf (last visited Sep. 19, 2020).

18. The Drug Equivalency Tables can be found at the end of Note 10(D) of § 2D1.1 in the 2003 version of the Sentencing Guidelines and in Note 8(C) of § 2D1.1 in the 2014 version of the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.8(D) (U.S. SENTENCING COMM'N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/drug_trafficking.pdf (last visited Sep. 19, 2020).

19. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.8(D) (U.S. SENTENCING COMM'N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/drug_trafficking.pdf (last visited Sep. 19, 2020).

20. AMENDMENTS TO THE GUIDELINES MANUAL APP. C, AMEND. 715 (U.S. SENTENCING COMM'N 2011), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/Appendix_C_Vol_III.pdf (last visited Sep. 19, 2020).

21. If you were convicted of a crime committed between Nov. 1, 2007, and May 1, 2008, your sentence may have been calculated using the method established by Amendment 711. If this is the case, you should calculate your base offense level the way that Amendment 711 tells you to and compare this result to your base offense level using the current Guideline method explained in Part B(2)(a) of this Chapter.

22. AMENDMENTS TO THE GUIDELINES MANUAL APP. C, AMEND. 715 (U.S. SENTENCING COMM'N 2011), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/Appendix_C_Vol_III.pdf (last visited Sep. 19, 2020).

An example may be helpful to explain the third exception: Suppose a case involves 5G of cocaine base and 6KG of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5G of cocaine base converts to 100KG of marijuana ($5G \times 20KG/1G = 100KG$), and 6KG of heroin converts to 6,000KG of marijuana ($6KG \times 1000KG/1G = 6,000KG$), which, when added together equals 6,100KG of marijuana. Under the Drug Quantity Table, 6,100KG of marijuana leads to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000KG of marijuana corresponds to an offense level 34 under the Drug Quantity Table. The combined offense level for cocaine and heroin, if reduced, would be Level 32. Since this is less than the offense level for *only* heroin (Level 34), the third exception says that the reduction does not apply. So, the combined offense level for the cocaine and heroin is still Level 34.²³

(c) What if Your Original Sentencing Judge Already Gave You a Shorter Sentence than the Old Guidelines Recommended?

Even if you were originally sentenced to shorter time in prison than the Guidelines recommended, you may still be eligible for re-sentencing. There is very little law in this area, but it is possible that you can receive a further reduction in your prison sentence if the Sentencing Commission has lowered the prison sentence for your offense in the new Guidelines. Section 1B1.10 of the 2014 Federal Sentencing Guidelines Manual governs this situation.²⁴

(d) Are You Eligible for Re-Sentencing Even if Your Current Sentence Is the Result of a Binding Plea Agreement?

You may not be eligible for re-sentencing if your current sentence is the result of a binding plea agreement.²⁵ Many courts have held that if you were sentenced pursuant to a binding plea agreement, then you are automatically ineligible for re-sentencing.²⁶ However, not all courts agree.²⁷ Even if you

23. AMENDMENTS TO THE GUIDELINES MANUAL APP. C. AMEND. 715 (U.S. SENTENCING COMM'N 2011), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/Appendix_C_Vol_III.pdf (last visited Sep. 19, 2020).

24. § 1B1.10(a)(1) reads as follows: “In General. In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(1), policy statement (U.S. SENTENCING COMM'N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_1.pdf (last visited Sep. 19, 2020).

24. FAQs: 2014 Amendments to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance 4 (2014), *available at* https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Sep. 19, 2020).

25. FAQs: 2014 Amendments to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance 4 (2014), *available at* https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Sep. 19, 2020).

26. *See, e.g.*, *United States v. Rivera-Martinez*, 665 F.3d 344, 348 (1st Cir. 2011); *United States v. Green*, 595 F.3d 432, 436 (2d Cir. 2010); *United States v. Sanchez*, 562 F.3d 275, 277–279 (3d Cir. 2009), *abrogated by* *Freeman v. United States*, 564 U.S. 522, 131 S. Ct. 2685, 180 L. Ed. 2d 519 (U.S. 2011); *United States v. Scurllark*, 560 F.3d 839, 841 (8th Cir. 2009) (holding that because defendant had been sentenced under plea agreement he had not been sentenced based on a sentencing range that had been lowered); *United States v. Peveler*, 359 F.3d 369, 377–379 (6th Cir. 2004), *abrogated by* *Freeman v. United States*, 564 U.S. 522, 131 S. Ct. 2685, 180 L. Ed. 2d 519 (U.S. 2011); *United States v. Trujeque*, 100 F.3d 869, 870–871 (10th Cir. 1996) (all holding that sentences obtained by binding plea agreements cannot be reduced under the revised crack-cocaine sentencing Guidelines).

27. *See* *United States v. Garcia*, 606 F.3d 209, 214 (5th Cir. 2010) (per curiam) (holding that “[t]he jurisdictional question is whether the sentence was ‘based on’ the subsequently amended crack-offense Guidelines, and answering that question requires that we examine the nuances of both the plea agreement and the sentencing transcript in each particular case”); *United States v. Franklin*, 600 F.3d 893, 896 (7th Cir. 2010) (holding that some binding plea agreements may be eligible for re-sentencing if original sentence was based on the Guidelines); *United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009) (holding that where a binding plea

pleaded guilty and are eligible for re-sentencing, you may not be re-sentenced automatically. You may have to prove that your plea agreement was based on the Guideline recommendations for your offense level that existed at the time.²⁸ Thus, if your sentence is the result of a binding plea agreement, you can file for re-sentencing, but you should be prepared to argue that your sentence was in fact based on the Guidelines. You should also know that a judge might still find you ineligible for re-sentencing because you entered into a binding plea agreement.

(e) Are You Eligible for Re-Sentencing if You Were Originally Sentenced as a “Career Offender”?

A “career offender” is defined under Section 4B1.1 of the new Guidelines.²⁹ The Guidelines says that you are a “career offender” if:

- (1) You were at least eighteen years old when you committed the offense you are currently serving time for,
- (2) The crime you are in jail for now is a felony, either a crime of violence or a controlled substance abuse, and
- (3) You had at least two prior felony convictions of either crimes of violence or controlled substance abuse.³⁰

If you were sentenced as a career offender under Section 4B1.1 of the Guidelines, you are probably not eligible to receive a sentence reduction under the new Guidelines. This is because your sentence may not have been based on the parts of the Guidelines that were amended. If the sections of the Guidelines that you were sentenced under were not amended, your sentence would probably not be lower under the New Guidelines. Recent decisions in a variety of circuit courts have rejected applications for re-sentencing made by incarcerated persons designated as career offenders.³¹

agreement is based on the Guidelines, it does not render the offender ineligible for re-sentencing).

28. *See* United States v. Garcia, 606 F.3d 209, 214 (5th Cir. 2010) (per curiam) (holding that binding plea agreements could be eligible for re-sentencing if they could be fairly said to have been based on the Guidelines); United States v. Franklin, 600 F.3d 893, 896 (7th Cir. 2010) (holding that some binding plea agreements may be eligible for re-sentencing); United States v. Cobb, 584 F.3d 979, 985 (10th Cir. 2009) (holding that the court has broad discretion to re-sentence offenders under 18 U.S.C. § 3582(c)(2) even where the original sentence was based on a binding plea agreement); United States v. Bride, 581 F.3d 888, 891 (9th Cir. 2009) (holding that where a binding plea agreement is based on the Guidelines, the offender may be eligible for re-sentencing); United States v. Coleman, 594 F. Supp. 2d 164, 167 (D. Mass. 2009) (holding that sentences obtained by binding plea agreements may be reduced under the revised sentencing Guidelines). Incarcerated persons sentenced under binding plea agreements may also be eligible for re-sentencing in the Fourth Circuit, although the law is not entirely clear because the decision was vacated and is no longer the law. *See* United States v. Dews, 551 F.3d 204, 209 (4th Cir. 2008), reh’g en banc granted (Feb 20, 2009), *reh’g dismissed as moot* (May 04, 2009), (holding that nothing in the federal rule regarding binding plea agreements “precludes a defendant pleading guilty under that rule from receiving the benefit of a later favorable retroactive amendment to the Guidelines, provided, of course, that the requirements of § 3582(c)(2) are met”).

29. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM’N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_4.pdf (last visited Sep. 19, 2020).

30. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM’N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_4.pdf (last visited Sep. 20, 2020).

31. *See* United States v. Mateo, 560 F.3d 152, 154 (3d Cir. 2009) (holding that because Amendment 706 did not affect defendant’s applicable sentencing range U.S.C. § 3582(c)(2) did not authorize a reduction in his sentence); United States v. Anderson, 591 F.3d 789, 791 (5th Cir. 2009) (holding that the crack cocaine guideline amendments did not apply to defendants sentenced as career offenders); United States v. Perdue, 572 F.3d 288, 293 (6th Cir. 2009) (holding that Congress had decided to cabin the court’s discretion and amendment 706 did not offer any relief to defendants sentenced as career offenders); United States v. Forman, 553 F.3d 585, 589-590 (7th Cir.), *cert. denied*, 556 U.S. 1173, 129 S. Ct. 1924, 173 L. Ed. 2d 1071 (holding Amendment 706 does not apply to career offenders); United States v. Thomas, 524 F.3d 889, 890 (8th Cir. 2008) (holding that career offenders’ sentences are determined by § 4B1.1 not § 2D1.1 so they are not eligible for re-sentencing); United States v. Ayala-Pizarro, 551 F.3d 84, 85 (1st Cir. 2008) (holding that incarcerated persons sentenced as career offenders are not eligible for re-sentencing); United States v. Caraballo, 552 F.3d 6, 10 (1st Cir. 2008) (holding that career offenders are not eligible for re-sentencing unless their sentence as a career offender would be lower under the amended Guidelines, which is highly unlikely); United States v. Sharkey, 543 F.3d 1236, 1239 (10th Cir. 2008) (holding

Although some circuits had held if you were designated a career offender, but you were ultimately sentenced based on the crack cocaine amount Guidelines, not the career offender Guidelines, you could be eligible for re-sentencing, the Sentencing Commission chose to reject that by amending its commentary on the Guidelines.³² It is still unclear whether incarcerated persons sentenced as career offenders can receive sentence reductions. If you were sentenced as a career offender, you may still want to apply for re-sentencing. But you should know that your request might be denied because you were sentenced as a career offender.

(f) Are You Eligible for Re-Sentencing if You Were Originally Sentenced to a Minimum Sentence under a Statute?

If you were sentenced a statutory minimum sentence, for example sixty months for 5G or more of crack or 120 months for 50G or more of crack, you are probably not eligible for re-sentencing. This is because the statutory minimum sentence is not affected by any reduction under the new Guidelines.³³

3. Applying for Re-Sentencing

(a) How Do You Apply?

To apply for re-sentencing because the new Guidelines have lowered the sentence for your offense, you must file a motion under 18 U.S.C. § 3582(c)(2).³⁴ You must file the motion in the same district court where you were sentenced. 18 U.S.C. § 3582(c)(2) allows courts to re-sentence incarcerated persons who were sentenced using the old Guidelines when the new Guidelines are retroactive and have lowered the suggested sentence for your offense.³⁵ You can find sample motions at the end of this Chapter.

It is unclear whether you have the right to an attorney when you apply for re-sentencing.³⁶ You may need to write and file your application for re-sentencing on your own. This is called filing *pro se*.

(i) How to File a Section 3582(c)(2) Re-Sentencing Motion *Pro Se*

In order to file a motion *pro se* for re-sentencing under 18 U.S.C. § 3582(c)(2), you will need to prepare an application. When you are finished, you will file your application and submit it to the district court that handled your original sentencing. Before you begin your application, you should make sure you know some key facts about your case:

(4) Your criminal case number,

that, because Amendment 706 of the Sentencing Guidelines has no effect on the Guidelines for career offenders, incarcerated persons sentenced as career offenders are not eligible for re-sentencing); *United States v. Wesson*, 583 F.3d 728, 731 (9th Cir. 2009); *United States v. Moore*, 541 F.3d 1323, 1330 (11th Cir. 2008).

32. The 2nd Circuit interpreted the guidelines to allow for re-sentencing if the prisoner was sentenced based on Guidelines for crack cocaine in his possession, not the Guidelines for career offenders. *United States v. McGee*, 553 F.3d 225, 230 (2d Cir. 2009). However, there was a split among the Circuits and the Sentencing Commission decided to update Note 1 to § 1B1.1(a) which rejected McGee. *United States v. Montanez*, 717 F.3d 287, 294 (2d Cir. 2013). *See also* *United States v. Quattlebaum*, 2015 U.S. Dist. LEXIS 82934, *4 (W.D. Va. June 26, 2015) (noting that the Sentencing Commission abrogated McGee); *United States v. Ponder*, 2012 U.S. Dist. LEXIS 63542, *6, 2012 WL 1570845 (S.D.N.Y. May 3, 2012) (noting that the Sentencing Commission abrogated McGee by updating the commentary).

33. U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.10 cmt. n.1(A), 5G1.1(b) (U.S. SENTENCING COMM’N 2014), available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_1.pdf (last visited Sep. 19, 2020). The changes made to the mandatory minimum sentencing scheme in 2010 by the Fair Sentencing Act have not been made retroactive, which means the old mandatory minimums still apply to you if you were sentenced under them. See Part B(2)(a) of this Chapter for more on the Fair Sentencing Act of 2010.

34. 18 U.S.C. § 3582(c)(2).

35. Office of Defender Servs., *Retroactivity of Crack Cocaine Amendments: Guidance to CJA Panel Attorneys*, FD.ORG, available at <https://www.fd.org/crack-cocaine-sentencing/2007-crack-cocaine-guideline-amendments/retroactivity-crack-cocaine-amendments> (last visited Sep. 19, 2020).

36. For more information on the right to counsel issue, see Part C(3) of this Chapter.

- (5) Your base offense level—you can find this in the “Criminal Computation” section of your pre-sentence report or you can calculate it yourself,
- (6) Your criminal history,
- (7) The Sentencing Guideline range that was originally used in your sentencing,
- (8) Your actual sentence,
- (9) The new Sentencing Guideline range that would be applicable to your crime under the amended Guidelines,
- (10) Whether you were sentenced pursuant to a binding plea agreement or were sentenced based on your status as a career offender,
- (11) Your disciplinary record and program participation during your incarceration.³⁷

Your application is a chance for you to argue that you are an ideal candidate for re-sentencing. You should remember that the court will probably receive many of these kinds of motions from incarcerated persons, so you may not want to make your application too long. Using the sample motions at the end of this chapter and filling in your own information is probably the simplest way to file an effective *pro se* motion.³⁸

After you file your motion for re-sentencing under 18 U.S.C. § 3582(c)(2), the judge may hold a re-sentencing hearing. At this hearing, the judge may consider factors listed in 18 U.S.C. § 3553(a).³⁹ If you think that some of these factors might help you for re-sentencing, you may want to explain them in your application. For example, you should mention any vocational or educational programs you have participated in while in prison. You should also mention other ways in which you can show your own rehabilitation. If you think these factors will be important in your re-sentencing, you should apply to have an attorney appointed using the form in Appendix A of this Chapter.

(b) Are You Entitled to a Hearing?

Under the Sentencing Guidelines, you are entitled to a hearing whenever any important factor in the sentencing determination is “reasonably in dispute” or whenever a judge plans to consider facts not found at the original sentencing proceeding.⁴⁰ Usually, courts find that a hearing is appropriate whenever there is a legitimate question of fact. Some appellate courts have found abuse of discretion where the lower court refused to hold a 18 U.S.C. § 3582(c)(2) hearing and denied the prisoner’s Section

37. See Office of Defender Servs., *Sample Motions, Briefs, Petitions and Orders Relating to Retroactive Application of Crack Cocaine Guideline Amendment*, FD.ORG, available at <https://www.fd.org/crack-cocaine-sentencing/2007-crack-cocaine-guideline-amendments/sample-motions-briefs-petitions-orders> (last visited Sep. 19, 2020) (providing links to various sample forms).

38. The Sample Document in Appendix B of this Chapter can serve as a template for your application.

39. These factors include the nature of the offense committed, the prior history and character of the prisoner, the need for the punishment to reflect the seriousness of the offense, the need to provide just punishment and protect the public, the need to avoid arbitrary sentencing differences among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to victims. 18 U.S.C. § 3582(c)(2) (2012).

40. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (U.S. SENTENCING COMM’N 2014), available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_6.pdf, 476 (last visited Feb. 4, 2019) (“[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor”); see also Fed. Pub. & Cmty. Defenders, *Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines*, FD.ORG, 3–4 (2008), available at https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/crack-retroactivity-questions-answers-caselaw-argument-outlines.pdf (last visited Sep. 19, 2020).

3582(c)(2) motion for a sentence reduction.⁴¹ However, other circuits have held you are not entitled to a hearing.⁴²

(c) Are You Entitled to Be Represented by Counsel at a Section 3582(c)(2) Proceeding?

Because Section 1B1.10 of the Guidelines was recently amended, it is still unclear whether you are entitled to counsel at a Section 3582(c)(2) proceeding.⁴³ Section 1B1.10 was revised in May 2008 and says that proceedings under Section 3582(c)(2) “do not constitute a full re-sentencing of the defendant.”⁴⁴ Because of this, many courts have held that you do not have a right to counsel at a Section 3582(c)(2) proceeding.⁴⁵

However, Section 1B1.10 calls for judges to reconsider the facts surrounding the offense as part of considering the factors in 18 U.S.C. § 3553(a).⁴⁶ Judges may also consider your post-sentencing conduct (such as your behavior while in prison).⁴⁷ These kinds of factual findings are characteristic of the kinds of proceedings where the Sixth Amendment requires that defense counsel is given to defendants.⁴⁸

41. See *United States v. Neal*, 611 F.3d 399, 401–402 (7th Cir. 2010) (although “[r]eliance on the prior resolution of factual disputes means that the court usually need not hold evidentiary hearings before acting on motions under § 3582(c)(2),” if judge wishes to rely on contestable post sentence facts to deny § 3582(c)(2) motion, defendant “is entitled to an opportunity to contest propositions that affect how long he must spend in prison.”); *United States v. Jules*, 595 F.3d 1239, 1245, 22 Fla. L. Weekly Fed. C 512 (11th Cir. 2010) (holding that a district court must allow the prisoner and Government an opportunity to dispute evidence in a § 3582(c)(2) motion when the court relies on new information); *United States v. Byfield*, 391 F.3d 277, 280–281 (D.C. Cir. 2004) (citing U.S. Sentencing Guidelines Manual § 6A1.3 (2004)) (finding that the lower court had abused its discretion by failing to hold an evidentiary hearing where prisoner’s factual assertions in his § 3582(c)(2) motion raised “enough of a smidgeon to put the matter ‘reasonably in dispute’”); *United States v. Mueller*, 168 F.3d 186, 189–190 (5th Cir. 1999) (holding that where a judge, in deciding a § 3582(c)(2) motion, intends to consider evidence not presented in the defendant’s pre-sentencing report, the judge must give notice to the prisoner and allow the prisoner an opportunity to respond).

42. See *United States v. Styer*, 573 F.3d 151, 153–154 (3d Cir. 2009) (holding that defendant is not entitled to an evidentiary hearing because § 1B1.10 limited the scope of the proceedings); *United States v. Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009) (holding defendant not entitled to evidentiary hearing); *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (holding defendant not entitled to evidentiary hearing); *United States v. Edwards*, 1998 U.S. App. LEXIS 39855 (5th Cir. 1998) (holding defendant is not entitled to evidentiary hearing because no facts are in dispute). But see *United States v. Burrell*, 622 F.3d 961, 966 (8th Cir. 2010) (though no hearing is required the district court must give enough explanation of the court’s reasoning to allow for meaningful appellate review).

43. *Memorandum on Appointment of Counsel in Crack Retroactivity Cases from the Training Branch of the Office of Defender Servs. to Participants, Nat’l Sentencing Policy Inst.* (Jun. 25, 2008), available at https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/crack_appointment_of_counsel.pdf (last visited Sep. 19, 2020).

44. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(3) (U.S. SENTENCING COMM’N 2014), available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_1.pdf.

45. See, e.g., *United States v. Webb*, 565 F.3d 789, 794–795 (11th Cir. 2009) (holding that incarcerated persons have no constitutional or statutory right to representation at § 3582(c)(2) proceedings); *United States v. Harris*, 568 F.3d 666, 668–669 (8th Cir. 2009) (same); *United States v. Forman*, 553 F.3d 585, 590 (7th Cir. 2009) (same); *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (same); *United States v. Townsend*, 98 F.3d 510, 512–513 (9th Cir. 1996) (same); *United States v. Reddick*, 53 F.3d 462, 463–465 (2d Cir. 1995) (same); *United States v. Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009) (same).

46. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. n.1(B)(i) (U.S. SENTENCING COMM’N 2008), available at http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP1.pdf (last visited Feb. 4, 2019).

47. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 1B1.10 cmt. n.1(B)(iii) (U.S. SENTENCING COMM’N 2014), available at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Sep. 19, 2020).

48. U.S. CONST. AMEND. VI.; Fed. Pub. & Cmty. Defenders, *Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines*, PD.ORG (2008), available at https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/crack-retroactivity-questions-answers-caselaw-argument-outlines.pdf (last visited Sep. 19, 2020).

There are some cases saying that a prisoner might be entitled to counsel for some 18 U.S.C. § 3582(c)(2) hearings, but no court has found a general right to counsel during re-sentencing.⁴⁹

If you want to have an attorney represent you during the re-sentencing process and cannot afford to hire one, you can apply to have counsel appointed to you. The form at Appendix A-1 of this Chapter provides a template for your application to have an attorney represent you in court.

(d) Are You Entitled to Be Present at a Section 3582(c)(2) Hearing?

You are not usually entitled to be present at a Section 3582(c)(2) hearing. Under the Federal Rules of Evidence, proceedings under Section 3582(c) are excused from the rule that a prisoner must be present at his sentencing.⁵⁰ You may also choose not to be present if your absence from prison would affect your housing, your work, or other obligations. However, if you think that important facts relating to your case will be involved at the hearing, you can argue that you have a constitutional right to be present.⁵¹

(e) What Sentence Might You Get if a Judge Grants Your Motion for Re-Sentencing?

Most likely, you will get a sentence within the changed Guidelines. You may get a sentence that is lower than the recommended sentence from the changed Guidelines if your original sentence was already lower than the sentence recommended by the old Guidelines.⁵²

49. See *Halbert v. Michigan*, 545 U.S. 605, 610, 125 S. Ct. 2582, 2586, 162 L. Ed. 2d 552, 560 (2005) (finding that the Due Process and Equal Protection clauses of the Federal Constitution require that if an avenue for relief is provided by statute, the government may not “bolt the door to equal justice to indigent defendants”); *Mempa v. Rhay*, 389 U.S. 128, 135, 88 S. Ct. 254, 257, 19 L. Ed. 2d 336, 341 (1967) (holding that the 6th Amendment guarantees a right to counsel in a proceeding where a judge has to recommend a revised sentence to the parole board because “to the extent such recommendations are influential in determining the resulting sentence, the mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent”); *United States v. Robinson*, 542 F.3d 1045, 1052 (5th Cir. 2008) (holding that where a prisoner convicted of selling crack cocaine moved for a sentence reduction by filing a §3582(c)(2) motion and requesting counsel, the interest of justice warranted appointment of counsel; the court refrained from definitively stating that all incarcerated persons have a right to counsel at § 3582(c)(2) hearings); *United States v. Reddick*, 53 F.3d 462, 465 (2d Cir. 1995) (holding that appointment of counsel for § 3582(c)(2) application rests in the discretion of the district court); *Turnbow v. Estelle*, 510 F.2d 127, 129 (5th Cir. 1975) (holding that there is a right to counsel whenever the judge can exercise some discretion and influence over the sentence imposed); see also Fed. Pub. & Cmty. Defenders, *Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines* (2008), available at https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/crack-retroactivity-questions-answers-caselaw-argument-outlines.pdf (last visited Sep. 19, 2020) (arguing that prior case law finding no right to counsel under United States Sentencing Guidelines § 1B1.10 for § 3582(c)(2) proceedings is now obsolete because of the significant revisions of § 1B1.10 in 2008).

50. See Fed. R. Crim. P. 43(b)(4); *United States v. Gainer*, 303 F. App’x 795, 796–797 (11th Cir. 2008) (per curiam) (holding that a prisoner has no right to be present for a § 3582(c)(2) re-sentencing hearing); *United States v. Jones*, 298 F. App’x 70, 72 (2d Cir. 2008) (*unpublished*) (distinguishing *United States v. DeMott* and holding that incarcerated persons who file § 3582(c)(2) motions for re-sentencing have no right to be present at a hearing); *United States v. Parrish*, 427 F.3d 1345, 1347 (11th Cir. 2005) (holding a prisoner has no right to be present at a § 3582(c)(2) re-sentencing hearing and that Federal Rule of Procedure 43(b)(4) exempts proceedings under § 3582(c)(2) from the rule that a prisoner must be present at sentencing). But see *United States v. DeMott*, 513 F.3d. 55, 58 (2d Cir. 2008) (holding that defendant has a constitutional right to be present during re-sentencing, insofar as the proceeding is technically imposing a new sentence in place of the vacated sentence).

51. Fed. Pub. & Cmty. Defenders, *Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines* (2008), available at https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/crack-retroactivity-questions-answers-caselaw-argument-outlines.pdf (last visited Sep. 19, 2020) (finding a possible constitutional right to be present at a re-sentencing hearing where important facts are in dispute).

52. See Part B(2)(c) above.

(f) May a Court Deny Your Motion for Re-Sentencing Even When the New Guidelines Have Been Lowered for Your Offense?

Yes, a court may deny your Section 3582(c)(2) motion even if it is clear that the Sentencing Commission has lowered the sentencing Guidelines for the incident for which you are serving time. A judge may choose not to re-sentence you if he believes that the factors listed in Section 3553(a), the history after your conviction, or concerns about public safety suggest that a reduction in your sentence would not be appropriate.⁵³

4. Applying for Reduction in Sentence under Amendment 782 (“Drug Minus Two” Amendment)

(a) Introduction

In July 2014, the U.S. Sentencing Commission passed Amendment 782, also called the “Drug Minus Two” Amendment, to § 1B1.10.⁵⁴ The amendment affects motions for sentence reductions filed under 18 U.S.C. § 3582(c)(2). It reduces by two levels the offense levels assigned to drug quantities in the Drug Quantity Table in § 2D1.1.⁵⁵ This applies for offenses related to any controlled substance. The Drug Quantity Table is used by federal judges to calculate sentences. It establishes a sentencing range for each offense level. Amendment 782, however, does not change the minimum base offense level (Level 6) or the maximum base offense level (Level 38) for most drug types. The Drug Quantity Table is at the end of this chapter.

In July 2014, the Commission voted to make Amendment 782 apply retroactively.⁵⁶ This means that if you are already serving a sentence for a federal drug offense, you are now able to file a motion for sentence reduction based on the changes made to the base offense levels. The first date motions could be filed was November 2014, and the effective date of sentence reduction orders (the first date people could be released) was November 1, 2015.⁵⁷ The effective date was delayed until November 2015 partly to give federal agencies time to set up reentry options.⁵⁸

The Commission has made it clear that the purpose of Amendment 782 is to deal with the overcapacity of federal prisons.⁵⁹ The Commission has also recognized that setting base offense levels above mandatory minimum penalties was no longer necessary.⁶⁰ The Commission projected that

53. U.S. SENTENCING COMMISSION GUIDELINES MANUAL, §1B1.10 cmt. n.1(B), 39 (U.S. SENTENCING COMM’N 2014), *available at* <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Sep. 19, 2020).

54. AMENDMENTS TO THE GUIDELINES MANUAL, AMEND. 782, 5 (U.S. SENTENCING COMM’N 2014), *available at* <https://www.ussc.gov/sites/default/files/pdf/training/CLE/presentation-amendments-20141030.pdf> (last visited Oct. 16, 2020).

55. AMENDMENTS TO THE GUIDELINES MANUAL, AMEND. 782, 1-2 (U.S. SENTENCING COMM’N 2014), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf (last visited Oct. 16, 2020).

56. AMENDMENTS TO THE GUIDELINES MANUAL, AMEND. 782, 1-2 (U.S. SENTENCING COMM’N 2014), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf (last visited Oct. 16, 2020).

57. U.S. SENTENCING COMMISSION GUIDELINES MANUAL, § 1B1.1(e), 39 (U.S. SENTENCING COMM’N 2015), *available at* <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Oct. 16, 2020).

58. AMENDMENTS TO THE GUIDELINES MANUAL, AMEND. 782, 2 (U.S. SENTENCING COMM’N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf (last visited Oct. 16, 2020).

59. AMENDMENTS TO THE GUIDELINES MANUAL, AMEND. 782, 1 (U.S. SENTENCING COMM’N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf (last visited Oct. 16, 2020).

60. AMENDMENTS TO THE GUIDELINES MANUAL, AMEND. 782, 1 (U.S. SENTENCING COMM’N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf (last visited Oct. 16, 2020).

approximately 46,000 offenders could take advantage of the Amendment's retroactive application, with sentences lessened on average by 18 percent.⁶¹

(b) Eligibility

Amendment 782 applies only to offenders sentenced in federal courts and currently serving a term of imprisonment. It applies to offenses related to any controlled substance. There are no specific eligibility limitations based on an incarcerated person's criminal history, use of weapons in the offense, or type of drug trafficking. However, these are factors that a judge is likely to take into consideration when deciding on the motion for a sentence reduction.⁶²

Amendment 782 does not provide for a sentence reduction for offenders whose sentences were based on guidelines specified in Section 2B1.1(a)(1-4).⁶³ These subsections provide for an enhanced base offense level if the defendant was convicted under a different statute and/or was accompanied by other mitigating circumstances, such as death or serious bodily injury resulting from the use of the substance. A judge may not re-sentence a defendant to a term that is lower than the amended guideline range.⁶⁴ Amendment 782 may also not apply if the petitioner originally received a downwardly adjusted sentence that was more than two levels below the offense base level at the time.

Several other exceptions to your eligibility for a sentence reduction under Amendment 782 may apply. These are discussed briefly below:⁶⁵

- (1) Are you eligible if your sentence has already been reduced pursuant to previous amendments to the crack cocaine guidelines?

You may still be eligible for further reduction to your sentence under Amendment 782.

- (2) Are you eligible for re-sentencing if you were originally sentenced as a Career Offender or under the Armed Career Criminal Statute?

No, reductions provided for by Amendment 782 do not apply if you were sentenced under the Career Offender (Section 4B1.1) or Armed Career Criminal Statute.⁶⁶ However, if your sentence was originally determined by the drug guideline range rather than the career offender range, you can still try to seek relief. Case law varies among the circuits on whether a defendant who was subject to the career offender guideline but received a variance or departure from that guideline is eligible for sentence reduction.⁶⁷

61. AMENDMENTS TO THE GUIDELINES MANUAL, AMEND. 782, 1 (U.S. SENTENCING COMM'N 2014), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf (last visited Oct. 16, 2020).

62. See 18 U.S.C. § 3582(c)(2) (“[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission,” the court may “reduce the term of imprisonment ... after considering the factors set forth in section 3553(a) to the extent that they are applicable...”); see generally 18 U.S.C. § 3553(a) (providing a detailed list of factors that the court may use to determine whether a sentence reduction is warranted and consistent with sentencing policies).

63. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 2D1.1 (a)(1-4), 141 (U.S. SENTENCING COMM'N 2014), available at <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Oct. 16, 2020).

64. United States v. Erskine, 717 F.3d 131, 137 (2d Cir. 2013).

65. See generally, *FAQs: 2014 Amendment to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance*, Federal Defenders, available at https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Oct. 16, 2020).

66. *FAQs: 2014 Amendment to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance*, Federal Defenders, available at https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Oct. 16, 2020).

67. *FAQs: 2014 Amendment to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance*, Federal Defenders

- (3) Are you eligible if you were sentenced under a mandatory minimum statute provided by Congress?

Yes, if you provided “substantial assistance to the government in the investigation and prosecution of others,” you may still be eligible for a sentence reduction despite a mandatory minimum.⁶⁸

- (4) Are you eligible if you entered into a plea agreement pursuant to Rule 11(c)(1)(c)?

Yes, most courts have held that a defendant is still eligible to file a motion under 18 USC § 3582(c) for a reduction in sentence if he or she entered into an 11(c)(1)(c) agreement.⁶⁹

- (5) How will Amendment 782 affect your sentence if you received a reduction for substantial assistance?

The Commission was clear in Amendment 782 that sentence reduction is still possible for petitioners who received downwardly adjusted sentences in substantial assistance cases.⁷⁰ Therefore, you should still file a 18 U.S.C. § 3582(c)(2) motion under Amendment 782.

- (6) What if you have previously waived the right to file a motion under 18 USC §3582(c)(2)?

If you have previously waived this right, counsel can file a “Notice of Eligibility” motion to alert the court that you may still be eligible for a sentence reduction pursuant to changes made by Amendment 782. The court can then file a *sua sponte* motion on its own if it determines the case warrants this.⁷¹

- (7) How do you apply?

The changes to your sentence provided for in Amendment 782 do not apply automatically. To apply for re-sentencing, you must file a motion under 18 USC § 3582(c)(2). The motion must be filed in the same district court that handled your original sentencing. This motion may be filed pro se.⁷² You can find a sample pro se motion at the end of this Chapter.

3, 12–14, *available at*

https://www.fed.defenders.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Oct. 16, 2020).

68. *FAQs: 2014 Amendment to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance*, Federal Defenders 12, *available at*

https://www.fed.defenders.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Oct. 16, 2020).

69. *FAQs: 2014 Amendment to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance*, Federal Defenders 4, *available at*

https://www.fed.defenders.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Oct. 16, 2020).

70. *FAQs: 2014 Amendment to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance*, Federal Defenders 12–13, *available at*

https://www.fed.defenders.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Oct. 16, 2020).

71. *FAQs: 2014 Amendment to USSG §1B1.10: Retroactivity of “Drugs Minus 2” (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance*, Federal Defenders 1, *available at*

https://www.fed.defenders.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/faqs-2014-amendments-to-ussg-1b1-10-retroactivity-of-drugs-minus-2.pdf (last visited Oct. 16, 2020).

72. “Pro se” means advocating on one’s own behalf before a court, rather than being represented by a lawyer.

It is important to show in the motion that your sentence would be different if today's guidelines had been in place during your original sentencing. At the end of this section, you can find the amended Drug Quantity Table.⁷³

Amendment 782 allows judges to reduce sentences on a case-by-case basis. There are a number of factors provided for both in 18 USC §3553(a) and in the Commission's explanation of Amendment 782 that will be used by the judge to make this determination. These include:⁷⁴

- (1) The nature and circumstances of the offense;
- (2) The history and characteristics of the defendant;
- (3) The need for the sentence based on the seriousness of the offense, protecting the public, and providing for adequate deterrence;
- (4) Any policy statement issued by the Sentencing Commission;
- (5) Your post-sentencing conduct;
- (6) Any new factual findings about the drug quantity.

Below is more information on how best to apply and what the process will be like.

- (1) Will this be an opportunity for a full re-sentencing?

No, the judge is not permitted to consider a full re-sentencing. The judge is only able to consider whether or not to apply a reduced sentence based on the two-level reduction of the base offense levels.

- (2) Are you entitled to a hearing on the matter?

No, petitioners filing a motion for a sentence reduction are not automatically entitled to a hearing. Most of the requests under Amendment 782 will be resolved based on written materials. The need for a hearing will most likely arise in cases where there is question of whether the amendment actually lowered the sentence. If the court denies the motion as a matter of discretion, no hearing is provided.

- (3) If your first motion is denied, can you file again?

It is not clear how many motions you can file for reconsideration or a second motion for relief based upon the same retroactive amendment. Nothing in 18 USC § 3582(c)(2) technically limits how many motions a petitioner may file.

(c) Calculating the New Range

Under Section 2D1.1, unless you are convicted of an offense that comes within the category of offenses specified in Section 2D1.1 (a)(1)–(4), the type and amount of drugs for which you are held responsible is a key factor in determining your sentence.⁷⁵ The base offense level specified in the Drug Quantity Table will apply.⁷⁶ Note that Amendment 782 revised the Drug Quantity Table so the table listed at the end of the Chapter is the current version. It is important to find out what was the base offense level used in your original sentencing.

If you received a departure or variance at the original sentencing hearing (for reasons other than substantial assistance), the court will likely calculate your new sentencing range based on an offense level *without* the previous departure or variance.

To determine how your base offense level would be different today, find the original base offense level used in your sentencing hearing. If your offense level was not the maximum or minimum, then

73. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 2D1.1(c), 145–167 (U.S. SENTENCING COMM'N 2014), *available at* <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Oct. 16, 2020).

74. For more information on the factors that could be considered, refer to 18 USC §3553(a); *See also* AMENDMENTS TO THE GUIDELINES MANUAL, AMEND. 782, 1 (U.S. SENTENCING COMM'N 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf (last visited Oct. 16, 2020).

75. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 2D1.1(a)(1)–(4) (U.S. SENTENCING COMM'N 2014), *available at* <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Oct. 16, 2020).

76. U.S. SENTENCING COMMISSION GUIDELINES MANUAL, 145–167 § 2D1.1(c) (U.S. SENTENCING COMM'N 2014), *available at* <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (last visited Oct. 16, 2020).

you can move forward with the calculation. Subtract two levels from the original base offense level used in your sentencing. For example, if your original base level was Level 28, then $28 - 2 = 26$. Today your base offense level would be Level 26, meaning the judge should consider the sentencing guidelines applicable to Level 26 for your potential sentence reduction.

(d) Recommendations

We recommend that if possible you get a lawyer to help you file this motion. Based on previous Amendment 782 cases, courts have been more willing to grant sentence reductions when the petitioner has had counsel. Included at the end of the Chapter is a petition for a court-appointed lawyer or a Federal Public Defender.

Also, a judge is likely to consider your disciplinary record in prison. If your record since post-sentencing is good, this is an important factor to tell the judge determining your sentence reduction.

5. Conclusion

In conclusion, the recent changes in the Federal Sentencing Guidelines that are in effect for prior sentencings for some drug offenses, especially those involving crack cocaine, allow some individuals currently serving sentences for federal drug convictions to apply for sentence reductions under the new Guidelines. If the sentencing range for your offense has been lowered by the changes, you may qualify for re-sentencing. You should try to have an attorney appointed to your case or, if you cannot get an attorney, you should file a re-sentencing application pro se.

(a) Drug Quantity Table

Controlled Substances and Quantity	Base Offense Level
<ul style="list-style-type: none"> • 90 KG or more of Heroin; • 450 KG or more of Cocaine; • 25.2 KG or more of Cocaine Base; • 90 KG or more of PCP, or 9 KG or more of PCP (actual); • 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of "Ice"; • 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); • 900 G or more of LSD; • 36 KG or more of Fentanyl; • 9 KG or more of a Fentanyl Analogue; • 90,000 KG or more of Marihuana; • 18,000 KG or more of Hashish; • 1,800 KG or more of Hashish Oil; • 90,000,000 units or more of Ketamine; • 90,000,000 units or more of Schedule I or II Depressants; • 5,625,000 units or more of Flunitrazepam. 	38
<ul style="list-style-type: none"> • At least 30 KG but less than 90 KG of Heroin; • At least 150 KG but less than 450 KG of Cocaine; • At least 8.4 KG but less than 25.2 KG of Cocaine Base; • At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); • At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of "Ice"; • At least 15 KG but less than 45 KG of Amphetamine, or 	36

<ul style="list-style-type: none"> at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); • At least 300 G but less than 900 G of LSD; • At least 12 KG but less than 36 KG of Fentanyl; • At least 3 KG but less than 9 KG of a Fentanyl Analogue; • At least 30,000 KG but less than 90,000 KG of Marihuana; • At least 6,000 KG but less than 18,000 KG of Hashish; • At least 600 KG but less than 1,800 KG of Hashish Oil; • At least 30,000,000 units but less than 90,000,000 units of Ketamine; • At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants; • At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam. 	
<ul style="list-style-type: none"> • At least 10 KG but less than 30 KG of Heroin; • At least 50 KG but less than 150 KG of Cocaine; • At least 2.8 KG but less than 8.4 KG of Cocaine Base; • At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); • At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; • At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); • At least 100 G but less than 300 G of LSD; • At least 4 KG but less than 12 KG of Fentanyl; • At least 1 KG but less than 3 KG of a Fentanyl Analogue; • At least 10,000 KG but less than 30,000 KG of Marihuana; • At least 2,000 KG but less than 6,000 KG of Hashish; • At least 200 KG but less than 600 KG of Hashish Oil; • At least 10,000,000 but less than 30,000,000 units of Ketamine; • At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; • At least 625,000 but less than 1,875,000 units of Flunitrazepam. 	34
<ul style="list-style-type: none"> • At least 3 KG but less than 10 KG of Heroin; • At least 15 KG but less than 50 KG of Cocaine; • At least 840 G but less than 2.8 KG of Cocaine Base; • At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); • At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice"; • At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual); • At least 30 G but less than 100 G of LSD; • At least 1.2 KG but less than 4 KG of Fentanyl; • At least 300 G but less than 1 KG of a Fentanyl Analogue; • At least 3,000 KG but less than 10,000 KG of Marihuana; • At least 600 KG but less than 2,000 KG of Hashish; • At least 60 KG but less than 200 KG of Hashish Oil; • At least 3,000,000 but less than 10,000,000 units of Ketamine; • At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants; • At least 187,500 but less than 625,000 units of Flunitrazepam. 	32
<ul style="list-style-type: none"> • At least 1 KG but less than 3 KG of Heroin; 	30

<ul style="list-style-type: none"> • At least 5 KG but less than 15 KG of Cocaine; • At least 280 G but less than 840 G of Cocaine Base; • At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual); • At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice"; • At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual); • At least 10 G but less than 30 G of LSD; • At least 400 G but less than 1.2 KG of Fentanyl; • At least 100 G but less than 300 G of a Fentanyl Analogue; • At least 1,000 KG but less than 3,000 KG of Marihuana; • At least 200 KG but less than 600 KG of Hashish; • At least 20 KG but less than 60 KG of Hashish Oil; • At least 1,000,000 but less than 3,000,000 units of Ketamine; • At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants; • At least 62,500 but less than 187,500 units of Flunitrazepam. 	
<ul style="list-style-type: none"> • At least 700 G but less than 1 KG of Heroin; • At least 3.5 KG but less than 5 KG of Cocaine; • At least 196 G but less than 280 G of Cocaine Base; • At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual); • At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice"; • At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual); • At least 7 G but less than 10 G of LSD; • At least 280 G but less than 400 G of Fentanyl; • At least 70 G but less than 100 G of a Fentanyl Analogue; • At least 700 KG but less than 1,000 KG of Marihuana; • At least 140 KG but less than 200 KG of Hashish; • At least 14 KG but less than 20 KG of Hashish Oil; • At least 700,000 but less than 1,000,000 units of Ketamine; • At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants; • At least 43,750 but less than 62,500 units of Flunitrazepam. 	28
<ul style="list-style-type: none"> • At least 400 G but less than 700 G of Heroin; • At least 2 KG but less than 3.5 KG of Cocaine; • At least 112 G but less than 196 G of Cocaine Base; • At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); • At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice"; • At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual); • At least 4 G but less than 7 G of LSD; • At least 160 G but less than 280 G of Fentanyl; • At least 40 G but less than 70 G of a Fentanyl Analogue; • At least 400 KG but less than 700 KG of Marihuana; 	26

<ul style="list-style-type: none"> • At least 80 KG but less than 140 KG of Hashish; • At least 8 KG but less than 14 KG of Hashish Oil; • At least 400,000 but less than 700,000 units of Ketamine; • At least 400,000 but less than 700,000 units of Schedule I or II Depressants; • At least 25,000 but less than 43,750 units of Flunitrazepam. 	
<ul style="list-style-type: none"> • At least 100 G but less than 400 G of Heroin; • At least 500 G but less than 2 KG of Cocaine; • At least 28 G but less than 112 G of Cocaine Base; • At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual); • At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice"; • At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual); • At least 1 G but less than 4 G of LSD; • At least 40 G but less than 160 G of Fentanyl; • At least 10 G but less than 40 G of a Fentanyl Analogue; • At least 100 KG but less than 400 KG of Marihuana; • At least 20 KG but less than 80 KG of Hashish; • At least 2 KG but less than 8 KG of Hashish Oil; • At least 100,000 but less than 400,000 units of Ketamine; • At least 100,000 but less than 400,000 units of Schedule I or II Depressants; • At least 6,250 but less than 25,000 units of Flunitrazepam. 	24
<ul style="list-style-type: none"> • At least 80 G but less than 100 G of Heroin; • At least 400 G but less than 500 G of Cocaine; • At least 22.4 G but less than 28 G of Cocaine Base; • At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual); • At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice"; • At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual); • At least 800 MG but less than 1 G of LSD; • At least 32 G but less than 40 G of Fentanyl; • At least 8 G but less than 10 G of a Fentanyl Analogue; • At least 80 KG but less than 100 KG of Marihuana; • At least 16 KG but less than 20 KG of Hashish; • At least 1.6 KG but less than 2 KG of Hashish Oil; • At least 80,000 but less than 100,000 units of Ketamine; • At least 80,000 but less than 100,000 units of Schedule I or II Depressants; • At least 5,000 but less than 6,250 units of Flunitrazepam. 	22
<ul style="list-style-type: none"> • At least 60 G but less than 80 G of Heroin; • At least 300 G but less than 400 G of Cocaine; • At least 16.8 G but less than 22.4 G of Cocaine Base; • At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual); • At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or 	20

<ul style="list-style-type: none"> at least 3 G but less than 4 G of "Ice"; • At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual); • At least 600 MG but less than 800 MG of LSD; • At least 24 G but less than 32 G of Fentanyl; • At least 6 G but less than 8 G of a Fentanyl Analogue; • At least 60 KG but less than 80 KG of Marihuana; • At least 12 KG but less than 16 KG of Hashish; • At least 1.2 KG but less than 1.6 KG of Hashish Oil; • At least 60,000 but less than 80,000 units of Ketamine; • At least 60,000 but less than 80,000 units of Schedule I or II Depressants; • 60,000 units or more of Schedule III substances (except Ketamine); • At least 3,750 but less than 5,000 units of Flunitrazepam. 	
<ul style="list-style-type: none"> • At least 40 G but less than 60 G of Heroin; • At least 200 G but less than 300 G of Cocaine; • At least 11.2 G but less than 16.8 G of Cocaine Base; • At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual); • At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice"; • At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual); • At least 400 MG but less than 600 MG of LSD; • At least 16 G but less than 24 G of Fentanyl; • At least 4 G but less than 6 G of a Fentanyl Analogue; • At least 40 KG but less than 60 KG of Marihuana; • At least 8 KG but less than 12 KG of Hashish; • At least 800 G but less than 1.2 KG of Hashish Oil; • At least 40,000 but less than 60,000 units of Ketamine; • At least 40,000 but less than 60,000 units of Schedule I or II Depressants; • At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine); • At least 2,500 but less than 3,750 units of Flunitrazepam. 	18
<ul style="list-style-type: none"> • At least 20 G but less than 40 G of Heroin; • At least 100 G but less than 200 G of Cocaine; • At least 5.6 G but less than 11.2 G of Cocaine Base; • At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual); • At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice"; • At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual); • At least 200 MG but less than 400 MG of LSD; • At least 8 G but less than 16 G of Fentanyl; • At least 2 G but less than 4 G of a Fentanyl Analogue; • At least 20 KG but less than 40 KG of Marihuana; • At least 5 KG but less than 8 KG of Hashish; • At least 500 G but less than 800 G of Hashish Oil; • At least 20,000 but less than 40,000 units of Ketamine; 	16

<ul style="list-style-type: none"> • At least 20,000 but less than 40,000 units of Schedule I or II Depressants; • At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine); • At least 1,250 but less than 2,500 units of Flunitrazepam. 	
<ul style="list-style-type: none"> • At least 10 G but less than 20 G of Heroin; • At least 50 G but less than 100 G of Cocaine; • At least 2.8 G but less than 5.6 G of Cocaine Base; • At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual); • At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice"; • At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual); • At least 100 MG but less than 200 MG of LSD; • At least 4 G but less than 8 G of Fentanyl; • At least 1 G but less than 2 G of a Fentanyl Analogue; • At least 10 KG but less than 20 KG of Marihuana; • At least 2 KG but less than 5 KG of Hashish; • At least 200 G but less than 500 G of Hashish Oil; • At least 10,000 but less than 20,000 units of Ketamine; • At least 10,000 but less than 20,000 units of Schedule I or II Depressants; • At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine); • At least 625 but less than 1,250 units of Flunitrazepam. 	14
<ul style="list-style-type: none"> • Less than 10 G of Heroin; • Less than 50 G of Cocaine; • Less than 2.8 G of Cocaine Base; • Less than 10 G of PCP, or less than 1 G of PCP (actual); • Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of "Ice"; • Less than 5 G of Amphetamine, or less than 500 MG of Amphetamine (actual); • Less than 100 MG of LSD; • Less than 4 G of Fentanyl; • Less than 1 G of a Fentanyl Analogue; • At least 5 KG but less than 10 KG of Marihuana; • At least 1 KG but less than 2 KG of Hashish; • At least 100 G but less than 200 G of Hashish Oil; • At least 5,000 but less than 10,000 units of Ketamine; • At least 5,000 but less than 10,000 units of Schedule I or II Depressants; • At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine); • At least 312 but less than 625 units of Flunitrazepam; • 80,000 units or more of Schedule IV substances (except Flunitrazepam). 	12
<ul style="list-style-type: none"> • At least 2.5 KG but less than 5 KG of Marihuana; • At least 500 G but less than 1 KG of Hashish; 	10

<ul style="list-style-type: none"> • At least 50 G but less than 100 G of Hashish Oil; • At least 2,500 but less than 5,000 units of Ketamine; • At least 2,500 but less than 5,000 units of Schedule I or II Depressants; • At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine); • At least 156 but less than 312 units of Flunitrazepam; • At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam) 	
<ul style="list-style-type: none"> • At least 1 KG but less than 2.5 KG of Marihuana; • At least 200 G but less than 500 G of Hashish; • At least 20 G but less than 50 G of Hashish Oil; • At least 1,000 but less than 2,500 units of Ketamine; • At least 1,000 but less than 2,500 units of Schedule I or II Depressants; • At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine); • Less than 156 units of Flunitrazepam; • At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam); • 160,000 units or more of Schedule V substances. 	8
<ul style="list-style-type: none"> • Less than 1 KG of Marihuana; • Less than 200 G of Hashish; • Less than 20 G of Hashish Oil; • Less than 1,000 units of Ketamine; • Less than 1,000 units of Schedule I or II Depressants; • Less than 1,000 units of Schedule III substances (except Ketamine); • Less than 16,000 units of Schedule IV substances (except Flunitrazepam); • Less than 160,000 units of Schedule V substances. 	6

C. Re-sentencing for Drug Crimes in New York State

1. Introduction

In 2004, New York reformed the state's old Rockefeller drug laws by adopting the Drug Law Reform Act ("DLRA").⁷⁷ The DLRA took effect on January 13, 2005, and changed sentencing ranges for drug offenses generally by making sentences shorter.⁷⁸ The new, shorter sentence ranges automatically apply to anyone sentenced for a drug offense committed after January 13, 2005.⁷⁹ The DLRA also allows people currently serving sentences for A-I felony drug offenses under the old law to apply for re-sentencing under the new law.⁸⁰ A second law, which took effect on October 29, 2005, also allows some people serving sentences for A-II felony drug convictions to apply for re-sentencing under the new law.⁸¹ The New York state legislature also adopted new re-sentencing policies in April 2009.⁸² This bill created a new provision of the criminal procedure law that allows certain people currently in prison for Class B felony drug offenses to apply for re-sentencing.⁸³

Overall, this means that if you are serving a sentence for an A-I, A-II, or Class B felony drug offense, and you were sentenced under the old laws, you may be able to have your sentence reduced under the new laws. This Chapter describes who is allowed to apply for re-sentencing, which new sentences you could receive if you apply, and how to apply for re-sentencing. Section 2 of this Part describes who is allowed to apply for re-sentencing. Section 3 describes what happens if you decide to apply. Section 4 explains how to apply for re-sentencing. Appendix B at the end of the Chapter provides forms you will need in order to apply for re-sentencing.

2. Eligibility: Who Is Allowed to Apply?

If you are serving time for a felony drug offense, you must first find out whether you are eligible for re-sentencing. Re-sentencing is only available to people who were convicted of A-I, A-II, or Class B felony drug offenses and are currently serving time for those offenses in the custody of the New York State Department of Corrections. The A-I felony drug offenses are criminal possession of a controlled substance in the first degree,⁸⁴ criminal sale of a controlled substance in the first degree,⁸⁵ and operating as a major trafficker.⁸⁶ The A-II felony drug offenses are criminal possession of a controlled substance in the second degree⁸⁷ and criminal sale of a controlled substance in the second degree.⁸⁸ The Class B felony drug offenses are criminal possession of a controlled substance in the third degree,⁸⁹ criminal sale of a controlled substance in the third degree,⁹⁰ criminal sale of a controlled substance in

77. Alan Rosenthal, *A Guide to Rockefeller Drug Reform: Understanding the New Legislation*, COMMUNITYALTERNATIVES.ORG, 1, available at http://www.communityalternatives.org/pdf/sentencing_guide.pdf (last visited Mar. 2, 2019).

78. Alan Rosenthal, *A Guide to Rockefeller Drug Reform: Understanding the New Legislation*, COMMUNITYALTERNATIVES.ORG, 1, available at http://www.communityalternatives.org/pdf/sentencing_guide.pdf (last visited Mar. 2, 2019).

79. *People v. Nelson*, 21 A.D.3d 861, 862, 804 N.Y.S.2d 1, 1 (1st Dept. 2005) (holding that new sentencing ranges under the DLRA do not apply to persons sentenced for offenses committed before January 13, 2005, even where sentencing takes place after January 13, 2005). New York's highest court, the New York Court of Appeals, upheld this decision in the consolidated appeals of three inmates in *People v. Utsey*, 7 N.Y.3d 398, 855 N.E.2d 791, 822 N.Y.S.2d 475 (2006).

80. N.Y. PENAL LAW § 70.71 (Consol. 2019).

81. N.Y. PENAL LAW § 70.71 (McKinney 2009).

82. N.Y. CRIM. PROC. LAW § 440.46 (McKinney 2009).

83. N.Y. CRIM. PROC. LAW § 440.46 (McKinney Supp. 2015).

84. N.Y. PENAL LAW § 220.21 (McKinney 2008).

85. N.Y. PENAL LAW § 220.43 (McKinney 2008).

86. N.Y. PENAL LAW § 220.77 (McKinney Supp. 2015).

87. N.Y. PENAL LAW § 220.18 (McKinney 2008).

88. N.Y. PENAL LAW § 220.41 (McKinney 2008).

89. N.Y. PENAL LAW § 220.16 (McKinney 2008).

90. N.Y. PENAL LAW § 220.39 (McKinney 2008).

or near school grounds,⁹¹ criminal sale of a controlled substance to a child,⁹² and unlawful manufacture of methamphetamine in the first degree.⁹³ These offenses are all described in Section 220 of the New York Penal Law.⁹⁴ People who are serving sentences for A-I, A-II, and Class B felony drug offenses have different re-sentencing requirements.

(a) If You Are Serving a Sentence for an A-I Felony Drug Conviction

Generally, if you are serving an indeterminate sentence for an A-I felony drug offense and you were sentenced under the old law, you may apply for re-sentencing.⁹⁵ An indeterminate sentence means that the sentence did not have a specified end date. But you must still meet some requirements to apply for re-sentencing. The courts have read the law to mean that you must be “in the custody of the Department of Correctional Services” to qualify for re-sentencing.⁹⁶ If you are incarcerated for a parole violation after being released from prison for your original A-I sentence, you are not considered to be “in the custody of the Department of Correctional Services” and cannot apply for re-sentencing under the Drug Law Reform Acts.⁹⁷

To be eligible for A-I re-sentencing, you also must have been subjected to an indeterminate length of imprisonment of fifteen or more years.⁹⁸ If you were sentenced to an A-I felony of fifteen or more years, but then had your sentence commuted to less than fifteen years, you might not be eligible for re-sentencing under an A-I felony drug offense.⁹⁹ However, you should look to Subsection (b) to see whether you are eligible for re-sentencing under an A-II felony drug conviction,¹⁰⁰ or Subsection (c) to see if you are eligible to apply for re-sentencing under a Class B felony drug conviction. Both of these Subsections are found below.

(b) If You Are Serving a Sentence for an A-II Felony Drug Conviction

If you are serving a sentence for an A-II felony drug offense and you were sentenced under the old law, you may apply for re-sentencing if you meet two additional requirements.¹⁰¹ The first requirement is the “Time to Parole Eligibility” requirement. This requirement sets Guidelines on how long it must be until you are eligible for parole under your current sentence. The second requirement is the “Merit Time Eligibility” requirement. This requirement concerns whether you are currently eligible for a merit time reduction. Both of these requirements are explained below. If you meet both of them, and you are serving a sentence for an A-II felony drug offense under the old law, then you may apply for re-sentencing.

91. N.Y. PENAL LAW § 220.44 (McKinney 2008).

92. N.Y. PENAL LAW § 220.48 (McKinney Supp. 2015).

93. N.Y. PENAL LAW § 220.75 (McKinney 2008).

94. N.Y. PENAL LAW § 220 (McKinney 2008 & Supp. 2015).

95. N.Y. PENAL LAW § 70.71 (Consol. 2019).

96. *People v. Bagby*, 11 Misc. 3d 882, 886–891, 816 N.Y.S.2d 302, 304–310 (Sup. Ct. Westchester County 2006) (holding (1) that defendant whose A-I felony sentence was commuted to eight and one-third years to life was not eligible for re-sentencing for an A-I offense; (2) that a defendant who has been placed on parole for an A-I or A-II offense, violates that parole, and is then incarcerated as a result of his parole violation is not eligible for re-sentencing; and (3) that only those defendants incarcerated on their original prison sentence have a mechanism for re-sentencing).

97. *People v. Bagby*, 11 Misc. 3d 882, 886, 816 N.Y.S.2d 302, 306 (Sup. Ct. Westchester County 2006); *see also* *People v. Overton*, 86 A.D.3d 4, 14, 923 N.Y.S.2d 619, 626 (2d Dept. 2011). *But see* *People v. Figueroa*, 27 Misc. 3d 751, 762–763, 767–774, 894 N.Y.S.2d 724, 732, 736–739 (Sup. Ct. N.Y. County. 2010) (holding that neither the Drug Law Reform Act of 2009 nor the Drug Law Reform Act of 2004 bars parole violators from re-sentencing).

98. *People v. Bagby*, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).

99. *People v. Bagby*, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).

100. *People v. Bagby*, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).

101. Drug Law Reform Act of 2005, 2005 N.Y. Laws 643, 2005 N.Y. ALS 643.

(i) The Time to Parole Eligibility Requirement

The first requirement is that you must be a certain period of time away from parole eligibility under your current sentence. The New York courts have determined this period to be three years, although the law itself does not clearly state how many years are required.¹⁰² The law only says you must be “more than twelve months from being an eligible inmate as that term is defined in [S]ubdivision 2 of [S]ection 851 of the correction law.”¹⁰³ An “eligible” person, according to Subdivision 2 of Section 851, is an incarcerated person “who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years.”¹⁰⁴ This meaning of “eligible” has two parts—“eligible for release on parole” and “who will become eligible for release on parole or conditional release within two years.” Even though there are two possible meanings of the time to parole eligibility requirement in the re-sentencing law, New York has only followed the three-year requirement. In other words, the courts have stated that you must be at least three years away from parole eligibility.¹⁰⁵

a. The Established Meaning of the Time to Parole Eligibility Requirement in New York

Basically, this requirement for re-sentencing means that you must be more than three years away from becoming eligible for release on parole or conditional release.¹⁰⁶ The Appellate Division First Department decided on the three-year requirement in 2006.¹⁰⁷ In later cases, the Appellate Divisions in the Second, Third, and Fourth Departments have followed the three-year requirement for eligibility.¹⁰⁸

102. See *People v. Bautista*, 26 A.D.3d 230, 230–231, 809 N.Y.S.2d 62, 63 (1st Dept. 2006) (holding that in order to be eligible for re-sentencing under the 2005 law, an incarcerated person serving time for an A-II drug felony must be at least three years away from his first possible parole date), *appeal granted*, 6 N.Y.3d 831, 847 N.E.2d 376, 814 N.Y.S.2d 79 (2006), *appeal dismissed*, 7 N.Y.3d 838, 857 N.E.2d 49, 823 N.Y.S.2d 754 (2006).

103. Drug Law Reform Act of 2005, 2005 N.Y. Laws 643, 2005 N.Y. ALS 643.

104. N.Y. CORRECT. LAW § 851(2) (McKinney 2009).

105. See *People v. Corley*, 45 A.D.3d 857, 858, 847 N.Y.S.2d 148, 148–149 (2d Dept. 2007) (holding that a defendant who had already been denied parole and whose motion for re-sentencing would always be less than three years away from the next parole hearing was not eligible for re-sentencing); *People v. Perez*, 44 A.D.3d 418, 419, 843 N.Y.S.2d 68, 68 (1st Dept. 2007) (holding that the Supreme Court was not required to assign counsel or conduct a hearing for a defendant who was less than three years from parole eligibility when he filed a motion for re-sentencing since defendant was ineligible for re-sentencing); *People v. Nolasco*, 37 A.D.3d 622, 623, 831 N.Y.S.2d 197, 197–198 (2d Dept. 2007) (holding that because defendant was less than three years from parole, he was an “eligible inmate” in the meaning of Chapter 643 and was not allowed to proceed with a motion for re-sentencing); *People v. Thomas*, 35 A.D.3d 895, 895–896, 826 N.Y.S.2d 456, 457 (3d Dept. 2006) (holding that defendant who was convicted of an A-II felony drug offense was not eligible for re-sentencing under the Drug Law Reform Act, because the defendant was eligible for parole within three years); *People v. Parris*, 35 A.D.3d 891, 892, 828 N.Y.S.2d 429, 429 (2d Dept. 2006) (holding that, since defendant was less than three years away from eligibility for parole, defendant could not seek re-sentencing under Chapter 643).

106. This determination is reached by adding the “more than twelve months” requirement to the “release within two years” requirement from the definition of “eligible” in Subdivision 2 of Section 851. N.Y. Correct. Law § 851(2) (McKinney 2009).

107. *People v. Bautista*, 26 A.D.3d 230, 809 N.Y.S.2d 62 (1st Dept. 2006).

108. See, e.g., *People v. Mills*, 48 A.D.3d 1108, 1108, 849 N.Y.S.2d 855, 855 (4th Dept. 2008) (finding applicant ineligible for re-sentencing because he was scheduled to appear before the parole board within two years after his initial parole denial); *People v. Dunham*, 46 A.D.3d 1416, 1417, 847 N.Y.S.2d 506, 506 (4th Dept. 2007) (denying application for re-sentencing because defendant was eligible for parole within three years); *People v. Corley*, 45 A.D.3d 857, 858, 847 N.Y.S.2d 148, 149, (2d Dept. 2007) (holding that because “defendant’s next parole hearing will always be less than three years away from any date he moves for re-sentencing in the future ... chapter 643 does not and will not afford him the right to move for re-sentencing”); *People v. Smith*, 45 A.D.3d 1478, 1479–1480, 846 N.Y.S.2d 520, 521 (4th Dept. 2007) (holding that the defendant could not be resentenced because she was eligible for parole within seven months); *People v. Nolasco*, 37 A.D.3d 622, 623, 831 N.Y.S.2d 197, 198 (2d Dept. 2007) (denying defendant’s motion for re-sentencing because he was fewer than three years from parole eligibility); *People v. Parris*, 35 A.D.3d 891, 892, 828 N.Y.S.2d 429, 430 (2d Dept. 2006) (holding that

For example, if you will become eligible for release on parole or conditional release on December 1, 2028, you may apply for re-sentencing on or before November 30, 2025, but not on or after December 1, 2025. *If you file your application with the court more than three years before your earliest possible release date under your current sentence, you will be eligible for re-sentencing.*

You should be aware that if you have already become eligible for parole and have been denied parole, it is likely that you are not eligible for re-sentencing. Once you have been granted a parole hearing and your request has been denied, your next parole hearing will be scheduled within two years of your last hearing. So, once you have come up for parole and been denied, you are always “eligible for release on parole within two years” and are therefore ineligible for re-sentencing because you fail to meet the Time to Parole Eligibility Requirement.¹⁰⁹

b. Measuring Time to Parole Eligibility

Time to Parole Eligibility is measured from the date that the court receives your application for re-sentencing.¹¹⁰ The day that you file the application with the court must be more than three years from your parole date. In *People v. Perez*, the Appellate Division First Department noted that, since the defendant “was less than three years from his parole eligibility date when he filed the motion,” he was ineligible for re-sentencing.¹¹¹ The court looked at the date of the motion for re-sentencing to measure the time to parole, and denied it because the application was filed within three years of parole eligibility. This means that the three years should be counted from the day you file the application. Other courts in New York have followed the same procedure to determine whether incarcerated people were eligible for re-sentencing. Therefore, *if possible, you should make sure you file your re-sentencing application with the court more than three years before your earliest possible parole release date.*

Another issue under the 2005 DLRA is how to measure the three years from parole if you are serving cumulative sentences for an A-II felony along with other crimes. The government has argued that eligibility for re-sentencing should be based only on the time left in serving the A-II felony sentence. This would mean that if you have served two years of a four-year A-II sentence, but also have more than three years to serve for another sentence, you would not be eligible for re-sentencing. But the Appellate Division has not followed this argument. The First Department said that defendant’s parole eligibility date was the date he would be eligible for parole on his cumulative sentence for both A-I and A-II felonies—not the date he would be eligible for parole if he was just serving his A-II felony sentence.¹¹² The court stated that “[t]he pivotal measuring rod is not the time remaining on an A-II felony sentence, but the time before an inmate becomes an ‘eligible inmate’”—in

Chapter 643 does not apply to incarcerated people who are three or fewer years from eligibility for parole); *People v. Thomas*, 35 A.D.3d 895, 896, 826 N.Y.S.2d 456, 457 (3d Dept. 2006) (holding that the two provisions of Subdivision 2 of Section 851 when read together require that in order to qualify for re-sentencing under the 2005 DLRA, a class A-II felony drug offender must not be eligible for parole within three years).

109. *People v. Mills*, 11 N.Y. 3d 527, 536, 901 N.E.2d 196, 202, 872 N.Y.S.2d 705, 711 (2008) (holding that an incarcerated person who had been denied parole four times in eight years was not eligible for re-sentencing because he was necessarily within two years of his next parole hearing).

110. *See, e.g., People v. Then*, 47 A.D.3d 404, 405, 849 N.Y.S.2d 234, 235 (1st Dept. 2008) (stating that an incarcerated person must be more than three years away from becoming eligible for parole at the time of his application for re-sentencing); *People v. Perez*, 44 A.D.3d 418, 419, 843 N.Y.S.2d 68, 68 (1st Dept. 2007) (holding that a prisoner who was less than three years away from becoming eligible for parole at the time of his application was ineligible for re-sentencing); Memorandum from Al O’Connor, N.Y. State Defenders Ass’n, to Chief Defenders 2–3 (Oct. 5, 2005, revised Oct. 24, 2005), *available at* <http://www.communityalternatives.org/pdf/A-II%20%20Re-sentencing%20Memo%20Revised%20NYSDA.pdf> (last visited Feb. 2, 2019) (stating “Class A-II offenders who are within the eligibility window ‘at the time of the petition’ are eligible for re-sentencing” and imploring that “caution dictates that whenever possible a motion be filed before an inmate might otherwise be time-barred. When a deadline is imminent, a bare bones application should suffice to toll the limitations period.”).

111. *People v. Perez*, 44 A.D.3d 418, 419, 843 N.Y.S.2d 68, 68 (1st Dept. 2007).

112. *People v. Paniagua*, 45 A.D.3d 98, 104–105, 841 N.Y.S.2d 506, 511–512 (1st Dept. 2007); *People v. Marchena*, 60 A.D.3d 508, 508, 875 N.Y.S.2d 53, 53 (1st Dept. 2009); *People v. Loyd*, 53 A.D.3d 679, 680, 861 N.Y.S.2d 176, 177–178 (3rd Dept. 2008); *People v. Peterson*, 50 A.D.3d 1588, 1589, 856 N.Y.S.2d 430, 430–431 (4th Dept. 2008).

other words, when the inmate will actually be up for parole.¹¹³ Therefore, you should file your application with the court more than three years before your earliest possible release date.

(ii) The Merit Time Eligibility Requirement

The second re-sentencing requirement is that you must be eligible to receive a merit time reduction of your current sentence. As with the first requirement, the re-sentencing law states this requirement indirectly. Specifically, the re-sentencing law says that you must meet “the eligibility requirements of paragraph (d) of [S]ubdivision 1 of [S]ection 803 of the correction law.”¹¹⁴ In order to meet the merit time requirements for the purposes of the DLRA, you:

[M]ust be serving a sentence of one year or more, be in the Correctional Service Department's custody as of certain periods of time, not have been convicted of certain crimes, not have committed a 'serious disciplinary infraction' or commenced a frivolous civil lawsuit or other civil proceeding against a state agency, officer or employee, and have participated in certain programs.”¹¹⁵

Section 803(1)(d) of the New York Correction Law states that prisoners serving sentences for certain types of crimes are ineligible for merit time.¹¹⁶ These crimes are listed below in Subsection (1) of this Section. *If you are serving time for one of the disqualifying offenses listed below, you do not meet the merit time eligibility requirement for re-sentencing, and you may not apply for re-sentencing.*

a. Eligibility for Merit Time Under New York Correction Law § 803(1)(d): Disqualifying Offenses

If you are serving time for certain types of offenses in addition to the A-II felony drug offense, you are not eligible for merit time under Section 803(1)(d) of the New York Correction Law, and therefore you are not eligible to apply for re-sentencing. The disqualifying offenses are:

- (1) Any non-drug class A-I felony,
- (2) Any violent felony offense as defined in Section 70.02 of the New York Penal Law,¹¹⁷
- (3) Manslaughter in the second degree,
- (4) Vehicular manslaughter in the first or second degree,
- (5) Criminally negligent homicide,
- (6) Any sex offense defined in Article 130 of the New York Penal Law,¹¹⁸
- (7) Incest,
- (8) Any sexual performance by a child offense defined in Article 263 of the New York Penal Law,¹¹⁹ and
- (9) Aggravated harassment of an employee by a prisoner.¹²⁰

You may wonder whether you are eligible for re-sentencing if you were sentenced for both a disqualifying offense and a drug offense, and you have arguably finished serving the sentence for the disqualifying offense. For example, if you were sentenced to two years' imprisonment for a disqualifying offense, to be served concurrently or consecutively with a longer prison term for an A-II felony drug offense, and you have already served four years, it appears that you are no longer serving time for the disqualifying offense. It is possible to apply for re-sentencing, but you would need to argue in your application that you are no longer serving the sentence for the disqualifying offense. This argument will likely be unsuccessful. Several cases have indicated that a defendant whose sentence originally included a disqualifying offense will not be resentenced.¹²¹

113. People v. Paniagua, 45 A.D.3d 98, 105, 841 N.Y.S.2d 506, 512 (1st Dept. 2007).

114. Drug Law Reform Act of 2005, 2005 N.Y. Laws 643, 2005 N.Y. ALS 643.

115. People v. Paniagua, 45 A.D.3d 98, 106, 841 N.Y.S.2d 506, 513 (1st Dept. 2007).

116. N.Y. CORRECT. LAW § 803(1)(d)(ii) (McKinney 2009).

117. N.Y. PENAL LAW § 70.02 (McKinney 2009 & Supp. 2015).

118. N.Y. PENAL LAW §§ 130.00–130.96 (McKinney 2009 & Supp. 2015).

119. N.Y. PENAL LAW §§ 263.00–263.30 (McKinney 2009 & Supp. 2015).

120. N.Y. CORRECT. LAW § 803(1)(d)(ii) (McKinney 2009) (listing all of the disqualifying offenses).

121. People v. Martinez, 74 A.D.3d 434, 434, 900 N.Y.S.2d 875, 875, 2010 NY Slip Op. 04648, 1 (1st Dept.

If you were sentenced for a disqualifying offense and an A-II offense at the same time, the decisions in *Merejildo* and *Quiñones* mean that your argument that you have finished serving the disqualifying offense will probably be unsuccessful, and you will therefore not be resentenced under the DLRA.

You are also probably not eligible to apply for re-sentencing if you were on parole for any one of the disqualifying offenses at the time that you were charged with the A-II felony drug offense. If you are in this situation, the time owed to parole on the first sentence was probably added to the A-II felony drug sentence. This would make you ineligible for merit time, which would make you ineligible for re-sentencing under the new law.¹²²

You probably meet the merit time eligibility requirement if you are not serving time for any of the disqualifying offenses listed above (or listed in Section 803(1)(d)(ii) of the New York Correction Law), and if you were not on parole for any of those offenses at the time that you were charged with the A-II felony drug offense.¹²³ However, the judge may also look at the other restrictions on granting merit time that are included in Correction Law Section 803(1)(d). These restrictions are discussed below, in Subsection (2).

b. Other Restrictions on Merit Time Under New York Correction Law § 803(1)(d)

Courts have identified other restrictions that might apply to merit time allowances in re-sentencing under the DLRA, according to Section 803(1)(d).¹²⁴ This means that it is possible that a judge may decide that you are ineligible for merit time—and therefore ineligible for re-sentencing—if you have a serious disciplinary infraction on your prison record or if, while you were in prison, you filed or proceeded with a lawsuit that the court dismissed as frivolous.¹²⁵

In other words, even if you are not serving time for any disqualifying offenses, a judge might decide that you do not meet the merit time eligibility requirement for re-sentencing because, under Correction Law § 803(1)(d)(iv), you could not be granted merit time. This Section states that “[A]llowance shall be withheld for any serious disciplinary infraction or upon a judicial determination that the person, while an inmate, commenced or continued a civil action, proceeding or claim that was found to be frivolous[.]”¹²⁶

However, most courts have decided that the re-sentencing law only requires that you be *eligible* for merit time under Correction Law § 803(1)(d). It does not require that you actually *earned* merit time under Correction Law § 803(1)(d). Therefore, a serious disciplinary infraction or a frivolous lawsuit or legal claim on your record does not *necessarily* prevent you from meeting the merit time eligibility requirement.¹²⁷ For example, the Supreme Court of New York County held, in *People v.*

2010); *People v. Dervon*, 29 Misc. 3d 1221(A), 1221A, 918 N.Y.S.2d 399, 399, 2010 NY Slip Op 51940(U), 2 (Sup. Ct. Kings County 2010).

122. See Memorandum from Al O'Connor, N.Y. State Defenders Ass'n, to Chief Defenders, 2–4 (Oct. 5, 2005, revised Oct. 24, 2005), available at <http://www.communityalternatives.org/pdf/A-II%20%20Re-sentencing%20Memo%20Revised%20NYSDA.pdf> (last visited Feb. 3, 2019).

123. See Memorandum from Al O'Connor, N.Y. State Defenders Ass'n, to Chief Defenders, 2–4 (Oct. 5, 2005, revised Oct. 24, 2005), available at <http://www.communityalternatives.org/pdf/A-II%20%20Re-sentencing%20Memo%20Revised%20NYSDA.pdf> (last visited Feb. 3, 2019).

124. *People v. Paniagua*, 45 A.D.3d 98, 106, 841 N.Y.S.2d 506, 513 (1st Dept. 2007) (“[T]o obtain a merit time allowance a defendant must ... not have been convicted of certain crimes, not have committed a ‘serious disciplinary infraction’ or commenced a frivolous civil lawsuit or other civil proceeding against a state agency, officer or employee, and have participated in certain programs.”).

125. See *People v. Paniagua*, 45 A.D.3d 98, 106–107, 841 N.Y.S.2d 506, 513 (1st Dept. 2007) (noting that merit time allowance will be withheld for any serious disciplinary infraction or upon a judicial determination when a defendant, while incarcerated, commences a frivolous lawsuit, and finding the defendant was not eligible for merit time since he had committed two serious disciplinary infractions); see also Memorandum from Al O'Connor, New York State Defenders Association, to Chief Defenders, 3–4 (Oct. 5, 2005, revised Oct. 24, 2005), available at <http://www.communityalternatives.org/pdf/A-II%20%20Re-sentencing%20Memo%20Revised%20NYSDA.pdf> (last visited Feb. 3, 2019).

126. N.Y. CORRECT. LAW § 803(1)(d)(iv) (McKinney 2009).

127. See *People v. Quiñones*, 11 Misc. 3d 582, 595–597, 812 N.Y.S.2d 259, 270 (Sup. Ct. N.Y. County 2005)

Quiñones, that a serious disciplinary infraction *does not* hurt eligibility for re-sentencing under the new law.¹²⁸ The Supreme Court, Appellate Division Second Department, agreed with that decision in *People v. Sanders*.¹²⁹ The court stated, “the reference in the 2005 DLRA to the ‘eligibility requirements’ of Correction Law Section 803(1)(d), does not preclude a defendant from whom a merit time allowance has been withheld pursuant to Correction Law Section 803(1)(d)(iv), from seeking re-sentencing under the 2005 DLRA.”¹³⁰ In other words, eligibility for re-sentencing under the Drug Reforms laws is different from eligibility under Section 803(1)(d) as a whole. Under the DLRA, the only requirement that matters for merit time eligibility is that you are not serving time for a disqualifying offense.

However, the Supreme Court, Appellate Division First Department and the Supreme Court, Appellate Division Third Department both disagree with the Second Department. In *People v. Paniagua*, the First Department court held that the defendant was ineligible for merit time because he committed two serious disciplinary infractions. The court noted that the regulations of the Department of Correctional Services define a ‘serious disciplinary infraction’ to include “[actions resulting in the] ‘receipt of disciplinary sanctions’ that entail ‘60 or more days of SHU [Special Housing Unit] and/or keeplock time’ [or] the ‘receipt of any recommended loss of good time as a disciplinary sanction.’”¹³¹ The defendant in *Paniagua* argued that since he had not committed a disqualifying offense, such as a violent felony, he had met the eligibility requirements of “earning” a merit time allowance. He argued that this was all that he needed to meet the merit time requirement for re-sentencing. The court here took a stricter view. They held that the defendant must have both *earned* and *been granted* merit time allowance in order to meet the requirement. The court stated:

Thus, the requirements set forth in § 803(1)(d)(iv), no less than those in § 803(1)(d)(i) and (ii), constitute the “eligibility” requirements for the grant of merit time. Nothing in the 2005 DLRA or § 803(1)(d) supports defendant’s argument that the phrase “eligibility requirements” refers only to the requirements for earning a merit time allowance, and not also to those for being granted one.¹³²

In 2008, the Third Department decided *People v. Williams*, finding that an incarcerated person whose record showed serious disciplinary infractions during his incarceration was not eligible for re-sentencing because he failed to meet the merit time eligibility requirement. The court used the same reasoning as the First Department did in *Paniagua*. The Third Department stated:

Here, it is undisputed that defendant has been found to have committed numerous disciplinary infractions while incarcerated which resulted in sanctions being imposed that exceeded 60 days in the special housing unit and/or keeplock. As a result of these infractions, defendant is not eligible for a merit time allowance under the provisions of Correction Law § 803(1)(d) and, as such, is not eligible for re-sentencing under DLRA 2005.¹³³

(holding that the merit time eligibility requirement of the A-II re-sentencing law only requires that an incarcerated person not be serving time for any of the disqualifying offenses listed in N.Y. Correct. Law § 803(1)(d)(ii), and not that the incarcerated person meet any of the other requirements for actual granting of merit time); *see also* Memorandum from Al O’Connor, N.Y. State Defenders Ass’n, to Chief Defenders, 4 (Oct. 5, 2005, revised Oct. 24, 2005), *available at* <http://www.communityalternatives.org/pdf/A-II%20%20Re-sentencing%20Memo%20Revised%20NYSDA.pdf> (last visited Mar. 3, 2019). Note that before the decision in *Quiñones*, the New York Department of Corrections had taken the position that incarcerated people with serious disciplinary infractions and incarcerated people found to have filed frivolous lawsuits while in prison do not meet the merit time eligibility requirement. Memorandum from Anthony J. Annucci, Deputy Comm’r and Counsel for N.Y. Dept. of Corr. Servs., to Criminal Justice Practitioners, 2 (Sept. 20, 2005) (on file with the JLM).

128. *People v. Quiñones*, 11 Misc. 3d 582, 598, 812 N.Y.S.2d 259, 271 (Sup. Ct. N.Y. County 2005).

129. *People v. Sanders*, 36 A.D.3d 944, 946, 829 N.Y.S.2d 187, 188 (2d Dept. 2007).

130. *People v. Sanders*, 36 A.D.3d 944, 946, 829 N.Y.S.2d 187, 188 (2d Dept. 2007).

131. *People v. Paniagua*, 45 A.D.3d 98, 107, 841 N.Y.S.2d 506, 513–514 (1st Dept. 2007) (internal citations omitted); N.Y. COMP. CODES R. & REGS. tit. 7, § 280.2(b)(3)–(4).

132. *People v. Paniagua*, 45 A.D.3d 98, 108, 841 N.Y.S.2d 506, 514 (1st Dept. 2007).

133. *People v. Williams*, 48 A.D.3d 858, 859–860, 850 N.Y.S. 2d 717, 718 (3d Dept. 2008) (internal citation

These cases show that the Departments disagree about whether eligibility for merit time requires 803(1)(d)(iv) (freedom from serious disciplinary infractions or frivolous lawsuits) in addition to 803(1)(d)(ii) (freedom from a disqualifying offense). Courts in the First and Third Departments may find that you are not eligible for re-sentencing if you have committed a “serious disciplinary infraction.”¹³⁴ If you wanted to argue for re-sentencing, you would have to argue, as the Second Department reasoned in *Sanders*, that Section 803(1)(d)(i) and (ii) provide the only requirements for being “eligible for merit time.”¹³⁵

Another thing to note is that you probably do not have to meet the work or program assignment requirement described in New York Correction Law Section 803(1)(d)(iv). This law, effective until September 2013, states that you *may* be granted merit time when you successfully participate in the work and treatment program assigned pursuant to New York Correction Law Section 805 *and* you successfully obtain one of the following: your general equivalency diploma (GED), an alcohol and substance abuse treatment certificate, a vocational trade certificate after six months of vocational programming, or completion of 400 hours of community service as part of a community work crew.¹³⁶ The court in *Paniagua* suggests that participation in these programs is included under the eligibility requirements of the DLRA.¹³⁷ But most courts do not follow this. Instead, they take the position of the Second Department in *Sanders*, which does not require participation in the programs listed above. Therefore, you probably do not need to participate in any of these programs in order to be considered eligible for merit time.¹³⁸

(c) If You Are Serving a Sentence for a Class B Felony Drug Conviction

If you are serving an indeterminate sentence with a maximum term of more than three years for a Class B felony drug offense committed before January 13, 2005, you may apply for re-sentencing.¹³⁹ As part of the re-sentencing application, you may also ask to be resentenced for Class C, D, or E felony drug offenses. However, you must have been sentenced for the Class C, D, or E felony drug offense at the same time or in the same court order as the Class B felony drug offense.¹⁴⁰ The applications for re-sentencing under this provision are governed by the provisions of the 2004 DLRA for A-II felony drug offenses. When deciding whether you are eligible for re-sentencing, courts will consider factors including, but not be limited to, your disciplinary history and your participation or willingness to participate in treatment or other programming while serving your sentence.¹⁴¹

You are ineligible to apply for re-sentencing under the 2009 DLRA if you committed what is called an “exclusion offense.”¹⁴² You committed an exclusion offense if you were convicted within the preceding ten years (from the date of the re-sentencing application) of a violent felony or of a felony

omitted).

134. See *People v. Williams*, 48 A.D.3d 858, 859–860, 850 N.Y.S.2d 717, 718 (3d Dept. 2008) (concluding that an incarcerated person who committed serious disciplinary infractions was ineligible for merit time and therefore could not apply for re-sentencing under DLRA); *People v. Paniagua*, 45 A.D.3d 98, 107–108, 841 N.Y.S.2d 506, 513–514 (1st Dept. 2007) (finding an incarcerated person ineligible for merit time based on two serious disciplinary infractions while incarcerated); see also N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2009) (“Such allowances may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program, and may be withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned.”); N.Y. COMP. CODES R. & REGS. tit. 7, § 280.2(b) (discussing serious disciplinary infractions that would lead to ineligibility for merit time).

135. *People v. Sanders*, 36 A.D.3d 944, 946–947, 829 N.Y.S.2d 187, 188–189 (2d Dept. 2007).

136. N.Y. CORRECT. LAW § 803(1)(d)(iv) (McKinney 2009); see N.Y. CORRECT. LAW § 805 (McKinney 2009) (discussing work and treatment program).

137. *People v. Paniagua*, 45 A.D.3d 98, 106, 108, 841 N.Y.S.2d 506, 513–514 (1st Dept. 2007).

138. See, e.g., *People v. Quiñones*, 11 Misc. 3d 582, 595–596, 812 N.Y.S.2d 259, 269 (Sup. Ct. N.Y. County 2005).

139. N.Y. CRIM. PROC. LAW § 440.46(1) (McKinney 2009 & Supp. 2015).

140. N.Y. CRIM. PROC. LAW § 440.46(2) (McKinney 2009 & Supp. 2015).

141. N.Y. CRIM. PROC. LAW § 440.46(3) (McKinney 2009 & Supp. 2015).

142. N.Y. CRIM. PROC. LAW § 440.46(5) (McKinney 2009 & Supp. 2015).

that makes you ineligible for merit-time allowance under Section 803(1)(d)(ii) (as discussed above), or if the court ever found you to be a second-time violent felony offender or a persistent violent felony offender.¹⁴³

(i) The Meaning of “In Custody”

Courts have interpreted these eligibility requirements as requiring that an applicant must be in the custody of the Department of Corrective Services (DOCS) at the time of the court’s decision on re-sentencing, rather than at the time the application was filed.¹⁴⁴ In *People v. Tavarez*, for example, the court explicitly applied appellate court precedent under the 2004 and 2005 DLRA, finding defendants

143. See *People v. Sosa*, 18 N.Y.3d 436, 440, 963 N.E.2d 1235, 1237, 940 N.Y.S.2d 534, 536 (2012). Violent felonies include:

(1) Class B violent felony offenses, which are:

Attempted murder in the second degree, Attempted kidnapping in the first degree, Attempted arson in the first degree, Manslaughter in the first degree, Aggravated manslaughter in the first degree, Rape in the first degree, Criminal sexual act in the first degree, Aggravated sexual abuse in the first degree, Course of sexual conduct against a child in the first degree, Assault in the first degree, Kidnapping in the second degree, Burglary in the first degree, Arson in the second degree, Robbery in the first degree, Sex trafficking, Incest in the first degree, Criminal possession of a weapon in the first degree, Criminal use of a firearm in the first degree, Criminal sale of a firearm in the first degree, Aggravated assault upon a police officer or a peace officer, Gang assault in the first degree, Intimidating a victim or witness in the first degree, Hindering prosecution of terrorism in the first degree, Criminal possession of a chemical weapon or biological weapon in the second degree, Criminal use of a chemical weapon or biological weapon in the third degree;

(2) Class C violent felony offenses, which are:

Attempts to commit any of the class B felonies specified above, Aggravated criminally negligent homicide, Aggravated manslaughter in the second degree, Aggravated sexual abuse in the second degree, Assault on a peace officer, police officer, fireman or emergency medical services professional, Assault on a judge, Gang assault in the second degree, Strangulation in the first degree, Burglary, in the second degree, Robbery in the second degree, Criminal possession of a weapon in the second degree, Criminal use of a firearm in the second degree, Criminal sale of a firearm in the second degree, Criminal sale of a firearm with the aid of a minor, Soliciting or providing support for an act of terrorism in the first degree, Hindering prosecution of terrorism in the second degree, Criminal possession of a chemical weapon or biological weapon in the third degree;

(3) Class D violent felony offenses, which are:

Attempts to commit any of the Class C felonies described above, Reckless assault of a child, Assault in the second degree, Menacing a police officer or peace officer, Stalking in the first degree, Strangulation in the second degree, Rape in the second degree, Criminal sexual act in the second degree, Sexual abuse in the first degree, Course of sexual conduct against a child in the second degree, Aggravated sexual abuse in the third degree, Facilitating a sex offense with a controlled substance, Labor trafficking, Criminal possession of a weapon in the third degree, Criminal sale of a firearm in the third degree, Intimidating a victim or witness in the second degree, Soliciting or providing support for an act of terrorism in the second degree, Making a terroristic threat, Falsely reporting an incident in the first degree, Placing a false bomb or hazardous substance in the first degree, Placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall, Aggravated unpermitted use of indoor pyrotechnics in the first degree;

(4) Class E violent felony offenses, which are:

Attempts to commit various forms of criminal possession of a weapon in the third degree, Persistent sexual abuse, Aggravated sexual abuse in the fourth degree, Falsely reporting an incident in the second degree, Placing a false bomb or hazardous substance in the second degree. N.Y. PENAL LAW § 70.02(a)–(d) (McKinney 2009 & Supp. 2015). N.Y. CRIM. PROC. LAW § 440.46(5) (McKinney 2009 & Supp. 2012).

144. See, e.g., *People v. Figueroa*, 27 Misc. 3d 1205(A), 2 (N.Y. Sup. Ct. 2010) (“Because the defendant is no longer in the custody of the Department of Correctional Services, he is ... ineligible for re-sentencing.”) (citing *People v. Rodriguez*, 68 A.D.3d 676, 892 N.Y.S.2d 356 (N.Y. App. Div. 1st Dept. 2009), a case pertaining to the 2005 DLRA); *People v. Wiggins*, 84 A.D.3d 1279, 923 N.Y.S.2d 349 (2d Dept. 2011) (holding that defendant arrested for felony drug offense in 2004 and granted release to parole supervision in January 2010 was ineligible for re-sentencing under the 2009 DLRA because he was no longer in custody at the time of the court’s consideration); *People v. Suriel*, No. 10325/03, slip op. at *3–4 (N.Y. Sup. Ct. Queens County Nov. 13, 2009) (holding that defendant released from DOCS custody and deported by Immigration and Customs Enforcement officials after applying for re-sentencing was no longer eligible for re-sentencing because not currently in DOCS custody), available at <http://www.communityalternatives.org/pdf/People-v-Suriel.pdf> (last visited Feb. 28, 2019).

ineligible for re-sentencing once released on parole, even if they were subsequently returned to Department of Corrective Services custody.¹⁴⁵ The court held that this precedent applied to the 2009 DLRA to hold that “the fact that defendant was in NYSDOCS custody when the motion was filed ... does not determine his eligibility for re-sentencing at the time the motion is considered.” This means that a defendant released from the DOCS custody at the time the motion is considered ineligible to be re-sentenced under the 2009 DLRA.¹⁴⁶ Additionally, in *People v. Figueroa*, the court explicitly stated that “[o]nce a defendant is released to parole and is thus no longer incarcerated, even if re-incarcerated on the original sentence for a parole violation, the defendant is no longer entitled to the ameliorative provisions of the Drug Law Reform Acts.”¹⁴⁷

In *People v. Sanabria*, the court found that a defendant released on parole several days after filing his application for re-sentencing was eligible for re-sentencing. The court stated that this was because the “in custody” provision of the 2009 DLRA meant that a person had to be in DOCS custody on the day of filing the application.¹⁴⁸

Regardless of the decisions of the courts in *People v. Cruz* and *People v. Sanabria*, the rule in most New York courts appears to be that the defendant must be in DOCS custody at the time the court considers the motion for re-sentencing. Thus, petitioners filing for re-sentencing under the 2009 DLRA are probably not eligible for re-sentencing if they are out of custody at the time the court considers the motion.

(ii) The Meaning of the Ten-Year “Look Back”

The majority of New York courts have interpreted the ten-year “look back” period for determining exclusion offenses to be ten years from the date of *filing* the re-sentencing application, rather than ten years from the present felony drug offense or the effective date of the statute.¹⁴⁹ In *People v. Danton*,

145. *People v. Tavarez*, Nos. 5241/99, 5261/99 & 1824/00, slip op. at 3–4 (N.Y. Sup. Ct. Bronx County Mar. 15, 2010) (citing *People v. Mills*, 11 N.Y.3d 527, 536–537, 901 N.E.2d 196, 202–203, 872 N.Y.S.2d 705 (2008) and *People v. Rodriguez*, 68 A.D.3d 676, 676, 892 N.Y.S.2d 356 (1st Dept. 2009), *available at* <http://www.communityalternatives.org/pdf/People-v-Tavarez-BronxCo.pdf> (last visited Feb. 4, 2019)).

146. *People v. Tavarez*, Nos. 5241/99, 5261/99, 1824/00, slip op. at 4–5 (N.Y. Sup. Ct. Bronx County Mar. 15, 2010), *available at* <http://www.communityalternatives.org/pdf/People-v-Tavarez-BronxCo.pdf> (last visited Feb. 4, 2019).

147. *People v. Figueroa*, 27 Misc. 3d 1205(A), 910 N.Y.S. 2d 407, No. 50557, slip op. at 2 (Sup. Ct. N.Y. County 2010) (applying appellate court precedent from 2004 and 2005 DLRA to defendant’s case under 2009 DLRA), *available at* <http://law.justia.com/cases/new-york/other-courts/2010/2010-50557.html> (last visited Feb. 4, 2019).

148. *People v. Sanabria* (N.Y. Sup. Ct. N.Y. County Mar. 29, 2010), Community Alternative, *available at* <http://www.communityalternatives.org/pdf/People-v-Sanabria.pdf> (last visited Feb. 28, 2019); *see also* *People v. Cuebas*, 12 Misc. 3d 987, 820 N.Y.S.2d 688 (N.Y. Sup. Ct. 2006).

149. *See* *People v. Arroyo*, 28 Misc.3d 1205(A), 957 N.Y.S.2d 637, 2010 N.Y. Misc. LEXIS 2823, at *7 (Sup. Ct. Bronx County June 25, 2010) (basing its decision that the ten-year look back should be measured from the date of the re-sentencing application on the ameliorative purpose of the 2009 DLRA, the absence of any language similar to that in other Penal Law provisions specifying the date of commission of the instant felony as the starting point for the 10-year look back, and similar decisions by other lower courts); *People v. Lee*, 88 A.D.3d 626, 931 N.Y.S.2d 502 (N.Y. App. Div. 1st Dept 2010), *aff’d*, *People v. Walltower*, 27 Misc. 3d 1205(A), 910 N.Y.S.2d 407, 2010 N.Y. Misc. LEXIS 663, at *4 (Sup. Ct. Queens County Apr. 6, 2010) (holding that “in light of both the dearth of legislative guidance and the ameliorative purposes of the 2009 DLRA, the natural meaning of the term ‘within the preceding ten years’ . . . is the ten-year period immediately preceding the date of filing of the application for re-sentencing.”); *People v. Lashley*, No. N10596/04, slip op. at 4 (Sup. Ct. Queens County Apr. 5, 2010), *available at* <http://www.communityalternatives.org/pdf/People-v-Lashley.pdf> (last visited Feb. 5, 2019) (analogizing to interpretation of “other recidivist sentencing statutes . . .” to find that “the plain meaning of the phrase ‘within the preceding ten years,’ unadorned as it is by any limiting language, appears intended to run from the time immediately preceding the [re-sentencing] application.”); *People v. Estela*, Nos. 720/2004 & 4336/2004, slip op. at 4 (Sup. Ct. N.Y. County Mar. 24, 2010), *available at* <http://www.communityalternatives.org/pdf/People-v-Estela-NYCo.pdf> (last visited Feb. 5, 2019) (holding that “the relevant point in time from which the statutory ‘preceding ten years’ is to be measured is the date of the filing of the petition for re-sentence . . .”); *People v. Austin*, No. 6738/02, slip op. at 4 (Sup. Ct. N.Y. County Mar. 22, 2010), *available at* <http://www.communityalternatives.org/pdf/People-v-Austin.pdf> (last visited Feb. 5, 2019) (relying on the

for example, the court found that, in light of the ameliorative (relieving) purpose of both the 2004 and 2005 DLRA, as well as the similarly corrective provisions of the 2009 DLRA, the ten-year look back provision ought to refer to the ten years immediately preceding the date of filing the re-sentencing application.¹⁵⁰

(d) Conclusion

To sum up, you may apply for re-sentencing if, (1) you are serving a sentence for an A-I felony drug offense and you were sentenced under the old law; (2) you are serving a sentence for an A-II felony drug offense, you were sentenced under the old law, and you meet the time to parole eligibility and merit time eligibility requirements described above; or (3) you are serving a sentence for a Class B felony drug offense, for which you were sentenced under the old law, and you are not serving time for an “exclusion offense” within the ten year period before the date of your re-sentencing application. Exclusion offenses include (a) a violent felony offense, (b) an offense that makes you ineligible for merit time under Section 803(1)(d)(ii), (c) a second violent felony offense, or (d) a persistent violent felony offense. Sections 3 and 4 below will describe what happens if you apply for re-sentencing, and how to apply.

D. Re-Sentencing: What Happens if You Apply?

1. The Re-Sentencing Process

The re-sentencing process is the same for A-I, A-II, and Class B felony drug offenses. When you apply, you must send your application to the court in which you were convicted, and you must also send a copy of your application to the District Attorney's office that prosecuted your conviction.¹⁵¹ The application will be decided by the judge that gave you your original sentence if that judge still works in the same court.¹⁵² Otherwise, the application will be decided by different judge in that court, chosen at random.¹⁵³ Or, if the original judge has moved to another court that has jurisdiction over your case,

interpretation of “[n]umerous trial level courts” to find that the 10-year look back means “ten years from the date the application is filed”); *People v. Murray*, No. 121/03, slip op. at 3 (Sup. Ct. Kings Cty. Mar. 22, 2010), *available at* <http://www.communityalternatives.org/pdf/People-v-Murray.pdf> (last visited Feb. 5, 2019) (holding that the 10-year look back “refer[s] to the ten years immediately preceding the application for resentencing”) (citing *People v. Danton*, 27 Misc.3d 638, 895 N.Y.S.2d 669 (Sup. Ct. N.Y. County Feb. 2, 2010)) (internal citations omitted); *People v. Loftin*, 26 Misc. 3d 1229(A), 907 N.Y.S.2d 439, 2010 N.Y. Misc. LEXIS 374, at *7–*8, slip op. at 3 (N.Y. Sup. Ct. Onondaga County Mar. 2, 2010) (adopting position so as to “agree with an increasing number of other trial courts who have ruled that the statute, by its plain meaning, contemplates eligibility determinations from the present date ... and that the most natural construction of the law is to read the reference point as the date of a re-sentencing application”) (internal citations omitted); *People v. Brown*, No. 4097/02, slip op. at 5–73 (Sup. Ct. N.Y. County Jan. 4, 2010), *available at* <https://law.justia.com/cases/new-york/other-courts/2010/2010-50000.html> (last visited Feb. 5, 2019) (citing *People v. Roman* to find that the 10 year period is “measured from the date of a violent felony conviction to the date of a re-sentencing application”); *People v. Roman*, 26 Misc. 3d 784, 786, 889 N.Y.S.2d 922, 923 (Sup. Ct. Bronx County 2009) (holding that “the statute by its plain meaning contemplates eligibility determinations from the present date,” especially in light of the clear purpose of the 2004, 2005, and 2009 DLRA to “ameliorate the lengthy sentences given to defendants for selling or possessing a small amount of drugs”); *see also* Ctr. for Cmty. Alternatives, *Re-sentencing Eligibility* (2009): *Calculating the 10 Year Look Back Simplified*. 1–2, *available at* <http://www.communityalternatives.org/pdf/ClassBDrugOffense-10YearLookBack.pdf> (last visited Feb. 5, 2019).

150. *People v. Danton*, 27 Misc. 3d 638, 641–649, 895 N.Y.S.2d 669, 672–678 (Sup. Ct. N.Y. County 2010) (“[V]iewing the re-sentencing provision generally, and its look-back provision particularly, in the context of the spirit and purpose underlying the legislation as a whole, it is appropriate to resolve any ambiguity in favor of the more ameliorative, rather than the more punitive, construction.”).

151. N.Y. CRIM. PROC. LAW § 440.46 (1) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

152. N.Y. CRIM. PROC. LAW § 440.46 (1) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

153. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

and if you and the District Attorney both agree, your application may be sent to the original judge at the new court where the judge works.¹⁵⁴

(a) How the Judge Will Make a Decision

If the judge finds that you meet the requirements to apply for re-sentencing, described above in Part B, the judge may consider any facts or circumstances that relate to whether you should be resentenced, including your prison record.¹⁵⁵ For Class B felony drug offenders, the judge is also instructed to consider your “participation in or willingness to participate in treatment or other programming while incarcerated” and your disciplinary history, though an inability to participate in such programs won’t count against you when making the determination.¹⁵⁶ It is your responsibility to provide the facts and circumstances that you want the judge to consider.¹⁵⁷ Similarly, the District Attorney may submit the facts and circumstances that the prosecutor wants the judge to consider.¹⁵⁸ The judge may also consider your institutional record of confinement.¹⁵⁹ However, the judge is only allowed to consider information regarding your re-sentencing, not information about whether you were correctly charged and convicted in the first place.¹⁶⁰

If you are eligible to apply for re-sentencing, you have a right to have an attorney represent you on your application.¹⁶¹ If you cannot pay for an attorney, you have a right to have one appointed by the court.¹⁶² Part 4 of this Chapter, “How to Apply for Re-sentencing,” explains how to get an attorney appointed to represent you. You also have a right to a hearing on your re-sentencing application and a right to be present at that hearing.¹⁶³ The court may also order a hearing to determine whether you are actually eligible to apply for re-sentencing. The court may also order a hearing to decide any relevant factual issues that are in dispute.¹⁶⁴

The judge will review the information you and the District Attorney submit and hold any necessary hearings before reaching a decision. If the judge decides to grant your application, he must choose a new sentence. The judge must choose the new sentence from the current sentencing ranges and tell you what that sentence is.¹⁶⁵ You will then have a choice—you can accept the suggested new sentence,

154. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

155. Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

156. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009).

157. In other words, it is up to you to convince the judge that you deserve to be re-sentenced. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

158. In other words, the District Attorney may try to convince the judge that you do not deserve to be re-sentenced. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

159. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

160. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

161. N.Y. CRIM. PROC. LAW § 440.46 (4) (McKinney 2009) (citing N.Y. COUNTY LAW §§ 717 (1), 722(4) (McKinney 2009)); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643 (citing N.Y. COUNTY LAW §§ 717 (1), 722 (4) (McKinney 2009)); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738 (citing N.Y. COUNTY LAW §§ 717 (1), 722 (4) (McKinney 2009)).

162. N.Y. CRIM. PROC. LAW § 440.46 (4) (McKinney 2009) (citing N.Y. COUNTY LAW §§ 717 (1), 722 (4) (McKinney 2009)); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643 (citing N.Y. COUNTY LAW §§ 717 (1), 722 (4) (McKinney 2009)); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738 (citing N.Y. COUNTY LAW §§ 717 (1), 722 (4) (McKinney 2009)).

163. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

164. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

165. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

withdraw your application, or appeal the suggested new sentence.¹⁶⁶ If you withdraw your application, you will keep your original sentence. If you do not take any action, the judge will vacate your original sentence and impose the new sentence.¹⁶⁷ All of the time you have served toward your old sentence will be counted towards your new sentence.¹⁶⁸ Whether the judge grants or denies your application, he must write an opinion explaining his findings of fact and legal reasoning.¹⁶⁹

The success or failure of achieving re-sentencing often turns on whether “substantial justice dictates that the application should be denied.” The judge is not supposed to have discretion beyond applying the law (for example, meeting the time to parole requirements, the merit time eligibility requirements, the ten-year look back) in determining whether a defendant is eligible for re-sentencing. The judge does have some discretion, however, in determining what substantial justice requires. For example, courts have previously denied re-sentencing because of substantial justice in cases where the defendant is a high-level drug offender, where the drug trafficking operation that the defendant participated in was very extensive, where the amount of drugs the defendant was convicted for was high, where the defendant had disciplinary infractions while in prison and a long prior criminal history, where the defendant committed serious offenses while incarcerated, where the defendant had a pattern of reoffending while on parole, and where the defendant showed no remorse for his crime and continued to deny guilt after pleading guilty.¹⁷⁰

166. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

167. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

168. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

169. N.Y. CRIM. PROC. LAW § 440.46 (3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Laws 643; Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Laws 738.

170. *People v. Morales*, 46 A.D.3d 1395, 1396, 848 N.Y.S.2d 486, 487 (4th Dep’t 2007) (affirming the lower court’s denial of re-sentencing application, under the “substantial justice” provision, because defendant’s conviction involved a large amount of cocaine and defendant was therefore not a “low level offender”); *People v. Montoya*, 45 A.D.3d 496, 496, 847 N.Y.S.2d 41, 41 (1st Dep’t 2007) (holding that “substantial justice” required denial of re-sentencing to a defendant who was a high-level participant in an international narcotics distribution ring); *People v. Perez*, No. 5450/03, slip op. at 9–11 (Sup. Ct. N.Y. County Mar. 4, 2010), <http://www.communityalternatives.org/pdf/People-v-Perez-NYCo.pdf>, *aff’d*, 89 A.D.3d 597, 932 N.Y.S.2d 903 (1st Dep’t 2011) (denying re-sentencing application as a result of a long criminal record with convictions that were “not a single sale for a couple of dollars,” but which included violent felony offenses and several severe infractions while in prison); *People v. Arana*, 45 A.D.3d 311, 311, 844 N.Y.S.2d 696, 696–697 (1st Dep’t 2007) (affirming lower court’s denial of defendant’s application for re-sentencing based on “substantial justice,” since defendant had been a participant in “a very extensive drug trafficking enterprise”); *People v. Estela*, Nos. 720/2004 & 4336/2004, slip op. at 4–5 (Sup. Ct. N.Y. County Mar. 24, 2010), <http://www.communityalternatives.org/pdf/People-v-Estela-NYCo.pdf>, *aff’d*, 80 A.D.3d 526, 914 N.Y.S.2d 893 (1st Dept. 2011) (denying defendant’s re-sentencing application because of “[t]he defendant’s history [as] one of a drug seller, not an addict,” given the fact that on one arrest “he was in possession of thirty-seven glassines of heroin and over one thousand dollars, and was observed selling four additional bags” and was later arrested “in possession of 200 glassines” while on parole); *People v. Rivers*, 43 A.D.3d 1247, 1248, 842 N.Y.S.2d 611, 612 (3d Dep’t 2007) (denying defendant’s application for re-sentencing based on defendant’s number of disciplinary violations while incarcerated and lengthy criminal record predating the conviction, even though defendant had achieved significant educational and vocational accomplishments while incarcerated); *People v. Paniagua*, 45 A.D.3d 98, 108–109, 841 N.Y.S.2d 506, 515 (1st Dep’t 2007) (“An inmate’s ...repeated commission of serious acts of insubordination while incarcerated can only be viewed adversely in considering his likelihood of re-adjusting to life outside of prison.”); *People v. Vega*, 40 A.D.3d 1020, 1020, 836 N.Y.S.2d 685, 686 (2d Dep’t 2007) (denying defendant’s application for re-sentencing after considering that defendant had a criminal history that included convictions for other controlled substance offenses and second-degree murder and that defendant’s prison disciplinary record was poor); *People v. Sanders*, 36 A.D.3d 944, 946–947, 829 N.Y.S.2d 187, 189 (2d Dep’t 2007) (denying defendant’s application for re-sentencing after considering that defendant committed disciplinary violation for drug use, for which he was confined to a special housing unit for at least 60 days after only 11 months in prison). *But see* *People v. Walltower*, No. N10539/96, slip op. at 8 (Sup. Ct. Queens County Apr. 6, 2010) (granting defendant’s application for re-sentencing under 2009 DLRA despite concerns about his “poor

Finally, you may also appeal a proposed, but not yet imposed, new sentence on the ground that it is harsh or excessive.¹⁷¹ If you do so, you still have the option to withdraw your application after the appeal is decided and keep serving your original sentence.¹⁷²

(b) Sentences: What Sentence Could You Receive?

While felony drug sentences imposed under the old law are indeterminate, the new sentencing laws require determinate sentences for drug felonies.¹⁷³ If you are resentenced, you will be given a determinate sentence.

A determinate sentence is a sentence for a fixed amount of time (eight years, for example). Under current law, you can receive good time or merit time reductions of a determinate sentence imposed for a drug offense.¹⁷⁴ These reductions are calculated and granted by the Department of Correctional Services. However, there is no possibility for parole from a determinate sentence, so the Parole Board has no say in when you are released.

An indeterminate sentence consists of two terms: a minimum and a maximum (for example, a sentence of five to ten years qualifies as an indeterminate sentence). The minimum term must be at least one year. It is the amount of time you must serve before you can become eligible for parole. The maximum term must be at least three years and can be as much as life imprisonment. The maximum term is the amount of time you will have to spend in prison if there are no reductions made to your sentence and you are not paroled. Many prisoners serving indeterminate sentences for non-violent offenses can receive reductions for good time or merit time as well as parole.¹⁷⁵ This means that both the Department of Correctional Services and the Parole Board may have a say in when you will be released.

If you are resentenced, you will receive a specific term of imprisonment. The term will fall *within* the appropriate range shown in the tables below. Any time you have already served under your original sentence will be subtracted from the time you will have to serve under your new sentence.

The new determinate sentencing ranges for A-I, A-II, and Class B felony drug offenses, effective January 13, 2005, are:

If Your Class A-I Drug Offense Is Your:	Determinate Sentence Range¹⁷⁶
First Felony Offense	Between 8 and 20 years

inmate disciplinary record, consisting of 32 infractions, 21 of which are of the more serious tier 3 level,” as well as his “violent felony conviction”); *People v. Encarnacion*, 101 A.D.3d 1746, 1747, 956 N.Y.S.2d 387, 388 (4th Dep’t 2012) (affirming the lower court’s denial of the defendant’s application based on substantial justice because “[o]nly five years after his drug conviction, defendant stabbed a fellow inmate to death, for which he was convicted of murder in the second degree murder and promoting prison contraband in the first degree”); *People v. Franklin*, 101 A.D.3d 1148, 1149, 956 N.Y.S.2d 494, 495 (2d Dept. 2012) (denying application for re-sentencing because “the evidence of rehabilitation did not outweigh the seriousness of the [defendant’s] instant offense and his lengthy criminal history, including the pattern of successive reoffense while on parole”); *People v. Lovett*, 116 A.D.3d 428, 429, 984 N.Y.S.2d 299, 301 (1st Dep’t 2014) *aff’d* in part, appeal dismissed in part, 25 N.Y.3d 1088, 34 N.E.3d 851 (2015), *reargument denied*, 26 N.Y.3d 961 (2015) (holding substantial justice dictated the denial of defendant’s motion for re-sentencing, where defendant had extensive criminal history, and his “insistence on his innocence notwithstanding the overwhelming evidence underscores his complete lack of insight into the wrongful nature of his conduct and a lack of acceptance of responsibility for the harm he caused himself and others”).

171. N.Y. CRIM. PROC. LAW § 440.46(3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1475 (McKinney).

172. N.Y. CRIM. PROC. LAW § 440.46(3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1582 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1475 (McKinney).

173. N.Y. PENAL LAW §§ 70.70, 70.71 (McKinney 2009).

174. N.Y. CORRECT. LAW §§ 803–806 (McKinney 2009).

175. See N.Y. CORRECT. LAW §§ 803–806 (McKinney 2009).

176. N.Y. PENAL LAW § 70.71 (McKinney 2009).

Second Felony Offense (Prior Felony = Non-Violent)	Between 12 and 24 years
Second Felony Offense (Prior Felony = Violent)	Between 15 and 30 years

If Your Class A-II Drug Offense Is Your:	Determinate Sentence Range¹⁷⁷
First Felony Offense	Between 3 and 10 years
Second Felony Offense (Prior Felony = Non-Violent)	Between 6 and 14 years
Second Felony Offense (Prior Felony = Violent)	Between 8 and 17 years

If Your Class B Drug Offense Is Your:	Determinate Sentence Range¹⁷⁸
First Felony Offense	Between 1 and 9 years
Second Felony Offense (Prior Felony = Non-Violent)	Between 2 and 12 years
Second Felony Offense (Prior Felony = Violent)	Between 6 and 15 years

Each of these determinate sentences includes a five-year period of post-release supervision¹⁷⁹ However, there are some exceptions to the five-year post-release supervision period.¹⁸⁰ One relevant exception is that the post-release supervision period for a first-time class B felony ranges from one to two years and for a second-time class B felony ranges from one and half years to five years.¹⁸¹

When deciding whether to apply for or accept a new sentence, you will want to compare your earliest likely release date under your old sentence with your earliest likely release date under your new sentence. Keep in mind that, depending on your prison record, you may or may not receive reduction for good time and/or merit time. Also, consider whether the Parole Board is likely to grant you parole under your indeterminate sentence. It is possible that your earliest resentenced determinate date could be further away than your earliest possible release date under your current sentence. For example, in *People v. Newton*, the defendant was originally sentenced six years to life, and the proposed re-sentencing was eleven years, which on appeal was found to be neither harsh nor excessive.¹⁸² Remember that even if the minimum term of your indeterminate sentence is shorter than the determinate sentence you receive at re-sentencing, you may be better off in some cases with the determinate sentence if you think that the Parole Board is unlikely to grant you parole at an earlier date.¹⁸³

2. How to Apply for Re-sentencing

You have the right to have an attorney represent you in your application for re-sentencing.¹⁸⁴ If you cannot afford an attorney, you can have one appointed.¹⁸⁵ You can file an application to have an

177. N.Y. PENAL LAW § 70.71 (McKinney 2009).

178. N.Y. PENAL LAW § 70.70 (McKinney 2009). Note that for a first felony offense that occurs on school grounds or school buses, the statute requires a minimum of two years. So, the sentence range can be between two and nine years. N.Y. PENAL LAW § 70.70(2)(a)(i) (McKinney 2009).

179. N.Y. PENAL LAW § 70.45(2) (McKinney 2009).

180. N.Y. PENAL LAW § 70.45(2) (McKinney 2009).

181. N.Y. PENAL LAW § 70.45(2)(b) (McKinney 2009); N.Y. PENAL LAW § 70.45(2)(f) (McKinney 2009).

182. *People v. Newton*, 48 A.D.3d 115, 120, 847 N.Y.S.2d 645, 649 (2d Dep't 2007).

183. See Memorandum from Al O'Connor, N.Y. State Defenders Assoc., "Understanding the A-II Re-sentencing Law," to Chief Defenders, at 6 (Oct. 5, 2005, revised Oct. 24, 2005), <http://www.communityalternatives.org/pdf/A-II%20%20Re-sentencing%20Memo%20Revised%20NYSDA.pdf>.

184. N.Y. CRIM. PROC. LAW § 440.46.(4) (McKinney 2009) (citing N.Y. COUNTY LAW §§ 717.(1), 722.(4) (McKinney 2009)).

185. N.Y. CRIM. PROC. LAW § 440.46.(4) (McKinney 2009) (citing N.Y. COUNTY LAW §§ 717(1), 722(4)

attorney appointed with a notice of motion and basic application for re-sentencing. Once appointed, your attorney can prepare a more detailed and complete application for you. You can find a sample application for an appointed attorney, a sample notice of motion, and a basic application for re-sentencing attached to this Chapter as Appendix B.¹⁸⁶

If you are applying for re-sentencing for an A-II felony drug offense and your earliest possible release date is not much more than three years away, it is important that your application for an appointed attorney include an application for re-sentencing. This is because you need to make sure your application is filed in time to meet the Time to Parole Eligibility requirement, explained above in Part C(2)(b)(i) of this Chapter. If you are applying for re-sentencing for a Class B felony drug offense, you need to make sure your application is not barred by the ten-year look back for exclusion offenses, explained above in Part C(2)(c)(ii) of this Chapter. You should always try to have an attorney represent you in your re-sentencing application. You should only file an application *pro se* (on your own) if you have trouble getting an attorney.

(a) Filing a *Pro Se* Application

If you are applying for re-sentencing for an A-II felony drug offense under the alternate, one-year-to-parole-eligibility reading, you may have to prepare your own application because you may have trouble getting an attorney appointed.¹⁸⁷ You may also have trouble getting an attorney if you were sentenced for a disqualifying offense at the same time you were sentenced for the felony drug offense. This may be a problem even if you have already finished serving the sentence for the disqualifying offense, as described above in Part C(2)(b)(ii)(a).¹⁸⁸ In these cases, you may have to prepare a *pro se* application. You can find sample documents for your *pro se* application in Appendix C.

Your *pro se* application should explain why you deserve a new sentence. You might want to include information about your role in the offense, the nature of the offense, the judge's position at the original sentencing, and your prior criminal history (or lack of). You might also want to include information about your health, your prison disciplinary record, favorable evaluations from correctional personnel, your participation in educational, drug-treatment, or work programs while in prison, and other attempts to rehabilitate yourself. You might include your plans for re-entry into your community, such as where you plan to live and how you plan to look for work when you are released.¹⁸⁹ You should provide as much documentation as possible. For example, you should include any certificates you received for program participation while in prison.¹⁹⁰

If you think they will be helpful, you can try to request documents from the prison records office. These documents might include your medical file, disciplinary file, visit log, education file, guidance file, and legal file. A sample document request letter is attached to this Chapter as Appendix B-4. Some prisons refuse to cooperate with document requests from incarcerated persons. It may be easier for a lawyer to request your records than for you to do it yourself. This is another reason why you should try to get a lawyer appointed instead of filing your application for re-sentencing *pro se*.

If you file your application *pro se*, you should submit a notice of motion and basic petition for re-sentencing (a sample is attached in Appendix B). You should also submit a signed, written statement, or "affirmation", in support of your application and any supporting documents you have

(McKinney 2009)); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581–1582 (McKinney) (citing N.Y. COUNTY LAW §§ 717(1), 722(4) (McKinney 2009)); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–1475 (McKinney) (citing N.Y. COUNTY LAW §§ 717(1), 722(4) (McKinney 2009)).

186. The sample document in Appendix B is for an incarcerated person serving time for an A-II felony drug offense.

187. E-mail from William Gibney, The Legal Aid Soc'y, to Sydney Bird, Contributing Author of this Chapter (Nov. 17, 2005) (on file with the JLM).

188. E-mail from William Gibney, The Legal Aid Soc'y, to Sydney Bird, Contributing Author of this Chapter (Nov. 17, 2005) (on file with the JLM).

189. Ctr. for Cmty. Alternatives, Rockefeller Drug Law Reform: Mitigation and Re-entry Planning Tips (2005) (unpublished manuscript) (on file with the JLM).

190. Ctr. for Cmty. Alternatives, Rockefeller Drug Law Reform: Mitigation and Re-entry Planning Tips (2005) (unpublished manuscript) (on file with the JLM).

collected. Your affirmation in support of your application should include: (1) a description of your original sentence, including the offense of which you were convicted, the term of the original sentence, the date it was imposed, how much of it you have served, and the judge who imposed it; (2) an explanation of why you are eligible for re-sentencing under the requirements of Chapter 738, Section 23 of the Laws of 2004 (for an A-I felony), Chapter 643 of the Laws of 2005 (for an A-II felony), or Section 440.46 of the Criminal Procedure Law (for a Class B felony); (3) what new sentence you think the judge should give you, according to the new sentencing law (for example, the minimum sentence allowed under the new law); and (4) the reasons you deserve the suggested new sentence, including, for example, an explanation of your prison disciplinary record, your participation in any work or drug-rehabilitation programs while in prison, any serious health problems you may have, and your plans to find housing and employment once you leave prison.¹⁹¹

Remember that when you file your application for re-sentencing, you must send it to both the court and the District Attorney's office that prosecuted your conviction.¹⁹² You must do this regardless of whether you are filing only a basic application or one combined with an application for an appointed attorney.

3. Conclusion

Many changes to the New York State drug laws went into effect in 2009. Some allow incarcerated persons serving time for drug offenses to apply for re-sentencing under the new, better sentencing framework. Incarcerated persons serving time for A-I felony drug offenses are automatically eligible for re-sentencing.¹⁹³ Incarcerated persons serving time for A-II and Class B felony drug offenses must meet additional requirements.¹⁹⁴ If you are serving time for an A-I, A-II, or Class B felony drug offense that occurred prior to January 13, 2005, you should consider whether you are eligible for re-sentencing. You should also consider whether re-sentencing is likely to give you an earlier release date. If you are eligible and think you might benefit from re-sentencing, you should try to get an attorney appointed to prepare your re-sentencing application. If you have trouble getting an attorney, you may file a re-sentencing application *pro se*.

E. Conclusion

Recent changes in the federal law and the law of New York have made some incarcerated persons eligible to apply for re-sentencing. You should make sure to conduct your own research and find out how these amendments are being applied to cases similar to your own. If you were convicted of a drug crime in either New York State or in federal court, you may be eligible for a reduction in your sentence. The reduction is not automatic, though, so you will need to make sure to apply for re-sentencing.

191. Sample Affirmation from William Gibney, The Legal Aid Soc'y, to JLM (2005) (on file with the JLM).

192. N.Y. CRIM. PROC. LAW § 440.46.(3) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474 (McKinney).

193. Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–1475 (McKinney).

194. N.Y. CRIM. PROC. LAW § 440.46(1) (McKinney 2009); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney).

APPENDIX A: SAMPLE FORMS FOR APPLYING FOR FEDERAL RE-SENTENCING**A-1. SAMPLE EX-PARTE APPLICATION FOR APPOINTMENT OF COUNSEL¹⁹⁵**

UNITED STATES DISTRICT COURT
DISTRICT OF _____
_____ DIVISION
UNITED STATES OF AMERICA,

Plaintiff, _____
v.
Defendant, _____
Counsel;

NO. CR _____

Ex Parte Application for Appointment of

Exhibits

Defendant hereby respectfully requests that this Court re-appoint his counsel under the Criminal Justice Act to assist him in preparing and filing a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c).

This application is made pursuant to 18 U.S.C. § 3006A, and is based on the attached memorandum of points and authorities, declaration of counsel, and exhibits; the files and records of this case; and any such further information as shall be made available to the Court.

Respectfully submitted,

DATED: [Month] __, 20__ By _____

195. Adapted from an example from Office of Defender Servs, Sample Motions, Briefs, Petitions and Orders Relating to Retroactive Application of Crack Cocaine Guideline Amendment, https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/motion-for-appointment-of-counsel-in-crack-cocaine-re-sentencing.pdf (last visited Mar. 3, 2019).

Memorandum of Points and Authorities

_____ respectfully applies to this Court to appoint counsel for his proceeding under 18 U.S.C. § 3582(c). As set forth in the attached declaration, undersigned counsel was appointed to represent _____ in his criminal proceedings. He was convicted of _____ and sentenced by this Court to a term of _____ months' imprisonment. His case involved cocaine use. Based on a review of records and files in this case, as well as the law, counsel believes that _____ is likely eligible to file a motion for reduction of sentence, pursuant to 18 U.S.C. § 3582(c).

This Court should appoint counsel. The amendments to USSG § 1B1.10, effective March 3, 2008, now invite the presentation of new facts and arguments in the context of § 3582(c) proceedings. See Amendment 712 to Guidelines. Moreover, in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), the Ninth Circuit held that, when re-sentencing defendants pursuant to § 3582(c)(2), district courts must treat the Guidelines as advisory, as required by *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). In view of these changes to § 3582(c) proceedings, _____ will be greatly assisted by the appointment of counsel. In addition, appointment of counsel will allow for negotiation with the Government, facilitate factual and legal presentation to the Court, and promote the efficient use of judicial resources.

_____ is still indigent. See Exhibit A. As the Court is aware, the Administrative Office of the United States Courts has established a new representation type for appointment of counsel in these cases. See Exhibit B.

For the foregoing reasons, _____ respectfully submits that appointment of counsel, as set forth in the proposed order, is appropriate.

Respectfully submitted,

DATED: [Month] __, 20__ By _____

A-2. SAMPLE APPLICATION FOR RE-SENTENCING¹⁹⁶

[DEFENDANT'S NAME]

UNITED STATES DISTRICT COURT

*** DISTRICT OF ***

*** DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

NO. CR _____

v.

[DEFENDANT'S NAME],

Defendant.

NOTICE OF MOTION; MOTION FOR
REDUCTION OF SENTENCE
PURSUANT TO 18 U.S.C. § 3582(c)(2);
MEMORANDUM OF POINTS AND
AUTHORITIES
Hearing Date: [INSERT DATE]
Hearing Time: [INSERT TIME]

TO: UNITED STATES ATTORNEY ***, AND ASSISTANT UNITED STATES ATTORNEY
[AUSA'S NAME]:

PLEASE TAKE NOTICE that on [DATE], at [TIME], defendant, [NAME], will bring on for
hearing the following motion:

MOTION

Defendant, [NAME], hereby moves this Honorable Court for a reduction in the sentence
imposed in this case on [DATE]. This motion is made pursuant to 18 U.S.C. § 3582(c)(2) and is
based upon the attached memorandum of points and authorities, all files and records in this
case, and such further argument and evidence as may be presented at the hearing on this
motion.

Respectfully submitted,

DATED: [Month] __, 20__ By _____

196. Adapted from an example from Office of Defender Servs, Sample Motions, Briefs, Petitions and Orders
Relating to Retroactive Application of Crack Cocaine Guideline Amendment, *available at*
https://www.fed.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/motion-for-reduction-of-sentence-pursuant-to-3582c2.pdf (last visited Feb. 6, 2019).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On [DATE], [NAME] was sentenced for [TYPE OF CRACK OFFENSE, I.E., DISTRIBUTION, POSSESSION WITH INTENT TO DISTRIBUTE, CONSPIRACY, ETC.], to serve _____ months of imprisonment and _____ years of supervised release. The sentence was imposed under the sentencing Guidelines [QUALIFY THIS IF POST-BOOKER], with a base offense level computed under § 2D1.1 of the Guidelines for a crack cocaine quantity of [INSERT AMOUNT IN YOUR CASE] grams. That base offense level—under the Guidelines in effect at the time—was _____. Combined with other Guidelines factors, it produced a guideline range of _____. The sentence imposed by the Court was _____ months, [WHICH WAS THE LOW END/WHICH WAS THE HIGH END/WHICH WAS WITHIN THE RANGE/WHICH WAS BELOW THE RANGE/ABOVE THE RANGE, BASED ON A [DESCRIBE DEPARTURE IF ANY]].

Subsequent to [NAME]'s sentencing—on November 1, 2007—an amendment to § 2D1.1 of the Guidelines took effect, which, generally, reduces base offense levels for most quantities of crack cocaine by two levels and, specifically, reduces the base offense level for the [INSERT AMOUNT IN YOUR CASE] gram quantity of crack cocaine in this case by two levels, to _____. *See* U.S.S.G. § 2D1.1. This amendment was adopted in response to studies that raise grave doubts about the fairness and rationale of the 100-to-1 crack/powder ratio incorporated into the sentencing Guidelines. *See generally Kimbrough v. United States*, 552 U.S. 85, 97–100, 128 S. Ct. 558, 568–569, 169 L. Ed. 2d 481, 492–494 (2007) (discussing history of crack cocaine guideline and various Sentencing Commission reports); United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007) [hereinafter *2007 Sentencing Commission Report*]; United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002); United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997); United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995). Yet the amendment is only a partial response, as the Sentencing Commission itself recognized. The Commission explained:

The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to these problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.

2007 Sentencing Commission Report, supra, at 10.

Subsequent to the effective date of this amendment to § 2D1.1, the Sentencing Commission considered whether to make the amendment retroactive under the authority created by 18 U.S.C. § 3582(c)(2). It took that action on December 11, 2007, by including this amendment in the list of retroactive amendments in § 1B1.10 of the Guidelines. *See* 73 Fed. Reg. 217-01 (2008). Based on this retroactivity, the statutory authority underlying it, and the Supreme Court's intervening [ONLY IF ALL OF FOLLOWING CASES WERE AFTER YOUR SENTENCING] decisions in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007); *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007), and *Kimbrough v. United States*, 552 U.S. 85, 128 S.

Ct. 558, 169 L. Ed. 2d 481 (2007), [NAME] brings this motion to reduce his sentence.

II. ARGUMENT

A. [NAME]'S OFFENSE LEVEL SHOULD BE REDUCED FROM ____ TO ____, AND THE GUIDELINE RANGE REDUCED FROM ____ TO ____ BASED ON THE AMENDMENT TO § 2D1.1.

18 U.S.C. § 3582(c)(2) provides as follows:

[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Section 1B1.10 is the Guidelines policy statement which implements 18 U.S.C. § 3582(c)(2). Subsection (c) of that policy statement lists amendments that are covered by the policy statement, and one of the amendments listed is amendment 711 to the Guidelines. Amendment 711 reduced the base offense level for crack cocaine offenses. *See* U.S.S.G., App. C, § 711. Application of this amendment to the crack cocaine guideline in the present case results in a decrease of the base offense level from ____ to ____, a decrease in the total offense level from ____ to ____, and a decrease in the resulting guideline range from ____ to _____. [THEN GO THROUGH CALCULATIONS TO ESTABLISH THIS AND ALSO DISCUSS ANY OTHER ISSUES THAT ARE RELEVANT SUCH AS MANDATORY MINIMUMS THAT LIMIT REDUCTION, WHETHER QUESTION OF SAFETY VALVE CAN BE REOPENED, ETC.].

B. THE COURT SHOULD REDUCE [NAME]'S SENTENCE [TO [INSERT SPECIFIC AMOUNT]/A SIGNIFICANT AMOUNT/SOME OTHER CHARACTERIZATION YOU CHOOSE].

Based on the amendment to § 2D1.1, the Court should significantly reduce [NAME]'s sentence. It follows from the discussion in the preceding section that the amendment alone justifies a reduction of [INSERT DIFFERENCE BETWEEN GUIDELINE RANGES] months.

[THIS PARAGRAPH ONLY IF ORIGINAL SENTENCING PRE-BOOKER, BUT CONSIDER ADAPTING HICKS AND KIMBROUGH DISCUSSION EVEN IF POST-BOOKER.] The Court should not stop there, however. At the time of [NAME]'s original sentence, the Court was required to treat the Guidelines as mandatory, under the controlling law at that time. Since then, the Supreme Court has held the Guidelines in their mandatory form are unconstitutional and—through severing 18 U.S.C. § 3553(b)—made them “effectively advisory.” *Booker*, 543 U.S. at 245. *Booker* and subsequent Supreme Court cases clarifying it—namely, *Rita v. United States*, *Gall v. United States*, and *Kimbrough v. United States*—have created a brave new world, in which the Guidelines are but one of several factors to be considered under § 3553(a). What the Supreme Court has described as the “overarching provision” in § 3553(a) is the requirement that courts “impose a sentence sufficient, but not greater than necessary” to accomplish the goals of sentencing. *Kimbrough*, 552 U.S. at 101 (internal quotation marks omitted) (quoting 18 U.S.C. § 3553(a) (2012)).

Moreover, *Booker* and its progeny apply to the imposition of a new sentence under 18 U.S.C. § 3582(c)(2). The Ninth Circuit considered this question in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007) and held, put most succinctly, that “*Booker* applies to § 3582(c)(2) proceedings.”

Hicks, 472 F.3d at 1169. As the court explained in more depth:

Booker explicitly stated that, “as by now should be clear, [a] mandatory system is no longer an open choice.” Although the Court acknowledged that Congress had intended to create a mandatory guideline system, *Booker* stressed that this was not an option: “[W]e repeat, given today’s constitutional holding, [a mandatory Guideline regime] is not a choice that remains open. . . . [W]e have concluded that today’s holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law.” The Court never qualified this statement, and never suggested, explicitly or implicitly, that the mandatory Guideline regime survived in any context.

In fact, the Court emphasized that the Guidelines could not be construed as mandatory in one context and advisory in another. When the government suggested, in *Booker*, that the Guidelines be considered advisory in certain, constitutionally-compelled cases, but mandatory in others, the Court quickly dismissed this notion, stating, “we do not see how it is possible to leave the Guidelines as binding in other cases. . . . [W]e believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create.” In short, *Booker* expressly rejected the idea that the Guidelines might be advisory in certain contexts, but not in others, and Congress has done nothing to undermine this conclusion. Because the “mandatory system is no longer an open choice,” district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2).

Hicks, 472 F.3d at 1170 (citations omitted).

Here, there are a number of non-Guidelines factors that justify a sentence below even the new guideline range. [EITHER HERE OR BELOW, INSERT ARGUMENT ABOUT ANY § 3553(a) FACTORS AND *BOOKER/GALL/KIMBROUGH*] [EITHER CONTINUATION OF LAST TEXT SENTENCE ABOVE OR NEW PARAGRAPH] One [OR ANOTHER?] consideration to which the Court should give particular weight is a consideration expressly recognized by the Supreme Court in *Kimbrough* as a ground for not following the Guidelines—the questionable provenance of the crack/powder ratio. As the Government itself acknowledged in *Kimbrough*, “the Guidelines ‘are now advisory’ and . . . , as a general matter, ‘courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.’” *Kimbrough*, 552 U.S. at 101 (quoting Brief for United States 16). While the government then tried to distinguish policy disagreement with the 100-to-1 crack/powder ratio from other policy disagreements, the Supreme Court squarely rejected that argument. *See Kimbrough*, 552 U.S. at 100–08.

Indeed, the Court suggested that policy disagreement in this area was even *more* defensible than in other areas. It noted that “in the ordinary case, the Commission’s recommendation of a sentence will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives,” *id.* at 109 (quoting *Rita*, 551 U.S. at 350), and so “closer review may be in order when the sentencing judge varies from the Guidelines, based solely on the judge’s view that the Guidelines range ‘fails properly to reflect § 3553(a) considerations’ even in a mine-run case,” *id.* (quoting *Rita*, 551 U.S. at 351). The Court then explained that this was not the case with the crack cocaine Guidelines:

The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role. In formulating

Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of “empirical data and national experience.” Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.*, sentences for crack cocaine offenses “greater than the necessary” in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence “greater than necessary” to achieve § 3553(a)’s purposes, *even in a mine-run case*.

Id. at 109–10 (emphasis added) (citations omitted).

These concerns are only partially assuaged by the recent amendment reducing crack cocaine offense levels, moreover. This also was recognized by the Supreme Court in *Kimbrough*:

This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. (Citation and footnote omitted.) Describing the amendment as “only . . . a partial remedy” for the problems generated by the crack/powder disparity, the Commission noted that “[a]ny comprehensive solution requires appropriate legislative action by Congress.”

Id. at 100 (quoting 2007 Sentencing Commission Report, *supra*, at 10).

Kimbrough’s rationale for varying from the crack Guidelines therefore remains even after the new guideline is applied. [CONSIDER APPLYING THIS *KIMBROUGH* ARGUMENT TO YOUR SPECIFIC CASE IN SOME WAY; FOR EXAMPLE, BY POINTING OUT WHAT YOUR SENTENCE WOULD HAVE BEEN IF IT WAS JUST POWDER]

[INSERT ANY ARGUMENT ABOUT ANY § 3553(a) FACTORS AND *BOOKER/GALL/KIMBROUGH* NOT ALREADY INSERTED ABOVE]

III. CONCLUSION

The Court should adjust [NAME]’s sentencing guideline range downward to _____. It should then [RECOMMEND SPECIFIC SENTENCE AND/OR MORE GENERAL URGING FOR LOWER SENTENCE, IF YOU DON’T WANT TO RECOMMEND A SPECIFIC SENTENCE].

Respectfully submitted,

DATED: MONTH DAY, YEAR By _____

APPENDIX B: SAMPLE APPLICATION FOR NY STATE RE-SENTENCING¹⁹⁷

B-1. SAMPLE PETITION FOR RE-SENTENCE

SUPREME COURT OF THE STATE OF NEW YORK¹⁹⁸
 _____ COUNTY CRIMINAL TERM

_____x	
THE PEOPLE OF THE STATE OF NEW YORK,	:
Plaintiffs,	:
	:
- against -	:
	:
_____	:
Defendant.	:
_____x	:

PETITION FOR
RE-SENTENCE

_____ County

Ind. No. _____

PLEASE TAKE NOTICE that, upon the annexed affirmation of _____, and all the prior proceedings, the undersigned will move this Court, at 100 Centre Street, New York, New York, 10013, on _____, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order vacating the sentence imposed by the Court on _____ (_____, J.); re-sentencing defendant pursuant to the Rockefeller Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)]; and granting such other relief as the Court may deem proper.

Please also accept this as an application for appointment of counsel. I am indigent, currently incarcerated, and I cannot afford counsel to represent me in this application for re-sentence.

Dated: _____, New York
 _____, 20__

Yours,

TO: Clerk of the Court
 New York County Supreme Court
 100 Centre Street
 New York, New York 10013

Hon. Cyrus R. Vance, Jr.
 New York County District Attorney
 1 Hogan Place
 New York, New York 10013

or

Hon. Bridget Brennan
 Special Narcotics Prosecutor
 80 Centre Street
 New York, New York 10013

197. Adapted from New York Legal Aid Society sample document. This sample is tailored to an incarcerated person serving time for an A-II felony drug offense.

198. Your Notice of Appeal is addressed to the court you were tried in, not the Appeals Court. This sample presumes you were tried in a Supreme Court. If you were tried in a County Court, be sure to replace this court for the Supreme Court at the top of the form. Make sure to address the form to the correct individuals in the "To:" section.

B-2. SAMPLE AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY CRIMINAL TERM

	x	
THE PEOPLE OF THE STATE OF NEW YORK,	:	
Plaintiffs,	:	
	:	AFFIRMATION
- against -	:	
	:	_____ County
	:	
Defendant.	:	Ind. No. _____
	x	

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Defendant _____, hereby affirms, under penalty of perjury, that the following statements are true.

1. I [pleaded guilty to] [was convicted after a trial of] second-degree criminal [possession] [sale] of a controlled substance (P.L. [possession: 220.18] [sale: 220.41]) and [list other counts, if any]. On _____, the court sentenced defendant to imprisonment for an indeterminate term of _____ years to the second-degree [sale] [possession] count to run [concurrently with] [consecutively to] [note other sentences, if any].

2. I am presently incarcerated on an A-II drug conviction.

3. Defendant is more than 12 months from being an “eligible inmate” as that term is defined in Subdivision 2 of Section 851 of the Correction Law.

4. Defendant meets the statutory eligibility requirements for merit time under Correction Law Section 803(1)(d).

5. For the above-stated reasons, defendant believes that [he] [she] is eligible to be re-sentenced under the Drug Law Reform Act of 2005 (“DLRA”) [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)] and defendant, thus, moves for such relief.

6. Defendant has yet to receive [his] [her] program and disciplinary records from the Department of Corrections. Defendant is filing this motion now to protect [his] [her] rights under the DLRA. Nevertheless, defendant requests the opportunity to supplement this motion and to provide the Court with additional pertinent information when that information becomes available.

WHEREFORE, Defendant respectfully requests that the Court grant [his] [her] petition for re-sentencing. Defendant further requests that the Court grant [him] [her] permission to supplement this application after additional information is obtained.

Dated: _____, New York
_____, 20____

[Name of Defendant]

B-3. SAMPLE AFFIDAVIT OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK, :
Plaintiffs, :
 : AFFIDAVIT
- against - : OF SERVICE
 :
 : _____ County
Defendant. :

Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

_____ being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the _____ day of _____ 20____, deponent served the within Petition for Re-sentence upon _____ in this action, at _____, the address designated by _____ for that purpose by depositing a true copy of the same by mail, enclosed in a post-paid properly addressed wrapper, in _____ a post office _____ official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Signature

Subscribed and sworn to before
me this _____ day of ____ 20____

Notary Public

B-4. SAMPLE DOCUMENT REQUEST LETTER¹⁹⁹

_____ Correctional Facility

Attn: Inmate Records

Box ____

_____, NY _____

[Date]

Dear Sir/Madam,

I am writing to request a copy of my entire inmate record. My name is _____, my date of birth is __/__/__, and my NYSID No. is _____. Please include the following records:

- (1) Complete copy of my legal file.
- (2) Complete copy of my guidance file.
- (3) Complete copy of my education file.
- (4) Complete copy of my package room file.
- (5) Complete copy of my medical file.
- (6) Complete copy of my disciplinary and disposition file.
- (7) Explanation of codes used in the inmate progress note sheets.
- (8) Visit log.

Thank you for your attention to this matter.

Sincerely,

[Your Name]

199. Adapted from New York Legal Aid Society sample document.

APPENDIX C: SAMPLE PRO SE APPLICATION²⁰⁰

C-1. SAMPLE PETITION FOR RE-SENTENCE

SUPREME COURT OF THE STATE OF NEW YORK
 _____ COUNTY CRIMINAL TERM

_____x	
THE PEOPLE OF THE STATE OF NEW YORK,	:
Plaintiffs,	:
	:
- against -	:
	:
	:
	:
Defendant.	:
_____x	

PETITION FOR
RE-SENTENCE

_____ County

Ind. No. _____

PLEASE TAKE NOTICE that, upon the annexed affirmation of _____, and all the prior proceedings, the undersigned will move this Court, at 100 Centre Street, New York, New York, 10013, on _____, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order vacating the sentence imposed by the Court on __ (__, J.); re-sentencing defendant pursuant to the Rockefeller Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)]; and granting such other relief as the Court may deem proper.

Dated: _____, New York
 _____, 20__

Yours,

TO: Clerk of the Court
 New York County Supreme Court
 100 Centre Street
 New York, New York 10013

Hon. Cyrus R. Vance, Jr.
 New York County District Attorney
 1 Hogan Place
 New York, New York 10013

or

Hon. Bridget Brennan
 Special Narcotics Prosecutor
 80 Centre Street
 New York, New York 10013

200. Adapted from New York Legal Aid Society sample document. This sample is tailored to an incarcerated person serving time for an A-II felony drug offense.

C-2. SAMPLE AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY CRIMINAL TERM

_____x		
THE PEOPLE OF THE STATE OF NEW YORK,	:	
Plaintiffs,	:	
	:	AFFIRMATION
- against -	:	
	:	_____ County
	:	
Defendant.	:	Ind. No. _____
_____x		

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Defendant _____, hereby affirms, under penalty of perjury, that the following statements are true.

1. I [pleaded guilty to] [was convicted after a trial of] second-degree criminal [possession] [sale] of a controlled substance (P.L. [possession: 220.18] [sale: 220.41]) and [list other counts, if any]. On _____, the court sentenced defendant to imprisonment for an indeterminate term of years on the second-degree [sale] [possession] count to run [concurrently with] [consecutively to] [note other sentences, if any].

2. I am presently incarcerated on an A-II drug conviction.

3. Defendant is more than 12 months from being an “eligible inmate” as that term is defined in Subdivision 2 of Section 851 of the Correction Law.

5. Defendant meets the statutory eligibility requirements for merit time under Correction Law Section 803(1)(d).

6. For the above-stated reasons, defendant believes that [he] [she] is eligible to be re-sentenced under the Drug Law Reform Act of 2005 (“DLRA”) [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)] and defendant, thus, moves for such relief.

7. Defendant has yet to receive [his] [her] program and disciplinary records from the Department of Corrections. Defendant is filing this motion now to protect [his] [her] rights under the DLRA. Nevertheless, defendant requests the opportunity to supplement this motion and to provide the Court with additional pertinent information when that information becomes available.

WHEREFORE, Defendant respectfully requests that the Court grant [his] [her] petition for re-sentence. Defendant further requests that the Court grant [him] [her] permission to supplement this application after additional information is obtained.

Dated: _____, New York
_____, 20____

[Name of Defendant]

C-3. SAMPLE AFFIDAVIT OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____	x	
THE PEOPLE OF THE STATE OF NEW YORK,	:	
Plaintiffs,	:	
	:	AFFIDAVIT
- against -	:	OF SERVICE
	:	
	:	_____ County
Defendant.	:	
_____	x	Ind. No. _____

STATE OF NEW YORK)	
)	ss:
COUNTY OF NEW YORK)	

_____ being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the _____ day of _____ 20__, deponent served the within Petition for Re-sentence upon _____ in this action, at _____, the address designated by _____ for that purpose by depositing a true copy of the same by mail, enclosed in a post-paid properly addressed wrapper, in _____ a post office _____ official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Signature

Subscribed and sworn to before
me this _____ day of ____ 20__

Notary Public

CHAPTER 11

USING POST-CONVICTION DNA TESTING TO ATTACK YOUR CONVICTION OR SENTENCE*

A. Introduction

As of 2018, more than 350 individuals have been exonerated¹ in the United States through post-conviction DNA testing.² This is because DNA is uniquely capable of proving innocence in crimes where biological material was left by the perpetrator.³ Many people in prison were convicted before DNA testing was possible or before it was considered reliable, and they were not able to present DNA evidence at their trial that might have helped prove their innocence. There are many organizations throughout the country that help incarcerated people recover DNA evidence and secure DNA testing. Because of the complexity of applying for DNA testing, we strongly recommend that you contact one of these organizations rather than proceed pro se (on your own).

If you do decide to go forward on your own, this Chapter can help you understand some of the legal issues involved in the process. This Chapter explains how you may be able to use DNA testing of physical evidence to challenge your conviction or sentence. It can also help you understand how DNA testing is currently being used within the criminal justice system. Part B of this Chapter discusses how to reopen your case based on DNA testing. Part C explains how to seek assistance from a legal organization. Appendix A lists some legal organizations that might be able to help you obtain DNA testing.

B. Common Procedures Used to Obtain DNA Testing

In the past, methods of testing evidence found at crime scenes were unreliable, and identifications based on crime scene evidence were often inaccurate. DNA testing is much more accurate than older methods of testing evidence. If you believe there might have been biological evidence (like blood, semen, hair, saliva, or sweat) collected at the scene of the crime for which you were convicted, and if you think DNA tests of the biological evidence would exonerate you, you can file several types of motions in court to try to get the evidence tested and have the results admitted in court.

Finding evidence is one of the biggest obstacles to getting DNA testing. You must first understand the difference between biological evidence that was introduced at your trial (for instance, a bloody shirt that was found at the crime scene by police investigators and introduced to the court as evidence during trial) and biological evidence that was collected during the investigation but was not introduced at your trial (for instance, a pair of pants that were found and collected by police investigators but not introduced as evidence during trial). You do not need to actually locate the evidence you want tested yourself. You only need to show that it was either collected during the course of the investigation or introduced into evidence at your trial (or both). When filing a motion to get certain evidence tested, you must be specific about: 1) what evidence you want to test; 2) why that evidence is important; and 3) the last known location of the evidence. It is very important to identify the last known location of the evidence, which may be in the possession of the police where you were prosecuted.

* This Chapter was revised by Susan Maples, based on previous versions by Kristin Jamberdino, Oluwashola Ajewole, and Sara Manaugh.

1. The word, “exonerated,” means to clear someone of accusations and declare that person not guilty of criminal charges.

2. See THE INNOCENCE PROJECT, *available at* <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide> (last visited Feb. 17, 2019).

3. DNA (which stands for “deoxyribonucleic acid”) is a substance contained in every human cell. Each strand of DNA is encoded with unique information about an individual’s specific physical characteristics. A perpetrator is a person who commits an illegal act.

1. Motion to Secure DNA Testing

Before filing a motion for a new trial based on newly discovered evidence (discussed in Part B(2)), you need to file a motion to secure DNA testing. How you must file your motion will depend on the post-conviction DNA testing statute that is applicable to your case. All fifty states have post-conviction DNA testing statutes.⁴ If you are incarcerated in a state prison in one of these states, read Subsection (a) below on how to make your motion. If you are incarcerated in a federal prison, you should file your motion under the Justice for All Act.⁵ Subsection (c) below explains how that statute works.

(a) State Prisoners in States with a Post-Conviction DNA Testing Statute

As of September 2018, all fifty U.S. states have laws allowing post-conviction DNA testing.⁶ State laws vary greatly with regard to who may request DNA testing and when they may do so. For example, some states only allow incarcerated people who were convicted of certain felonies to petition for DNA testing.⁷ Other states impose “due diligence” requirements⁸ or only grant DNA testing if an individual’s identity was an issue at trial or in the case.⁹ You should carefully read the requirements and conditions for petitioning for post-conviction DNA testing under your state’s law. Footnote 19 (on the next page) lists each state’s relevant statute to help you do this research.

New York was the first state to allow post-conviction DNA testing, and its provisions are some of the most flexible.¹⁰ According to the provisions of New York’s law, which are incorporated into Article 440 of the New York Criminal Procedure Law,¹¹ there is no express due diligence requirement (though

4. See THE INNOCENCE PROJECT, *available at* <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/access-to-post-conviction-dna-testing> (last visited Feb. 17, 2019).

5. Innocence Protection Act of 2004, 18 U.S.C. § 3600A.

6. See THE INNOCENCE PROJECT, *available at* <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/access-to-post-conviction-dna-testing> (last visited Feb. 17, 2019). Oklahoma became the fiftieth state to pass a post-conviction DNA testing statute on May 24, 2013.

7. See, e.g., IND. CODE ANN. §§ 35-38-7-1, 35-38-7-3, 35-38-7-5 (LexisNexis 2018) (indicating that only those convicted of murder or a class A, B, or C felony may petition).

8. The “due diligence” requirement means a court will not order DNA testing if the evidence was discoverable and you did not originally request the DNA evidence at the trial or plea stage. See, e.g., ARK. CODE ANN. § 16-112-201(a)(2) (West 2015) (requiring that an incarcerated person claim under penalty of perjury that “the scientific predicate for the claim could not have been previously discovered through the exercise of due diligence” in order for a DNA test to be ordered); see WYO. STAT. ANN. § 7-12-303(d) (West 2008) (preventing the court from ordering DNA testing if the person did not request DNA testing or present DNA evidence for strategic or tactical reasons or as a result of a lack of due diligence).

9. The phrase, “Identity at issue at trial,” means that you or your attorney claimed that you were mistakenly identified as the perpetrator of the crime for which you were on trial. See, e.g., 725 ILL. COMP. STAT. ANN. 5/116-3(b)(1) (2014) (requiring that identity must have been an issue at trial); MICH. COMP. LAWS ANN. § 770.16(4)(b)(iii) (2011) (requiring that identity must have been an issue at trial); MO. ANN. STAT. § 547.035(2)(4) (West 2015) (requiring that identity must have been an issue at trial); TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(C) (2015) (requiring that identity was or is an issue in the case).

10. The text of the New York provision reads as follows:

“Where the defendant’s motion requests the performance of a forensic DNA test on specified evidence, and upon the court’s determination that any evidence containing deoxyribonucleic acid (“DNA”) was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.”

N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(1) (McKinney 2015); see also Deborah F. Buckman, Annotation, *Validity, Construction, and Application of State Statutes and Rules Governing Requests for Postconviction DNA Testing*, 72 A.L.R.6th 227 (2012) (explaining that New York’s statutes are more flexible in allowing DNA testing than those of other states).

11. For more information on Article 440, see *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence.”

some courts have imposed an implicit due diligence requirement),¹² identity does not need to have been an issue at trial, and there is no time limit for filing a petition. In New York, the court will order testing if it determines that you have met the following requirements:

- (1) Your Article 440 motion requests that a forensic test be performed on *specific* evidence that you have clearly identified;
- (2) The evidence you are requesting to have tested was obtained in connection with the trial that resulted in your conviction; and
- (3) There is a “reasonable probability” that, if the results of a DNA test had been admitted at your trial, the verdict would have been more favorable to you.¹³

The “reasonable probability” requirement is very important. The court will not order a DNA test if it believes there is not a “*reasonable probability*” that the verdict at your trial would have been different, even if you are right about whatever you are trying to prove with the DNA test.¹⁴ This requirement does not mean that the court must be certain that the evidence will prove you are innocent, but it does place a significant burden on you. A court can legally deny your request for testing if it believes that your conviction was justifiable, regardless of what a new DNA test might show.¹⁵

The New York law is unusual in that it allows you to request DNA testing as part of your Article 440 motion to vacate judgment (request a new trial).¹⁶ Not all states allow you to combine the request for DNA testing and the request for a new trial in the same motion. You may find that the law in your state is more complex. For instance, some states have different deadlines, called “statutes of limitations,” for filing a motion for a new trial and for requesting post-conviction DNA testing.¹⁷ The deadline to request a new trial may have passed even though your opportunity to request DNA testing is still available. Yet, many states have not codified a statute of limitations.¹⁸ Also, some states have

12. See *People v. Kellar*, 218 A.D.2d 406, 410, 640 N.Y.S.2d 908, 910 (3d Dept. 1996) *appeal dismissed and remanded*, *People v. Kellar*, 89 N.Y.2d 948, 678 N.E.2d 464 (1997) (finding that there is an implied due diligence requirement for DNA testing because there should not be a second chance for those who failed to take advantage of DNA testing before trial); *People v. Sterling*, 6 Misc. 3d 712, 719, 787 N.Y.S.2d 846, 851 (Sup. Ct. Monroe County 2004) (noting that CPL 440.10(1)(g) contains a due diligence requirement for introducing newly discovered evidence, and that this requirement must apply to post-conviction DNA testing as well).

13. N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (Consol. 2015 McKinney).

14. N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (Consol. 2015 McKinney); see also *People v. Tookes*, 167 Misc. 2d 601, 604–606, 639 N.Y.S.2d 913, 915–916 (N.Y.S. Sup. Ct. N.Y. County 1996) (finding that there was not a reasonable probability that the verdict would have been different even with DNA evidence because (1) there was no case for mistaken identity, (2) there was clear evidence of rape, and (3) available biological specimens were unlikely to have helped defendant’s case, given the unclear results of blood and saliva tests, the defendant’s earlier failure to pursue an enzyme analysis, and the unknown age of the recovered sperm).

15. See, e.g., *People v. Smith*, 245 A.D.2d 79, 79, 665 N.Y.S.2d 648, 649 (1st Dept. 1997) (finding that, for first degree rape and related crimes, post-conviction DNA tests would not have shown with reasonable probability that the defendant was innocent where (1) fact that defendant was not the source of semen was consistent with victim’s testimony that she had intercourse with her boyfriend shortly before rape and that she did not know whether defendant ejaculated; (2) evidence of guilt was overwhelming; and (3) there was no claim of mistaken identity); *People v. De Oliveira*, 223 A.D.2d 766, 767–768, 636 N.Y.S.2d 441, 443 (3d Dept. 1996) (finding defendant not entitled to DNA testing because it was unlikely that results of DNA testing would change his second degree murder conviction where (1) it was undisputed that victim was sexually active about the time of her murder, (2) there was no evidence that the killing was part of a sexual encounter, and (3) there was no critical testimony that could be seriously called into question by test results).

16. For more information on Article 440, see *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence.”

17. Compare ARIZ. REV. STAT. ANN. 13-4240(a) (2015) (allowing the motion to occur at any time), with A.C.A. ARK. CODE ANN. § 16-112-202 (2015) (requiring that the petitioner file the motion for the performance of fingerprinting in a “timely fashion.” There is a rebuttable presumption of timeliness if the motion is made within thirty-six months of the conviction date).

18. See CAL. PENAL CODE § 1405 (Deering 2015); IOWA CODE § 81.10 (West 2015); TEX. CODE CRIM. PROC. ANN. art. 64.01–.05 (West 2015).

stricter requirements for granting a request for DNA testing than for granting a motion for a new trial (or vice versa).

Because there is such variation among state laws, you must look carefully at your state's post-conviction DNA testing statute. When deciding whether to request post-conviction DNA testing, consult both the statute governing motions for a new trial and the case law, if any, governing post-conviction DNA testing in your state.¹⁹

When filing your motion, it is important that you know which pieces of evidence you want tested, show that you understand your state's post-conviction DNA testing statute, and explain why you believe you meet every requirement set out by that statute. You should write out your state's entire post-conviction DNA testing statute in your motion, then go through each requirement of the statute separately and show how the facts of your case meet each requirement. If you clearly identify the pieces of evidence you want tested, explain why you are seeking post-conviction DNA testing, and explain how you meet all the requirements of your state's DNA testing statute, your motion will have a better chance of succeeding.

(b) Possible Constitutional Rights

Until recently, it was unclear whether there was a right to DNA testing under the U.S. Constitution. However, in a case called *District Attorney's Office for Third Judicial District v. Osborne*, the Supreme Court held that people incarcerated in state and federal prisons do *not* have a constitutional right to post-conviction DNA testing.²⁰ According to the Court, state legislatures may decide whether to allow prisoners access to DNA testing.²¹ However, an incarcerated person who has

19. The following lists all the state laws governing post-conviction DNA testing, in alphabetical order of the states: Alabama: ALA. CODE § 15-18-200 (LexisNexis 2015); Alaska: ALASKA STAT. §§ 12.73.010–.090 (2015); Arizona: ARIZ. REV. STAT. ANN. § 13-4240 (LexisNexis 2015); Arkansas: ARK. CODE ANN. §§ 16-112-201–208 (2015) (LexisNexis 2015); California: CAL. PENAL CODE § 1405 (Deering 2015); Colorado: COLO. REV. STAT. ANN. §§ 18-1-411–416 (2015) (West 2015); Connecticut: CONN. GEN. STAT. § 54-102kk (2015); Delaware: DEL. CODE ANN. tit. 11, § 4504 (2015); District of Columbia: D.C. CODE ANN. § 22-4133 (LexisNexis 2015); Florida: FLA. STAT. ANN. § 925.11 (LexisNexis 2015); FLA. R. CRIM. P. 3.853 (2009); Georgia: GA. CODE ANN. § 5-5-41 (2015); Hawaii: HAW. REV. STAT. ANN. §§ 844D-121–133 (LexisNexis 2015); Idaho: IDAHO CODE ANN. § 19-4902 (2015); Illinois: 725 ILL. COMP. STAT. ANN. 5/116-3 (LexisNexis 2015); Indiana: IND. CODE ANN. §§ 35-38-7-1–19 et seq. (LexisNexis 2015); Iowa: IOWA CODE § 81.10 (2015); Kansas: KAN. STAT. ANN. § 21-2512 (2015); Kentucky: KY. REV. STAT. ANN. §§ 422.285, 422.287 (LexisNexis 2015); Louisiana: LA. CODE CRIM. PROC. ANN. art. 926.1 (2015); Maine: ME. REV. STAT. ANN. tit. 15, §§ 2136–2138 (2015); Maryland: MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2015); Massachusetts: MASS. ANN. LAWS ch. 278A, § 3 (LexisNexis 2015); Michigan: MICH. COMP. LAWS SERV. § 770.16 (LexisNexis 2015); Minnesota: MINN. STAT. ANN. §§ 590.01–.06 (West 2015); Mississippi: MISS. CODE ANN. § 99-39-9 (2015); Missouri: MO. ANN. STAT. § 547.035 (LexisNexis 2015); Montana: MONT. CODE ANN. § 46-21-110 (2015); Nebraska: NEB. REV. STAT. ANN. §§ 29-2101, 29-4120 to -4126 et seq. (LexisNexis 2015); Nevada: NEV. REV. STAT. ANN. § 176.0917–.0919 (LexisNexis 2015); New Hampshire: N.H. REV. STAT. ANN. §§ 651-D:1–D:4 (LexisNexis 2015); New Jersey: N.J. STAT. ANN. § 2A:84A-32a (West 2015); New Mexico: N.M. STAT. ANN. § 31-1A-2 (LexisNexis 2015); New York: N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2015); North Carolina: N.C. GEN. STAT. § 15A-269 (2015); North Dakota: N.D. CENT. CODE § 29-32.1-15 (2015); Ohio: OHIO REV. CODE ANN. §§ 2953.71–2953.75 (LexisNexis 2015); Oklahoma: OKLA. STAT. ANN. tit. 22, §§ 1360, 1371.1, 1371.2 (West 2015); Oregon: OR. REV. STAT. ANN. § 138.690 (West 2015); Pennsylvania: 42 PA. CONS. STAT. ANN. § 9543.1 (LexisNexis 2015 West2015); Rhode Island: R.I. GEN. LAWS §§ 10-9.1-10–10-9.1-12 (2015); South Carolina: S.C. CODE ANN. § 17-28-90 (2014); South Dakota: S.D. CODIFIED LAWS ANN. §§ 23-5B-1–23-5B-17 (LexisNexis 2015); Tennessee: TENN. CODE ANN. §§ 40-30-110, TENN. CODE ANN. §§ 40-30-301–313 (2015); Texas: TEX. CODE CRIM. PROC. ANN. art. 64.01–.05 (LexisNexis, 2015); Utah: UTAH CODE ANN. § 78B-9-301 to -304 et seq. (LexisNexis 2015); Vermont: VT. STAT. ANN. tit. 13, §§ 5561–5570 (2015); Virginia: VA. CODE ANN. § 19.2-327.1 (2015); Washington: WASH. REV. CODE ANN. § 10.73.170 (LexisNexis 2015); West Virginia: W. VA. CODE ANN. § 15-2B-14 (LexisNexis 2015); Wisconsin: WIS. STAT. ANN. §§ 974.02, .06, .07 (West 2015); Wyoming: WYO. STAT. ANN. §§ 7-12-303–305 (West 2015). For information about the difference between statutes and cases, see Chapter 2 of the *JLM*, “Introduction to Legal Research.”

20. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73–74, 129 S. Ct. 2308, 2323, 174 L. Ed. 2d 38, 55 (2009).

21. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62, 129 S. Ct. 2308, 2316, 174 L. Ed. 2d 38, 48 (2009) (stating that figuring out how to use DNA testing is a task that “belongs primarily to the legislature.”).

been denied DNA testing under a state's post-conviction DNA testing statute may still bring a Section 1983 lawsuit to challenge the constitutional adequacy of the state's DNA testing statute.²²

(c) Federal Prisoners and the Federal Post-Conviction DNA Testing
Statute: The Justice for All Act of 2004

On October 30, 2004, the Justice for All Act²³ was signed into law. This law gives incarcerated people the right to request post-conviction DNA testing, but it applies only to people incarcerated in federal prison.²⁴ If you are a state incarcerated person, you must use your state's post-conviction DNA testing statute listed in Footnote 19 (see Part B(1)(a) of this Chapter).

The Justice for All Act works exactly like a state post-conviction DNA statute, but it only applies if you are serving time for a federal crime. It states the rules and procedures for people incarcerated in federal prison who are serving a prison or death sentence and applying for DNA testing.²⁵ To qualify for DNA testing, the Act requires that:

- (1) The applicant assert, under penalty of perjury, that they are “actually innocent” of the federal offense for which they are imprisoned or on death row, or, in death penalty cases, that they are “actually innocent” of another offense, if being exonerated of this offense would give them the right to a reduced sentence or a new sentencing hearing (where the other offense is a state offense, the applicant must show that there is no adequate remedy under the applicable state law for DNA testing, or that the applicant has exhausted the remedies available under state law); and
- (2) The specific evidence that is to be tested must not have been previously tested, unless a newer and more reliable method of testing is being requested; and
- (3) The proposed DNA testing may produce new evidence raising a reasonable probability that the applicant did not commit the offense; and
- (4) The applicant provides a current DNA sample for comparison with existing evidence.²⁶

22. A person incarcerated in a state prison may pursue post-conviction DNA testing in a Section 1983 action if he can prove that the applicable state DNA testing statute violates the incarcerated person's procedural due process rights and is therefore unconstitutional. *Skinner v. Switzer*, 562 U.S. 521, 531–536, 131 S. Ct. 1289, 1297–1300, 179 L. Ed. 2d 233, 242–46 (2011) (finding that the person incarcerated in state prison properly used Section 1983 to challenge the constitutionality of the Texas DNA statute). Though the Supreme Court did not establish any explicit requirements for state DNA testing statutes, federal courts have used the Alaska statute relating to proceedings for post-conviction relief (Alaska Stat. § 12.72.010 (2015)) as a reference point. If a state's statute is as or less strict than the Alaska statute, then it appears the court will find the testing procedure constitutional. *See, e.g., In re Smith*, 349 F. App'x 12, 15–16 (6th Cir. 2009) (*unpublished*) (finding an incarcerated person's due process claim “untenable because Michigan's [DNA testing] scheme is more comprehensive than the state procedures sanctioned by the *Osborne* Court.”); *see also* *Tevlin v. Spencer*, 621 F.3d 59, 71 (1st Cir. 2010) (upholding the constitutionality of Massachusetts's post-conviction procedure because it is no more restrictive than the Alaska statute upheld by the Supreme Court in *Osborne*); *Thompson v. Rundle*, 393 F. App'x 675, 679–680 (11th Cir. 2010) (*unpublished*) (upholding the constitutionality of Florida's post-conviction DNA testing procedure because it contains similar requirements and limitations imposed by other DNA-testing statutes including the Alaska statute upheld by the Supreme Court in *Osborne*); *McKithen v. Brown*, 626 F.3d 143, 153–154 (2d Cir. 2010) (finding New York's provision for post-conviction DNA testing constitutional because it is less stringent than the Alaska statute considered in *Osborne*).

23. *See* Justice for All Act, available at <http://www.ovc.gov/publications/factsheets/justforall/fs000311.pdf>; <http://www.justice.gov/usao-nh/programs/victim-witness-assistance-program/justice-all-act-2004> (last visited Feb. 17, 2019).

24. 18 U.S.C. § 3600(a).

25. 18 U.S.C. § 3600.

26. 18 U.S.C. § 3600(a)(1)(A)–(B), 3600(a)(3)(A)–(B), 3600(a)(8)–(9).

You should file for DNA testing within three years of your conviction. If you do not, your motion requesting DNA testing will be considered late, and you will have to show that you had a specific reason (“good cause”) for filing late.²⁷

The government is not allowed to destroy DNA evidence from a federal criminal case while the defendant remains in prison, unless: (1) a court has denied a motion for DNA testing, (2) the defendant knowingly and voluntarily waived their right to DNA testing, (3) the defendant was notified after their conviction became final that the evidence might be destroyed and did not file a motion for DNA testing within 180 days of notification, or (4) the evidence has already been tested and the results determined that the defendant was the source of the DNA evidence. Also, if the evidence is large or bulky, the government may preserve only a representative sample.²⁸

One important word of caution: *If you assert your innocence and the DNA testing results are “inculpatory,” (demonstrating that you committed the offense in question), the court can hold you in contempt. If you are convicted of making false assertions, your term of imprisonment will be extended by at least three years.* Additionally, you may be denied good conduct credit that you were otherwise entitled to.²⁹

However, if the evidence excludes you as the source of the DNA evidence, then you can petition for a new trial. The new trial will be granted if the DNA test results, considered with all other evidence in the case (whether introduced at trial or not), establish by compelling evidence that a new trial would result in your acquittal.³⁰ Also, if you are incarcerated in federal prison, you may file a motion for a new sentencing hearing if evidence of an offense was admitted during a federal death sentencing hearing and exoneration of that offense would entitle you to a reduced sentence or to a new sentencing proceeding.³¹

2. Motion for a New Trial Based on Newly Discovered Evidence

Once you have succeeded in your motion to secure DNA evidence, received the DNA testing you asked for, and obtained results that point to your innocence, it is time to file a motion for a new trial. Each state, and the federal government, allows you to file a motion for a new trial based on newly discovered evidence. Because DNA technology is so new and is continuously improving, the results of DNA analysis may be considered “newly discovered evidence,” even if the substance being analyzed is not itself newly discovered.

Every jurisdiction has a test that its courts apply in deciding whether to grant a motion for a new trial based on newly discovered evidence. In the federal system, courts traditionally ask five questions to determine whether to grant a defendant’s motion for a new trial based on newly discovered evidence:³²

- (1) Was the evidence available before the trial?

27. Innocence Protection Act of 2004, 18 U.S.C. § 3600(a)(10)(A)–(B) (If you do not file within three years of your conviction, there is a presumption that your motion is late. That presumption can be rebutted (proven wrong) by showing (1) that you did not file earlier due to incompetence (incompetence in this situation means that there is reasonable cause to believe you suffered from a mental disease or defect that made you unable to understand the legal charges against you or to assist properly in your defense); (2) that the DNA evidence to be tested is newly discovered; or (3) the appeal is not only based on your claim of your innocence and that denying the appeal would be a obvious injustice; or (4) that you had “good cause” for the delay). *See also* The Death Penalty Information Center, *Summary: The Innocence Protection Act of 2004*, available at <http://www.deathpenaltyinfo.org/article.php?scid=40&did=1234#subA> (last visited Sept. 23, 2018).

28. Innocence Protection Act of 2004, 18 U.S.C. § 3600A(a), 3600A(c)(1)–(5).

29. Innocence Protection Act of 2004, 18 U.S.C. § 3600(f)(2)(B)(i), 3600(f)(2)(b)(iii), 3600(f)(3).

30. Innocence Protection Act of 2004, 18 U.S.C. § 3600(g)(2).

31. Innocence Protection Act of 2004, 18 U.S.C. § 3600(g)(2)(B).

32. In federal courts, Rule 33 of the Federal Rules of Criminal Procedure authorizes a request for a new trial. Rule 33 allows the court to grant a new trial on defendant’s motion if “the interest of justice so requires.” FED. R. CRIM. P. 33(a).

- (2) Could it have been discovered before the trial through the exercise of due diligence?³³
- (3) Is the evidence “material” (relevant) to the issue you raise in your motion?
- (4) Is the evidence merely “cumulative” (does it only support other similar evidence already admitted at trial) or “impeaching” (does it contradict other evidence admitted at trial)?
- (5) Would the evidence probably change the trial’s result if a new trial were granted?³⁴

State courts, including New York courts,³⁵ use similar tests to decide whether to grant a motion for a new trial based on newly discovered evidence. While courts are bound by their test, they generally have some discretion to decide whether to grant a new trial. Motions for new trials are extraordinary, so courts do not grant them freely, and appellate courts rarely reverse a lower court’s decision to deny a new trial.

Most states, as well as the federal government, limit the period of time after your conviction during which you can file a motion for a new trial.³⁶ These time limits, called “statutes of limitations,” are based on the idea that evidence becomes less reliable over time. If time has expired for you to file your motion for a new trial, you will have to pursue other post-conviction remedies (such as seeking a writ of habeas corpus, discussed in Section 3 below), which may not have time limits.

To file your motion on time, you need to establish that you have newly discovered evidence. Depending on your jurisdiction, you may be able to establish this if biological evidence from the crime for which you were convicted still exists, and:

- (1) DNA testing was never performed on it;
- (2) DNA analysis was performed, but the results were not admitted in court (because, for example, DNA testing was not regarded as reliable at the time of your trial); or
- (3) DNA analysis was performed, but improved methods of DNA testing are now available.

Your motion for a new trial based on newly discovered evidence (and/or your request for DNA testing) may be denied if you pleaded guilty at your trial. New York law does not explicitly bar people who pleaded guilty from requesting DNA testing, but New York courts have held that those who have admitted their factual guilt when they pleaded guilty have waived their right to a new trial based on newly discovered evidence.³⁷ You should consult both your state’s statutes and case law to determine whether a guilty plea prevents you from seeking a new trial based on DNA evidence.

33. In this context, “due diligence” means that you and/or your attorney should have been able to find the evidence had you looked for it. There should be a reason why you were not able to find the evidence before trial, and you should make this reason known to the court.

34. See John A. Glenn, Annotation, *What Constitutes “Newly Discovered Evidence” Within Meaning of Rule 33 of Federal Rules of Criminal Procedure Relating to Motions for New Trial*, 44 A.L.R. FED. 13 (1979); see also *United States v. Carlone*, 603 F.2d 63, 66–67 (8th Cir. 1979) (using this standard to deny a new trial when a newly discovered defense witness claimed that F.B.I. agents asked him to plant weapons and drugs in the defendant’s home); *Pitts v. United States*, 263 F.2d 808, 810–811 (9th Cir. 1959) (going through all five questions to show that evidence submitted by the defense would not meet any of the standards, even if it had been newly discovered); *United States v. Bertone*, 249 F.2d 156, 160 (3d Cir. 1957) (rejecting motion for a new trial based on testimony from newly available witnesses because the witnesses were available and known by the defendant during trial); *United States v. Marachowsky*, 213 F.2d 235, 238–239 (7th Cir. 1954) (applying a similar test to the five-question test to reject three witnesses newly brought by the defense to secure a new trial).

35. See *People v. Priori*, 164 N.Y. 459, 472, 58 N.E. 668, 672 (N.Y. 1900) (using a six-step test to deny the defendant’s motion for a new trial, and splitting question four of the federal test into two separate questions about cumulative and impeaching evidence).

36. See *Herrera v. Collins*, 506 U.S. 390, 410–411, 113 S. Ct. 853, 865–866, 122 L. Ed. 2d 203, 223 (1993) (finding that while some states required filing a motion within weeks of conviction, some provide a time limit of one, two, or three years, and a few states have no time limit). Since *Herrera*, the federal statute of limitations for filing a motion based on new evidence was extended from two to three years. See FED. R. CRIM. P. 33(b)(1) for time required to file ‘newly discovered evidence’.

37. See *People v. Jackson*, 163 Misc. 2d 224, 226, 620 N.Y.S.2d 240, 241 (Sup. Ct. Broome Cnty. 1994)

3. Habeas Corpus Relief

It might be possible for you to get post-conviction relief by petitioning for a writ of habeas corpus, but it is rare.³⁸ A habeas corpus writ is a court's written order demanding that an incarcerated person be brought before the court to see whether his imprisonment or detention is illegal. Unlike most post-conviction DNA cases in which motions are made to find evidence, it is assumed you already have the evidence to prove yourself innocent in habeas cases.³⁹ So, this remedy is not available unless DNA testing has already been done on the biological evidence from the crime scene.

You can bring a federal habeas petition by claiming "actual innocence."⁴⁰ This idea is based on *Herrera v. Collins*, in which the Supreme Court left open the possibility that "a truly persuasive [post-trial] demonstration of 'actual innocence'" in a capital case might lead to relief if the state did not provide any way to present such a claim.⁴¹ It is very hard to demonstrate "actual innocence,"⁴² but if you are able to meet this high standard, you can bring the habeas claim even if state or federal law would have normally not allowed the filing. In *House v. Bell*, the Supreme Court decided that in some cases where new evidence would have been likely to create a reasonable doubt about a person incarcerated in state prison's conviction, that individual may file for a federal habeas corpus writ, even if the laws of the state where he was convicted would have normally not allowed a federal habeas filing.⁴³

In connection with habeas review, you may find success by using the "*Brady* obligation" (also known as the "*Brady* material doctrine").⁴⁴ Under this rule, the prosecution in a criminal case must reveal any strong evidence that may help prove your innocence. Thus, you may have a claim for habeas corpus relief if: (1) evidence was subjected to DNA testing; (2) the prosecution withheld the results of that test from you; and (3) the results may have helped to prove your innocence at trial.

(finding that because the defendant had already admitted his guilt and also waived his right to confront those that accused him, his subsequent application to defend himself against those accusers based on newly discovered evidence was denied).

38. See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for more information on habeas corpus petitions.

39. If you are already bringing a petition for habeas corpus on other grounds, then you can also request DNA testing. However, because a petition for habeas corpus is a difficult route to take to seek testing, it is only recommended if you are already filing a habeas petition on other grounds. See *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 767, 775–776 (E.D. Va. 2001) (defending decision to order DNA testing on previously tested material due to technological advances and the principle that newly-discovered DNA evidence would "illuminate" federal habeas claim that a conviction is potentially unconstitutional). See also *Thomas v. Goldsmith*, 979 F.2d 746, 749–750 (9th Cir. 1992) (requiring the state to turn over DNA evidence that is favorable to the incarcerated person in order to allow the person to try and prove his innocence and overcome any state court procedures that block his habeas claim).

40. *In re Davis*, 557 U.S. 952, 953–954, 130 S. Ct. 1, 1–3, 174 L. Ed. 2d 614, 614–615 (2009) (Stevens, J., concurring) (suggesting ways habeas relief could be granted for claims of actual innocence).

41. *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 869, 122 L. Ed. 2d 203, 227 (1993) (talking about the potential power of a demonstration of actual innocence that might alter the outcome of a case).

42. You have to show that it is "more likely than not that no reasonable juror would have found [you] guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536–537, 126 S. Ct. 2064, 2067–2077, 165 L. Ed. 2d 1, 21 (2006) (*quoting* *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836).

43. *House v. Bell*, 547 U.S. 518, 535–537, 126 S. Ct. 2064, 2076–2077, 165 L. Ed. 2d 1, 21 (2006) (holding that incarcerated people can bring habeas petitions if their "actual innocence" claim is very compelling, even if state or federal law would otherwise not have allowed it); see also *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019, 1027 (2013) (holding the same).

44. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963) (holding that the prosecution, if asked, cannot hold back evidence that is relevant to guilt or punishment); *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342, 353–354 (1976) (holding that, when evidence is obviously very valuable to the defense, the prosecution must share that evidence even if not asked). The *Agurs* standards used to determine when evidence must be disclosed are no longer good law, but the idea behind them still is. See, e.g., *Smith v. Cain*, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571, 574 (2012) (explaining that under *Brady*, the prosecution must share evidence that is favorable to the defense if it is relevant to the defendant's guilt or punishment). See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for information on the *Brady* duty.

The prosecution is required to give you DNA evidence, but only if it exists. The Supreme Court had ruled that states do not have a constitutional duty to perform DNA tests on evidence or to preserve evidence so that it can be tested.⁴⁵ In 2004 Congress passed the Justice for All Act of 2004.⁴⁶ The Justice for All Act imposes uniform rules for the preservation of evidence for DNA testing in federal crimes.⁴⁷ However, the Act specifically states that it cannot be used as a basis for a federal habeas corpus claim.⁴⁸

C. Legal Assistance for Those Seeking Post-Conviction DNA Testing

If you do not have a lawyer and want to seek post-conviction DNA testing, there are many not-for-profit organizations—usually called “innocence projects”—that might be able to help you. These organizations are often forced to choose some cases over others that may be just as worthy because they receive huge numbers of requests. You may want to consider contacting multiple organizations for help.

Appendix A (below) lists organizations that may help you use DNA evidence to prove your innocence. To have one of these organizations consider your case, you should mail a brief summary of the facts of your case and a list of the evidence used against you. Your case must involve biological evidence (semen, blood, saliva, skin, sweat, or hair). If possible, you should indicate what evidence you want to test, why it would be important to your case, and the last known location of that evidence (if you include this information, it may help the attorneys get back to you faster). Include your full name, mailing address, and prison identification number.

D. Conclusion

If you believe DNA can prove your innocence, you should pursue the legal options summarized in the sections above. The legal options differ depending on whether you are in a state or federal prison. Appendix A provides a list of organizations with a lot of experience in helping incarcerated people seek post-conviction DNA testing. These organizations may be able to help you.

45. *See Arizona v. Youngblood*, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988) (holding that, unless a defendant can show bad faith, a state’s failure to preserve evidence so that it can be tested does not violate the Due Process Clause of the Fourteenth Amendment). *See also Illinois v. Fisher*, 540 U.S. 544, 545, 124 S. Ct. 1200, 1200, 157 L. Ed. 2d 1060, 1064 (2004) (citing *Youngblood* to overturn a dismissal of criminal charges because evidence was destroyed following normal police procedures).

46. Justice for All Act of 2004, 18 U.S.C. § 3600A.

47. Justice for All Act of 2004, 18 U.S.C. § 3600A.

48. Justice for All Act of 2004, 18 U.S.C. § 3600A(g).

APPENDIX A

PROJECTS THAT MAY OFFER ASSISTANCE IN OBTAINING DNA TESTING—BY STATE

Alaska

Alaska Innocence Project
P.O. Box 201656
Anchorage, AK 99520
Phone: 907-279-0454
E-mail: info@alaskainnocence.org
<http://www.alaskainnocence.org/>

Alabama

Georgia Innocence Project
2645 North Decatur Road
Decatur, GA 30033
Phone: 404-373-4433
<http://www.georgiainnocenceproject.org/>

Arizona

Arizona Justice Project
c/o Arizona State University
Mail Code 4420
411 North Central Avenue, Suite 600
Phoenix, AZ 85004-2139
Phone: (602) 496-0286
E-mail: info@azjusticeproject.org
<http://azjusticeproject.org/>

Northern Arizona Justice Project

Department of Criminal Justice
Northern Arizona University
P.O. Box 15005
Flagstaff, AZ 86011
Phone: 928-523-7028
<http://nau.edu/arizona-innocence-project/>

Arkansas

Midwest Innocence Project
605 West 47th Street, Suite 222
Kansas City, MO 64112
Phone: 816-221-2166
Email: office@TheMIP.org
<http://themip.org/>

California (Northern)

Northern California Innocence Project
Santa Clara University School of Law
900 Lafayette Street, Suite 105
Santa Clara, CA 95050
Phone: 408-554-4790
Fax: 408-554-5440
E-mail: ncip@scu.edu
<http://law.scu.edu/ncip/>

California (Southern)

California Innocence Project
California Western School of Law Institute for
Criminal Defense Advocacy
225 Cedar Street
San Diego, CA 92101
Phone: 619-525-1485
Fax: 619-615-1443
<http://californiainnocenceproject.org/>

Loyola Law School Project for the Innocent

Loyola Law School
919 Albany Street
Los Angeles, California 90015
Phone: 213-736-8141

Colorado

Colorado Innocence Project
Colorado Law School
Wolf Law Building, 404 UCB
Boulder, Colorado 80309-0404
Phone: 303-492-2640
Fax: 303.492.4587
E-mail:
ColoradoInnocenceProject@colorado.edu
<http://www.colorado.edu/law/academics/clinics/korey-wise-innocence-project>

Connecticut

Connecticut Innocence Project
2275 Silas Deane Highway
Rocky Hill, Connecticut 06067
Phone: 860-258-4940
E-mail: info@innocenceproject.org
<http://www.ct.gov/ocpd/site/default.asp>

New England Innocence Project

160 Boylston Street, #2
Boston, MA 02116
Phone: 617-830-7685
E-mail: intake@newenglandinnocence.org
<http://www.newenglandinnocence.org/>

Delaware**Office of the Public Defender**

Carvel State Building
820 North French Street, 3rd floor
Wilmington, DE 19801
Phone: 302-577-5160

District of Columbia**Mid-Atlantic Innocence Project**

George Washington School of Law
2000 H Street NW
Washington, DC 20052
Phone: 202-994-4586
Email: cfiscella@exonerate.org
<http://www.exonerate.org/>

Florida**Innocence Project of Florida, Inc.**

1100 East Park Avenue
Tallahassee, FL 32301
Phone: 850-561-6767
Fax: 850-561-5077
<http://www.floridainnocence.org/>

University of Miami Law Innocence Clinic

3000 Biscayne Blvd, Suite 100
Miami, FL 33137
Phone: 305-284-8115
E-mail: umwrongfulconvictions@gmail.com

Georgia**Georgia Innocence Project**

2645 North Decatur Road
Decatur, GA 30033
Phone: 404-373-4433
<http://www.georgiainnocenceproject.org/>

Hawaii**Hawai'i Innocence Project**

University of Hawai'i School of Law
2515 Dole Street
Honolulu, HI 96822
Phone: 1-808-956-6547
Fax: 1-808-443-0554
E-mail: innocenceprojecthawaii@gmail.com
<http://www.innocenceprojecthawaii.org/>

Idaho**Idaho Innocence Project**

Boise State University
c/o Biology Department
1910 University Drive
Boise, ID 83725-1515
Phone: 208-426-4219
Fax: 208-426-1040
<https://innocenceproject.boisestate.edu/>

Illinois**Center on Wrongful Convictions**

Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: 312-503-2391
Fax: 312-503-8977
<http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/>

Illinois Innocence Project

Institute for Legal and Policy Studies
University of Illinois at Springfield
One University Plaza
MS Public Affairs Center 451
Springfield, IL 62703-5407
Phone: 217-206-6569
E-mail: innocenceproj@uis.edu
<http://www.uis.edu/illinoisinnocenceproject/>

Indiana**Wrongful Conviction Clinic at Indiana University**

Indiana University School of Law
Wrongful Conviction Clinic – Suite 111
530 West New York Street
Indianapolis, IN 46202-3225

IowaInnocence Project of Iowa

19 South 7th Street
Estherville, Iowa 51334
<http://www.iowainnocence.org/>

Midwest Innocence Project

605 West 47th Street, Suite 222
Kansas City, MO 64112
Phone: 816-221-2166
Email: office@TheMIP.org
<http://themip.org/>

KansasMidwest Innocence Project

605 West 47th Street, Suite 222
Kansas City, MO 64112
Phone: 816-221-2166
Email: office@TheMIP.org
<http://themip.org/>

KentuckyKentucky Innocence Project

Linda A. Smith, Directing Attorney
Department of Public Advocacy
100 Fair Oaks Lane, Suite 301
Frankfort, KY 40601
Phone: 502-564-8006
Fax: 502-564-7890
<http://dpa.ky.gov/kip/>

LouisianaInnocence Project New Orleans

Case Review Manager
Innocence Project New Orleans
4051 Ulloa Street
New Orleans, LA 70119
Fax: 504-943-1905
E-mail: info@ip-no.org
<http://www.ip-no.org/>

MaineNew England Innocence Project

160 Boylston Street, #2
Boston, MA 02116
Phone: 617-830-7685
E-mail: intake@newenglandinnocence.org
<http://www.newenglandinnocence.org/>

MarylandMid-Atlantic Innocence Project

George Washington University Law School
2000 H Street, NW
Washington, DC 20052
Phone: 202-994-4856
E-mail: cfiscella@exonerate.org

University of Baltimore Innocence Project Clinic

1420 North Charles Street
Baltimore, MD 21201
Phone: 410-837-6543
Fax: 410-837-4776

MassachusettsNew England Innocence Project

160 Boylston Street, #2
Boston, MA 02116
Phone: 617-830-7685
E-mail: intake@newenglandinnocence.org
<http://www.newenglandinnocence.org/>

Committee for Public Counsel Services
Innocence Program

21 McGrath Highway, 2nd floor
Somerville, MA 02143
Phone: 617-623-0591
<https://www.publiccounsel.net/pc/innocence-program/>

MichiganCooley Innocence Project

WMU-Cooley Law School
300 S. Capitol Avenue
P.O. Box 13038
Lansing, MI 48933
Phone: 517-334-5764
E-mail: babelca@cooley.edu
http://www.cooley.edu/clinics/innocence_project.html

Michigan Innocence Clinic

University of Michigan Law School
625 South State Street
Ann Arbor, MI 48109-1215
Phone: 734-763-9353
Fax: 734-764-8242
<http://www.law.umich.edu/clinical/innocenceclinic/>

**Michigan State Appellate Defender Office –
Wrongful Conviction Unit**

Suite 3300 Penobscot Building
645 Griswold Street
Detroit, MI 48226
Phone: 313-256-9883
Fax: 313-965-0372

Minnesota

Minnesota Innocence Project
1536 Hewitt Avenue, MS-D2204
St. Paul, MN 55104
Phone: 651-523-3152
Fax: 651-523-3042
<http://www.ipmn.org/>

Mississippi

Innocence Project New Orleans*
Case Review Manager
Innocence Project New Orleans
4051 Ulloa Street New Orleans, LA 70119
Fax: 504-943-1905
E-mail: info@ip-no.org
<http://www.ip-no.org/>
* South Mississippi Counties only

The George C. Cochran Innocence Project*

P.O. Box 1848
University, MS 38677-1848
Phone: 662-915-5207
<http://innocenceproject.olemiss.edu/>
*North Mississippi Counties only

Missouri

Midwest Innocence Project
605 West 47th Street, Suite 222
Kansas City, MO 64112
Phone: 816-221-2166
Email: office@TheMIP.org
<http://themip.org/>

Montana

Montana Innocence Project
P.O. Box 7607
Missoula, MT 59807
Phone: 406-544-6698
<http://www.mtinnoceproject.org/>

Nebraska

Nebraska Innocence Project
P.O. Box 24183
Omaha, NE 68124-0183
E-mail: neinnocenceproject@gmail.com
<http://www.nebraskainnocenceproject.org/>

Midwest Innocence Project

605 West 47th Street, Suite 222
Kansas City, MO 64113
Phone: 816-221-2166
Email: office@TheMIP.org
<http://themip.org/>

Nevada

Rocky Mountain Innocence Center
358 South 700 East, Box B235
Salt Lake City, UT 84102
Phone: 801-355-1888
E-mail: contact@rminnocence.org
<http://rminnocence.org/>

New Hampshire

New England Innocence Project
160 Boylston Street, #2
Boston, MA 02116
Phone: 617-830-7685
E-mail: intake@newenglandinnocence.org
<http://www.newenglandinnocence.org/>

New Jersey

Centurion Ministries
1000 Herrontown Road
Princeton, NJ 08540
Phone: 609-921-0334
Fax: 609-921-6919
<http://www.centurionministries.org/>

New Mexico

New Mexico Innocence and Justice Project
University of New Mexico School of Law
1117 Stanford Avenue
Albuquerque, NM 87131-0001
Phone: 505-277-2146
<http://lawschool.unm.edu/ijp/index.php>

New YorkInnocence Project

40 Worth St., Suite 701

New York, NY 10013

Phone: 212-364-5340

Fax: 212-364-5340

E-mail: info@innocenceproject.org<http://www.innocenceproject.org/>New York Law School Post-ConvictionInnocence Clinic

New York Law School

Legal Services

185 West Broadway

New York, NY 10013

Phone: 212-431-2813

The Exoneration Initiative

233 Broadway, Suite 2370

New York, NY 10279

Phone: 212-965-9335

Fax: 212-965-9375

E-mail: info@exi.org<http://exi.org/>**North Carolina**North Carolina Center on Actual Innocence

PO Box 52446, Shannon Plaza Station

Durham, NC 27717-2446

Phone: 919-489-3268

Fax: 919-489-3285

E-mail: admin@nccai.org<http://www.nccai.org/>Wrongful Convictions Clinic

Duke University Law School

Box 90362

Durham, NC 27708

Phone: 919-613-7241

Fax: 919-613-7262

<https://law.duke.edu/wrongfulconvictions/>North Carolina Innocence InquiryCommission

Administrative Office of the Courts

NC Innocence Inquiry Commission

P.O. Box 2448

Raleigh, NC 27602

Phone: 919-890-1580

Fax: 919-890-1937

Email: nciic@nccourts.org<http://www.innocencecommission-nc.gov/>**North Dakota**Minnesota Innocence Project

1536 Hewitt Avenue, MS-D2204

St. Paul, MN 55104

Phone: 651-523-3152

Fax: 651-523-3042

<http://www.ipmn.org/>**Ohio**Lois and Richard Rosenthal Institute for Justice: Ohio Innocence Project

University of Cincinnati College of Law

P.O. Box 210040

Cincinnati, OH 45221

Phone: 513-861-2946

Fax: 513-556-1236

<http://www.law.uc.edu/oip>Wrongful Conviction Project

Office of the Ohio Public Defender

Attn: Project Director, Joe Bodenhamer

250 East Broad Street, Suite 1400

Columbus, Ohio 43215

Phone: 614-466-5394

Fax: 800-686-1573

E-mail: wrongfulconviction@opd.ohio.gov[http://opd.ohio.gov/Trial-Services/Wrongful-](http://opd.ohio.gov/Trial-Services/Wrongful-Conviction-Project/)[Conviction-Project/](http://opd.ohio.gov/Trial-Services/Wrongful-Conviction-Project/)**Oklahoma**Oklahoma Innocence Project

800 N. Harvey Avenue

Oklahoma City, OK 73102

Phone: 405-208-6161

E-mail: innocence@okcu.edu<http://innocence.okcu.edu/>

Oklahoma Indigent Defense System

DNA Forensic Testing Program

P.O. Box 926

Norman, OK 73070

Phone: 405-801-2601

OregonOregon Innocence Project

P.O. Box 5248

Portland, Oregon 97208

Phone: 503-944-2270

E-mail: info@oregoninnocence.org<http://www.oregoninnocence.org/>**Pennsylvania**Pennsylvania Innocence Project

Temple University

Beasley School of Law

1515 Market Street, Suite 300

Philadelphia, PA 19102

Phone: 215-204-4255

E-mail: innocenceprojectpa@temple.edu<http://innocenceprojectpa.org/>**Puerto Rico**Puerto Rico Innocence Project

Universidad Interamericana de Puerto Rico

Facultad de Derecho

PO Box 70351

San Juan, PR 00936-70351

Phone: 787 751-1912 ext. 2000

Rhode IslandNew England Innocence Project

160 Boylston Street, #2

Boston, MA 02116

Phone: 617-830-7685

E-mail: intake@newenglandinnocence.org<http://www.newenglandinnocence.org/>**South Carolina**Innocence Project

40 Worth St., Suite 701

New York, NY 10013

Phone: 212-364-5340

Fax: 212-364-5341

<http://www.innocenceproject.org/>**South Dakota**Minnesota Innocence Project

1536 Hewitt Avenue, MS-D2204

St. Paul, MN 55104

Phone: 651-523-3152

Fax: 651-523-3042

<http://www.ipmn.org/>**Tennessee**Innocence/Wrongful Convictions Clinic

University of Tennessee College of Law

Suite 83

1505 W. Cumberland Ave.

Knoxville, Tennessee 37996-1810

Phone: 865-974-2331

Fax: 865-974-6782

<http://law.utk.edu/clinics/innocence/>**Texas**Innocence Project of Texas

1511 Texas Ave

Lubbock, Texas 79401

Phone: 806-744-6525

Fax: 806-744-6480

Email: info@ipoftexas.org<http://www.ipoftexas.org/>Texas Innocence Network

100 Law Center

Houston, TX 77204-6060

Email: CJI@uh.edu<http://texasinnocencenetwork.com/>Texas Center for Actual Innocence

University of Texas School of Law

727 East Dean Keeton Street

Austin, TX 78705

<https://law.utexas.edu/tcai/>Thurgood Marshall School of Law Innocence Project

3100 Cleburne Street

Houston, TX 77004

Phone: 713-313-1139

http://www.tsulaw.edu/centers/eci/featured/innocence_project.html/

UtahRocky Mountain Innocence Center

358 South 700 East, Box B235

Salt Lake City, UT 84102

Phone: 801-355-1888

E-mail: contact@rminnocence.org

<http://rminnocence.org/>

VermontNew England Innocence Project

160 Boylston Street, #2

Boston, MA 02116

Phone: 617-830-7685

E-mail: intake@newenglandinnocence.org

<http://www.newenglandinnocence.org/>

VirginiaMid-Atlantic Innocence Project

George Washington University Law School

2000 H Street, NW

Washington, DC 20052

Phone: 202-994-4856

E-mail: cfiscella@exonerate.org

<http://www.exonerate.org/>

Innocence Project at UVA School of Law

580 Massie Rd.

Charlottesville, VA 22903

Phone: 434-924-3732

<http://www.law.virginia.edu/html/academics/practical/innocenceclinic.htm>

WashingtonInnocence Project Northwest

University of Washington School of Law

William H. Gates Hall, P.O. Box 85110

Seattle, WA 98145-1110

Phone: 206-616-8792

<http://www.ipnw.org/>

West VirginiaInnocence Project

West Virginia University College of Law

P.O. Box 6130

Morgantown, WV 26506

Phone: 304-293-7249

<http://wvinnocenceproject.wvu.edu/>

WisconsinWisconsin Innocence Project

Frank J. Remington Center

University of Wisconsin Law School

975 Bascom Mall

Madison, WI 53706-1399

Phone: 608-265-1160

Fax: 608-263-3380

<http://law.wisc.edu/fjr/clinicals/ip/>

WyomingRocky Mountain Innocence Center

358 South 700 East, Box B235

Salt Lake City, UT 84102

Phone: 801-355-1888

E-mail: contact@rminnocence.org

<http://rminnocence.org/>

CHAPTER 12

APPEALING YOUR CONVICTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

A. Introduction

Many incarcerated people appeal their convictions based on a claim of “ineffective assistance” of counsel. A successful claim of ineffective assistance requires two things. First, your lawyer must have performed so badly that they failed to follow professional standards while representing you.¹ Second, there must be a “reasonable probability” that your lawyer’s poor representation negatively affected the outcome of your case.² The right to effective counsel comes from the Sixth and Fourteenth Amendments of the U.S. Constitution. If you are in New York State, Article I, Section 6 of the New York State Constitution also protects the right to effective assistance of counsel.³ There are different reasons that counsel can be found ineffective, and there are different ways to appeal your conviction based on the claim that your counsel was ineffective. This Chapter summarizes how to bring these claims, but other *JLM* chapters, listed in Footnote 3, can give you more detailed information.

B. Ways to Claim Ineffective Assistance of Counsel

There are three general ways to attack your conviction: direct post-conviction appeal, state post-conviction appeal, and a federal and/or state habeas corpus claim. Other *JLM* Chapters cover each of these topics in more depth.⁴ In New York, if you are appealing your conviction based on ineffective assistance of counsel that occurred during your trial, you should do this by first raising your claim (1)

1. See *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984) (“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”).

2. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). It is important to note that the “outcome” that might be negatively affected by attorney ineffectiveness is not limited to the trial outcome. For example, you might claim that your lawyer’s ineffectiveness caused you to proceed to trial when you should have accepted a plea, or to accept a plea when you should have gone to trial. See *Lafler v. Cooper*, 556 U.S. 156, 174, 132 S. Ct. 1376, 1391, 182 L. Ed. 2d 398, 414 (2012) (holding that there was a reasonable probability that the defendant would have accepted a guilty plea and received a lower minimum sentence but for his counsel’s deficient performance). Or you might claim that your lawyer’s ineffectiveness caused you to not accept a plea deal that you otherwise might have accepted. See *Missouri v. Frye*, 566 U.S. 134, 150, 132 S. Ct. 1399, 1411, 182 L. Ed. 2d 379, 393 (2012) (“There appears to be a reasonable probability Frye would have accepted the prosecutor’s original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor.”).

3. Even if you do not live in New York, your state’s constitution may also provide the right to effective counsel. Regardless of whether your state’s constitution has a provision regarding the right to counsel, the 6th and 14th Amendments of the U.S. Constitution give you a federal right to effective counsel.

4. Review the following Chapters of the *JLM* for more information: Chapter 9, “Appealing Your Conviction or Sentence” (direct appeals); Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence” (state post-conviction appeals); Chapter 13, “Federal Habeas Corpus” (federal habeas corpus claims); and Chapter 21, “State Habeas Corpus: Florida, New York, and Michigan” (state habeas corpus claims).

in your direct appeal in state court,⁵ and then (2) in your federal habeas corpus petition.⁶ If you are filing a claim in New York State court there may not be enough facts in the record to let the court review an ineffectiveness claim on appeal. In these situations, you should also file an Article 440 motion in New York State court.⁷ It is important to note that there is no Sixth Amendment right to counsel before you are actually charged with a crime, so you can only claim that your lawyer was ineffective *after* charges were brought against you (and not before that point).⁸

You have the right to have effective counsel during a direct post-conviction appeal, which is your first appeal after your conviction.⁹ A finding that you had ineffective counsel during your first appeal can lead to a “*de novo*” (new) appeal and, sometimes, a reversal of your conviction.¹⁰ If you are appealing your conviction based on ineffective counsel during your first appeal, you should file the appropriate post-conviction motion in your state court, or file a federal habeas corpus petition in federal district court. To file an ineffective appellate counsel claim in New York State court, you must

5. In New York, an ineffective assistance claim that is based only on the trial record must be made on direct appeal. *See* *People v. Love*, 57 N.Y.2d 998, 1000, 443 N.E.2d 486, 487, 457 N.Y.S.2d 238, 239 (1982) (quoting *People v. Jones*, 55 N.Y.2d 771, 773, 431 N.E.2d 967, 968, 447 N.Y.S.2d 242, 243 (1981)) (“Here . . . we cannot conclude that defendant’s counsel was ineffective simply by reviewing the trial record without the benefit of additional background facts that ‘might have been developed had an appropriate after-judgment motion been made’ pursuant to CPL 440.10.”); *People v. Brown*, 45 N.Y.2d 852, 853, 382 N.E.2d 1149, 1149, 410 N.Y.S.2d 287, 287 (1978) (stating that “[g]enerally, the ineffectiveness of counsel is not demonstrable on the main record, but in this case it is”); *People v. Terry*, 44 A.D.3d 1157, 1159, 845 N.Y.S.2d 145, 147 (3d Dept. 2007) (holding that defendant must raise his ineffective assistance claim on direct appeal rather than in an Article 440 motion because defendant’s allegations could have been raised on direct appeal, citing CPL 440.10(2)(b)). However, ineffective assistance of counsel claims are “generally not reviewable on direct appeal” when they involve facts outside the scope of the record and must first be brought through a CPL 440.10 motion so that the facts may be sufficiently developed for review. *People v. Medina-Gonzalez*, 116 A.D.3d 519, 520, 983 N.Y.S.2d 554, 556 (1st Dept. 2014).

6. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 697–698, 106 S. Ct. 2052, 2070, 80 L. Ed. 2d 674, 700 (1984) (stating that the “principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial” and that a state court’s finding of effective assistance is “not a finding of fact binding on the federal court to the extent stated by 28 U. S. C. § 2254(d).”).

7. For claims of ineffective assistance of trial counsel, an Article 440 motion, not a state habeas corpus petition, is the appropriate procedural method in New York State. *See* Chapter 20 of the *JLM*, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence,” for further discussion of Article 440. A state habeas corpus petition may be the appropriate procedure in other states. *See, e.g., Corzo v. State*, 806 So. 2d 642, 645 (Fla. Dist. Ct. App. 2002) (“The general rule is that a claim of ineffective assistance of counsel may not be raised on direct appeal.”)

8. *Moran v. Burbine*, 475 U.S. 412, 431, 106 S. Ct. 1135, 1146, 89 L. Ed. 2d 410, 427 (1986) (holding that “the Sixth Amendment right to counsel does not attach until after the initiation of formal charges”); *People v. Claudio*, 83 N.Y.2d 76, 80–81, 629 N.E.2d 384, 386, 607 N.Y.S.2d 912, 914 (1993) (holding the right to effective counsel under both the U.S. Constitution and the New York State Constitution does not attach until the start of adversarial judicial proceedings). However, note that some state constitutions grant broader rights to counsel than the U.S. Constitution. *See, e.g., People v. McCauley*, 645 N.E.2d 923, 929, 163 Ill. 2d 414, 423–424, 206 Ill. Dec. 671, 677 (1994) (giving a broader reading to article 1, section 10 of the Illinois Constitution than the 5th Amendment right against self-incrimination as discussed in *Moran v. Burbine*). Also, you have a right to counsel under the 5th Amendment if you are interrogated while in custody. *See Miranda v. Arizona*, 384 U.S. 436, 469, 86 S. Ct. 1602, 1625, 16 L. Ed. 2d 694, 721 (1966) (“[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.”). But that right may not include the right to *effective* counsel. *See Sweeney v. Carter*, 361 F.3d 327, 333 (7th Cir.) (“[T]he Supreme Court has not mentioned effective assistance of counsel (in the *Strickland* sense) and the Fifth Amendment in the same breath, let alone set forth a clearly established right to that effect.”).

9. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) (establishing that the defendant’s 14th Amendment right to effective counsel during trial extends to a first appeal).

10. *See, e.g., McHale v. United States*, 175 F.3d 115, 119–121 (2d Cir. 1999) (reinstating appeal upon finding that appellate counsel’s ineffectiveness caused dismissal of original appeal).

file a “*coram nobis* motion”¹¹ in the court where the first appeal was filed,¹² but you should note that each state has its own state post-conviction appeals procedure.¹³

If your direct post-conviction appeal fails, you may make additional appeals—referred to as state post-conviction appeals. You should note, however, there is no federal constitutional right to counsel for these additional appeals; that right only applies on direct appeal. Therefore, the U.S. Constitution does not grant you the right to raise a claim of ineffective counsel in state post-conviction proceedings.¹⁴ However, even though the federal constitution does not grant this right, some *states* do grant the right to counsel in state post-conviction proceedings, and some states allow courts to require effective counsel in state post-conviction proceedings when it is in the interest of justice.¹⁵ If you are in a state that gives you a right to counsel in state post-conviction proceedings, you may also have a right to effective representation in those hearings.¹⁶

You must raise your ineffective counsel claims within the proper time and with the proper procedures. If your claim is not raised during the proper time and with the proper procedures, it could be dismissed. In federal court, and in many states, you should *not* raise an ineffective assistance claim on direct appeal because the trial record usually does not contain enough information to evaluate the claim. Instead, you should make the claim in a *collateral (separate) proceeding*, allowing the trial court to hear testimony specifically about the adequacy of your representation. In such a collateral proceeding, you can also argue that the lawyer for your appeal was ineffective for not raising an ineffectiveness claim regarding your trial lawyer. If you had the same lawyer at trial and on direct appeal, failure to raise an ineffectiveness claim on direct appeal does not prevent you from raising the claim in a post-conviction proceeding.¹⁷ But in some states like New York, an ineffective assistance

11. A “*coram nobis* motion” is a motion to restore you to a pre-conviction status, alleging a wrongful conviction.

12. See *People v. Bachert*, 69 N.Y.2d 593, 509 N.E.2d 318, 323, 600, 516 N.Y.S.2d 623, 628 (1987) (holding that a claim of ineffective assistance of counsel must be filed “in the appellate tribunal which considered the primary appeal.”).

13. In most states, ineffective appellate counsel can be raised as part of your state post-conviction motion, but you should check your state’s laws. See, e.g., *State v. Davis*, 894 N.E.2d 1221, 1224, 119 Ohio St. 3d 422, 425 2008 Ohio 4608, ¶ 13 (2008) (holding Ohio statute requires ineffective appellate counsel claims be made only to the state appellate court, rather than to the trial court in a post-conviction petition). For information on *coram nobis* motions, see Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence.”

14. See *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272, 282 (2012) (holding that a federal habeas court may only excuse a failure to raise an ineffective assistance of counsel claim in state post-conviction proceedings in “narrow” circumstances); see also *Murray v. Giaratano*, 492 U.S. 1, 7–10, 109 S. Ct. 2765, 2768–2771, 106 L. Ed. 2d 1, 9–11 (1989) (holding that the right to effective counsel at trial and during the initial appeal does not apply to discretionary state post-conviction proceedings).

15. For example, the Alaska post-conviction statute provides for counsel in one post-conviction appeal. See Alaska Stat. § 18.85.100(c) (2009). Florida does not provide a statutory right, but the court may determine in the interest of justice whether, given the facts of the case, the incarcerated person should have the assistance of counsel. See *State v. Weeks*, 166 So. 2d 892, 897 (Fla. 1964) (“Each case must be decided in the light of 5th Amendment Due Process requirements.”). You should research your state’s post-conviction laws and relevant case law to see if such a right exists in your state.

16. See, e.g., *Lozada v. Warden*, 613 A.2d 818, 821–824, 223 Conn. 834, 838–843 (1992) (finding that a statutory right to counsel on a habeas petition encompassed right to effective counsel, which could be vindicated by means of a second habeas petition); *Moore v. Commonwealth*, 199 S.W.3d 132, 139 (Ky. 2006) (reinstating appeal from denial of post-conviction relief, on grounds that statutory right to post-conviction counsel included right to competent counsel, but cautioning that “[o]ur holding . . . should not be construed as sanctioning” the filing of a subsequent post-conviction motion based on previous post-conviction counsel’s ineffectiveness).

17. *Massaro v. United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003) (holding “that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding . . . whether or not the petitioner could have raised the claim on direct appeal”); see also *United States v. Martinez*, 136 F.3d 972, 979 (4th Cir. 1998) (“A [federal] defendant can raise the claim of ineffective assistance of counsel . . . by a collateral challenge pursuant to [federal habeas corpus].”); *People v. Dor*, 132 Misc. 2d 568, 569–570, 505 N.Y.S.2d 317, 319 (Sup. Ct. Kings County 1986) (holding that, in an Article 440 motion, a defendant cannot

claim that can be decided based on the trial record alone must be made in the direct appeal.¹⁸ In those cases, you are barred from raising it in a post-conviction motion.¹⁹ Be sure to check the laws in your state for the proper procedure.

Note that claiming ineffective assistance of counsel means that you give up some of your attorney-client confidentiality privileges with that attorney.²⁰ This means that once you file an ineffective counsel claim against your lawyer, your lawyer can then sometimes reveal information about your case that otherwise would be kept secret. For example, your lawyer could cooperate with the prosecution by turning over case files, or even testifying for the prosecution against you.

make further attacks on “any issues that were raised or could have been raised in the appeal,” but could claim ineffective assistance, which is “an issue that could not possibly be raised in an appeal by the same counsel”).

18. In a New York claim, courts have said that an Article 440 motion is usually the correct way to raise an ineffective assistance of counsel claim. *People v. Brown*, 45 N.Y.2d 852, 853–854, 382 N.E.2d 1149, 1149–1150, 410 N.Y.S.2d 287, 287 (1978) (“Generally, the ineffectiveness of counsel is not demonstrable on the main record Consequently, in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10.”); *see also* *People v. Medina-Gonzalez*, 116 A.D. 3d 519, 520, 983 N.Y.S.2d 554, 556 (1st Dept. 2014) (finding the record insufficient to resolve the issue of counsel’s ineffectiveness and explaining that a defendant seeking to bring ineffective assistance of counsel claims where the record is insufficient must use the CPL 440.10 motions to expand the record before the court can consider the issue). If matters outside of the trial record must be examined, such as reasons for counsel’s actions, New York courts require you to raise an ineffective counsel claim in an Article 440 motion, rather than in a motion to set aside the verdict or in a direct appeal. *See* *People v. Love*, 57 N.Y.2d 998, 1000, 443 N.E.2d 486, 487, 457 N.Y.S.2d 238, 239 (1982) (rejecting a claim for ineffective assistance of counsel but suggesting that the court might have found otherwise, if defendant had introduced additional evidence following an Article 440 motion); *People v. Monroe*, 52 A.D.3d 623, 623, 860 N.Y.S.2d 564, 565 (2d Dept. 2008) (“To the extent that the defendant’s claim of ineffective assistance of counsel . . . [goes beyond] the record, . . . it may not be reviewed on direct appeal.”); *People v. Bagarozzy*, 182 A.D.2d 565, 566, 582 N.Y.S.2d 424, 425 (1st Dept. 1992) (“The appropriate vehicle by which to allege ineffective assistance of counsel grounded in allegations referring to facts outside of the trial record is pursuant to CPL 440.10, where matters . . . [beyond] the record may be considered.”); *People v. Garcia*, 187 A.D.2d 868, 868, 590 N.Y.S.2d 565, 566 (3d Dept. 1992) (rejecting an ineffective assistance of counsel claim because the new evidence that defendant wished to introduce was not properly submitted under an Article 440 motion). You can use an Article 440 motion to raise claims that are based on information in the record, but in such a case you must have first made the claim in your direct appeal. N.Y. CRIM. PROC. LAW § 440.10(3)(b)–(c) (McKinney 2009). *See* Chapter 13 of the *JLM*, “Federal Habeas Corpus,” for an additional explanation of barred claims, and Chapter 20 of the *JLM*, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence,” for more on how to file an Article 440 motion.

19. *See, e.g.,* *Nixon v. Epps*, 405 F.3d 318, 323 (5th Cir. 2005) (holding that a Mississippi statute, requiring defendant to raise ineffective assistance claim on direct review when he uses a different counsel, created an “adequate and independent” procedural default when defendant failed to comply on direct appeal); *Guinan v. United States*, 6 F.3d 468, 471 (7th Cir. 1993); *Alston v. Donnelly*, 461 F. Supp. 2d 112, 123 (W.D.N.Y. 2006) (“[W]here the record is sufficient to allow appellate review of a[n ineffective assistance of counsel] claim, the failure to raise that claim on appeal precludes subsequent collateral review.”); *People v. Jossiah*, 2 A.D.3d 877, 877, 769 N.Y.S.2d 743, 743 (2d Dept. 2003) (per curiam) (“[Since the] record . . . clearly presented sufficient facts from which the defendant could have raised his [ineffective assistance claim] . . . on direct appeal, it could not be raised on the CPL 440.10 motion.”). *But see* *Hartman v. Bagley*, 492 F.3d 347, 357–358 (6th Cir. 2007) (holding that although Ohio’s statute provided “adequate and independent” grounds to bar ineffective assistance claims in collateral proceedings, it did not apply to defendant’s claim that relied on information outside of the trial record).

20. MODEL RULES OF PROF’L CONDUCT 1.6(b)(5) (AM. BAR ASS’N 2004) (allowing a lawyer to “reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer’s representation of the client”); STANDARDS FOR CRIMINAL JUSTICE § 4-9.6(d) (AM. BAR ASS’N 4th ed. 2015) (“Defense counsel whose conduct in a criminal case is drawn into question is permitted to testify concerning the matters at issue, and is not precluded from disclosing the truth concerning the matters raised by his former client, even though this involves revealing matters which were given in confidence.”). Note that this is not a complete waiver of confidentiality and does not allow for complete disclosure.

C. How to Prove Ineffective Assistance of Counsel

As discussed above, there is a federal right to effective counsel and, in many states, a separate state right as well. The federal and New York State standards for ineffective counsel are discussed below. If you were convicted in a state other than New York, you should research your state's constitution and laws to find out whether there is a different state standard for ineffective assistance of counsel that you can argue was not met at trial.²¹ You should *always* raise ineffective assistance of counsel as a federal constitutional claim, even if you are also claiming a violation of state guarantees to effective assistance of counsel. This is because if you do not present the claim as a federal constitutional violation at this point, you may not be able to do so in a later federal habeas corpus petition.²²

1. The Federal Standard

The standard for ineffective assistance of counsel under the U.S. Constitution is the same no matter where you are. There are three ways you can make an ineffective counsel claim under federal law: you can claim (1) that your lawyer was actually ineffective, (2) constructively ineffective, or (3) that he had a conflict of interest that caused him to be actually ineffective. Each claim requires you to prove different things, which are detailed below.

(a) Actual Ineffectiveness: The *Strickland* Test

To claim that your lawyer was actually ineffective, you must pass the two-part *Strickland* test.²³ The first part of this test, the “deficient performance” prong, requires you to prove that your lawyer’s performance was “deficient.”²⁴ For this part, the court decides whether your lawyer’s representation fell below an “objective standard of reasonableness.”²⁵ This means the court looks to see if your lawyer acted in a way that most other lawyers would think is acceptable. Since this standard can apply differently in different situations, you must identify the specific things your lawyer did that were so bad that you were effectively deprived of your right to counsel.²⁶ You cannot simply say that you had a bad lawyer or that your lawyer did not do enough to help you. You must point to the specific things your lawyer did poorly—or did not do at all, like failing to cross examine a witness at all—and show that these failures made their representation of your case fall below the professional standards for lawyers.

If the court finds your lawyer’s representation fell below this objective standard of reasonable lawyering (that it was deficient), you will have satisfied the first part of the *Strickland* test. The court will then apply the second part of the *Strickland* test. The second part, the “prejudice prong,” requires

21. For more information on legal research, see *JLM*, Chapter 2, “Introduction to Legal Research.”

22. For more information on filing a federal habeas corpus claim, see *JLM*, Chapter 13, “Federal Habeas Corpus.”

23. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (establishing federal standard for ineffective assistance of counsel); see also *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009) (finding counsel’s decision not to pursue insanity defense was not deficient or prejudicial because it was reasonable to believe that the defense would fail).

24. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (describing “deficient performance” prong).

25. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). These basic professional standards could include, but are not limited to: a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant’s cause, a duty to consult with defendant on important decisions and to keep defendant informed of important developments during the prosecution, and a duty to use the level of skill and knowledge that make the trial truly adversarial. See *Strickland v. Washington*, 466 U.S. 668, 688–689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984) (outlining these duties but noting that they “neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance”).

26. See *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984) (stating that in deciding an ineffectiveness claim, a judge will look at the reasonableness of counsel’s conduct based on facts of the particular case, viewed at the time of the counsel’s conduct).

you to prove there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”²⁷ This means that you not only have to point out what your lawyer did wrong, but you also have to show that your lawyer’s actions hurt you and possibly changed the outcome of your case. You can only win on an ineffective counsel claim if you can satisfy both parts of the test.²⁸ You should remind the court that the Supreme Court has specifically said that the “prejudice prong” requires you to show only a “reasonable probability” of a different result, and you do not have to prove that your lawyer’s errors “more likely than not altered the outcome” of your trial.²⁹

Ineffective counsel claims are some of the most difficult claims to plead successfully because of the second part of the *Strickland* test. Courts usually do not find that an attorney’s behavior affected a trial so strongly that the outcome is unreliable. When you are making an ineffective counsel claim, you should ask the court to consider the total effect of all of your lawyer’s errors.³⁰ Try to find cases where defendants successfully made claims based on facts similar to yours and argue your claim in a similar way. Unfortunately, for every successful ineffective counsel claim, there are many others that do not win. So, be aware of recent cases that work against you and try to point out how those cases are different from your case.

(b) Constructive Ineffectiveness: The *Cronic* Standard

If you cannot establish that your lawyer was actually ineffective under the *Strickland* test (above), the second type of ineffective assistance of counsel claim available under the U.S. Constitution is a “constructive denial” of assistance claim as described in *United States v. Cronic*.³¹ You can claim constructive ineffective assistance if the circumstances of your trial were so unfair that ineffective assistance and prejudice can be presumed.³² This means that under the *Cronic* standard, unlike the *Strickland* test, you do not have to prove that there was actual prejudice. This is important because,

27. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984); *see also Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 696 (1984) (holding that “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment”); *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471, 493 (2003) (“In assessing prejudice [in a capital case], we reweigh the evidence in aggravation against the totality of available mitigating evidence.”); *Williams v. Taylor*, 529 U.S. 362, 390–391, 120 S. Ct. 1495, 1511–1512, 146 L. Ed. 2d 389, 416 (2000) (holding that analysis of the prejudice prong should focus solely on whether there was reasonable probability that but for counsel’s errors, the result of the proceeding would have been different).

28. *See Strickland v. Washington*, 466 U.S. 668, 700, 104 S. Ct. 2052, 2071, 80 L. Ed. 2d 674, 702 (1984) (holding that “[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim”).

29. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 697 (1984).

30. *See, e.g., Ray v. Thomas*, Civil Action No. 11-0543-WS-N, 2013 U.S. Dist. LEXIS 138780, at *239–240 (S.D. Ala. Sept. 26, 2013) (*unpublished*) (explaining that a petitioner may raise a cumulative error claims if he raises them early enough), *aff’d sub nom. Ray v. Ala. Dept. of Corr.*, 809 F.3d 1202 (11th Cir. 2016); *Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006) (stating that in determining prejudice under the *Strickland* test, the “Court examines the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case”). *But see Stalnaker v. Bobby*, 589 F. Supp. 2d 905, 915 n.8 (N.D. Ohio 2008) (noting that while the Supreme Court precedent has not held that distinct constitutional claims can be cumulated to grant habeas relief, 6th Circuit precedent has considered whether the cumulative effects of all acts of counsel are constitutionally deficient in ineffective assistance of counsel claims).

31. *United States v. Cronic*, 466 U.S. 648, 658–660, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d. 657, 667 (1984) (recognizing potential for constructive denial where performance of counsel deprived defendant of a fair trial by not subjecting witnesses to effective cross-examination).

32. *United States v. Cronic*, 466 U.S. 648, 661, 104 S. Ct. 2039, 2048, 80 L. Ed. 2d. 657, 669 (1984) (noting that “surrounding circumstances [may] make it so unlikely that any lawyer could provide effective assistance that ineffectiveness ... [may be] properly presumed without inquiry into actual performance at trial”); *see also Powell v. Alabama*, 287 U.S. 45, 57–58, 53 S.Ct. 55, 60, 77 L.Ed. 158, 164 (1932).

as mentioned above, having to show prejudice under the second part of *Strickland* are often difficult to prove to a court.

The *Cronic* standard applies in three situations.³³ First, prejudice may be presumed if you were completely denied counsel during a “critical stage” of your trial—meaning that you had no counsel present at all.³⁴ Second, you can claim ineffective assistance under *Cronic* if your lawyer “entirely fails to subject the prosecution’s case to meaningful adversarial testing.”³⁵ Your lawyer’s failure to test the state’s case must have been “complete,” meaning she put up no opposition whatsoever.³⁶ Third, you can also make a *Cronic* claim if the circumstances of your trial made it highly unlikely that any lawyer could have provided effective assistance to you.³⁷ If your case falls within this third situation, you do not have to prove that your lawyer’s trial performance was deficient.

(c) Conflict of Interest

In addition to actual and constructive ineffectiveness claims, you can also argue that your lawyer provided ineffective assistance due to a conflict of interest. To establish that your lawyer had a conflict of interest, you must show that she had an actual conflict of interest that “adversely affected” her work.³⁸ For example, a conflict of interest can exist when one lawyer represents more than one co-defendant for the same crime.³⁹ The conflict must be actual, not just potential. This means that your

33. *United States v. Cronic*, 466 U.S. 648, 659–662, 104 S. Ct. 2039, 2047–2048, 80 L. Ed. 2d. 657, 668–670 (1984) (describing cases in which ineffective assistance and prejudice may be presumed); *see also* *Bell v. Cone*, 535 U.S. 685, 695–698, 122 S. Ct. 1843, 1850–1852, 152 L. Ed. 2d 914, 927–929 (2002) (recognizing *Cronic*’s holding that prejudice may be presumed in the three situations identified).

34. *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668 (1984); *see, e.g.,* *Wright v. Van Patten*, 552 U.S. 120, 125–126, 128 S. Ct. 743, 746–747, 169 L. Ed. 2d 583, 588–589 (2008) (per curiam) (holding counsel’s participation in plea hearing by speakerphone should not be treated as complete denial of counsel); *Rickman v. Bell*, 131 F.3d 1150, 1156–1160 (6th Cir. 1997) (affirming judgment of ineffective assistance where counsel had abandoned defendant’s interests by repeatedly expressing contempt for client at trial and portraying client as crazy and dangerous, effectively acting as a second prosecutor); *Javor v. United States*, 724 F.2d 831, 833–834 (9th Cir. 1984) (finding prejudice inherent when counsel slept through much of the trial). *But see* *Tippins v. Walker*, 77 F.3d 682, 684–687 (2d Cir. 1996) (holding ineffective assistance claim should be judged under *Strickland* when counsel slept through the trial).

35. *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668 (1984).

36. *Bell v. Cone*, 535 U.S. 685, 697–698, 122 S. Ct. 1843, 1851–1852, 152 L. Ed. 2d 914, 928–929 (2002) (holding counsel’s failure to produce mitigating evidence and waiver of closing argument did not constitute a complete failure to test the prosecutor’s case and that *Strickland* applied rather than *Cronic*). This is a difficult standard to meet. For example, counsel’s decision to concede guilt in a capital trial and focus instead on the sentencing phase, even though his client entered a “not guilty” plea, is not automatically a complete failure to subject the prosecution’s case to adversarial testing. *Compare* *Florida v. Nixon*, 543 U.S. 175, 189, 125 S. Ct. 551, 561, 160 L. Ed. 2d 565, 579 (2004) (“The Florida Supreme Court’s erroneous equation of [counsel’s] concession strategy to a guilty plea led it to ... [wrongly apply the *Cronic* standard] in determining whether counsel’s performance ranked as ineffective assistance.”), *with* *State v. Carter*, 14 P.3d 1138, 1148, 270 Kan. 426, 441 (2000) (finding a “breakdown in the our adversarial system of justice” when counsel premised defense on defendant’s guilt against his client’s wishes).

37. *Compare* *Powell v. Alabama*, 287 U.S. 45, 56–58, 53 S. Ct. 55, 59–60, 77 L. Ed. 158, 164–165 (1932) (finding a denial of effective counsel when defendants, who were “young, ignorant, illiterate, [and] surrounded by hostile sentiment,” were tried for a capital offense, and when defense counsel was designated only minutes before their trials began and thus had no opportunity to investigate the facts or to prepare), *with* *United States v. Cronic*, 466 U.S. 648, 658–667, 104 S. Ct. 2039, 2046–2051, 80 L. Ed. 2d. 657, 667–673 (1984) (rejecting defendant’s constructive ineffective assistance argument based on counsel’s lack of experience in criminal law or jury trials, and 25-day preparation time).

38. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 348 (1980); *see also* *United States v. Iorizzo*, 786 F.2d 52, 57–58 (2d Cir. 1986) (applying *Cuyler* and finding that defendant’s trial counsel had a conflict of interest because he had previously represented the state’s key witness on a related matter and failed to effectively cross examine this witness after the trial judge had told counsel that he might encounter ethical problems if he pursued certain lines of questioning).

39. A conflict of interest may also arise in other situations, including: if your lawyer represented a

lawyer must have taken some action, or refrained from acting in some way, which harmed you and benefited the other person.⁴⁰ You do not have to show prejudice if your lawyer had an actual conflict of interest that adversely affected you; instead, prejudice is presumed.

2. New York State Standard

In addition to your federal right to effective counsel, New York state courts have said that you are entitled to “meaningful representation” under Article I, Section 6 of the New York State Constitution.⁴¹ This means that in New York, you must show that your lawyer’s failures harmed you so much that you did not have meaningful representation at trial.⁴² Meaningful representation does not mean that your attorney made no mistakes. It means that your lawyer provided good enough representation to satisfy the court that you were properly represented.⁴³

3. Using a Claim of Ineffectiveness to Save a Procedurally Defaulted Claim

Ineffective assistance of counsel claims can be very useful because they can allow you to present claims that would otherwise be prohibited. As the various Chapters on attacking your conviction explain, many issues must be “preserved” in order to be appealed.⁴⁴ Usually, if you or your lawyer did not raise certain issues during your trial, you cannot raise them on appeal because they were not “preserved.” But, even if an issue was never raised and preserved during your trial, it can often still

government or defense witness in a related trial, if the victim was a client of your lawyer, or if your lawyer collaborated or had a connection with the prosecution. *See, e.g.,* Perillo v. Johnson, 205 F.3d 775, 808 (5th Cir. 2000) (finding actual conflict existed when counsel represented a co-defendant cooperating with the state as witness against the accused); United States v. O’Leary, 806 F.2d 1307, 1315 (7th Cir. 1986) (holding actual conflict existed when counsel was prosecutor’s campaign manager for State’s Attorney election, and counsel colluded with prosecutor and a police officer to get defendant to retain him because it would be good for the campaign).

40. *See, e.g.,* Burger v. Kemp, 483 U.S. 776, 783–785, 107 S. Ct. 3114, 3120–3121, 97 L. Ed. 2d 638, 650–651 (1987) (holding that petitioner failed to show actual conflict when his lawyer’s partner was appointed to represent co-defendant, because “defendants may actually benefit from the joint efforts of two partners who supplement one another in their preparation”); Edens v. Hannigan, 87 F.3d 1109, 1116 (10th Cir. 1996) (holding actual conflict of interest existed when counsel made no effort to present a defense for client because it would have harmed co-defendant); Burden v. Zant, 24 F.3d 1298, 1305–1307 (11th Cir. 1994) (finding ineffective assistance where counsel, representing two co-defendants, made an agreement with the prosecutor that one co-defendant would testify against the other in exchange for not prosecuting that co-defendant); Dawan v. Lockhart, 31 F.3d 718, 721–722 (8th Cir. 1994) (finding ineffective counsel where a public defender also represented co-defendant who had pleaded guilty and made statements tying the client to the crime).

41. *People v. Baldi*, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981) (“So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.”).

42. If you are in a state other than New York, your state may have an independent source for the right to effective counsel and/or a different standard for proving ineffective counsel. You should research successful ineffective counsel claims in your state and look at what standard the courts use.

43. *See People v. Benevento*, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998) (holding that the New York State Constitution guarantees meaningful but not perfect representation, and that representation does not have to be “errorless”) (*quoting* *People v. Aiken*, 45 N.Y.2d 394, 398, 380 N.E.2d 272, 274, 408 N.Y.S.2d 444, 447 (1978)); *see also* *People v. Droz*, 39 N.Y.2d 457, 462, 348 N.E.2d 880, 882–883, 384 N.Y.S.2d 404, 407 (1976) (finding improper representation where a lawyer failed to adequately prepare for trial, did not communicate with his client in a timely manner, made almost no attempt to contact potential witnesses, and neglected to study the record); *but see* *People v. Young*, 116 A.D.2d 922, 923, 498 N.Y.S.2d 667, 669 (3d Dept.) (noting that the standards from *People v. Baldi* and *People v. Droz* only apply to ineffective assistance during trial; evaluation of attorney performance is measured differently when the defendant has entered a guilty plea).

44. *See JLM*, Chapter 9, “Appealing Your Conviction or Sentence,” regarding preservation of claims; *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence,” regarding errors of record in the trial; and *JLM*, Chapter 13, “Federal Habeas Corpus,” regarding procedural default.

be raised as part of an ineffective counsel claim.⁴⁵ In other words, the fact that your lawyer did not raise certain issues during trial can be used as evidence that he did not effectively represent you.

Ineffective assistance claims are also useful in “procedural default” situations. “Procedural default” happens when your claim is kept out of federal court because you have not followed all the procedures in your state. In procedural default situations, federal courts will not hear your claim because you did not follow state procedures. If your claim has been procedurally defaulted, you can often raise it as an ineffective counsel claim instead.⁴⁶ For example, you can argue that the jury was selected in a racially discriminatory manner because your lawyer failed to object. In addition, if any court has held that you have a procedurally defaulted claim, you can argue that your lawyer’s ineffectiveness was the “cause” of the default.⁴⁷ As a general rule of thumb, if you are raising a claim for the first time that should have been raised earlier, you should allege that you did not raise the claim earlier because your attorney was ineffective.

To include a prohibited claim (a claim that is not preserved or is procedurally defaulted) in an ineffective assistance of counsel claim, you must state the issue by saying your lawyer was ineffective for not properly arguing your claim. For example, if the wrong jury instructions were given at trial, but that claim is prohibited because it was not raised at trial or “preserved,” you can claim that your attorney was ineffective for not objecting to the jury instructions. Remember, you still must prove that your attorney’s mistake deprived you of your right to counsel because it negatively affected your trial. This means you must show both that (1) by not objecting to the instructions, your attorney performed below the standard attorneys are judged by; and (2) by not objecting, your attorney lost a chance to argue a claim that would have succeeded.

Here is an example of how to include a prohibited claim in an ineffective counsel claim. Suppose you believe that your jury was selected in a racially discriminatory manner, but this issue was not raised at trial or on direct appeal and is now prohibited. You can follow these possible steps:

- (1) Argue that your lawyer failed to object to the way in which the jury was selected and also failed to select a racially unbiased jury. Argue that your lawyer’s failure to correct or object to the discriminatory jury selection fell below the reasonable standard of performance for attorneys;
- (2) Argue that this failure of your attorney meant that you had a racially biased jury and, because of the circumstances of your case, you were denied a fair trial as a result of this jury selection error. Since there is a chance the outcome of your case would have been different, your lawyer’s failure to object to or raise this claim resulted in prejudice.

To summarize, your lawyer was ineffective because his performance fell below the standard of objective reasonableness for attorneys. By not objecting to the racially discriminatory way in which the jury was selected, the lawyer negatively affected the outcome of your case.

Below is a checklist for incorporating a barred claim into an ineffective counsel claim:

- (1) Identify the prohibited claim. Make sure the claim cannot be raised directly for procedural reasons;
- (2) Determine whether the claim is prohibited because of your lawyer’s ineffectiveness. Did your lawyer not raise the issue at trial? Did your lawyer say or do something at trial that

45. In *Kimmelman v. Morrison*, 477 U.S. 365, 384–385, 106 S. Ct. 2574, 2587–2588, 91 L. Ed. 2d 305, 325–326 (1986), for example, the trial court refused to rule on the defendant’s motion to suppress evidence because counsel’s motion was untimely. The defendant nonetheless ultimately obtained a hearing on the merits of the suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion.

46. See *Kimmelman v. Morrison*, 477 U.S. 365, 382–383, 106 S. Ct. 2574, 2587, 91 L. Ed. 2d 305, 324 (1986) (finding that the usual rules regarding procedural default do not apply to Sixth Amendment ineffective assistance claims, since, without effective assistance, the incarcerated person has been unconstitutionally deprived of their liberty).

47. See *JLM*, Chapter 13 for an additional explanation of prohibited claims.

decreased your chance of winning on the issue? Did your lawyer fail to raise the issue on direct appeal?⁴⁸ and

- (3) Argue that the claim is only prohibited because of your lawyer's ineffectiveness. Then show that if your lawyer had not been ineffective in this way, this claim would have succeeded. Remember you must plead both the "deficient performance" prong and the "prejudice" prong of the *Strickland* test. This means you must both (a) point out the specific failures of your lawyer and (b) show that your lawyer's failures to correct or address the issues hurt your case.

Note that in addition to re-framing the barred claim as an ineffective counsel claim, you should still raise the claim separately, alleging that counsel's ineffectiveness constitutes "cause and prejudice" for any procedural default.⁴⁹

D. Common Ineffective Assistance of Counsel Claims

Below are some of the most common ineffective counsel claims that have succeeded. This does not mean that these claims are always successful or that this list includes every possible ineffective counsel claim. When you plead these claims, be sure to check the case law in your state.

- (1) Counsel is not qualified to practice law;⁵⁰
- (2) Counsel had a conflict of interest;⁵¹
- (3) Counsel failed to investigate⁵² or perform certain pretrial functions;⁵³
- (4) Counsel failed to properly select a jury;⁵⁴

48. *Jackson v. Leonardo*, 162 F.3d 81, 84–87 (2d Cir. 1998) is an excellent example of how to turn a procedurally barred claim into a successful claim of ineffectiveness. In *Jackson*, the Court of Appeals held that the defendant's double jeopardy claim was procedurally barred, but granted relief on the defendant's claim that his appellate counsel was ineffective for failing to raise the double jeopardy claim.

49. *See, e.g., Williams v. Anderson*, 460 F.3d 789, 799–801 (6th Cir. 2006) (finding that appellate counsel's ineffectiveness in raising trial counsel ineffectiveness claim on direct appeal constituted "cause and prejudice" for the procedural default that it caused).

50. *See United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990) (holding that "counsel" does not include an individual who presents himself as a lawyer but obtains admission to the bar under false pretenses). *See also Solina v. United States*, 709 F.2d 160, 167–169 (2d Cir. 1983) (requiring reversal where defendant was unaware that counsel was unlicensed to practice law in any state, and "the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to legal ability, such as failure to pass a bar examination, or want of moral character"); *but see Waterhouse v. Rodriguez*, 848 F.2d 375, 382–383 (2d Cir. 1988) (framing rule to exclude situation where licensed attorney is unknowingly disbarred during trial).

51. *See the discussion in Part C(1)(c) of this Chapter.*

52. *See Wiggins v. Smith*, 539 U.S. 510, 535–538, 123 S. Ct. 2527, 2542–2544, 156 L. Ed. 2d 471, 493–495 (2003) (finding decision of counsel not to expand investigation of petitioner's life history for mitigating evidence beyond pre-sentence investigation report and department of social services records fell short of prevailing professional standards and amounted to ineffective assistance); *Appel v. Horn*, 250 F.3d 203, 215–218 (3d Cir. 2001) (finding counsel's failure to investigate or prepare for the petitioner's competency determination violated his right to effective assistance and merited granting habeas corpus relief); *People v. LaBree*, 34 N.Y.2d 257, 259–261, 313 N.E.2d 730, 731–732, 357 N.Y.S.2d 412, 413–415 (1974) (finding ineffective assistance based on counsel's inadequate investigation and preparation); *see also Henry v. Poole*, 409 F.3d 48, 65–67 (2d Cir. 2005) (finding counsel's failure to investigate led counsel to present alibi defense for the wrong date and helped an prosecution's otherwise weak prosecution case).

53. *See Kimmelman v. Morrison*, 477 U.S. 365, 385–391, 106 S. Ct. 2574, 2588–2591, 91 L. Ed. 2d 305, 326–329 (1986) (finding ineffective assistance of counsel where counsel failed to conduct any pretrial discovery and failed to file timely motion to suppress illegally seized evidence); *Gersten v. Senkowski*, 426 F.3d 588, 609–615 (2d Cir. 2005) (finding that attorney's failure to seek medical expert consultation for the defense or to investigate critical government evidence constituted ineffective assistance of counsel); *People v. Donovan*, 184 A.D.2d 654, 654–656, 585 N.Y.S.2d 70, 71–72 (2d Dept. 1992) (ordering a new trial for ineffective assistance of counsel after attorney did not move to suppress certain evidence and failed to conduct an adequate investigation before the trial).

54. *See Johnson v. Armontrout*, 961 F.2d 748, 755–756 (8th Cir. 1992) (finding ineffective assistance where

- (5) Counsel failed to pursue defenses available to defendant;⁵⁵
- (6) Counsel did not properly advise defendant about a plea;⁵⁶
- (7) Counsel did not advise non-citizen defendant of possible deportation risks of a guilty plea;⁵⁷
- (8) Counsel failed to use important evidence or testimony at trial;⁵⁸

evidence showed that at least two jurors were biased, and counsel failed to request removal of those jurors for cause); *Hollis v. Davis*, 912 F.2d 1343, 1350–1352 (11th Cir. 1990) (finding ineffective assistance where trial counsel failed to challenge the racial composition of a jury chosen in 1959 when African-Americans were systematically excluded from the list of potential jurors).

55. See *Wilcox v. McGee*, 241 F.3d 1242, 1246 (9th Cir. 2001) (finding ineffective assistance where counsel failed to move at a second trial to dismiss an indictment barred by double jeopardy); *Jackson v. Leonardo*, 162 F.3d 81, 86 (2d Cir. 1998) (holding that appellate counsel's failure to raise the obvious double jeopardy claim constituted ineffective assistance); *DeLuca v. Lord*, 77 F.3d 578, 590 (2d Cir. 1996) (determining that counsel's failure to pursue an extreme emotional disturbance defense constituted ineffective assistance when a reasonable probability existed that a jury would have found this defense persuasive and would have reduced defendant's liability from second degree murder to first degree manslaughter). However, defense counsel does not have to pursue defenses that she believes are futile, even if it is the only defense available and there is nothing to lose by pursuing it. See *Knowles v. Mirzayance*, 556 U.S. 111, 123–128, 129 S. Ct. 1411, 1420–1422, 173 L. Ed. 2d 251, 262–265 (2009).

56. The Supreme Court in *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 209 (1985), held that the two-prong *Strickland* standard is “applicable to ineffective-assistance claims arising out of the plea process.” Hill claimed his guilty plea was induced by false information about his parole eligibility. The Court held that if a defendant claims that he pleaded guilty because of ineffective assistance of counsel, the second prong of the *Strickland* test would be satisfied by showing “a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); see also *Meyers v. Gillis*, 142 F.3d 664, 666–670 (3d Cir. 1998) (finding the *Strickland* test satisfied and granting habeas relief where defendant's attorney claimed that defendant would be eligible for parole after seven years, though law required mandatory life sentence without possibility of parole); *United States v. Hansel*, 70 F.3d 6, 8 (2d Cir. 1995) (finding counsel provided ineffective assistance in plea bargaining when counsel failed to inform defendant that charges against him were time-barred and defendant would not have otherwise pleaded guilty). Courts have extended this reasoning to the “reverse-*Hill*” claim where a defendant claims that counsel's ineffectiveness caused the defendant to proceed to trial when there is a reasonable probability that, if correctly advised, the defendant would have accepted a plea offer. See *Mask v. McGinnis*, 233 F.3d 132, 139–142 (2d Cir. 2000) (finding that a reasonable probability that the defendant would have accepted a plea if counsel effectively advised him constitutes ineffective assistance of counsel); *United States v. Gordon*, 156 F.3d 376, 380–382 (2d Cir. 1998) (finding that the large disparity between the defendant's actual maximum sentence under the Sentencing Guidelines and the maximum sentence represented by defendant's attorney indicated that a reasonable probability existed that the proceedings would have gone differently if defendant's counsel had properly advised him); but see *Purdy v. United States*, 208 F.3d 41, 46–48 (2d Cir. 2000) (finding that although attorney should inform each client of the probable costs and benefits of accepting a plea bargain, he need not actually advise client whether to plead guilty or not). Normally, your lawyer is not required to advise you about the collateral consequences of a guilty plea. “Collateral consequences” refers to the effects of a guilty plea that are not a direct result of the plea. For example, if you lose your job because of a guilty plea, that is considered a collateral consequence. In some jurisdictions, however, if your lawyer provides incorrect information about collateral consequences, it may be considered ineffective assistance of counsel. See, e.g., *United States v. Couto*, 311 F.3d 179, 182–188 (2d Cir. 2002) (finding that counsel's misrepresentation regarding the deportation-related consequences of defendant's plea constituted ineffective assistance). However, you should check the law in your state because some states do not allow ineffective assistance claims for collateral consequences, even if your attorney has given you awful advice.

57. The Supreme Court, in *Padilla v. Kentucky*, 559 U.S. 356, 374, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010), held that a defense attorney committed ineffective assistance of counsel by failing to inform the attorney's client that his guilty plea would lead to automatic removal (deportation) from the country and that he need not worry about the immigration consequences of his plea constituted ineffective assistance of counsel. Thus, counsel must advise non-citizen clients about the deportation risks of a guilty plea. See also *Lee v. United States*, 137 S. Ct. 1958, 1969, 198 L. Ed. 2d 476 (2017) (explaining that the duty to inform non-citizen clients of the immigration consequences of a guilty plea extends to situations where the non-citizen client would almost certainly be found guilty and thus deportable if he went to trial).

58. See *Lindstadt v. Keane*, 239 F.3d 191, 201–204 (2d Cir. 2001) (finding ineffective assistance in part because trial counsel made no effective challenge to the only physical evidence of sexual abuse, which consisted

- (9) Counsel failed to object to improper use of evidence at trial;⁵⁹
- (10) Counsel failed to request proper jury instructions;⁶⁰
- (11) Counsel failed to object to improper jury instructions;⁶¹

of expert testimony based on unnamed studies, which were essentially unchallenged at trial and disputed by other easily available published studies); *Pavel v. Hollins*, 261 F.3d 210, 216–226, 228 (2d Cir. 2001) (finding ineffective assistance where trial counsel did not prepare a defense, failed to call two important fact witnesses, and did not call a medical expert); *Brown v. Myers*, 137 F.3d 1154, 1156–1158 (9th Cir. 1998) (finding ineffective assistance when counsel failed to investigate and present testimony supporting petitioner's alibi); *Tosh v. Lockhart*, 879 F.2d 412, 414–415 (8th Cir. 1989) (finding defense counsel's failure to try to find alibi witnesses was ineffective assistance of counsel); *People v. Jenkins*, 68 N.Y.2d 896, 897, 501 N.E.2d 586, 586–587, 508 N.Y.S.2d 937, 937–938 (N.Y. 1986) (finding that failure to use crucial evidence, if due solely to attorney's incorrect assumption of its inadmissibility, may be so prejudicial as to be ineffective assistance of counsel); *People v. Riley*, 101 A.D.2d 710, 711, 475 N.Y.S.2d 691, 692–693 (4th Dept. 1984) (finding failure to impeach prosecution witnesses with available records of prior testimony contributed to ineffective assistance of counsel).

59. *See Kimmelman v. Morrison*, 477 U.S. 365, 385–87, 106 S. Ct. 2574, 2588–90, 91 L. Ed. 2d 305, 326–27 (1986) (finding ineffective assistance when counsel failed to move to suppress evidence because of counsel's failure to investigate); *Tomlin v. Myers*, 30 F.3d 1235, 1237–1239 (9th Cir. 1994) (finding counsel ineffective for failure to move to suppress lineup identification evidence); *People v. Wallace*, 187 A.D.2d 998, 998–999, 591 N.Y.S.2d 129, 130 (4th Dept. 1992) (finding attorney's failure to object to admission of evidence was ineffective assistance); *People v. Riley*, 101 A.D.2d 710, 711, 475 N.Y.S.2d 691, 692–693 (4th Dept. 1984) (finding failure to object to inadmissible hearsay evidence, and lack of preparation, and the pursuit of a highly prejudicial cross-examination constituted ineffective assistance).

60. *See, e.g., People v. Norfleet*, 267 A.D.2d 881, 883–884, 704 N.Y.S.2d 146, 148 (3d Dept. 1999) (finding ineffective assistance where counsel failed to seek jury instructions for lesser offense); *People v. Wiley*, 120 A.D.2d 66, 67–68, 507 N.Y.S.2d 928, 929 (4th Dept. 1986) (holding that an attorney who fails to request an alibi charge may be found ineffective).

61. *See Cox v. Donnelly*, 432 F.3d 388, 390 (2d Cir. 2005) (finding that counsel's repeated failure to object to erroneous jury instruction constituted ineffective counsel); *Everett v. Beard*, 290 F.3d 500, 513, 515–516 (3d Cir. 2002) (holding that counsel performed deficiently by failing to object on due process grounds to jury instruction which incorrectly permitted jury to convict defendant of first degree murder even if his accomplice intended to cause the death of the victim); *Gray v. Lynn*, 6 F.3d 265, 269, 271–272 (5th Cir. 1993) (finding counsel fell below objective standard of reasonable assistance, thereby providing ineffective assistance, where counsel failed to object to erroneous jury instructions regarding elements of first degree murder).

- (12) Counsel failed to present or argue an appeal,⁶² or to present a meritorious issue (one that was likely to be successful) on appeal;⁶³ and
- (13) Counsel's conduct at trial was simply so bad that it was ineffective.⁶⁴

E. Conclusion

Ineffective assistance of counsel can be a very useful claim for incarcerated people who had inadequate legal representation at trial or on direct appeal. It can also be useful for incarcerated people who face procedural problems with some of their appellate claims. When you bring your ineffective counsel claim, it is important to check the relevant Chapters of the *JLM* and other sources to make sure you are using the right procedure. Your ineffective counsel claim will have a better chance of success if you make sure to show the court all the specific reasons why your lawyer performed poorly and all of the ways in which this inadequate representation prejudiced the outcome of your case.

62. See *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985, 999–1000 (2000) (finding that defendant was entitled to effective assistance of counsel when deciding whether to file a notice of appeal, but he must “demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed” that he must show a reasonable probability that, but for he would have filed the appeal); *Garcia v. United States*, 278 F.3d 134, 137–138 (2d Cir. 2002) (finding ineffective assistance of counsel where counsel incorrectly advised defendant on the record that he could not appeal and district court confirmed that advice); *United States v. Phillips*, 210 F.3d 345, 348, 50–53 (5th Cir. 2000) (finding that counsel’s failure to appeal an obstruction of justice sentencing enhancement constituted ineffective assistance); *Castellanos v. United States*, 26 F.3d 717, 718 (7th Cir. 1994) (when a defendant tells his lawyer to appeal, and the lawyer does not file an appeal by the court’s deadline, the lawyer commits ineffective assistance of counsel); *United States v. Peak*, 992 F.2d 39, 41–42 (4th Cir. 1993) (finding that counsel’s failure to file for appellate review when requested by defendant deprives defendant of 6th Amendment right to assistance of counsel even if he would have not been likely to win on appeal); *United States v. Horodner*, 993 F.2d 191, 195–196 (9th Cir. 1993) (finding failure to file timely appeal constitutes ineffective assistance of counsel which prejudiced the defendant if the defendant did not agree to waive the appeal); *Bonneau v. United States*, 961 F.2d 17, 18–2019, 22–23 (1st Cir. 1992) (finding that where attorney never filed an appeal despite multiple time extensions, ineffective assistance of counsel denied the defendant his constitutionally guaranteed opportunity to appeal); *People v. Stokes*, 95 N.Y.2d 633, 638–639, 744 N.E.2d 1153, 1156, 722 N.Y.S.2d 217, 220 (2001) (finding defendant’s right to appellate counsel was not adequately fulfilled because appellate counsel’s brief contained no reference to the evidence or to defense counsel’s objections at trial and made clear that counsel did not act like an advocate on behalf of the client); *People v. Vasquez*, 70 N.Y.2d 1, 3–4, 509 N.E.2d 934, 935, 516 N.Y.S.2d 921, 922 (1987) (finding that defense counsel denied the defendant effective assistance of counsel by characterizing the points defendant wished to raise on appeal in an appellate brief as being “without merit”).

63. See, e.g., *Ballard v. United States*, 400 F.3d 404, 407–410 (6th Cir. 2005) (holding appellate counsel ineffective for failing to raise meritorious argument that sentence enhancement by judge violated right to jury trial).

64. This kind of general argument is very hard to make successfully. Your claim must include specific information about why your counsel’s conduct was not acceptable. See *Tippins v. Walker*, 77 F.3d 682, 6886–6890 (2d Cir. 1996) (finding ineffective assistance where attorney slept through substantial portions of the trial such that judge interrupted proceedings to reprimand attorney); *Burdine v. Johnson*, 262 F.3d 336, 339–341 (5th Cir. 2001) (finding ineffective assistance because counsel was unconscious during substantial portions of trial, leaving the petitioner without representation during critical stages of the trial); *People v. Huggins*, 164 A.D.2d 784, 786–887, 559 N.Y.S.2d 720, 721–722 (1st Dept. 1990) (finding ineffective assistance where attorney was an alcoholic who had once been disbarred for twenty years and was confused and inattentive at trial).

CHAPTER 13

FEDERAL HABEAS CORPUS*

A. Introduction

This Chapter explains an important right—the writ of habeas corpus. Habeas corpus is guaranteed by the Constitution to incarcerated people in federal custody whose arrest, trial, or actual sentence violated a federal statute, treaty, or the U.S. Constitution. Because the Constitution is the only federal law that governs state criminal procedures, if you are incarcerated in state custody, you must show a violation of the U.S. Constitution for your habeas petition to succeed. As an incarcerated person (regardless of whether you are in state or federal prison), you can challenge your conviction or sentence by petitioning for a writ of habeas corpus in federal court. By petitioning for a writ, you are asking the court to determine whether your conviction or sentence is illegal. A writ of habeas corpus can be very powerful because if the court accepts your argument, the court can order your immediate release, a new trial, or a new sentencing hearing. This Chapter will teach you more about federal habeas corpus and how to petition for it. Part A will introduce and explain a few basic concepts about federal habeas. The rest of the Chapter will go into more detail. Please note that the term, “federal habeas corpus,” refers to habeas corpus in a federal court. Though subject to different rules, incarcerated people in both state *or* federal custody may petition for a federal writ of habeas corpus.

1. What Is Habeas Corpus?

Habeas corpus is a kind of petition that you can file in federal court to claim that your imprisonment violates federal law.² The term “federal law” includes not only federal statutes, but also U.S. treaties and the U.S. Constitution. Whether you are incarcerated in state or federal custody, a federal habeas petition claims that your imprisonment is illegal because your arrest, trial, or sentence violated federal law. This would be true if any aspect of your arrest, trial, or actual sentence violated a federal statute, treaty, or the U.S. Constitution. If you believe that your imprisonment violates federal law, you can file a habeas petition regardless of whether your trial was in state court or federal court, and regardless of whether you are in a state prison or a federal prison. However, as you will learn in this Chapter, incarcerated people in state custody and incarcerated people in federal custody will have to go through different processes for filing habeas petitions. People incarcerated in state custody may also find it more difficult than incarcerated people in federal custody to win a habeas claim. In both cases, a federal habeas petition claims that your imprisonment is illegal because your arrest, trial, or sentence violated *federal* law.

It is important to understand what a habeas petition is not. A habeas petition is *not* a “direct appeal” of your conviction. A direct appeal asks the state or federal appeals court (the court above the trial court in which you were convicted) to review the objections you or your lawyer made during the trial. To learn more about direct appeals, read *JLM*, Chapter 9, “Appealing Your Conviction or Sentence.” Federal habeas is a “collateral appeal,” which is different from a direct appeal. A direct appeal challenges the merits of the judgment, but a collateral appeal challenges the *procedure* leading to the judgment. When you file a habeas petition, you are claiming that a mistake that violated federal law was made during your trial or sentencing. You will probably base this claim on evidence that you did not present at your trial. You can only make a habeas claim in federal court *after* making other appeals.

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2. A habeas challenge is a *civil* action, not a *criminal* action. It is an action that you bring against the government. Therefore, in habeas petitions, the incarcerated person is often referred to as the “plaintiff,” “petitioner,” or “complainant.” For clarity, this Chapter often refers to the incarcerated person bringing the habeas petition as the “defendant.”

If you are incarcerated for a state crime and lose your direct appeal, your state will have another procedure you can follow to challenge your conviction. This procedure is usually called either “state post-conviction proceedings” or “state habeas corpus.” State habeas corpus is the same thing as a state post-conviction appeal; it is a remedy provided by the state in which you were convicted, and is based on that state’s statutes.³ It is important to remember that state post-conviction proceedings and federal habeas corpus are entirely different claims.

If you are incarcerated in state custody, you will need to “exhaust” your state remedies before being able to file a federal habeas petition. This means that you can only file a federal habeas petition if you have already lost your state direct appeal and your state post-conviction proceedings. In your federal habeas petition, you can ask the federal court to review the claims that you brought in your direct appeal and your post-conviction proceedings in state court. However, in your federal habeas petition, you can *only* include claims that are based on federal law (federal statutes, treaties, or the U.S. Constitution).

If you are incarcerated in federal custody, you will not file a state post-conviction proceeding. If you lose your direct appeal in federal court, you will be able to file a federal habeas petition right away. This Chapter will often discuss state proceedings. If you are an incarcerated person in federal custody, you should keep in mind that discussions of state proceedings in this Chapter do not apply to you unless the Chapter specifically says that they do.

2. What Will This Chapter Teach You?

Part B (“The Fundamental Elements of a Federal Habeas Corpus Argument”) will teach you about the basic elements of claims you can bring in a habeas petition and how the courts will treat your claims. Since most habeas petitions include claims of constitutional violations, Section 1 explains the portions of the U.S. Constitution that you are most likely to rely on in your habeas petition. Section 1 also tells you how to discover a habeas claim in your arrest, trial, or sentence. Appendix C lists examples of successful habeas claims. These concrete examples should help you prepare your own petition. Section 2 explains how the court evaluates your claim. Section 2 will teach you how to know which standard the courts use and how to show the court that your rights were violated. Section 3 teaches you how to show the court that the violation of your rights affected your conviction or sentence. Section 3 also discusses the harmless error rule. Section 4 explains the special standard of review that federal courts must use when they review habeas claims brought by people incarcerated in state custody.

Part C (“What You Cannot Raise In Your Habeas Petition”) tells you what violations or issues you cannot complain about in your habeas petition because the writ of habeas corpus is designed to only allow you to obtain relief in specific situations. Section 1 explains that you generally cannot bring habeas petitions that claim Fourth Amendment violations. Sections 2 and 3 discuss laws that are passed after your trial, called new laws. Section 2 discusses what a new law is and explains that you normally cannot bring habeas claims based on new laws. Section 3 explains the exceptions to this rule—the situations in which you *can* include claims based on a new law in your habeas petition.

Part D (“Procedures for Filing a Petition for Habeas Corpus”) explains the basic requirements of your habeas petition, including that you be in custody, have exhausted state remedies, are not in procedural default, have filed within the proper time limit, and that your petition is not successive.

3. For more information about state post-conviction proceedings, you can look at *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence,” and *JLM*, Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules.” State post-conviction proceedings for Florida, New York, and Texas are described in *JLM*, Chapter 21, “State Habeas Corpus: Florida, New York, and Texas.” Remember, state habeas proceedings are the same as state post-conviction proceedings. In this Chapter, the term “state post-conviction proceedings” will be used to refer to both. The term “habeas” will only be used to refer to federal habeas corpus.

Part E (“The Mechanics of Petitioning for Federal Habeas Corpus”) discusses the basic mechanical process surrounding habeas law: (1) when to file, (2) where to file, (3) against whom to file, (4) how to file, (5) what to expect after you file, and (6) how to appeal.

Part F (“How to Get Help from a Lawyer”) discusses, as the title suggests, how to get help from a lawyer for your habeas petition. Even though you are entitled to a lawyer during your trial and direct appeals, you are not entitled to have a lawyer to help with your habeas petition. However, you should still try to get help from a lawyer if you can.

Appendix A is a chart of the appeals process, from your trial through your federal habeas petition. Appendix B provides a checklist you can refer to when putting together your federal habeas corpus petition. Appendix C lists examples of successful habeas claims.

3. When Do People File Habeas Petitions?

Usually incarcerated people file their federal habeas petitions after they have finished their direct appeals and state post-conviction proceedings:

Direct Appeal → State Post-Conviction Appeal → Federal Habeas Claim

Because you are entitled to a lawyer during your direct appeal, you should always file a direct appeal before filing anything else. If you lose your direct appeal, you have to decide whether to file a state post-conviction appeal. You do not have to file a state post-conviction appeal, but most people do in order to meet the “exhaustion” requirement. Exhaustion means that you have to give the state court the chance to hear all of the claims you will raise in your habeas petition first. If you did not raise a claim in your direct appeal, you must file the claim with the state court in a post-conviction appeal before you can file the claim in your federal habeas petition. Because you will often want to raise issues in habeas that you were unable to raise on direct appeal, you must raise them first in your state post-conviction proceeding. Exhaustion is an important requirement, and is discussed in more detail in Part D(2) (“Exhaustion of State Remedies and Direct Appeal”) below.

After your direct appeal, you might find, or your lawyer might point out to you, errors that occurred during your trial that you did not know about at the time of your direct appeal. These errors may be based on outside information not in your trial transcript. If you want to bring these claims in your federal habeas petition and you are incarcerated in state custody, you must first go to state court and file a state post-conviction appeal with these claims. Then, if you are denied relief, you can bring a federal habeas petition. Your federal habeas petition will be filed after you finish all your state appeals (direct and collateral). There are strict timelines that apply to habeas petitions after you finish your state appeals, discussed in Part D(4) (“Time Limit”) below.

4. Which Laws Apply to Federal Habeas Corpus?

You can find all of the laws covering federal habeas corpus in 28 U.S.C. §§ 2241–66. Section 2241 is the habeas corpus statute, which gives courts the authority to release incarcerated people who are being held in violation of the Constitution. Sections 2242 and 2253 deal with issues relating to a habeas petition, such as evidence and appeals issues. There are additional statutes that apply separately to people in state and federal custody, in Sections 2254 and 2255 respectively.⁴ When an incarcerated

4. The differences between petitions filed by those in state custody and by those in federal custody are mostly procedural, not substantive. This means that regardless of whether you are incarcerated in state or federal custody, if you are discussing substantive issues, you may use cases brought under either 28 U.S.C. § 2255 or under 28 U.S.C. § 2254 as authority in your petition. *See* Davis v. United States, 417 U.S. 333, 344, 94 S. Ct. 2298, 2304, 41 L.Ed.2d 109 (1974) (“No microscopic reading of § 2255 can escape either the clear and simple language of § 2254 authorizing habeas corpus relief ‘on the ground that (the prisoner) is in custody in violation of the . . . laws . . . of the United States’ or the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect.”); United States v. Bendolph, 409 F.3d 155, 163 (3d Cir. 2005) (“[T]o provide guidance to the district courts, as well as to avoid confusion, we . . . should treat § 2255 motions and § 2254 petitions the same absent sound reason to do otherwise.”); Miller v. New Jersey Dept. of Corr., 145 F.3d 616, 619 n.1 (3d Cir. 1998) (“[W]e have followed the practice, whenever we decide an AEDPA issue that arises under § 2254 and the same holding would analytically be required in a case arising under § 2255, or vice versa, of so informing the district

person in state custody brings a habeas petition, he brings it under 28 U.S.C. § 2254.⁵ When an incarcerated person in federal custody brings a habeas petition, he brings it under 28 U.S.C. § 2255.⁶ In some circumstances, an incarcerated person in federal custody may bring a habeas action directly under 28 U.S.C. § 2241,⁷ without using Section 2255. Additionally, in cases where the defendant faces the death penalty, special procedures in 28 U.S.C. §§ 2261–66 may be used if the state meets certain standards. See Part F (“How to Get Help from a Lawyer”) of this Chapter for more information. There are also special rules governing procedures for filing and litigating habeas corpus cases. These can be found in the rules that govern each statute, called the “Rules Governing Section 2254 Cases in the United States District Courts,” and the “Rules Governing Section 2255 Proceedings in the United States District Courts.”⁸ The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) also affects federal habeas corpus law.⁹ These laws change often, and courts often decide cases changing the interpretation of these laws. So, you should *Shepardize* the cases included in this Chapter before relying on them.¹⁰

5. Three Rules to Know Before Filing

Habeas corpus law is very complex. Different courts follow different rules. You will need to research cases in your district to understand how your district follows each rule. You should use this Chapter as a general guide to direct more specific research. You should try to get a lawyer,¹¹ but if you cannot, you should not give up on your habeas claim. Although it may seem confusing at first,

courts.”). In this Chapter, the procedural differences are discussed as they arise, and you should pay careful attention to them.

5. You are incarcerated in state custody if you are imprisoned for committing a state crime. You are incarcerated in federal custody if you are imprisoned for violating a federal law. Most crimes, including murder and theft, are state crimes. Some crimes, including kidnapping and drug-related offenses, may be federal crimes. If you are detained by a tribal court, you are in neither state nor federal custody. To bring a habeas claim, incarcerated people in the custody of a tribal court should use 25 U.S.C. § 1303. This Chapter does not address habeas petitions by incarcerated people of a tribal court. Because tribes are not subject to the same provisions of the Constitution that states and the federal government are, if you are incarcerated in tribal custody, you should do outside research to find out how habeas law applies to you. A few cases dealing with habeas claims by petitioners in tribal custody are *United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996); *Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995).

6. Technically, 28 U.S.C. § 2255 is not a petition for a writ of habeas corpus, but it has the same effect. Therefore, it is still referred to as a habeas petition.

7. Note that the restrictions in § 2241(e) denying federal court jurisdiction to detainees determined to be “enemy combatants” were found to be unconstitutional. *Boumediene v. Bush*, 553 U.S. 723, 792, 128 S. Ct. 2229, 2274, 171 L. Ed. 2d 41, 93 (2008).

8. In the United States Code (“U.S.C.”), the rules immediately follow the individual statute.

9. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C. and 21 U.S.C.). The changes this law made to the habeas statutes are all incorporated into later versions of the applicable statutes in title 28 of the United States Code. If you have a recent copy of the United States Code or recent supplements to the Code, the habeas statutes will contain the AEDPA changes. Such statutes include 28 U.S.C. §§ 2244, 2253, 2254, 2255, 2261–2266 and 21 U.S.C. § 848.

10. By using LexisNexis and *Shepardizing*, you can make sure that the law has not changed. See Chapter 2 of the *JLM* for an explanation of how to *Shepardize* a case.

11. Part F of this Chapter (“How to Get Help from a Lawyer”) gives more information on how to get a lawyer for your habeas petition. In most cases, you are not entitled to a lawyer and have to convince the court to give you one. If the court denies your request, you can write your own habeas petition and ask for a lawyer again after the court has seen your petition. However, if you are an incarcerated person on death row, you are entitled to a lawyer under 18 U.S.C. § 3599(a)(2). At least one of your lawyers must have been able to practice before the relevant court for at least five years, and must have at least three years of experience in felony cases in that court. 18 U.S.C. § 3599(b). In *McFarland v. Scott*, 512 U.S. 849, 859, 114 S. Ct. 2568, 2574, 129 L. Ed. 2d 666, 676, the Supreme Court held that incarcerated people on death row can request counsel before filing a habeas petition and that the court should appoint such counsel.

after reading this Chapter, federal habeas corpus will be easier to understand. Read this Chapter very carefully, and try to understand the rules. Before you read the rest of this Chapter, there are three important rules to be aware of:

(a) **File Your Petition Within One Year of the End of Your Direct Appeal.**

If you file a state post-conviction appeal, the one-year deadline will be extended while your case goes through the state post-conviction process. This deadline and extension will be discussed at greater length in Part D(4) (“Time Limit”) of this Chapter. It is important for you to remember that time matters, and that you must pay attention to the different time requirements.

(b) **Present Any and All Claims You Bring in a Federal Court to the State Court First.**

This is called “exhaustion” and is discussed more fully in Part D(2) (“Exhaustion of State Remedies and Direct Appeal”) of this Chapter. The point of this requirement is to give state courts a chance to correct any violations of federal law that occurred during your trial before you complain to a federal court in your habeas petition. So, if you do not ask the state court for relief first, the federal court will not address your claims.

(c) **Be Aware that It Is Almost Impossible to File More than One Habeas Petition.**

Courts are very strict about this rule. Therefore, except for in very limited cases, you only have one chance to get your habeas petition right. This means that you have to meet all the deadlines, follow all the court procedures correctly, and include all the necessary information in your first habeas petition. If you make a mistake or miss deadlines, you probably will not be able to ask for habeas relief again. For more information about this, see Part D(5) (“Successive Petitions”) of this Chapter.

6. Plea Agreements May Affect Habeas Corpus Relief

If your conviction was based on a plea, habeas relief may not be available to you. Some federal courts, including the Tenth Circuit and the Middle District of Pennsylvania, have found that if a defendant agreed to serve his sentence without protest, a successful post-conviction challenge such as a habeas petition violates the plea agreement. In some instances, these courts have ruled that, by appealing their sentence, defendants effectively threw away their plea arrangements. In such cases, the courts later convicted them under the charges previously dropped by the agreements.¹² In other words, if your conviction was a part of a plea agreement, your habeas relief may violate that previous arrangement. If the court voids that plea agreement as part of your habeas relief, the prosecutor can try to convict and imprison you under another charge that had been dropped under the plea arrangement. In short, you may still end up in jail on another charge.¹³

12. *See* *United States v. Bunner*, 134 F.3d 1000, 1002–1005 (10th Cir. 1998) (concluding that the defendant’s challenge of the plea agreement breaks the contract, so the charges that were dismissed by the plea agreement can be reinstated); *United States v. Viera*, 931 F. Supp. 1224, 1228–1229 (M.D. Pa. 1996) (same). *But see* *United States v. Sandoval-Lopez*, 122 F.3d 797, 802 (9th Cir. 1997) (determining that defendant did not break plea bargain contract by vacating conviction because plea agreement prohibited attacks on the sentence, not the conviction); *United States v. Gaither*, 926 F. Supp. 50, 51–52 (M.D. Pa. 1996) (holding that defendant did not breach plea agreement by moving to vacate his conviction); *DiCesare v. United States*, 646 F. Supp. 544, 548 (C.D. Cal. 1986) (holding that government is still bound by obligations in plea agreement when defendant’s conviction was vacated because of intervening change in law). *See also* *United States v. Midgley*, 142 F.3d 174, 179 (3rd Cir. 1998) (holding that defendant’s successful challenge of plea agreement did not entitle the government to equitable tolling of the limitations period for charges dismissed under plea agreement).

13. However, the state may be prevented from reinstating charges against you if (1) the statute of limitations has run on the dismissed charges, (2) you already served a substantial part of the sentence you received as part of the plea agreement, and (3) you did not agree to waive the statute of limitations defense in your plea agreement. *See* *Rodriguez v. United States*, 933 F. Supp. 279, 281–283 (S.D.N.Y. 1996) (ruling that, based on a new court ruling, the conviction should be dropped and that the other charges dropped by the plea agreement cannot be reinstated as defendant could not be returned to her position prior to the plea agreement,

But, at least one federal district court in New York has held that habeas relief does *not* violate prior plea agreements. The Southern District of New York has granted habeas relief and still held valid the previous plea arrangements. The court held that, after the federal court releases you based on a successful habeas petition, no prosecutor can try to convict you for charges that were dropped by the prior plea agreements.¹⁴ The Ninth Circuit has also held that a grant of habeas relief does not entitle the court to set aside the entire plea agreement and let the State re-prosecute charges that had been dropped as part of the agreement.¹⁵ If you signed a plea agreement and are challenging the validity of your conviction on only one of multiple counts, you should probably assume that the court will set aside the invalid conviction and re-sentence you on the remaining crimes for which you pleaded guilty.

7. Can You Petition for Someone Else in Governmental Custody?

Filing a habeas petition for someone else is often allowed. The *petitioner* (the person who files the habeas petition) is called a “next friend” and may be a relative, friend, or lawyer. To be allowed to file a petition as a “next friend” in court, you must establish that (1) the incarcerated person cannot bring the petition himself and (2) you are truly dedicated to the best interests of the incarcerated person. Sometimes the courts may require that you have some significant relationship with the incarcerated person.¹⁶ In addition, courts seek proof that the next friend is in a better position to file the petition than the incarcerated person.¹⁷ In general, filing a habeas petition for a competent adult incarcerated person is not allowed if it goes against his wishes.¹⁸ However, courts usually permit parents to petition on behalf of their underage children who are in governmental custody.¹⁹

having already served more than half her sentence; distinguishing this case from other cases where the dropped charges could be reinstated). *But see* United States v. Myers, No. 96 C 5725, 91 CR 463-5, 1996 U.S. Dist LEXIS 18464 at *1 (N.D. Ill. Dec. 3, 1996) (*unpublished*) (holding that, after vacating a conviction, a court may resentence the defendant for other convictions that were unchallenged).

14. Rodriguez v. United States, 933 F. Supp. 279, 281–283 (S.D.N.Y. 1996) (ruling that the conviction should be dropped based on a new court ruling and that the other charges dropped by the plea agreement cannot be reinstated as defendant could not be returned to her position prior to the plea agreement, having already served more than half her sentence; distinguishing this case from other cases where the dropped charges could be reinstated). *But see* Gordils v. United States 943 F. Supp. 346, 3513–54 (S.D.N.Y. 1996) (holding that after a defendant successfully challenges a conviction for carrying a firearm during a drug crime, the resentencing court has jurisdiction to enhance the sentence for the other unchallenged counts). It is important to note that the Second Circuit has not addressed this issue, and that New York district courts are not in agreement about this case. You will need to examine the cases in your district to see whether this ruling is accepted there.

15. United States v. Barron, 172 F.3d 1153, 1158–1160 (9th Cir. 1999) (holding that a defendant seeking to set aside a conviction for conduct that was innocent under a statute neither breached the plea agreement nor repudiated the agreement and that, as a result, the district court could only vacate the judgment and resentence the defendant on the counts of conviction that still stood, not those counts that had been dropped).

16. See Whitmore v. Arkansas, 495 U.S. 149, 163–164, 110 S. Ct. 1717, 1727, 109 L. Ed. 2d 135, 150 (1990) (noting that the two prerequisites for next friend standing are (1) providing an adequate explanation, such as mental incompetence or disability as to why the real party in interest cannot appear on his own behalf, and (2) showing that the “next friend” is truly dedicated to the best interests of the person on whose behalf he seeks to litigate and has some significant relationship with the real party in interest).

17. See Demosthenes v. Baal, 495 U.S. 731, 735, 110 S. Ct. 2223, 2225, 109 L. Ed. 2d 762, 766 (1990) (*per curiam*) (holding that though the incarcerated person’s parents filed a petition for him, he was competent to represent his own interests and therefore his parents’ petition must be dismissed); Lonchar v. Thomas, 58 F.3d 588, 588–589 (11th Cir. 1995) (*per curiam*) (denying next friend petition because incarcerated person was competent and did not want a habeas petition filed, but allowing a next friend petition where incarcerated person is incompetent).

18. See In re Zettlemoyer, 53 F.3d 24, 28 (3d Cir. 1995) (*per curiam*) (denying next friend petition brought by both incarcerated person’s former counsel and his mother because incarcerated person competently chose to waive his right to file habeas petition, but not questioning lawyer’s ability to proceed on an incompetent incarcerated person’s behalf).

19. See Amerson v. State of Iowa, Dept. of Human Serv., 59 F.3d 92, 93 n.3 (8th Cir. 1995) (concluding that although a child was placed with the state department of human services, the child’s mother “was, and still is, a

B. The Fundamental Elements of a Federal Habeas Corpus Argument

This part of the Chapter will give you an idea of what types of claims you can make in a habeas petition and how to prove you are entitled to relief. It is important to remember that if you are incarcerated in state custody, you must present any claim in your habeas petition to the state court first. This requirement, called exhaustion, will be discussed in Part D(2) (“Exhaustion of State Remedies and Direct Appeal”).

In arguing for federal habeas relief, you will try to show that you are being held in prison illegally because you have been wrongfully convicted in violation of your rights. Because the Constitution is the only federal law that governs state criminal procedures, *habeas claims by people incarcerated in state custody must claim a violation of the Constitution*. People incarcerated in federal custody may claim violations of other federal laws. The Constitution does not describe in detail what your set of constitutional rights includes. The U.S. Supreme Court interprets the Constitution, which means it defines constitutional rights and violations in the cases it decides.

To argue that you deserve federal habeas relief, you will first need to show which of your federal rights were violated. Section 1 of this Part explains how to find constitutional violations. Appendix C gives many examples and cases to reference. Once you have identified at least one possible violation, you will need to identify the standard the court uses to determine whether the action violated your rights. Section 2 explains both how to find the standard the court uses for your violation and how to show the court that the standard was met.

However, just showing that your rights were violated is not enough to get federal habeas relief. You must also show that the violation of your rights harmed you by having a “substantial effect” on the outcome of your trial. Section 3, therefore, explains how to show the court that the error had a substantial effect on your trial (in other words, that the violation of your rights was not a “harmless” error).

If you are *incarcerated in federal custody*, once you have shown that your rights were violated and that the violation substantially harmed your trial, you will have shown that you deserve habeas relief. However, there are many specific procedures that you must follow to successfully file for habeas corpus. These procedures are discussed in Part D (“Procedures for Filing a Petition for Habeas Corpus”).

If you are *incarcerated in state custody* showing that your federal rights were violated and that the violation substantially harmed your trial is not enough to be granted habeas relief in federal court. As a person incarcerated in state custody, you have another very important element to prove in your habeas petition: that the state appellate court was unreasonable in finding either that your rights were not violated or that the outcome of your trial was not affected by the violation. This “unreasonableness” requirement is called the “standard of relief,” and it is a very hard standard to meet. It is discussed in detail in Section 4 of this Part. In sum, in order for you, as a person incarcerated in state custody, to obtain federal habeas relief, you must show that your rights were violated, that the violation was not harmless, and that the state court’s ruling that either 1) your rights weren’t violated and/or 2) any violation was harmless, was unreasonable.

1. Examples of Constitutional Violations

To obtain a writ of habeas corpus, you must show the court that you are in custody in violation of the Constitution or laws of the United States.²⁰ You cannot claim that your custody violates the state constitution or state laws because federal habeas corpus relief is only granted if your federal rights have been violated. You can satisfy this requirement by showing that the police, prosecutor, defense counsel, or judge acted (or failed to act)—during your arrest, trial, or sentencing—in a way that

proper next friend to bring this petition on behalf of [the child], notwithstanding termination of her parental rights . . .”).

20. 28 U.S.C. § 2254(a). Because there are no *federal* laws that regulate *state* criminal proceedings, as a person incarcerated in state custody you must prove that your custody violates the U.S. Constitution. Remember, you can raise state constitutional violations in your petition, but only if they amount to a denial of your rights under the federal Constitution.

violated your constitutional rights. Your constitutional rights can be found in the amendments to the Constitution. Habeas petitions often claim violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

Below is a list designed to give you a very general idea of what rights these amendments guarantee. A more detailed list in Appendix C gives some examples of habeas claims in violation of these amendments. It is hard to understand what these rights mean in real situations without looking at cases. You should look over the list below. If you think one of these amendments contains a right that may have been violated in your case, refer to the list in Appendix C of this chapter. Locate the amendment you believe was violated in Appendix C, and then read the cases in the footnotes to get a better idea of how courts understand the amendment. Also, carefully read the examples in Appendix C to see if you experienced anything similar to the violations listed there. Remember, these are just general lists, which means that the examples provide only a few of the things found to violate the Constitution. You may have experienced a violation that is not mentioned here and still may be able to get habeas corpus relief.

(a) The Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments

Fourth Amendment: This is the right to be free from unlawful search or seizure. This Amendment is why the police need to have warrants, or probable cause, to search you or take your property.

Fifth Amendment: This Amendment has more than one right in it. First, it has the right to be tried before a grand jury for certain crimes.²¹ Second, it has the right to be tried only once for any specific crime. Being tried more than once for the same crime is called “double jeopardy” and is not legally allowed. Third, it has the right to be free from self-incrimination. This right means that you do not have to disclose evidence that would help the people prosecuting you, which is why you do not have to speak to the police or be a witness in your own trial. Fourth, the Fifth Amendment has the right to due process. Due process basically means a fair procedure, but the courts have identified many elements under the right to due process.

Sixth Amendment: This Amendment also has several rights in it, which apply to your right to a jury trial. First, it has the right to a speedy and public trial. Second, it has the right to an impartial jury.²² Third, it has the right to have your trial in the state and district where the crime occurred. Fourth, it has the right to be told the crime with which you are charged. Fifth, it has the right to confront witnesses against you and to be able to obtain witnesses for your side. Sixth, it has the right to have the assistance of a lawyer.

Eighth Amendment: This is the right to be free from excessive bail, excessive fines, or cruel and unusual punishment.

Fourteenth Amendment: This Amendment again guarantees the right to due process (for an explanation of due process, see the explanation of the Fifth Amendment, above). However, this Amendment applies specifically to states. It makes the rights in the Constitution apply to both federal trials and state trials.

If you are incarcerated in state custody, remember that you may only raise violations of the Constitution and its amendments in your habeas petition. If you are incarcerated in federal custody, you may raise violations of the Constitution and its amendments or violations of federal criminal law.²³

21. This amendment gives you the right to be indicted by a grand jury before you must prove your case against a trial jury. “This amendment guarantees that prosecutions for serious crime may be instituted only by indictment; indictment serves to apprise the accused of charges against him so that he may adequately prepare his defense and to describe the crime with which he is charged with sufficient specificity to enable him to protect against future jeopardy for the same offense.” U.S. v. Haldeman, C.A.D.C.1976, 559 F.2d 31, 181 U.S. App. D.C. 254 (D.C. Circ. 1976), *certiorari denied*, 97 S. Ct. 2641, 431 U.S. 933, 53 L. Ed. 2d 250, *rehearing denied*, 97 S. Ct. 2992, 433 U.S. 916, 53 L. Ed. 2d 1103.

22. An impartial jury means you have the right to a jury whose members have not made up their minds on your guilt or innocence before hearing your case and who decide your case fairly. “Constitutional standard of fairness requires that a state defendant have a panel of impartial, indifferent jurors.” Murphy v. Florida, 95 S. Ct. 2031, 421 U.S. 794, 44 L. Ed. 2d 589 (1975).

23. See Title 18 of the United States Code for information on federal criminal law.

2. Standards and Tests for Claims of Violations

Once you have found at least one possible violation that you think occurred, you will need to identify the standard the court will use to determine whether or not that violation happened. A standard is a rule or a test that sets out the requirements a defendant must meet in order to prove to the court that a violation occurred. Most courts use a standard that is “well-established,” and some may have multiple standards.²⁴

After you have identified the applicable standard, you will need to show the court that this standard was met in your case in order to convince the court that a violation of your rights occurred. You do this by demonstrating to the court that the facts of your case match the requirements set out in the standard. This Section will explain how you find the standard and how to show the court that the violation in your case meets that standard.

After you have proven that the standard was met (that you have suffered a violation), you will still need to show that the violation harmed you. To show harm, you will need to convince the court that the violation may have negatively affected the outcome of your trial (discussed in Part B(3) of this Chapter). Also, if you are incarcerated in state court, you will need to show that the state court was incorrect in failing to find that the violation occurred. If the state court ruled there was a violation but it did not harm you, you will need to show that its finding of “no harm” was unreasonable or contrary to federal law (discussed in Part B(4) of this Chapter).

(a) Finding the Standard the Court Uses for Your Violation

To find the standard the court will use to judge your claim, you have to look at past cases in which a habeas petitioner raised the same claim. If you are complaining about a violation from the list in Appendix C, you should check the cases that appear in the relevant footnotes. When you read these cases, you will be able to get an idea of the test the court will use to judge whether a violation has occurred in your case. The court will usually say something like: “To prove a violation, the court should look to the following,” “To prove a violation has occurred, the petitioner needs to satisfy the following requirements,” or “In order to show the right was violated, petitioner has to meet the following test.” This exact language does not appear in every case, but it gives you an idea of the language for which to look to find the standard. Once you find the test used by the courts for the claim you are making, your next step is to figure out if there is any way to argue that your claim meets the test.

Here is one example of a violation and its standard. At your trial, you have a constitutional right to an effective attorney. If you had a bad trial lawyer, you might have a claim that he or she did not represent you effectively at trial. This claim is called an “ineffective assistance of counsel” claim, and it argues a violation of the Sixth Amendment. The case *Strickland v. Washington* sets out the standard for this type of violation.²⁵ In *Strickland*, the court established a two-part test (now called the *Strickland* test) to determine whether your right to effective counsel was violated.

Under the first part, a court evaluates whether your lawyer’s representation fell below an objective standard of reasonableness by considering all the circumstances under prevailing (current)

24. For example, if you are arguing that your confession was obtained involuntarily in violation of the Fourteenth Amendment, you must meet the standard of proving that you confessed because your will was overtaken. *Miller v. Fenton*, 474 U.S. 104, 110–112, 106 S. Ct. 445, 449–451, 88 L. Ed. 2d 405, 411–412 (1985). As another example, if you are arguing that you were denied your Sixth Amendment right to a speedy trial, you must meet the standard of showing that there was a delay in your trial, that it occurred for no good reason, that you asked for a speedy trial, and that the delay prejudiced you. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972). For a final example, if you are arguing that you were not given counsel during interrogation or discussions with police officers while in custody in violation of the Fifth and Sixth Amendments, you must meet the standard of proving that you did not waive that right voluntarily, knowingly, and intelligently. *Brewer v. Williams*, 430 U.S. 387, 403, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424 (1977).

25. *Strickland v. Washington*, 466 U.S. 668, 701, 104 S. Ct. 2052, 2071 80 L. Ed. 2d 674, 702 (1984) (affirming the denial of defendant’s claim that his lawyer’s advice at and before his death sentencing hearing constituted ineffective assistance of counsel that would require reversal of conviction or sentencing).

professional norms.²⁶ This means that the court will determine the reasonableness of what you are claiming that your attorney did, or failed to do, while representing you.²⁷

Under the second part of the *Strickland* test, the court will determine whether you were prejudiced as a result of your lawyer's unreasonable representation.²⁸ *Prejudice* is an important concept in habeas. It means that there is a "reasonable probability"²⁹ that the result of your trial would have been different, and more favorable to you, if the violation (in this example, your lawyer's ineffective representation) had not occurred.³⁰

To meet the standard required to show ineffective assistance of counsel, you must satisfy both parts of the *Strickland* test.³¹ These two parts are: (1) that your lawyer acted unreasonably and (2) that his or her actions prejudiced you.

Other constitutional violations will have different standards that you meet in order to persuade the court that a violation occurred. There are so many different tests that the *JLM* cannot explain all of them. However, you can begin to learn about the standards that matter to you by reading and *Shepardizing*³² the cases cited in the footnotes, especially those in Appendix C.

26. *Strickland v. Washington*, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984).

27. Note that it is possible that, even if your lawyer made mistakes or failed to provide you with the best representation, the court may still find you have received *reasonable* representation. That is, the court may find that the representation you received was still above the standard the court uses to determine what is reasonableness. *See, e.g.*, *Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 1854, 152 L. Ed. 2d 914, 931 (2002) (holding that, when counsel is faced with a tough choice, even if his or her decision was arguably mistaken, the court reviewing that decision because of a habeas petition must start with "a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance") (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). Note that a habeas corpus appeal involving the same parties, *Bell and Cone*, was heard by the Supreme Court in 2009. The holding of that decision does not affect the holding of this one.

28. *Strickland v. Washington*, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984).

29. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984) (holding that the appropriate test for prejudice is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and defining "reasonable probability" as "a probability sufficient to undermine confidence in the outcome").

30. *United States v. Lilly*, 536 F.3d 190, 197 (3d Cir. 2008) (affirming the denial of an incarcerated person's habeas petition based upon ineffective assistance of counsel by finding that the incarcerated person was not prejudiced by following his attorney's advice to waive a jury trial because the court found that the prosecution offered sufficient evidence for a jury to convict the incarcerated person even if he had had a jury trial).

31. *Strickland v. Washington*, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984). Though many incarcerated people may claim ineffective assistance of counsel, proving it is difficult. In *Lockhart v. Fretwell*, 506 U.S. 364, 369–370, 113 S. Ct. 838, 842–843, 122 L. Ed. 2d 180, 188–189 (1993), trial counsel failed to raise an objection at sentencing, but the Supreme Court held that this was not enough to meet the *Strickland* "prejudice" test because the defendant must show *both* that the outcome would have been different *and* that the defendant was deprived of a fundamentally fair trial with a "reliable result." However, in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the Supreme Court limited the effect of *Lockhart* on the *Strickland* test. In this case, the Supreme Court held that failure to develop mitigating evidence during a capital sentencing hearing, which included severe childhood neglect and abuse, borderline mental retardation, and a favorable prison record, violated the standard of *Strickland v. Washington*. Additionally, the court held that, by applying the standard in *Lockhart* to this claim, the Virginia Supreme Court had erred by expanding the scope of when *Lockhart* applies. The Court stated that *Lockhart* applies in situations where the ineffectiveness of counsel does not deprive the defendant of a substantive or procedural right to which the defendant is entitled by law. *Williams v. Taylor*, 529 U.S. 362, 391–393, 120 S. Ct. 1495, 1512–1514, 146 L. Ed. 2d 389, 416–418 (2000); *see also Stallings v. United States*, 536 F.3d 624, 628 (7th Cir. 2008) (vacating and remanding to the district court a claim of ineffective assistance of counsel to determine whether there was "prejudice" as defined by *Strickland*—that is, whether the outcome at the district court level would have been different had counsel raised those claims).

32. By *Shepardizing*, you can make sure that the law has not changed. See Chapter 2 of the *JLM* for an explanation of how to Shepardize a case.

(b) Showing the Court Your Rights Have Been Violated

Once you have identified the standard that must be satisfied to prove your violation, you will need to show the court that your situation meets that standard. You must explain how your federal rights were violated in the court proceedings being challenged. To get federal habeas relief, the facts must support each violation you claim. For example, if you claim that your right to counsel was violated, you should use the *Strickland*³³ standard. Under the *Strickland* standard, you must show (1) that you had a right to counsel at the time,³⁴ and (2) that adequate counsel was not provided. If you do not tell the court about the facts³⁵ of the violation and how they relate to the relevant standard, your allegations will not entitle you to relief and your claim may be dismissed.³⁶ Remember to give as many details about the violation as you can, but make sure that the facts that you choose to include are relevant to the violation. If a statement relevant to the violation you have claimed was made during your trial, find those exact words in the trial transcript and include them as supporting evidence in your habeas petition. Note in your petition the line and page in the transcript where the words can be found.

You may need to obtain additional information through public records and other means in order to support the facts of your case. This process is called discovery and is generally described in Chapter 8 of the *JLM*, “Obtaining Information to Prepare Your Case: The Process of Discovery.” While a non-capital habeas petitioner is usually not entitled to discovery, you may obtain discovery under the Federal Rules of Civil Procedure by showing “good cause” that it is needed.³⁷ You can show good cause when the facts you are alleging, if correct, would entitle you to habeas relief.³⁸

33. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). For a discussion of habeas petitions based on a violation of your right to counsel, see Part B(2)(a) of this Chapter.

34. If, for example, a statement you gave to an agent of the prosecution (police, marshals, jailers, bailiffs, etc.) was used against you at trial and you are claiming that the statement was illegal because you did not have counsel present, you must first show that you had a right to counsel at the time the information was given to that agent. *See United States v. Henry*, 447 U.S. 264, 274–275, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 124–125 (1980) (holding that the prosecution’s use of a statement made by defendant to an undercover informant after the defendant was indicted violated his 6th Amendment right to counsel); *Massiah v. United States*, 377 U.S. 201, 205–206, 84 S. Ct. 1199, 1202–1203, 12 L. Ed. 2d 246, 250 (1964) (ruling that an incarcerated person’s statements to a government informant, where a situation was intentionally created to induce incriminating statements after the incarcerated person’s indictment and without counsel, should not be admitted at trial because it violated his right to counsel). *But see Illinois v. Perkins*, 496 U.S. 292, 299, 110 S. Ct. 2394, 2399, 110 L. Ed. 2d 243, 253 (1990) (ruling that a defendant’s 6th Amendment rights are not violated by admission of confession he made to undercover agent while in jail because no charges had been filed on the subject of the confession and there was no right to counsel).

35. Courts refer to these facts as “elements” of the violation.

36. *See McFarland v. Scott*, 512 U.S. 849, 860, 114 S. Ct. 2568, 2574, 129 L. Ed. 2d 666, 676 (1994) (O’Connor, J., concurring in part and dissenting in part) (“[T]he habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner’s claim.”). Note that a dissenting opinion is an opinion disagreeing with the majority opinion. Where a dissenting opinion disagrees with the majority opinion of the court, it does not have the force of law. It can be influential, however, and provide you some ideas on how to distinguish your case from the law and facts in the majority opinion. A concurring opinion agrees with the basic holding of the majority opinion, but may decide the case on different grounds, or provide alternative explanations for the basis of the holding. Again, concurring opinions can sometimes be very influential and provide different arguments that might help your case, but they do not have as much weight or persuasive force as majority opinions.

37. *See Rules Governing § 2254 Cases*, Rule 6, 28 U.S.C. § 2254; *Rules Governing § 2255 Cases*, Rule 6, 28 U.S.C. § 2255; *Bracy v. Gramley*, 520 U.S. 899, 908–909, 117 S. Ct. 1793, 1799, 138 L. Ed. 2d 97, 106 (1997) (holding that the petitioner made a sufficient factual finding of “good cause” as required by Habeas Corpus Rule 6(a) to entitle him to discovery).

38. *See Bracy v. Gramley*, 520 U.S. 899, 908–09, 117 S. Ct. 1793, 1799, 138 L. Ed. 2d 97, 106 (1997) (finding that it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry if petitioner’s allegations when fully developed may demonstrate that the petitioner is entitled to relief); *United States v. Armstrong*, 517 U.S. 456, 468–470, 116 S. Ct. 1480, 1488–1489, 134 L. Ed. 2d 687, 701–702 (1996) (explaining what a defendant alleging racially discriminatory prosecutorial practices must do to establish entitlement to discovery); *United States v. Bass*, 536 U.S. 862, 863–864, 122 S. Ct. 2389, 2391–2392, 153 L. Ed.

3. The Harmless Error Rule

(a) General

Once you have established that there was a violation, you will also need to show that you were *actually* harmed by the violation. When you present your habeas petition, the State will likely argue that even though a violation occurred, the violation did not actually harm you in your trial, and therefore was a “harmless error.” If the court finds that the violation did not cause “actual prejudice” to your case, it will conclude that the error was harmless, and habeas relief will not be granted.³⁹

While the “actual prejudice” standard applies to all federal habeas claims, people incarcerated in state custody will also need to overcome the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) standard. AEDPA limits federal courts’ ability to grant habeas relief when reviewing claims from people incarcerated by the state. This standard is described in further detail in Section (h) below.

(b) The State will likely say that the error was harmless in a clear and timely manner

While you will likely have to overcome the State’s defense that the error was harmless, the court will not automatically assume that the State has made this argument. Rather, the State must come forward and affirmatively plead (come forward and say) that the violation was a “harmless error.”⁴⁰ This is called “raising the ‘harmless error’ issue” or “raising the ‘harmless error’ defense.” If the prosecution does not raise the harmless error issue in a *clear* and *timely* manner, it is “waived” (lost), and the court will assume that the violation caused you actual harm. This generally means that the State must raise the “harmless error” defense in its response to your habeas petition.⁴¹ Ultimately, however, it is likely that the State will raise this defense, so you should be sure to explain in your petition how the error harmed you and show how it affected the jury’s decision-making.

(c) Standard of review

The “standard of review” is the level that the trial court’s error must reach in order for the habeas court to overturn its verdict. To determine whether the error was harmless, courts will generally ask whether the error “had a substantial and injurious effect or influence in determining the jury’s verdict.”⁴² In other words, the court will ask whether the error substantially influenced the jury’s decision that you were guilty, either by keeping you from defending yourself or by convincing them of your guilt. If the court finds that it did, it will likely grant habeas relief. If, on the other hand, the court finds that it had only a “slight effect” on the jury, no relief will be granted.⁴³ The only

2d 769, 771–772 (2002) (reaffirming the *Armstrong* requirements to show entitlement to discovery and adding that raw statistics about overall arrest and charge patterns say nothing about charges brought against similarly situated defendants).

39. *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1713 (1993). This test is sometimes referred to as the *Kotteakos* test. Before *Brecht*, the *Kotteakos* test had been the test used in federal habeas proceedings of people incarcerated in federal custody to determine whether a non-constitutional error was harmless. In *Brecht*, the court applied the *Kotteakos* test to all violations including constitutional violations. *See Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

40. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.7, 124 S. Ct. 2333, 2339 n.7, 159 L. Ed. 2d 157, 167 n.7 (2004) (stating that using the *Brecht* standard means that the government has “the burden of showing that constitutional trial error is harmless”); *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005) (holding that the harmless error rule was waived because the state did not raise it in district court); *Holland v. McGinnis*, 963 F.2d 1044, 1057–1058 (7th Cir. 1992) (holding that the state waived the harmless error defense by waiting until oral argument before the Court of Appeals to present the defense).

41. RANDY HERTZ AND JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (7th ed., 2016) (citing *Miller v. Stovall*, 608 F.3d 913, 926–927 (6th Cir. 2010) (“Joining other courts that have considered the question, we now hold that a State waives harmless error when it fails to raise the issue in its response to the habeas petition in federal district court.”)).

42. *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1711 (1993).

43. *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

exception to this is if your petition is subject to the AEDPA standard (if you are incarcerated in state custody), which is described in further detail in Section (h) below.

(d) Burden of proof and degree of certainty

The State “bears the burden” of demonstrating that the error was harmless.⁴⁴ This means that, if the State cannot come forwards and convince the judge that the error was harmless, relief must be granted. The key question is: how certain must the judge be that the error caused you actual harm in order to grant relief? How certain the judge must be is called the “degree of certainty.” It is helpful to think of the required degree of certainty along a spectrum, from “possible” that the error was harmful at the low end, to “beyond a reasonable doubt” at the high end. In *Davis v. Ayala*, the Court notes that it is not enough for you to show that there was a “reasonable possibility” that the error was harmful.⁴⁵ On the other hand, it is not necessary for you to prove that the error was harmful beyond a reasonable doubt, or even that it was “more probable than not” that it was harmful.⁴⁶

Instead, the minimum threshold that courts will use is the “grave doubt” standard, which is somewhere towards the middle of that spectrum. This test says that if the judge reviewing your case is in “grave doubt,” meaning he cannot decide if an error had a “substantial and injurious effect,” then he must find that the error was not harmless.⁴⁷ In other words, if in the judge’s mind, the matter is ties and he is unsure whether the error is harmless or not, he must rule in your favor (that the state has not met its burden of proof). Since the State bears the burden of proving that the error was harmless, the judge must grant you relief in this case.⁴⁸ Of course, any degree of certainty above this threshold (for instance, if the judge believes it is “highly likely” that the error was harmful) will also win you relief. However, anything below this threshold (for instance, if there is merely a “reasonable possibility” that the error was harmful) will not be sufficient.

(e) Factors to be considered

Judges are likely to consider the context when making a harmless error determination. Factors that might be considered are:⁴⁹

- (1) The nature of the right you claim has been violated;
- (2) How much violations of that right are likely to affect the jury’s deliberations;
- (3) What is at stake;
- (4) The phase of the trial that was affected by the error;
- (5) The seriousness of the violation;
- (6) The centrality of the error to the case (how big of a role the error played in your trial);
- (7) The frequency of the violation during trial,
- (8) Whether the error resulted in the exclusion or omission of evidence that could have influenced the jury’s deliberations or whether the absence of that evidence misled the jury about the facts;

44. *Davis v. Ayala*, 135 S. Ct. 2187, 2187, 192 L. Ed. 2d 323 (2015) (“in the absence of the ‘rare type of error’ that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness.”)

45. *Davis v. Ayala*, 135 S. Ct. 2187, 2198, 192 L. Ed. 2d 323 (2015).

46. RANDY HERTZ & JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 1819 (7th ed., 2016).

47. *O’Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 994, 130 L. Ed. 2d 947, 952 (1995) (“When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had ‘substantial and injurious effect or influence in determining the jury’s verdict,’ that error is not harmless. And, the petitioner must win.”). However, the federal judge does not need to be convinced beyond a reasonable doubt that the error was harmless. *See Fry v. Pliler*, 551 U.S. 112, 121–22, 127 S. Ct. 2321, 2328, 168 L. Ed. 2d 16, 24 (2007) (holding that a court must assess the prejudicial impact of state court’s constitutional error under the “substantial and injurious effect” standard regardless of whether the state appellate court applied the “harmless beyond a reasonable doubt” standard).

48. *O’Neal v. McAninch*, 513 U.S. 432, 435, 115 S. Ct. 992, 994, 130 L. Ed. 2d 947, 952 (1995).

49. RANDY HERTZ & JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 1828–1846 (7th ed., 2016).

- (9) If there were multiple errors, the total effect of the errors; and
- (10) Whether the court failed to give “curative instructions” or took other remedial measures to prevent the error from substantially affecting the jury’s deliberations.⁵⁰

Additionally, if your case involves evidence that should not have been admitted, the court will look how much:

- (1) The prosecutor emphasized improper evidence in his closing argument or the judge emphasized improper evidence in jury instructions,
- (2) The improperly admitted evidence was likely to influence the jury’s deliberations, and
- (3) The improperly admitted evidence was not the same as other evidence that was lawfully presented to the jury.

(f) Examples of “harmless error” cases

Below are examples of errors that courts have found to be harmless (cases where the petitioner could not win relief because the error did not harm him). Keep in mind that similar errors will not always be held harmless, as the context of the error (all of the factors listed above) mattered to the court’s decision in these cases. Errors were found to be harmless:

- (1) When the defendant alleged the prosecutor used racial discrimination in selecting the jury, and the state court did not allow the defendant or his attorney to attend the later scheduled hearing on this matter, nor provide transcripts of the hearing.⁵¹
- (2) When the defendant’s right to cross-examine the victim was limited, but not completely denied.⁵²
- (3) When the trial court failed to issue a jury instruction on unlawful imprisonment as a lesser included offense to kidnapping in a felony murder case.⁵³
- (4) When the federal trial court failed to inform the defendant of his right to appeal his conviction, but the defendant was already aware of this right.⁵⁴
- (5) When the trial court admitted evidence that was obtained in violation of the defendant’s Fifth Amendment rights, but the evidence was unrelated to the charges the defendant was appealing.⁵⁵

The following are some situations where courts have found errors to be *not harmless* (the petitioner could win relief because the error harmed him):

50. *Kotteakos v. United States*, 328 U.S. 750, 762, 66 S. Ct. 1239, 1246, 90 L. Ed. 1557 (1946). *Brecht* also included an exception, stating that a deliberate and especially serious error, or one combined with a pattern of prosecutorial misconduct, might warrant habeas relief even if it did not “substantially influence” the jury’s verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9, 113 S. Ct. 1710, 1722 n.9, 123 L. Ed. 2d 353, 373 n.9 (1993); *see also* *Duckett v. Mullin*, 306 F.3d 982, 993 n.3 (10th Cir. 2002) (finding that misconduct of the prosecutor does not put error into *Brecht*’s “footnote nine exemption”); *Hardnett v. Marshall*, 25 F.3d 875, 879–880 (9th Cir. 1994) (holding that the key consideration to whether the *Brecht* “footnote nine exemption” will be applicable is whether the integrity of the proceeding was so infected that the entire trial was unfair). As of 2015, however, no court has found for a defendant based on these details.

51. *Davis v. Ayala*, 135 S. Ct. 2187, 2207, 192 L. Ed. 2d 323 (2015). (“The most that Ayala can establish is that reasonable minds can disagree about whether the prosecution’s fears [concerning jury selection] were well founded, but this does not come close to establishing “actual prejudice” under *Brecht*.”).

52. *Pettitway v. Vose*, 100 F.3d 198, 202 (1st Cir. 1996) (finding that a trial judge’s limitation of the defendant’s right to cross-examine the victim in a child molestation sexual assault case did not have a “substantial and injurious” effect because other evidence in the case was so overpowering).

53. *Villafuerte v. Stewart*, 111 F.3d 616, 624–625 (9th Cir. 1997) (stating that the lower court’s error did not have a “substantial or injurious” effect on the verdict and adding that the error “was at most harmless and more likely irrelevant”).

54. *Peguero v. United States*, 526 U.S. 23, 24, 119 S. Ct. 961, 963, 143 L. Ed. 2d 18, 22 (1999) (holding that no harm is caused when a district court fails to advise a defendant of his right to appeal if the defendant knew of his right, and ruling that the court’s error did not entitle defendant to habeas relief).

55. *United States v. Suarez*, 263 F.3d 468, 484 (6th Cir. 2001).

- (1) When the defense attorney represented two defendants charged with possession of drugs. Both defendants wanted to assert that someone else owned the drugs. The two defendants had conflicting interests because they each may have argued that the other defendant was guilty as part of their defense strategy. The error was not harmless because the attorney had a conflict of interest when he represented the habeas petitioner.⁵⁶
- (2) When a juror lied about his background to get on the jury and made numerous comments that called into doubt the juror's objectivity.⁵⁷
- (3) When the trial court allowed testimony from a co-defendant about his understanding of the defendant's knowledge of fraudulent behavior. The appellate court reversed, finding the admission of this testimony was not harmless error because the testimony related to the case's "central disputed issue" and because of the government's weak case. The testimony of the co-defendant was found to be "vitally important."⁵⁸

(g) Structural Errors

In a few situations, the court will make an exception to the harmless error rule and will automatically assume that you were harmed because of the nature of the violation. These violations are called "*per se* prejudicial," or "structural errors."⁵⁹ Structural errors are errors that the court will always consider to have violated your right to a fair trial. Therefore, these errors are not subject to the harmless error rule, and you do not have to prove to the court that you were actually harmed.⁶⁰ Structural errors include:⁶¹

- (1) the total denial of the right to counsel,⁶²
- (2) the denial of the right to an impartial judge,⁶³
- (3) unlawful discrimination in the grand jury selection process,⁶⁴

56. *McFarland v. Yukins*, 356 F.3d 688, 713–714 (6th Cir. 2004) (holding that the court's error was prejudicial where the defendant "was forced, over her objection, to go to trial with counsel who was actively representing a co-defendant").

57. The juror in question lied about having a prior felony conviction, which made him ineligible to serve as a juror in California. *Green v. White*, 232 F.3d 671, 677–678 (9th Cir. 2000).

58. *United States v. Kaplan*, 490 F.3d 110, 123–124 (2d Cir. 2007).

59. A court rarely finds a violation *per se* prejudicial. If you find a case where a court described the violation you are claiming as a *per se* prejudicial violation, a structural violation, or an automatic reversal violation, you should cite the case and show the court how your violation is similar and why it deserves the same treatment as the violation described in that case. Here are some examples of when courts have found violations *per se* prejudicial: *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985, 999 (2000) (finding *per se* prejudice when the petitioner is effectively denied the right to an appeal due to ineffective assistance of counsel); *Edwards v. Balisok*, 520 U.S. 641, 647, 117 S. Ct. 1584, 1588, 137 L. Ed. 2d 906, 914 (1997) (finding *per se* prejudice when the trial judge is not impartial); *Bell v. Cone*, 535 U.S. 685, 695–696, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914, 927 (2002) (finding *per se* prejudice when petitioner is denied counsel at a "critical stage" of the proceedings).

60. *See Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302, 332 (1991) ("[S]tructural defect[s] affect[] the framework within which the trial proceeds, rather than simply...error[s] in the trial process.").

61. This list is not complete. There are other instances where the court will find the error *per se* prejudicial (a structural error), and your federal appeals court may include more instances than the Supreme Court.

62. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (upholding a habeas petition due to Florida's refusal to grant assistance of counsel in a criminal proceeding).

63. *But see Richardson v. Quarterman*, 537 F.3d 466, 478 (5th Cir. 2008) (denying a habeas petition alleging that a judge had to remove himself from a murder prosecution because the appearance of bias arising from his wife's acquaintance with the victim was only a harmless error and not a structural error requiring automatic reversal).

64. *Vasquez v. Hillery*, 474 U.S. 254, 262–264, 106 S. Ct. 617, 623, 88 L. Ed. 2d 598, 609 (1986) (upholding a habeas petition alleging that the defendant was denied equal protection because blacks were systematically excluded from the grand jury that indicted him).

- (4) the denial of the right to self-representation at trial,⁶⁵
- (5) the denial of the right to a public trial,⁶⁶ and
- (6) giving flawed jury instructions in a case where the jury must find guilt beyond a reasonable doubt to find the defendant guilty.⁶⁷

While the court does occasionally find that a structural error has occurred, these cases are rare. Therefore, you should always show the court how you suffered actual harm, even if you believe that a structural error occurred. You should only use the argument that a violation was structural to *strengthen* your argument that you were harmed by the violation.⁶⁸

(h) AEDPA

As mentioned, the “substantial or injurious effect” standard does not always apply in federal courts when the court is reviewing a state court’s determination that an error was harmless. Generally speaking, if you are a person incarcerated by the state, the federal court will apply the AEDPA standard when reviewing your habeas claim. Specifically, AEDPA states that, if the state court adjudicated your habeas claim *on the merits* of your case, then the federal court cannot grant relief unless the state court’s decision was *unreasonable*.⁶⁹ This means that if the state court held that the constitutional error in your case was harmless, your habeas petition will have to convince the federal court that the state court’s decision that the violation was harmless was unreasonable.⁷⁰ Federal courts will generally hold that a state court decision was not unreasonable “if fair-minded jurists could disagree on its correctness.”⁷¹ This task is more difficult than just convincing a court that the error caused harm.

To learn more about the standard that AEDPA imposes for federal habeas review of state court decisions (including whether or not it applies to your case), see Part B(4) of this Chapter.

65. *McKaskle v. Wiggins*, 465 U.S. 168, 177–178, n.8, 104 S. Ct. 944, 950–951, n.8, 79 L. Ed. 2d 122, 133, n.8 (1984) (denying a habeas petition alleging that the court-appointed standby counsel interfered with the defendant’s presentation because he was allowed to make his own appearances); *see also* *Johnstone v. Kelly*, 808 F.2d 214, 218 (2d Cir. 1986) (“[V]iolation of a defendant’s right to proceed *pro se* requires automatic reversal of a criminal conviction.”).

66. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (holding that the closure of an entire suppression hearing to the public violated the defendant’s right to a public trial).

67. *United States v. Allen*, 406 F.3d 940, 944 (8th Cir. 2005) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 1264, 113 L. Ed. 2d 302, 331 (1991)); *see also* *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1834, 144 L. Ed. 2d 35, 45 (1999) (noting structural errors subject to automatic reversal are (1) a complete denial of counsel, (2) biased trial judge, (3) racial discrimination in selection of grand jury, (4) denial of self-representation at trial, (5) denial of public trial, and (6) defective reasonable-doubt instruction).

68. For example, after you show the court that the error was harmful, you might say, “Even if this error were harmless, I would still be entitled to relief because the error was a *per se* prejudicial violation that affected my substantial rights.” *See, e.g.,* *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35, 46 (1999) (stating that there is a “limited class of fundamental constitutional errors that...are so intrinsically harmful as to require automatic reversal (i.e., ‘affect substantial rights’) without regard to their effect on the outcome”).

69. *Davis v. Ayala*, 135 S. Ct. 2187, 2198, 192 L. Ed. 2d 323 (2015) (citing AEDPA, 28 U. S. C. §2254(d)). An unreasonableness standard means that the court will only look at whether the lower court’s decision was unreasonable. This means that if the lower court did not find a constitutional error, but the reviewing court does find a constitutional error, the reviewing court cannot reverse the lower court’s decision unless the lower court was unreasonable in not finding an error.

70. *See* *Mitchell v. Esparza*, 540 U.S. 12, 18, 124 S. Ct. 7, 12, 157 L. Ed. 2d 263, 271 (2003) (“[The federal court] may not grant [a] habeas petition . . . if the state court simply erred in concluding that the State’s errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an ‘objectively unreasonable’ manner.”) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75–77, 123 S. Ct. 1166, 1174, 155 L. Ed. 2d 144, 158 (2003)).

71. *Davis v. Ayala*, 135 S. Ct. 2187, 2199, 192 L. Ed. 2d 323, 334 (2015) (citing *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624, 640 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 2149, 158 L. Ed. 2d 398, 407 (2004))).

4. AEDPA Standard of Relief: Showing the Federal Court that the State Court Was Incorrect in Refusing to Grant You Relief⁷²

If you are a person incarcerated by the state, once you have shown the court that your rights were violated and the violation was harmful, you will also need to convince the federal court that the state court was incorrect in failing to find that your rights were violated or that the violation did not harm you when it reviewed your habeas petition. In some cases, where the state court ruled on both of these elements, you will have to show the federal court that the state court was incorrect on both counts. (Remember, you must present your claims to a state court first, so you will only be filing a federal habeas petition if the state court has denied you relief).

In 1996, AEDPA altered 28 U.S.C. § 2254 and set a new “standard of review” for habeas relief for people incarcerated by the state court. A standard of review is the test that the federal court will use to decide whether to overrule the state court’s decision denying you relief. Under AEDPA, you must prove that the state court decision rejecting your habeas petition was either “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,”⁷³ or that it was based on an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁷⁴ *This is a very high standard* and it is not easy to prove. The federal courts do not like to overturn state court decisions. This means that to get federal habeas relief, you cannot just show the federal court that the state court was wrong—you must show that the state court’s ruling was “unreasonable” or “contrary” to the Supreme Court’s interpretation of federal law.

How the federal court will apply the AEDPA standard of review will depend on how the state court handled your state collateral attack.⁷⁵ If the state court made a determination about certain issues, then the federal court will apply the AEDPA standard of review to the state court’s decision-making process. The federal court will look to see if the state court’s decision was “unreasonable” or “contrary” to the Supreme Court’s interpretation of the law. In addition to demonstrating that the state court’s decision-making process was incorrect, you still need to provide facts that show that the state court’s ultimate determination was incorrect as well.

For example, if the state court rejected your collateral attack because it found that a constitutional violation did not occur, and it did not discuss the issue of harmless error, then the AEDPA standard of review will only apply to proving the constitutional violation. Showing that the state court was incorrect will be subject to the AEDPA standard of review, so you will have to prove that the state court was “unreasonable” or “contrary” to the Supreme Court’s interpretation of federal law. In order to do this, you must do two things: (1) show the federal court that the state court was incorrect in failing to find that the violation occurred; (2) show the federal court that a constitutional violation occurred by showing the standard used by the state court was met as discussed in Part B(2) of this Chapter.

If the state court did not rule on the next element of the habeas petition, harmless error, then you will not need to apply the AEDPA standard of review to the harmless error issue. In this example, because the state court never ruled on the harmless error issue, the federal court will look at the harmless error issue “*de novo*”, which means that the federal court will look at the issue as if it was the first time the issue was raised. The federal court will not consider whether the state court’s decision

72. The standard of review discussed in this Section only applies to people incarcerated in state custody. For people incarcerated in federal custody, appellate courts review questions of law *de novo*, and questions of fact for clear error. This means that reviewing courts will apply their own judgments to questions of law, but “the factual findings of [the courts] are presumed to be correct.” *Smith v. Mann*, 173 F.3d 73, 76 (2d Cir. 1999) (citing *Nelson v. Walker*, 121 F.3d 828, 833 (2d Cir. 1994) (quoting *Green v. Scully*, 850 F.2d 894, 900 (2d Cir. 1998)); *see, e.g., Dorsey v. Chapman*, 262 F.3d 1181, 1185, n. 4 (11th Cir. 2001) (stating that a factual finding in an ineffective assistance of counsel claim is accorded a presumption of correctness).

73. 28 U.S.C. § 2254(d)(1).

74. 28 U.S.C. § 2254(d)(2).

75. *Harrington v. Richter*, 562 U.S. 86, 97–104, 131 S. Ct. 770, 783–787, 178 L. Ed. 2d 624, 638–642 (2011). See Part A(1) of this Chapter for an explanation of “collateral attack.”

was unreasonable. This would mean an easier or less stringent standard of review. If, on the other hand, the state court found that a violation occurred, but that it was harmless, the federal court will apply AEDPA's unreasonableness standard of review to the harmless error issue. Also, the state court may have found that there was no constitutional violation but may have ruled on the harmless error issue anyway. Because in such a situation the state court ruled on both elements of the habeas petition, the federal court has to apply the AEDPA unreasonableness standard of review to both elements.

Sometimes people incarcerated by the state present habeas claims to federal courts that have not been previously presented to state courts. This happens when the claim falls under one of the exceptions to the 'exhaustion rule'. You should see Part D(2) of this Chapter below for a discussion of the state exhaustion rule. In these rare circumstances, the AEDPA standard of review will not be used at all. If your claim falls under one of the exceptions to the exhaustion rule, you only need to show the federal court that your rights were violated and that the violation affected the outcome of the trial. Once you have shown this, you will have completed the substantive part of your habeas claim. However, there are still many procedural issues you will have to address to be granted habeas relief. These procedural issues are discussed below in Part D ("Procedures for Filing a Petition for Habeas Corpus") of this Chapter.

Assuming the state court has ruled on your claim, it will be subject, at least in part, to the AEDPA standard of review. This Section discusses this standard in more detail. Subsection (a) of this Section will discuss how to use the first AEDPA test—"contrary to, [or an] unreasonable application of, clearly established Federal law as determined by the Supreme Court." Subsection (b) will discuss the second AEDPA test—"unreasonable determination of facts in light of the evidence presented." To give your petition the best chance of success, you should always argue that your situation meets both the "contrary" standard and the "unreasonable application" standard.

- (a) "Contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"⁷⁶

The Supreme Court explained this test in *Williams v. Taylor*.⁷⁷ In *Williams*, the petitioner claimed his attorney had provided ineffective assistance of counsel. The Court held that Mr. Williams had shown his counsel's performance was ineffective and went on to consider whether habeas relief should be granted under this standard.⁷⁸ The Court first held that to be successful, a petitioner must show that the claimed violation was based on federal law that was clearly established by the Supreme Court *at the time* the state court decided these claims. This means that before the court will consider your claim, you must show that the law you are relying on is not new and that the Supreme Court itself has reviewed the law at some point in the past.⁷⁹ Most of the examples of constitutional violations listed above are not new laws and would be considered for relief. There are some very limited exceptions that allow new law to be used. To learn more about these exceptions read Part C(3) ("Exceptions to the New Laws Rule") of this Chapter.

If you can show that you are relying on clearly established federal law, your next step is to show either that the state or trial court's decision was contrary to that federal law, or that the state or trial court applied the law in an unreasonable manner. Remember, the point of the federal habeas petition is to give the federal court a chance to correct a wrong decision by the state or trial court.

76. 28 U.S.C. § 2254(d)(1).

77. *Williams v. Taylor*, 529 U.S. 362, 384–390, 120 S. Ct. 1495, 1508–1511, 146 L. Ed. 2d 389, 412–416 (2000).

78. In determining that Mr. Williams' counsel was ineffective, the Court found that Mr. Williams had met the *Strickland* standard. *Strickland v. Washington*, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984). Mr. Williams showed a violation of clearly established federal law and/or the Constitution, found the right standard, and showed the Court that he had suffered harm from this violation. To learn more about the *Strickland* standard, see Part B(2) of this Chapter. For a discussion of the "clearly established" standard, see Part B(1) of this Chapter. To learn how to find the correct standard, see Part B(2) of this Chapter, and for an explanation of how to establish that a violation caused harm, see Part B(3) of this Chapter.

79. For an explanation of how to establish that the law you are relying on is not new, see Part C(2) ("New Laws: The *Teague* Rule") of this Chapter.

(i) “Contrary” Standard

The first way to show that the court’s decision was wrong is to show that the court’s decision was contrary to (conflicting with) clearly established federal law.⁸⁰ This is a difficult standard to prove. In *Williams*, the Court held that the contrary standard meant that habeas relief is deserved if the court “applies a rule that contradicts the governing law set forth in [its] cases.”⁸¹ This means that the court must have either applied the wrong standard in a case or interpreted the standard incorrectly. For example, in a case on ineffective assistance of counsel, the *Strickland* standard governs.⁸² If the court applied a standard that was different from the *Strickland* standard, then it has applied a standard “contrary” to clearly established law. In this case, relief may be appropriate. Likewise, if the court interpreted the *Strickland* standard incorrectly, then the decision would also be contrary to federal law, and relief could be granted.⁸³ However, it is difficult to persuade an appeals court that a state court applied the law in a contrary way.⁸⁴

The other way to show that your state court’s decision was contrary to federal law is to show that the Supreme Court considered a case very similar to yours, and it reached a different conclusion from the one reached by your state court.⁸⁵ This means that if you can find a Supreme Court case with similar facts to your case, and the state court ruled differently from the Supreme Court, you might be entitled to relief.⁸⁶ This only applies when you are able to point to a case with similar enough facts.

In order to show that the decision rejecting your claim was contrary to federal law under this part of the test, you must do one of three things: you must (1) show that the court relied on the wrong standard in determining whether a violation had occurred;⁸⁷ (2) show that the court chose the right standard, but then applied it incorrectly to your case; or (3) point to a Supreme Court case with similar facts and claims to your case, in which the Supreme Court ruled differently from how the state court in your case ruled. Put another way, to prove that you deserve relief under this “contrary” standard

80. It is important to note that *dicta* (plural of *dictum*) are not considered clearly established federal law. Only Supreme Court holdings are considered law clearly established by the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389, 429 (2000).

81. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389, 425 (2000) (O’Connor, J., concurring).

82. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984) (declaring that the standard for establishing ineffective assistance of counsel is whether the attorney’s performance was objectively reasonable and whether deficient performance prejudiced the defense). To learn more about the *Strickland* standard, see Part B(2) of this Chapter.

83. In *Williams*, the Court found that the state court decision was contrary to federal law because the court used the test for ineffective assistance of counsel found in *Lockhart v. Fretwell*, 506 U.S. 364, 366, 113 S. Ct. 838, 841, 122 L. Ed. 2d 180, 187 (1993), instead of the *Strickland* standard, which should have been used. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L. Ed. 2d 389, 416–417 (2000); *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984).

84. See, e.g., *Bell v. Cone*, 535 U.S. 685, 693, 122 S. Ct. 1843, 1849, 152 L. Ed. 2d 914, 926 (2002) (noting that AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under the law”).

85. *Williams v. Taylor*, 529 U.S. 362, 406, 120 S. Ct. 1495, 1519–1520, 146 L. Ed. 2d 389, 426 (2000) (“A state-court decision will also be contrary to this Court’s clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.”); see also *Ram Dass v. Angelone*, 530 U.S. 156, 165–166, 120 S. Ct. 2113, 2119–2120, 147 L. Ed. 2d 125, 135–136 (2000) (stating that “a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts.”).

86. See *Cockerham v. Cain*, 283 F.3d 657, 663 (5th Cir. 2002) (finding jury instructions were contrary to federal law because the same instructions had been found to be unconstitutional by the Supreme Court in *Cage v. Louisiana*, 498 U.S. 39, 41, 111 S. Ct. 328, 329, 112 L. Ed. 2d 339, 342 (1990)).

87. To find out what standard the court should have applied, see Part B(2) (“Standards and Tests for Claims of Violations”) of this Chapter.

you must point to a violation of a federal right,⁸⁸ identify the standard that applies to that violation,⁸⁹ show the court that the violation in your case meets that standard,⁹⁰ and then argue that the state court used the wrong standard or applied the standard incorrectly to the facts in your case.

(ii) Unreasonable Application Standard

If the state court used the correct standard and was not contrary to federal law in deciding to reject your claim of a federal rights violation, you may still be able to get relief under the second part of the test. This part of the test applies either if the state court used the right standard but applied it to the facts of your case in an unreasonable (unfair) way, or if the state court did not use the correct standard for your violation.⁹¹ There are times when this standard will overlap with the “contrary to” standard,⁹² and *you should always argue that your case meets both standards*. To show that the state court decision was an unreasonable application of federal law, you have to show that the state court was “objectively unreasonable” in the way it applied the standard.⁹³ Here, “objectively unreasonable” means that the standard was applied to your case in an unfair way, or that the wrong standard was used unfairly.

You should show that there is specific Supreme Court case law that requires the state court to reach a result that it did not reach. State courts will follow Supreme Court case law depending on how similar, specific, and recent the case law is.⁹⁴ You will strengthen your argument that the state court was unreasonable by showing the federal court that the Supreme Court case law was specific and required a specific outcome in your case. The Supreme Court has said that an “unreasonable” application of federal law is more than just an “incorrect” application of federal law.⁹⁵ State courts can go so far as to be “imprecise” and yet still apply the law reasonably.⁹⁶ Therefore, you cannot just show

88. See Part B(1) (“Examples of Constitutional Violations”) of this Chapter.

89. See Part B(2) (“Standards and Tests for Claims of Violations”) of this Chapter.

90. See Part B(4) (“AEDPA Standard of Getting Relief: Showing the Federal Court that the State Court Was Incorrect in Refusing to Grant You Relief”) of this Chapter.

91. *Williams v. Taylor*, 529 U.S. 362, 409, 120 S. Ct. 1495, 1521, 146 L. Ed. 2d 389, 427 (2000) (explaining that the “unreasonable application” standard is met when “a state-court decision unreasonably applies the law of this Court to the facts of a prisoner’s case”); *see Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 2534–35, 156 L. Ed. 2d 471, 484 (2003) (stating that unreasonable application of federal law is when a state court “has misapplied a ‘governing legal principle’ to ‘a set of facts different from those of the case in which the principle was announced’”) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144, 158 (2003)); *Ramdash v. Angelone*, 530 U.S. 156, 166, 120 S. Ct. 2113, 2120, 147 L. Ed. 2d 125, 136 (2000) (“The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.”).

92. *Williams v. Taylor*, 529 U.S. 362, 384–386, 120 S. Ct. 1495, 1508–1509, 146 L. Ed. 2d 389, 412–413 (2000) (explaining that the two standards are not mutually exclusive and anticipating that claims will be brought that implicate both).

93. *Williams v. Taylor*, 529 U.S. 362, 409–410, 120 S. Ct. 1495, 1521–1522, 146 L. Ed. 2d 389, 428 (2000) (explaining that a showing of “objective[] unreasonable[ness]” is not defeated by the fact that one jurist has applied the law in the same manner as the state court); *see also Woodford v. Visciotti*, 537 U.S. 19, 24–25, 123 S. Ct. 357, 360, 154 L. Ed. 2d 279, 286 (2002) (holding that it is not enough for a federal court to find a state court applied federal law incorrectly, rather, the incarcerated person must show that the state court applied federal law “in an *objectively unreasonable* manner”) (emphasis added).

94. *See Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 2149, 158 L. Ed. 2d 938, 951 (2004) (concluding the more general the rule being applied, the more leeway the state courts have in making their decisions in case-by-case determinations).

95. *Williams v. Taylor*, 529 U.S. 362, 410–411, 120 S. Ct. 1495, 1522, 146 L. Ed. 2d 389, 428–429 (2000).

96. *See Woodford v. Visciotti*, 537 U.S. 19, 23–24, 123 S. Ct. 357, 359, 154 L. Ed. 2d 279, 285–286 (2002) (holding that while the California Supreme Court was not precise in applying the *Strickland* test, its decision was not unreasonable).

the federal court that the state court was wrong—you must show them something more, that it was unreasonable.⁹⁷

It is hard to define what you would need to show to prove that a state court's application of Supreme Court case law was unreasonable. You should try to show that the state court's analysis of your case and reasoning were flawed, as well as its conclusion. You should show that the court's point of view is different from how most people would see the situation, and that it would be hard for a reasonable person to understand how the state court came to its decision. If you can show a significant error in the court's reasoning, you may be able to show that its actions were unreasonable.⁹⁸

Federal Circuit court have different interpretations as to what this “unreasonable” standard means. You should check how your circuit defines “unreasonable” in this context by Shepardizing the main Supreme Court case on this point, *Williams v. Taylor*,⁹⁹ and finding a case in your circuit that discusses *Williams*.

97. See *Phoenix v. Matesanz*, 233 F.3d 77, 83 (1st Cir. 2000) (“We cannot say that [the state court’s] finding was objectively unreasonable, even if we might have found differently.”); *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (stating that “[s]ome increment of incorrectness beyond error is required” but “the increment need not be great”); *Hameen v. Delaware*, 212 F.3d 226, 235 (3d Cir. 2000) (stating that a federal court may not grant habeas relief simply because the state court applied federal law erroneously or incorrectly). See also *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624, 641 (2011) (stating that a federal court may find a state court’s ruling unreasonable only “where there is no possibility fair minded jurists could disagree that the state court’s decision conflicts with this Court’s precedents”); *Middleton v. McNeil*, 541 U.S. 433, 437–438, 124 S. Ct. 1830, 1832–1833, 158 L. Ed. 2d 701, 707 (2004) (holding that the state court was not unreasonable when it upheld jury instructions, even though an incorrect instruction was given, because the jury was given the correct instructions at least three other times).

98. See *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S. Ct. 2527, 2539, 156 L. Ed. 2d 471, 489 (2003) (finding that a “clear factual error” in a state court’s analysis “highlight[ed] the unreasonableness of the court’s decision”). See also *Rompilla v. Beard*, 545 U.S. 374, 389, 125 S. Ct. 2456, 2467, 162 L. Ed. 2d 360, 376 (2005) (finding that the state court’s “fail[ure] to answer the considerations [the Supreme Court] ha[s] set out” amounted to an unreasonable decision on a claim of ineffective assistance of counsel); *Mask v. McGinnis*, 233 F.3d 132, 140 (2d Cir. 2000) (concluding that the state court’s decision was a “unreasonable application” of the test in *Strickland*, because it required petitioner to meet a higher standard—certainty that the results of the proceeding would have been different—to establish an ineffective assistance of counsel claim, rather than the “reasonable probability” standard required under *Strickland*); *Washington v. Hofbauer*, 228 F.3d 689, 707 (6th Cir. 2000) (concluding that the state court’s application of *Strickland* was objectively unreasonable where, among other things, the state court erroneously cited *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) to support its incorrect conclusion that counsel was not ineffective when it failed to object to prosecutorial misconduct in the closing argument).

99. *Williams v. Taylor*, 529 U.S. 362, 409–414, 120 S. Ct. 1495, 1521–1524, 146 L. Ed. 2d 389, 427–31 (2000). The following is a list of sample cases, by circuit, interpreting the unreasonable application standard. See *Byrd v. Lewis*, 566 F.3d 855, 866 (9th Cir. 2009) (finding that an error in jury instructions is not “structural” when it “affects only an element of the offense, a permissible evidentiary inference, or a potential theory of conviction,” rather than “the overarching reasonable doubt standard of proof”); *Jackson v. Edwards*, 404 F.3d 612, 628 (2d Cir. 2005) (holding that a trial court applied the law unreasonably by not instructing the jury about a justification defense); *McFarland v. Yukins*, 356 F.3d 688, 714 (6th Cir. 2004) (finding that requiring the defendant to go to trial with an attorney with a conflict of interest was contrary to clearly established federal law); *Miller v. Dormire*, 310 F.3d 600, 604 (8th Cir. 2002) (finding that the state court’s application of the harmless error rule to defense attorney’s waiver of jury trial without defendant’s consent was contrary to clearly established federal law because federal law holds that denial of a jury trial is a “structural” error and always harmful); *Brown v. Head*, 272 F.3d 1308, 1313–1315 (11th Cir. 2001) (holding that the lower court decision was not objectively unreasonable and noting that it is the “objective reasonableness, not the correctness *per se*, of the state court decision that [the reviewing court is] to decide”); *Davis v. Strack*, 270 F.3d 111, 133 (2d Cir. 2001) (finding that the Appellate Division’s decision was “egregiously at odds with the standards of due process propounded by the Supreme Court” and fit within either the “unreasonable application” clause or the “unreasonable determinations of fact” clause); *Kibbe v. Dubois*, 269 F.3d 26, 37, 39 (1st Cir. 2001) (finding that the state court’s decision was objectively reasonable because it fell within “the universe of plausible, credible outcomes,” and stating that multiple contradictory, reasonable interpretations are likely when there are unresolved legal issues) (quoting *O’Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998)); *Jermyn v. Horn*, 266 F.3d 257, 312 (3d Cir. 2001) (finding that defendant’s counsel had been ineffective for failing to conduct adequate investigation and that the state court’s decision to the

(b) “Unreasonable determination of facts in light of the evidence presented in the State court proceeding”

This Subsection discusses a different standard for getting habeas relief. As you will recall, Part B(4)(a) of this Chapter reviews how to get habeas relief if the state court determination of your claim rested on incorrect law or law that was unreasonably applied. This Subsection is not for when the state court gets the *law* wrong, but rather when the state court gets the *facts* of your case wrong. This means that the state court determined the right standard for your case, but (1) did not believe some of the evidence that was presented; (2) understood some of that evidence incorrectly and based a ruling on this misunderstood evidence; or (3) ignored legally relevant facts that it needed to consider in order to reach the correct result.

If the federal court decides that the state court’s understanding of the facts in your case is unreasonable and the state court based its decision on this unreasonable interpretation, then it can grant habeas relief.¹⁰⁰ On the other hand, if the federal court decides that the state court was reasonable in its determination of the facts, it cannot grant relief. A reviewing court will defer to the trial court and start with the assumption that the state court based its decision on a correct reading of the facts.¹⁰¹ It is up to you to prove that the court did not read the facts correctly because it either ignored some evidence or interpreted some evidence incorrectly. You must then prove that the state court decision would have been different if the court had properly considered and applied all of the relevant facts.

The first step is to show the federal court that there *was* a determination of facts—for example, at an evidentiary hearing or at credibility determinations where the court chose to believe one witness over another. You may not be able to rely on this standard for relief if no facts were determined by the state court. However, if the state court did not determine any facts, but should have, you might obtain relief by arguing that a failure to find facts at all is actually an unreasonable determination of facts.¹⁰²

contrary was objectively unreasonable); *Boss v. Pierce*, 263 F.3d 734, 742 (7th Cir. 2001) (holding that the appellate court’s decision was unreasonable and noting that to determine unreasonableness, the court asks “whether the decision is ‘at least minimally consistent with the facts and circumstances of the case’ or ‘if it is one of several equally plausible outcomes,’ . . . [and only granting habeas] if the determination is ‘at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary’ as to be unreasonable”) (first quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997); then quoting *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997); and then quoting *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997)); *Martinez v. Johnson*, 255 F.3d 229, 243–245 (5th Cir. 2001) (distinguishing the objective standard of unreasonableness from the subjective “debatable among reasonable jurists” standard, and holding that the court’s decision was not objectively unreasonable because a rational trier of fact could come to the same conclusion) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)); *Bell v. Jarvis*, 236 F.3d 149, 162 n.9, 175 (4th Cir. 2000) (holding that the state court’s rejection of the plaintiff’s ineffective counsel claim was not objectively unreasonable, and explicitly stating that the “unreasonable” standard should not be equated with the “clearly erroneous” standard); *Thomas v. Gibson*, 218 F.3d 1213, 1220 (10th Cir. 2000) (applying the Supreme Court’s distinction between erroneous and unreasonable); *Hameen v. Delaware*, 212 F.3d 226, 235 (3d Cir. 2000) (following *Williams* by requiring more than error to find unreasonableness).

100. See *Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (finding that “the state courts’ factual determinations were unreasonable” and that the defendant “rebutted the presumption of correctness of [the state courts’] findings by clear and convincing evidence.”) (citation omitted) (internal quotation marks omitted).

101. 28 U.S.C. § 2254(e)(1) (“[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”); see also *Weeks v. Snyder*, 219 F.3d 245, 258 (3d Cir. 2000) (holding that the presumption of correctness applies to the state court’s implicit factual findings as well as express findings); *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000) (finding that “[w]hen there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact” to which the presumption of correctness is applied).

102. See *Taylor v. Maddox*, 366 F.3d 992, 1000–1001 (9th Cir. 2004) (finding that a state court’s determination of facts is unreasonable if no finding was made and the court “should have made a finding of fact but neglected to do so”) (overruled on alternate grounds); *Nunes v. Mueller*, 350 F.3d 1045, 1054–1055 (9th Cir. 2003) (finding that the state court’s “factual” findings were unreasonable when the court made the findings without holding an evidentiary hearing); *Mask v. McGinnis*, 233 F.3d 132, 140 (2d Cir. 2000) (refusing to give the

The second step is to prove that the state court determinations of fact were unreasonable. One way to do this is to show that the fact-finding procedure the court used was inadequate.¹⁰³ This means that the court made conclusions without looking at the evidence you presented or did not consider some of the important evidence you presented. In other words, this step deals with *how* the state court went about making factual determinations, not what those determinations were.

The third step in proving that the state court determinations of fact were unreasonable is to show that the determinations the state court made were substantively unreasonable. This means you have to show that the state court's determination of facts was unreasonable and not at all supported by the evidence in the record.¹⁰⁴ The standard for doing this is "clear and convincing" evidence.¹⁰⁵ This means you cannot just assert that the state court determined the facts unreasonably—you actually have to demonstrate to the court, with specific examples, why the state's determination of facts was unreasonable.¹⁰⁶

C. What You Cannot Raise in Your Habeas Petition

Federal law is very particular about what you can raise as a violation of your rights in your federal habeas petition. As stated in Parts A and B of this Chapter, you must show that your imprisonment violates the U.S. Constitution, the federal laws, or the treaties of the United States. Remember, this means that you cannot discuss violations of state constitutions, state laws, or prison conditions, unless your prison condition or sentence amounts to cruel and unusual punishment.¹⁰⁷ You generally may not raise habeas complaints based on illegal search and seizure or based on new law. This section discusses these two situations, as well as the exceptions to these rules.

state court's "factual findings" a presumption of correctness because they were not factual findings but only conclusions).

103. See *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 698 (9th Cir. 2004) (deciding that there is no deference given to a state court's fact findings when those findings were "arrived at through the use of erroneous legal standards"); *Nunes v. Mueller*, 350 F.3d 1045, 1054–1055 (9th Cir. 2003) (finding that without an evidentiary hearing, there was no need to defer to the "facts" found by the state courts); *Bottoson v. Moore*, 234 F.3d 526, 533–536 (11th Cir. 2000) (determining that 10 days of evidentiary hearings and contradicting expert witnesses are adequate to support findings of fact); *Francis S. v. Stone*, 221 F.3d 100, 116 (2d Cir. 2000) (finding an "extensive" record is adequate to credit one expert witness over another).

104. See *Miller-El v. Dretke*, 545 U.S. 231, 240–265, 125 S. Ct. 2317, 2325–2340, 162 L. Ed. 2d 196, 214–230 (2005) (finding that the state court's finding of no racial discrimination in jury selection was an unreasonable determination of facts "in light of the evidence presented"); *Miller v. Dormire*, 310 F.3d 600, 603–604 (8th Cir. 2002) (determining that the state court's finding that defendant had waived his right to a jury was unreasonable when the record was "devoid of any direct testimony from [defendant] regarding his consent to waive trial by jury"); *Torres v. Prunty*, 223 F.3d 1103, 1109 (9th Cir. 2000) (concluding that state court's factual determination of competency was unreasonable because it was "conclusionary and not fairly supported by evidence on the record"); *Thomas v. Gibson*, 218 F.3d 1213, 1228–1229 (10th Cir. 2000) (determining that the court's assumption that "a murderer would not continue to inflict blows after a victim fell unconscious" to support a finding that defendant had inflicted the blows while the victim was conscious was an unreasonable factual finding because other uncontradicted evidence in the record indicated that the victim had been stabbed after death).

105. 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

106. See *Fisher v. Lee*, 215 F.3d 438, 446 (4th Cir. 2000) (holding that petitioner failed to demonstrate to the court that the state's factual findings were unreasonable); *Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (finding that the state courts' factual determinations were unreasonable and defendant rebutted the "presumption of correctness" of the state courts' findings "by clear and convincing evidence"); *Hooks v. Ward*, 184 F.3d 1206, 1231 (10th Cir. 1999) (holding that petitioner rebutted the presumption of correctness by demonstrating through clear and convincing evidence that the state court's conclusion, that the evidence admitted at trial was insufficient to raise a reasonable doubt as to defendant's intent to kill, was incorrect).

107. The 8th Amendment of the Constitution prohibits cruel and unusual punishment. The Supreme Court defines "cruel and unusual punishment" as the "unnecessary and wanton infliction of pain" that is "grossly out of proportion to the severity of the crime." *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976).

1. Illegal Search and Seizure

The Fourth Amendment of the U.S. Constitution addresses searches and seizures. Evidence that is gathered in violation of the Fourth Amendment is not allowed to be introduced at trial.¹⁰⁸ Even though introducing illegally gathered evidence into trial violates federal law, the habeas court will rarely listen to complaints about this problem. The Supreme Court has created a different standard of review for this particular kind of federal violation. In *Stone v. Powell*, the Supreme Court held that you cannot complain about the introduction of illegally obtained evidence in a habeas petition if the state provided you with a “full and fair” opportunity to raise this error at trial and on appeal.¹⁰⁹ All courts have procedures for deciding whether there has been a “full and fair” opportunity to litigate a claim. Because different states may have different standards, you should check the law of the state where you stood trial.

In some lower courts, the “full and fair” opportunity standard is not met when: (1) the state’s procedures do not allow any petitioner in your situation to raise a claim; or (2) the procedures were used incorrectly in your case.¹¹⁰ You should focus your claims on the ways the procedures failed to let you challenge the use of illegally obtained evidence in your trial.¹¹¹ If the state court never considered this claim “on the merits” (i.e., your claim was dismissed for procedural reasons before the court heard or considered your evidence), most courts will find you were denied your “full and fair” opportunity. In other words, you can complain about an illegal search and seizure problem in your habeas petition if the court: (1) never considered *whether* your factual arguments were right or wrong; or (2) never considered *why* your factual arguments were right or wrong.¹¹²

108. The 4th Amendment of the Constitution bars illegal searches and seizure. The “exclusionary rule” says that evidence seized by the police illegally may not be introduced in the criminal trial of the victim of the unreasonable search and seizure. *See Weeks v. United States*, 232 U.S. 383, 393–395, 34 S. Ct. 341, 344–345, 58 L. Ed. 652, 656 (1914) (applying the exclusionary rule only to a federal officer in a federal court); *see also* *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961) (applying the exclusionary rule to states through the 14th Amendment).

109. *Stone v. Powell*, 428 U.S. 465, 494, 96 S. Ct. 3037, 3052, 49 L. Ed. 2d 1067, 1088 (1976).

110. *See Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir. 1992) (“Review of fourth amendment claims in habeas petitions [is] undertaken . . . : (a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process.”). This standard has been adopted in other circuits. *See Willett v. Lockhart*, 37 F.3d 1265, 1271–1272 (8th Cir. 1994) (adopting the standard in *Capellan*); *Palmer v. Clarke*, 408 F.3d 423, 437 (8th Cir. 2005) (applying *Willett* and therefore the *Capellan* standard); *see also* *Machacek v. Hofbauer*, 213 F.3d 947, 952 (6th Cir. 2000) (finding that if a state has adequate procedural mechanisms for reviewing illegally seized evidence, the federal court may only review an illegal search and seizure claim if those mechanisms failed and the incarcerated person was prevented from litigating his claim); *United States ex. rel. Bostick v. Peters*, 3 F.3d 1023, 1027–1029 (7th Cir. 1993) (finding that state review of 4th Amendment claims was deficient where defendant was denied the opportunity to testify at a suppression hearing about his version of an encounter with drug enforcement officers).

111. *See Capellan v. Riley*, 975 F.2d 67, 71 (2d Cir. 1992) (explaining that the focus as to whether a federal court may review a 4th Amendment claim in a habeas petition is the “existence and application of the [state’s] corrective procedures,” not the outcome of those procedures) (emphasis omitted).

112. Here are three examples of cases where the federal habeas court decided that the state court failed to provide a full and fair opportunity to litigate an illegally-seized evidence claim:

(1) In *United States ex. rel. Bostick v. Peters*, the petitioner sought habeas relief from a conviction of drug possession. The police had searched his bags without a warrant or probable cause. The petitioner raised this issue in a pretrial hearing, but the judge told him he did not have to testify in order to make his claim. The evidence was then admitted, and the petitioner was convicted. The petitioner raised the illegal evidence claim again on appeal, but the appellate court affirmed the conviction without considering the petitioner’s claim. The petitioner then filed a federal habeas petition raising the same claim. The federal appeals court held that the petitioner was not at fault because he reasonably relied on the trial court’s ruling that his testimony was not necessary. *United States ex. rel. Bostick v. Peters*, 3 F.3d 1023, (7th Cir. 1993).

(2) In *Agee v. White*, the petitioner sought habeas relief from a murder conviction. The police had brought him to the station twice, first under illegal arrest and then voluntarily a week later. During the

Defendants in New York generally have the opportunity to raise illegal search and seizure claims at several different stages during a trial. For example, the defendant may notify the judge of this problem during pretrial hearings and during the trial.¹¹³ The defendant may also raise this type of claim on appeal as long as the claim was properly preserved¹¹⁴ during the trial.¹¹⁵ Full and fair opportunity to raise claims concerning illegally gathered evidence is almost always provided. Therefore, in New York, unless something unusual occurred at your trial, you probably cannot complain about illegal search and seizure in your habeas petition.

Stone's full and fair opportunity test applies only when you claim that the trial court allowed the prosecutor to use evidence that should have been kept out under the Fourth Amendment. So far, this standard has not been applied to other constitutional claims based on amendments other than the Fourth Amendment.¹¹⁶ The *Stone* rule is a defense that the state can raise to your petition for habeas relief. This means that it is the state's responsibility to raise it in your habeas proceedings and state that you had a full and fair opportunity to litigate your Fourth Amendment claim. If the state does not raise the issue, the rule will not apply. Once *Stone* has been raised, it is your burden to prove that you did not have a full and fair opportunity to litigate your Fourth Amendment claim. However, it is unlikely that the state will fail to raise the *Stone* rule, so you should *always* be sure to show that you did not have a full and fair opportunity to raise the claim in state court. Remember that your lawyer's failure to raise a Fourth Amendment issue might also be grounds for an ineffective assistance of counsel claim.¹¹⁷

second visit, the petitioner made incriminating statements that were later admitted as evidence. At his trial and on state appeal, the petitioner argued that the information given in the second interrogation was "tainted." Both courts, however, ignored the claims. Petitioner argued in his habeas petition that he had not had a "full and fair opportunity" to present the illegal evidence claim because the appellate court ignored his argument. The habeas court agreed that the petitioner did not have a full and fair opportunity to bring this claim earlier, and therefore agreed that the claim was properly before the court in the habeas petition. But after considering the petitioner's argument, the habeas court decided that the second interrogation was not illegal because it occurred a week after the first illegal arrest and was itself voluntary. *Agee v. White*, 809 F.2d 1487 (11th Cir. 1987).

(3) In *Riley v. Gray*, the petitioner raised his claim of illegally seized evidence on appeal. The evidence had been taken under a warrant that was based on other evidence obtained in a warrantless search. The appellate court affirmed the conviction on the basis of a procedural rule without considering the facts of the illegal evidence claim. The appeals court granted habeas relief based on the same claim because an "unforeseeable application of a procedural rule" had prevented the petitioner from fully presenting his claim earlier. *Riley v. Gray*, 674 F.2d 522 (6th Cir. 1982).

113. N.Y. CRIM. PROC. LAW § 710.40 (McKinney 2009) allows a defendant to raise this claim in a pretrial motion or at trial if the defendant was unaware of the illegal seizure.

114. To preserve your claim, you must make a motion to suppress the evidence and object to its inclusion if your motion does not succeed. See Chapter 9 of the *JLM* for more information on properly preserved claims.

115. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1, 9 (1999) (holding that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"). See Part C(2) ("New Laws: The *Teague* Rule") of this Chapter for more information on 28 USC § 2254 and its effect on procedural default.

116. See *Kimmelman v. Morrison*, 477 U.S. 365, 373–375, 106 S. Ct. 2574, 2582–2583, 91 L. Ed. 2d 305, 318–319 (1986) (refusing to extend the *Stone* rule to claims of ineffective assistance of counsel based on counsel's failure to file a timely suppression motion); *Rose v. Mitchell*, 443 U.S. 545, 560–561, 99 S. Ct. 2993, 3002–3003, 61 L. Ed. 2d 739, 752–753 (1979) (refusing to extend the *Stone* rule to an equal protection claim of racial discrimination in the selection of a state grand jury foreman); *Jackson v. Virginia*, 443 U.S. 307, 320–325, 99 S. Ct. 2781, 2790–2792, 61 L. Ed. 2d 560, 574–577 (1979) (refusing to extend the *Stone* rule to claims of due process violations alleging insufficiency of evidence supporting conviction); *Withrow v. Williams*, 507 U.S. 680, 682–683, 113 S. Ct. 1745, 1748, 123 L. Ed. 2d 407, 413 (1993) (refusing to extend the *Stone* rule to a claim of *Miranda* violations). *Miranda* requires police to take certain precautions when interrogating suspects in their custody, such as informing the suspect that he has a right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966).

117. Failure to raise 4th Amendment claims of illegally obtained evidence may amount to ineffective assistance of counsel if the claim of illegal evidence is meritorious and there is a reasonable probability that the defendant would not have been convicted if his 4th Amendment rights had been respected. *Kimmelman v.*

2. Exceptions to the New Law Rule

Although you should avoid basing your habeas petition on new law, there are some exceptions that allow you to use new law. Remember, you only need to defend your petition as not based on new law or show that your claims fit into an exception if the government raises the issue.

The first exception to the new law rule is retroactive application. If the Supreme Court makes a new law and clearly states that the law applies retroactively, the law will apply to your case even if the law was established after your conviction. For Supreme Court rulings, this will be true regardless of whether you are incarcerated in state or federal custody. Examples of retroactive laws will be given below. However, it is rare for the Supreme Court to declare a new law retroactive.

The Court in *Teague v. Lane* also mentions specific exceptions to the *Teague* rule that allow you to bring a habeas petition based on new law.¹¹⁸ It is not yet clear if these exceptions necessarily apply to people incarcerated in state custody. Although AEDPA does not explicitly mention the exceptions to the “clearly established” requirement that *Teague* sets out, the Supreme Court has suggested that Section 2254 of AEDPA implicitly contains the *Teague* retroactivity analysis.¹¹⁹ If you are incarcerated in state custody, you should research whether your district has ruled that Section 2254 of AEDPA contains exceptions and whether they are the same exceptions as in *Teague*. If you are an incarcerated person in a state that has not recognized the *Teague* exceptions, you most likely *cannot* use the exceptions below.

There are two exceptions to the *Teague* rule. The first exception includes two kinds of new law: (1) new laws prohibiting certain types of punishment, and (2) new laws decriminalizing certain behavior. The second exception is for new laws that ensure fundamental fairness at trial. If the law you are relying on is new law, *and* the new law fits within one of these exceptions, then you may base your habeas claim on the new law.

(a) Exception: Prohibited Punishments and Decriminalized Behavior

(i) Prohibited Punishments

You may raise a new rule of law if it bars a certain type of punishment for a certain crime or for certain defendants.¹²⁰ For example, in *Ford v. Wainwright*, the Supreme Court prohibited states from imposing the death penalty on insane defendants.¹²¹ In *Roper v. Simmons*, the Supreme Court held that incarcerated people who were under eighteen years old when their crimes were committed must not receive the death penalty.¹²² If a court decision states that the punishment you received is unconstitutional, you should raise this decision in your petition for federal habeas corpus. Because this is one of the exceptions to the “new law” rule, you can use the decision even if it is a new rule of law. In other words, even if the Court changed the law after your conviction, you can use it.

Morrison 477 U.S. 365, 375, 106 S. Ct. 2574, 2582–2583, 91 L. Ed. 2d 305, 319 (1986). See Part B(2) (“Standards and Tests for Claims of Violations”) of this Chapter for more information on ineffective assistance of counsel claims.

118. *Teague v. Lane*, 489 U.S. 288, 310–312, 109 S. Ct. 1060, 1075–1076, 103 L. Ed. 2d 334, 355–357 (1989).

119. *See Williams v. Taylor*, 529 U.S. 362, 380 n.12, 120 S. Ct. 1495, 1506 n.12, 146 L. Ed. 2d 389, 410, n.12 (2000) (“We are not persuaded by the argument that because Congress used the words ‘clearly established law’ and not ‘new rule,’ it meant in this section to codify an aspect of the doctrine of executive qualified immunity rather than *Teague*’s antiretroactivity bar.”).

120. *See, e.g., Sawyer v. Smith*, 497 U.S. 227, 241, 110 S. Ct. 2822, 2831, 111 L. Ed. 2d 193, 211 (1990) (noting the first *Teague* exception applies to new rules that decriminalize an entire category of conduct, or to new rules that prohibit a certain kind of punishment for a class of defendants because of their status or offense); *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 2953, 106 L. Ed. 2d 256, 285 (1989) (remanding case for resentencing in light of defendant’s mental disability as a mitigating circumstance).

121. *Ford v. Wainwright*, 477 U.S. 399, 409–410, 106 S. Ct. 2595, 2602, 91 L. Ed. 2d 335, 346 (1986).

122. *Roper v. Simmons*, 543 U.S. 551, 568, 125 S. Ct. 1183, 1194, 161 L. Ed. 2d 1, 21 (2005).

(ii) Decriminalized Behavior

Another exception allows you to use a new rule of law if it “places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’”¹²³ What this means is that if the behavior for which you were convicted is no longer criminal under the new rule of law, you can use this new law to petition for habeas relief. For example, in *Griswold v. Connecticut*, the Supreme Court ruled that the Connecticut law against using contraception violated the constitutional right to marital privacy.¹²⁴ Therefore, the Court reversed the conviction of a Connecticut doctor who was convicted of the crime for giving advice about birth control to a married couple.¹²⁵ Like the other *Teague* exceptions, this exception rarely applies. For this reason, you should avoid using new rules whenever possible.

(b) Exception: Fundamental Fairness at Trial

You can also raise a new rule of law that requires the police, prosecutor, or judge to follow a procedure in order to ensure the “fundamental fairness” of your trial,¹²⁶ and “without which the likelihood of an accurate conviction is seriously diminished.”¹²⁷ To fit into this exception, the new rule has to involve a “bedrock procedural element.”¹²⁸ For example, in *Gideon v. Wainwright*, the Court ruled, on due process grounds, that the state needed to appoint counsel for poor defendants facing criminal charges.¹²⁹ This rule might fall under the fundamental fairness exception. By contrast, in *Crawford v. Washington*, the Supreme Court changed the standard for when out-of-court testimony may be allowed in trial.¹³⁰ However, the Supreme Court recently decided that the *Crawford* rule may not be applied retroactively.¹³¹

Keep in mind that it is rare that a new rule of law comes within the fundamental fairness exception. The Supreme Court has suggested that it believes that courts have already discovered most of the procedures essential to a fair trial and conviction.¹³² For instance, in 1988, in *Arizona v. Roberson*, the Supreme Court decided that police interrogation after an incarcerated person had requested a lawyer during interrogation for a separate charge violated the Constitution.¹³³ In 1990, however, the Supreme Court decided that forbidding such interrogations was not essential to the

123. *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334, 356 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165, 28 L. Ed. 2d 404, 420 (1971)).

124. *Griswold v. Connecticut*, 381 U.S. 479, 485–486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–516 (1965).

125. *See* *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 516 (1965); *see also* *Richardson v. United States*, 526 U.S. 813, 815, 119 S. Ct. 1707, 1709, 143 L. Ed. 2d 985, 991 (1999) (requiring a jury to unanimously agree on which specific violations make up a continuing series of violations for conviction of a continuing criminal enterprise under 18 U.S.C. § 848, and therefore vacating a conviction in which the jury was not unanimous in deciding which specific violations were committed).

126. *Teague v. Lane*, 489 U.S. 288, 312, 109 S. Ct. 1060, 1076, 103 L. Ed. 2d 334, 357 (1989).

127. *Teague v. Lane*, 489 U.S. 288, 313, 109 S. Ct. 1060, 1077, 103 L. Ed. 2d 334, 358 (1989).

128. *Teague v. Lane*, 489 U.S. 288, 315, 109 S. Ct. 1060, 1078, 103 L. Ed. 2d 334, 359 (1989).

129. *Gideon v. Wainwright*, 372 U.S. 335, 342–344, 83 S. Ct. 792, 795–796, 9 L. Ed. 2d 799, 804 (1963).

130. *Crawford v. Washington*, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004).

131. The Court held that because the *Crawford* rule does not impose an “impermissibly large risk of an inaccurate conviction,” *Whorton v. Bockting*, 549 U.S. 406, 418, 127 S. Ct. 1173, 1182, 167 L. Ed. 2d 1, 12 (2007) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 356, 124 S. Ct. 2519, 2525, 159 L. Ed. 2d 442, 451 (2004)), and does not “constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding,” *Whorton v. Bockting*, 549 U.S. 406, 421, 127 S. Ct. 1173, 1183, 167 L. Ed. 2d 1, 14 (2007), it may not be applied to cases that occurred before the *Crawford* decision was made.

132. *See, e.g.,* *Beard v. Banks*, 542 U.S. 406, 417, 124 S. Ct. 2504, 2513–14, 159 L. Ed. 2d 494, 506 (2004) (noting that the Court has “yet to find a new rule that falls under the second *Teague* exception”); *Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 1264, 108 L. Ed. 2d 415, 429 (1990) (deciding that habeas petitioner's contention, that the 8th Amendment required that the jury be allowed to base its sentencing decision in a capital case upon the sympathy it felt for the defendant after hearing his mitigating evidence, did not constitute a watershed right or rule).

133. *Arizona v. Roberson*, 486 U.S. 675, 677–678, 108 S. Ct. 2093, 2096, 100 L. Ed. 2d 704, 710–711 (1988).

fairness of the trial or to obtaining an accurate conviction.¹³⁴ Since this “new rule” did not involve any “bedrock” procedural element, the Court concluded it could not be a basis for habeas relief for any incarcerated persons whose conviction became final before *Roberson* was decided. As another example, in 2005, the Supreme Court decided in *United States v. Booker* that the federal mandatory sentencing guidelines were unconstitutional.¹³⁵ However, several circuit courts have held that this new rule does not fit under the fundamental fairness exception and may not be applied retroactively.¹³⁶

As you have seen, the *Teague* exceptions are hard to meet. You should always try to base your habeas claim on old and clearly established law. If you make your claim on new law with a *Teague* exception, remember that even when you are basing your claim on an exception to the *Teague* rule, the *Teague* rule itself is an affirmative defense that the government must assert. You should not raise the *Teague* rule in your petition. Instead, you should wait to defend the government’s claim that your habeas petition is based on new law. Once the government has argued your petition is based on new law, you should defend your claim by showing the law is either not new law or fits into one of the *Teague* exceptions just described.

D. Procedures for Filing a Petition for Habeas Corpus

A successful habeas claim will allow the court to vacate, set aside, or correct your present sentence. However, there are strict procedural rules you must follow in order to be successful in a habeas petition. This Part explains these procedural rules.

Although this Part explains the federal habeas corpus procedures for both people incarcerated in state custody and people incarcerated in federal custody, it focuses on the process for person incarcerated in New York State custody. When the procedure differs for people incarcerated in federal custody, this Section will explain the different procedure. People incarcerated in state custody in other states will need to research their state’s procedures. However, you should still read and understand this Section, as many of the procedures will be the same in every state. People incarcerated in state custody will use 28 U.S.C. § 2254 to file a habeas claim. People incarcerated in federal custody will use 28 U.S.C. § 2255 to file a habeas claim.¹³⁷

You must prove some important conditions in your petition. These conditions are complicated and require a great deal of attention. The conditions are:

- (1) you must be in custody;
- (2) you must have exhausted all state procedures before petitioning to a federal court if you are incarcerated in state custody, or you must have given the direct appeals court a chance to hear your petition if you are incarcerated in federal custody;

134. *Butler v. McKellar*, 494 U.S. 407, 416, 110 S. Ct. 1212, 1218, 108 L. Ed. 2d 347, 357 (1990) (noting that interrogating an incarcerated person despite his request for counsel during interrogation for a separate charge might in fact increase the likelihood of an accurate conviction).

135. *United States v. Booker*, 543 U.S. 220, 245–246, 125 S. Ct. 738, 756–757, 160 L. Ed. 2d 621, 651 (2005) (holding that federal sentencing guidelines are recommendations and that the sentencing court can take into account a variety of factors when deciding whether to depart from the guidelines).

136. *See, e.g., Lloyd v. United States*, 407 F.3d 608, 611–616 (3d Cir. 2005) (determining that the rule announced in *United States v. Booker* was new and not subject to either *Teague* exception); *Never Misses A Shot v. United States*, 413 F.3d 781, 783–784 (8th Cir. 2005) (following other Circuits in determining that the rule announced in *Booker* was a new rule and not subject to either *Teague* exception); *United States v. Bellamy*, 411 F.3d 1182, 1186–1188 (10th Cir. 2005) (holding *Booker* rule does not apply retroactively because it is a new rule and doesn’t fall into *Teague* exceptions); *Guzman v. United States*, 404 F.3d 139, 141–144 (2d Cir. 2005) (holding *Booker* rule does not apply retroactively because it is a new rule and doesn’t fall into *Teague* exceptions); *Varela v. United States*, 400 F.3d 864, 867–868 (11th Cir. 2005) (holding *Booker* rule does not apply retroactively because it is a new rule and doesn’t fall into *Teague* exceptions); *Humphress v. United States*, 398 F.3d 855, 861–863 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005) (holding *Booker* rule does not apply retroactively because it is a new rule and doesn’t fall into *Teague* exceptions).

137. Occasionally, a person incarcerated in federal custody will file under 28 U.S.C. § 2241, instead of § 2255. See Part A(4) (“Which Laws Apply to Federal Habeas Corpus?”) for information on when a person incarcerated in federal custody would file under § 2241.

- (3) you must follow all state rules and procedures correctly before petitioning to a federal court if you are incarcerated by the state; and
- (4) the petition must be filed in federal court within a specific time frame.

These conditions are explained in detail in this Part. Section 5 of this Part will also discuss when you can file a second (“successive”) petition.

1. In Custody

When you file your petition for a writ of habeas corpus, you must be “in custody” for the conviction or sentence that you are attacking.¹³⁸ This rule makes sure that you have enough of an interest in the habeas relief.¹³⁹ This is not a difficult condition to fulfill. Courts have interpreted “in custody” broadly. Actual physical custody is not necessary. You are “in custody” as long as you are presently restrained in ways that are not shared by the general public.¹⁴⁰ You are “in custody” if you are in prison, on parole, or on probation.¹⁴¹

If you are claiming that your sentence is illegal, you do not have to be currently serving that sentence in order to meet the “in custody” requirement. You are also considered “in custody” if: (1) you are contesting a consecutive sentence that you have not yet begun to serve,¹⁴² (2) you are contesting a sentence that has been temporarily postponed because you have been released on your own recognizance,¹⁴³ or (3) you are out on bail pending trial or appeal.¹⁴⁴ In fact, you may have already

138. 28 U.S.C. § 2241(c)(1)–(3); 28 U.S.C. 2254(a)–(b); *see, e.g.*, *Carafas v. LaVallee*, 391 U.S. 234, 238, 88 S. Ct. 1556, 1560, 20 L. Ed. 2d 554, 559 (1968) (noting that the federal habeas corpus statute requires that the applicant be “in custody” when the application for habeas corpus is filed); *Finkelstein v. Spitzer*, 455 F.3d 131, 133 (2d Cir. 2006) (finding that federal courts will consider a habeas corpus petition from a state court judgment only when the petitioner’s custody is in violation of the Constitution or laws or treaties of the United States at the time his petition is filed).

139. *See Hensley v. San Jose-Milpitas Mun. Ct.*, 411 U.S. 345, 351, 93 S. Ct. 1571, 1574, 36 L. Ed. 2d 294, 299–300 (1973) (“The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty.”).

140. *See, e.g.*, *Jones v. Cunningham*, 371 U.S. 236, 242–243, 83 S. Ct. 373, 376–377, 9 L. Ed. 2d 285, 290–291 (1963) (holding that petitioner, as a parolee, was in custody within the meaning of the habeas corpus statute); *Harvey v. City of New York*, 435 F. Supp. 2d 175, 177 (E.D.N.Y. 2006) (finding that a petitioner who is on parole or serving a term of supervised release is “in custody” for purposes of federal habeas corpus statutes).

141. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 437, 124 S. Ct. 2711, 2719, 159 L. Ed. 2d 513, 529 (2004) (“[W]e no longer require physical detention as a prerequisite to habeas relief.”); *Garlotte v. Fordice*, 515 U.S. 39, 45, 115 S. Ct. 1948, 1952, 132 L. Ed. 2d 36, 43 (1995) (quoting *Peyton v. Rowe*, 391 U.S. 54, 67, 88 S. Ct. 1549, 1556, 20 L. Ed. 2d 426, 435 (1968)) (“[A] prisoner serving consecutive sentences is ‘in custody’ under any one of them for purposes of the habeas statute.”); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 498–499, 93 S. Ct. 1123, 1131–1132, 35 L. Ed. 2d 443, 454–455 (1973) (discussing “custody” in one state when the incarcerated person is held in another); *Jones v. Cunningham*, 371 U.S. 236, 239–240, 83 S. Ct. 373, 375–376, 9 L. Ed. 2d 285, 289 (1963) (noting that aliens seeking entry, persons subject to enlistment in the military, and paroled incarcerated persons are all “in custody”); *Jackson v. Coalter*, 337 F.3d 74, 78–79 (1st Cir. 2003) (holding that custody includes supervised probation).

142. *See Peyton v. Rowe*, 391 U.S. 54, 67, 88 S. Ct. 1549, 1556, 20 L. Ed. 2d 426, 435 (1968) (holding that an incarcerated person serving consecutive sentences is “in custody” under any one of them for purposes of the federal habeas corpus statute, even where he is scheduled to serve one of them); *Frazier v. Wilkinson*, 842 F.2d 42, 44–45 (2d Cir. 1988) (finding that habeas corpus may be used to challenge a sentence that is consecutive to a sentence currently being served where there is reason to believe that the jurisdiction that obtained the consecutive sentence will seek its enforcement).

143. *See Hensley v. San Jose-Milpitas Mun. Ct.*, 411 U.S. 345, 351, 93 S. Ct. 1571, 1575, 36 L. Ed. 2d 294, 300 (1973) (holding that a person is “in custody” for habeas purposes when subject to restraints and rules not shared by the general public); *see also Maleng v. Cook*, 490 U.S. 488, 491, 109 S. Ct. 1923, 1925, 104 L. Ed. 2d 540, 545 (1989) (*per curiam*) (noting that a person is in custody when “release from physical confinement . . . was not unconditional”).

144. *See Lefkowitz v. Newsome*, 420 U.S. 283, 286 n.2, 95 S. Ct. 886, 888 n.2, 43 L. Ed. 2d 196, 200 n.2 (1975) (noting that petitioner was recognized as “in custody” when he was released on bail pending final disposition of his case); *see also United States v. Arthur*, 367 F.3d 119, 121–122 (2d Cir. 2004) (finding that

served the sentence imposed for the conviction being challenged. You are still “in custody” as long as you are serving a sentence that is ordered to run consecutively to your challenged sentence.¹⁴⁵ In addition, you are restrained, and so “in custody,” if you must appear in court for trial and cannot leave without permission.¹⁴⁶ At least one court has extended the definition of “in custody” to minors who may suffer future collateral consequences.¹⁴⁷

2. Exhaustion of State Remedies and Direct Appeal

Before filing a habeas petition, if you are incarcerated in state custody, you must “exhaust” all available state procedures that can correct your unconstitutional conviction or sentence.¹⁴⁸ To “exhaust state remedies” means you must do all that you can to get the state courts to change your conviction or sentence before you can petition a federal court. The purpose of this exhaustion requirement is to give the state courts a chance to correct any mistakes of federal law and to respect the state court’s ability to conduct judicial proceedings.¹⁴⁹ Federal habeas petitions are based on federal law. This exhaustion requirement allows the state court to correctly apply federal law before the federal court steps in. People incarcerated in federal custody do not need to meet any state court exhaustion requirements. However, people incarcerated in federal custody cannot pursue habeas remedies before they have finished the direct appeal process in federal court.

If you are incarcerated in state custody, to meet the exhaustion requirement, you must do two things: (1) give the highest court of the state an opportunity to hear your federal claims; and (2) present these claims fairly to the highest court of the state (called “fair presentation”). The following two sections discuss these two exhaustion requirements. Remember, there are very few exceptions to exhaustion, and these will be discussed below only as a brief outline. It is not safe to rely on these exceptions to exhaustion; you must exhaust state remedies for all your federal claims or you risk losing the chance to bring your federal claims!

While exhausting your claims in state court, it is important to keep in mind the one-year time limit for bringing federal habeas claims.¹⁵⁰ Your state may allow you more than one year to file the state procedures necessary to exhaust a claim, but a longer state time limit *does not* affect the federal time

defendant who was free on bail awaiting surrender date on sentence for federal convictions for mail fraud was in custody and therefore able to seek habeas relief).

145. See *Garlotte v. Fordice*, 515 U.S. 39, 45–46, 115 S. Ct. 1948, 1952, 132 L. Ed. 2d 36, 43 (1995) (deciding that petitioner who is serving consecutive state sentences is “in custody” and may attack the sentence scheduled to run first, even after it has expired, until all sentences have been served).

146. See *Hensley v. San Jose-Milpitas Mun. Ct.*, 411 U.S. 345, 348–349, 93 S. Ct. 1571, 1573–1574, 36 L. Ed. 2d 294, 298–299 (1973) (holding that a person is in custody when they are released on bail and required to return to court); see also *United States v. Arthur*, 367 F.3d 119, 121–122 (2d Cir. 2004) (finding that defendant who was free on bail awaiting surrender date on sentence for federal convictions for mail fraud was in custody and therefore able to seek habeas relief).

147. See *A.M. v. Butler*, 360 F.3d 787, 790 (7th Cir. 2004) (finding that a declaration of juvenile delinquency without any further restrictions does not bar a habeas petition when the juvenile will continue to face adverse consequences stemming from that declaration); see also *D.S.A. v. Circuit Court*, 942 F.2d 1143, 1145–1150 (7th Cir. 1991) (holding that a minor’s release from custody did not bar consideration of habeas petition even though the sentence had already been served where underlying conviction had sufficient collateral consequences such as consideration of the conviction in future juvenile proceedings). But cf. *Spencer v. Kemna*, 523 U.S. 1, 14–16, 118 S. Ct. 978, 986–987, 140 L. Ed. 2d 43, 54–55 (1998) (determining that a revocation of parole, where defendant has since been released, does not have sufficient collateral consequences to warrant consideration of habeas petition).

148. 28 U.S.C. § 2254(b)–(c).

149. See *Rose v. Lundy*, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379, 387 (1982) (“The exhaustion doctrine is principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings.”), *abrogated in part by* *Rhines v. Weber*, 544 U.S. 269, 273–279, 125 S. Ct. 1528, 1532–1536, 161 L. Ed. 2d 440, 449–452 (2005) (allowing district courts to stay “mixed petitions,” where some claims have been exhausted and others have not).

150. For more information about time limits for bringing federal habeas claims, see Part E(1) (“When to file”) of this Chapter.

limit. You will still have only one year to file your federal petition.¹⁵¹ You must exhaust *all* of the claims in your habeas petition in state court first. If you fail to exhaust the process for just one of the claims in state court, and then proceed to federal court, the federal court may dismiss your *entire* habeas petition.¹⁵² But if your petition is dismissed, it will be dismissed without prejudice. This means that you can leave the federal court to exhaust your claims in state court. Then, once your claims are exhausted, you may resubmit your petition in federal court, and you will not be prejudiced (meaning that you won't have any legal consequences for filing your claim again) for filing a second or successive petition.¹⁵³ But most often, such a dismissal still affects your one-year time limit.

Most courts have found that a state court challenge on a specific claim will “toll”¹⁵⁴ the time limit for your entire habeas petition.¹⁵⁵ This means that, in most cases, the clock will temporarily be stopped on all the claims in your habeas petition, not just for the claims you are making in your present case. In addition, in rare circumstances, the court may issue a “stay and abeyance” order for your dismissed petition,¹⁵⁶ which means you will have a short amount of time to present your unexhausted claims to the state court while your time limit is tolled for your entire petition.¹⁵⁷ If the district court says that your petition contains exhausted and unexhausted claims, you should request a stay and abeyance and explain to the district court that you are concerned that your one-year time limit will expire before you are able to resubmit your fully exhausted petition. In some circumstances you may also be able to delete the unexhausted claims from your petition and proceed only with the exhausted claims.¹⁵⁸ You will need to decide whether proceeding in federal court immediately without the unexhausted claims is a better option than leaving to exhaust the claims in state court and risking the time limit running out for all of your claims in federal court.

(a) Opportunity for Highest State Court to Hear Your Federal Claims¹⁵⁹

Before you can petition for federal habeas corpus in federal court, you must first present each claim you want to include in your petition to the highest court in your state, either through the state

151. The Supreme Court has been strict in enforcing time limits on federal habeas petitions. *See, e.g., Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130, 145 (2010) (holding that a court may excuse a late habeas petition only in extraordinary circumstances).

152. *See Rhines v. Weber*, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (noting that courts may dismiss entire petitions in some circumstances); *Rose v. Lundy*, 455 U.S. 509, 518–519, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379, 387 (1982) (requiring “total exhaustion” of claims in state courts).

153. See Part D(4) (“Successive Petitions”) of this Chapter for more information on successive petitions.

154. “Tolling” means that the running of the time period is paused. Time that is tolled does not count toward the one-year time limit. See Part E(1) (“When to file”) for more information on time limits and tolling.

155. *See Sweger v. Chesney*, 294 F.3d 506, 520 (3d Cir. 2002) (holding that “a properly filed state post-conviction proceeding challenging the judgment tolls the AEDPA statute of limitations during the pendency of the state proceeding”); *Carter v. Litscher*, 275 F.3d 663, 665 (7th Cir. 2001) (“Any properly filed collateral challenge to the judgment tolls the time to seek federal collateral review”).

156. *See Rhines v. Weber*, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (holding that federal courts should issue a stay and abeyance for a mixed petition if petitioner had “good cause” for failing to exhaust the unexhausted claims, the unexhausted claims are “potentially meritorious,” and there is no indication that the petitioner has engaged in tactics with the purpose of delaying the proceedings).

157. *See Rhines v. Weber*, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (determining that if a stay and abeyance is issued, district courts should “place reasonable time limits on a petitioner’s trip to state court and back”). See Part E(1) (“When to file”) for more information on tolling and time limits.

158. *See Rhines v. Weber*, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (“[I]f a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner’s right to obtain federal relief”).

159. The Supreme Court held that, even when a state’s appellate rules do not automatically give you the right to a hearing in your state’s highest court, you must still present all of your claims to that court in order to exhaust your state remedies. In Illinois, for example, a party must petition the Illinois Supreme Court for leave

appellate process (often called “direct appeal”) or through a state post-conviction procedure (often called “collateral attack”).¹⁶⁰ The difference between a direct appeal and a collateral attack is explained more in Part A(1) (“What Is Habeas Corpus?”) of this Chapter. A key point is that you must provide the state court with the opportunity to rule on each of your claims before you submit them to federal court. It is not enough that you presented each claim just to the intermediate appellate court in your state. This process, in which you pursue all state remedies available before you can have access to federal court, is called “exhaustion.” You only have to present your federal claims to the highest state court once—you do not have to do it both on direct appeal and in state post-conviction procedures. Most states call their highest court the “State Supreme Court.” However, in New York, the “New York Supreme Court” is actually a lower court, and the “New York Court of Appeals” is the highest state court.¹⁶¹

You can present your claim to the highest state court in one of two ways. First, if you have not appealed your conviction yet and still have time to do so, you can contest your conviction through the state appellate process.¹⁶² You have a right to appeal to an intermediate appellate court.¹⁶³ If the appellate court rejects your claim, you should then “request leave”¹⁶⁴ to appeal to the state’s highest court. Whether the highest state court grants your leave to appeal and then rejects your claim, or simply denies your leave to appeal, you have satisfied the exhaustion requirement by allowing the state court a chance to rule on your claim. You do not need to petition the U.S. Supreme Court for *certiorari*. In other words, your petition can be reviewed by a lower federal court without having to petition the Supreme Court on direct review first,¹⁶⁵ and you do not need to pursue your claim through a state post-conviction remedy as long as that claim was raised on direct appeal.¹⁶⁶

If you missed the deadline for a direct appeal, or if you neglected to raise a claim in your direct appeal, you must pursue your claim through a state post-conviction procedure to satisfy the exhaustion requirement.¹⁶⁷ In New York, you can choose between two post-conviction remedies: an Article 440

to appeal a decision of the intermediate appellate court. Even though the granting of such a petition for review is not guaranteed, the Supreme Court held that petitioner had not exhausted his claims because the Illinois Supreme Court had not been able to review them. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 847–848, 119 S. Ct. 1728, 1733–1734, 144 L. Ed. 2d 1, 10–11 (1999) (holding that claims not submitted to the state’s court of last resort in a petition for discretionary review are deemed to be procedurally defaulted).

160. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 847–848, 119 S. Ct. 1728, 1733–1734, 144 L. Ed. 2d 1, 10–11 (1999) (holding that claims not submitted to the state’s court of last resort in a petition for discretionary review are deemed to be procedurally defaulted); *Roberts v. LaVallee*, 389 U.S. 40, 42–43, 88 S. Ct. 194, 196, 19 L. Ed. 2d 41, 44 (1967) (determining that repetitious appeals applications to state courts are not required when defendant has already exhausted his remedies to the state courts); *see also Grey v. Hoke*, 933 F.2d 117, 119–121 (2d Cir. 1991) (holding that petitioner’s failure to specifically raise his sentencing and prosecutorial misconduct claims in state court appeals barred him from making these claims in federal habeas proceedings).

161. *See* Chapter 2 of the *JLM*, “Introduction to Legal Research,” for more information on the court system.

162. *See* Part B(1) of Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” for an explanation of the time limits for appealing your conviction.

163. *See* Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” for a discussion of state appeals.

164. To “request leave” means to ask for permission.

165. *See, e.g., Cty. Court v. Allen*, 442 U.S. 140, 149 n.7, 99 S. Ct. 2213, 2220 n.7, 60 L. Ed. 2d 777, 787 n.7 (1979) (determining that petitioner did not lose federal power of review by failing to seek *certiorari* from the Supreme Court).

166. *See Castille v. Peoples*, 489 U.S. 346, 350, 109 S. Ct. 1056, 1059, 103 L. Ed. 2d 380, 386 (1989) (quoting *Brown v. Allen*, 344 U.S. 443, 447, 73 S. Ct. 397, 402, 97 L. Ed. 469, 484 (1953)) (“[O]nce the state courts have ruled upon a claim, it is not necessary for a petitioner ‘to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review.’”); *see also Daye v. Attorney Gen.*, 696 F.2d 186, 190 n.3 (2d Cir. 1982) (“[A] petitioner need not give the state court system more than one full opportunity to rule on his claims; if he has presented his claims to the highest state court on direct appeal he need not also seek state collateral relief.”).

167. For example, if you raise a claim of ineffective assistance of counsel, which is usually brought in post-conviction proceedings, rather than on direct appeal, you must bring that claim in state court post-conviction proceedings. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 488–489, 106 S. Ct. 2639, 2645–2646, 91 L. Ed. 2d 397, 408–09 (1986) (holding that the exhaustion doctrine generally requires that a habeas petitioner raise an

motion¹⁶⁸ or a petition for state habeas corpus.¹⁶⁹ You should generally use an Article 440 motion because it is the most modern and has the best-developed state post-conviction procedure.¹⁷⁰ If a New York Supreme Court (the state trial court) denies the claim presented in your Article 440 motion, you should ask for leave to appeal to an intermediate appellate division. Then, if the appellate division does not allow you to appeal, or grants leave to appeal but then rejects your claim, you still have given the highest state court an opportunity to decide your claim and you have fulfilled this part of the exhaustion requirement.¹⁷¹

(b) Fair Presentation

To exhaust your state remedies, you must “reasonably inform” the state court about your federal claim and thus provide the court with a “fair presentation” of the federal claim. This means you must clearly say that you are raising a federal claim or an alleged violation of the Constitution in your state action.¹⁷² When you file a direct appeal or collateral attack in state court, your appeal/attack must mention the same relevant facts and legal theory that you will later include in your petition for federal habeas corpus.¹⁷³ While it is important to provide both the factual basis and legal principles on which your claim relies, some courts have been flexible on the factual requirement.¹⁷⁴ It is not enough to discuss a state claim that is similar to a federal claim.¹⁷⁵ Rather, the Supreme Court has held that you must make specific references to the federal law that forms the basis of each of your claims.¹⁷⁶ Thus, the Court has held that a petitioner does not fairly present a claim if the petition or brief does not tell the state court that the claim is federal in nature.¹⁷⁷

ineffective assistance of counsel claim as an independent claim in state court before it may be raised in federal court).

168. Article 440 motions are discussed in Chapter 20 of the *JLM*.

169. New York State habeas corpus procedure is explained in Chapter 21 of the *JLM*.

170. The New York legislature designed the Article 440 motion to simplify and to combine all of the previously existing post-conviction remedies, including state habeas corpus. See Chapter 20, Part B, of the *JLM* for a discussion of why New York courts prefer Article 440 motions over petitions for state habeas corpus. See also Chapter 14, “The Prison Litigation Reform Act,” for a discussion of exhausting your administrative remedies.

171. See *Edkin v. Travis*, 969 F. Supp. 139, 141 (W.D.N.Y. 1997) (finding that petitioner had exhausted all state court remedies when the New York State Court of Appeals had denied his leave to appeal).

172. See *Duncan v. Henry*, 513 U.S. 364, 365–366, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865, 868 (1995) (*per curiam*) (“If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.”); see also *Schneider v. Delo*, 85 F.3d 335, 339 (8th Cir. 1996) (noting that in order to fairly present a habeas claim in state court, the factual arguments and legal theories must be present in the state claim).

173. See *Picard v. Connor*, 404 U.S. 270, 278, 92 S. Ct. 509, 513, 30 L. Ed. 2d 438, 445 (1971) (holding that the substance of a federal habeas corpus claim must first be presented to the state courts).

174. See, e.g., *Davis v. Silva*, 511 F.3d 1005, 1010–1011 (9th Cir. 2008) (holding that a claim was fairly presented when the factual basis of the petitioner’s claim was not presented in a clear narrative, but could be determined from the legal materials provided, including citations to relevant cases, statutes, and regulations and a basic factual description).

175. See, e.g., *Casey v. Moore*, 386 F.3d 896, 911–914 (9th Cir. 2004) (holding that the incarcerated person did not fairly present federal claims to state court when he only cited state cases in his appellate brief).

176. See *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 1351, 158 L. Ed. 2d 64, 71 (2004) (rejecting the idea that judges, on appeal, can find for themselves the claims based on federal law, and holding that “ordinarily a state prisoner does not ‘fairly present’ a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim”).

177. See *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 1351, 158 L. Ed. 2d 64, 71 (2004) (“[O]rdinarily a state prisoner does not ‘fairly present’ a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim.”).

These facts and legal principles must show the court that your claim rests, either entirely or partially, on the Constitution.¹⁷⁸ This puts the state court on notice that you are raising a federal claim. You may satisfy this requirement by:

- (1) Citing a specific provision of the Constitution,¹⁷⁹
- (2) Relying on federal constitutional precedents,¹⁸⁰
- (3) Alerting the state court of the claim's federal nature through your claim's substance,¹⁸¹
- (4) Claiming a particular right guaranteed by the Constitution.¹⁸²

To provide a fair presentation to the state, you must clearly show you are claiming a violation of the Constitution.¹⁸³ For example, one petitioner claimed in state court that the admission of certain evidence “infringed on his right to present a defense and receive a fair trial” but mentioned only a state evidentiary law without mentioning any federal constitutional rights.¹⁸⁴ While the petitioner's federal due process rights may have been violated, the court held that because the federal law part of his claim was not “fairly presented” to the state court, the federal court was required to dismiss his habeas

178. See *Picard v. Connor*, 404 U.S. 270, 277–278, 92 S. Ct. 509, 513, 30 L. Ed. 2d 438, 444–445 (1971) (dismissing habeas claim because petitioner failed to specify that his claim stems from the Constitution, even though he raised all of the facts of his claim in state court). You must clearly tell the state court the constitutional, and therefore, federal nature of the claim and permit the state court to decide the federal issue squarely. See *Verdin v. O'Leary*, 972 F.2d 1467, 1474–1475 (7th Cir. 1992) (alteration in original) (citation omitted) (quoting *Dougan v. Ponte*, 727 F.2d 199, 201 (1st Cir. 1984)) (“What is important is that the *substance* of the federal claim be presented fairly. It is incumbent on the petitioner to ‘raise the red flag of constitutional breach.’”).

179. See *Scarpa v. DuBois*, 38 F.3d 1, 6–7 (1st Cir. 1994) (finding that petitioner's reference to the 6th Amendment “sufficiently alerted the state courts to the substance of the constitutional claim”); see also *Daye v. Attorney Gen.*, 696 F.2d 186, 192 (2d Cir. 1982) (en banc) (“Obviously if the petitioner has cited the state courts to the specific provision of the Constitution relied on in his habeas petition, he will have fairly presented his legal basis to the state courts.”). But see *Gray v. Netherland*, 518 U.S. 152, 163, 116 S. Ct. 2074, 2081, 135 L. Ed. 2d 457, 471 (1996) (“[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the ‘substance of such a claim to a state court.’”).

180. See *Gagne v. Fair*, 835 F.2d 6, 7 (1st Cir. 1987) (“[A] petitioner may satisfy the exhaustion requirement by . . . reliance on federal constitutional precedents.”); see also *Abdurrahman v. Henderson*, 897 F.2d 71, 73 (2d Cir. 1990) (finding that defendant's citation to *Strickland v. Washington* in a brief to the Appellate Division was sufficient to alert the court that defendant was raising a federal claim regarding ineffective assistance of counsel, since *Strickland* is the leading Supreme Court case on that issue).

181. See *Gagne v. Fair*, 835 F.2d 6, 7 (1st Cir. 1987) (“[A] petitioner may satisfy the exhaustion requirement by . . . presenting the substance of a federal constitutional claim in such manner that it likely alerted the state court to the claim's federal nature.”); see also *Jackson v. Edwards*, 404 F.3d 612, 619 (2d Cir. 2005) (finding petitioner had fairly presented his claim to the state court because “the substance of the federal habeas corpus claim [was] clearly raised and ruled on in state court” even though petitioner had failed to explicitly name it as a federal claim). In other words, if a state court rules on the substance of the federal claim, it is considered fairly presented and sufficient for federal exhaustion purposes. However, you must indicate in your petition that the state court ruled on the substance of your federal claim, and therefore, found it to be fairly presented. It is your job to alert the reviewing federal court that the state court knew of your federal claims and ruled on your federal claims. See *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 1351, 158 L. Ed. 2d 64, 71 (2004) (holding that the federal nature of the claim must be apparent from the brief or petition, not hidden in the opinion of a lower court).

182. See *Scarpa v. DuBois*, 38 F.3d 1, 6–7 (1st Cir. 1994) (finding that petitioner's reference to ineffective assistance of counsel “sufficiently alerted the state courts to the substance of the constitutional claim”); see also *Janosky v. St. Amand*, 594 F.3d 39, 44 (1st Cir. 2010) (holding that “the petitioner assiduously pursued a constitutionally focused ineffective assistance claim before all the affected state courts, thus satisfying the exhaustion requirement”).

183. See *Duncan v. Henry*, 513 U.S. 364, 365–366, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865, 868 (1995) (“If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.”).

184. *Johnson v. Zenon*, 88 F.3d 828, 830–831 (9th Cir. 1996).

petition.¹⁸⁵ While you do not need to cite the Constitution word for word,¹⁸⁶ you must be specific in showing why the claim is federal.¹⁸⁷ You should be as specific as possible in explaining the violation of a federal law to the state court.

Federal courts generally say state remedies are exhausted when you have fairly presented a claim one time to the highest state court.¹⁸⁸ For example, if you raised a particular claim on direct appeal to the highest state court, you do not have to raise it again in state post-conviction proceedings.¹⁸⁹ In short, be sure that you present the same factual arguments and legal theories regarding a federal claim in both your state claims and federal habeas claims, and be sure to state that you are raising a federal claim.

So, what do you do if you discover new evidence about your claim or learn more of the law concerning your claim after presenting your claim to the state court? You can, and should, strengthen your claim by adding this new factual and legal material to your federal petition. Explain to the court that you are only *supplementing* your pending claim, not adding a new claim. This may also help by giving you more time to file your habeas petition.¹⁹⁰ However, be aware that supplementing a federal petition with new information may lead to the dismissal of your original habeas claim. If the new information that you wish to include in your habeas petition was not presented to the state courts, and state relief is now available to you, then the federal courts will probably dismiss your federal claim.¹⁹¹

It is important to remember to go to state court first in order to exhaust all claims before filing in federal court. If you file first in federal court, go back to exhaust, and then try to amend the federal petition, you risk having the petition dismissed as untimely. Remember, you have a one-year time limit to file your federal habeas petition. Furthermore, your state petition could be your only opportunity to have a judge thoroughly review your claims on the merits. AEDPA, a federal law dealing with federal habeas corpus claims, only allows federal courts to overturn state court decisions in rare circumstances. AEDPA forbids federal courts from granting a writ of habeas corpus unless the state court's consideration of your claims was "contrary to, or involved an unreasonable application of, clearly established Federal law" or if the decision was based on an "unreasonable determination of the facts."¹⁹²

185. Johnson v. Zenon, 88 F.3d 828, 830–831 (9th Cir. 1996).

186. See Picard v. Connor, 404 U.S. 270, 277–278, 92 S. Ct. 509, 513, 30 L. Ed. 2d 438, 445 (1971) (quoting Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958) ("[W]e do not imply that respondent could have raised the equal protection claim only by citing 'book and verse on the federal constitution.'").

187. See Beauchamp v. Murphy, 37 F.3d 700, 704 (1st Cir. 1994) (emphasizing that in reviewing for exhaustion, the substance of the fair presentment of the federal issue is more important than the form of the presentment).

188. See O'Sullivan v. Boerckel, 526 U.S. 838, 838, 119 S. Ct. 1728, 1729, 144 L. Ed. 2d 1, 9 (7th Cir. 1999) ("State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").

189. However, if you raise a claim for the first and only time in a petition for discretionary review to a state appellate court, you will not meet the exhaustion requirement. See Castille v. Peoples, 489 U.S. 346, 349–351, 109 S. Ct. 1056, 1059–1060, 103 L. Ed. 2d 380, 385–387 (1989) (stating that presentation of a new claim to a state's highest court on discretionary review does not constitute "fair presentation" for purposes of determining that claim's exhaustion).

190. See 28 U.S.C. § 2244(d)(1)(D). See Part (D)(3)(b)(iii) ("Time Limit") of this Chapter for more information on the one-year time limit in which you must file your federal habeas corpus petition. The time limit may also run from the time that new facts could have been discovered through due diligence.

191. See, e.g., Graham v. Johnson, 94 F.3d 958, 970–71 (5th Cir. 1996) (determining that, even though the state waived the exhaustion requirement, the petitioner's extensive new evidence was mostly factual and needed to be presented to state courts).

192. 28 U.S.C. § 2254(d)(1)–(2). The standard that federal courts use to review habeas petitions is contained here. For more information about this standard, see Part B(4) ("Standard for Getting Relief") of this Chapter.

(c) Exceptions to Exhaustion

There are few narrow exceptions to the exhaustion requirement. First, you do not need to go to state court if state remedies are unavailable or ineffective.¹⁹³ For example, in North Carolina, a state statute did not allow a defendant who had been convicted to raise an issue in a post-conviction proceeding if he could have raised the issue earlier.¹⁹⁴ Since the state statute did not allow him to raise the issue, there was no state remedy available to him. Because there was no state remedy, the exhaustion requirement did not apply, and the Fourth Circuit Court of Appeals held that the defendant was not barred from seeking habeas corpus relief.¹⁹⁵ In another case, a court found that state remedies were ineffective to protect the rights of an incarcerated person because he would be raising the same constitutional issue to the state supreme court that a fellow incarcerated person had already raised and lost.¹⁹⁶ In this situation, bringing the same issue before the court would most likely be unsuccessful and would have wasted the resources of the state system. So, the court ruled that he did not need to exhaust his state court remedies.¹⁹⁷

Another exception to the exhaustion requirement may occur after an unusually long and unjustified delay in receiving a ruling in state court.¹⁹⁸ Some federal courts do not require exhaustion when the state courts have unconstitutionally delayed hearing the incarcerated person's appeal for a few years or more.¹⁹⁹ Finally, in at least one case, exhaustion of state remedies was not required because the incarcerated person's jury misconduct claim needed to be heard as soon as possible because it hinged on the testimony of a juror who was elderly, somewhat incompetent, and in poor health.²⁰⁰

Despite these exceptions, federal courts do not usually excuse the exhaustion requirement; they expect the state courts to deal with all of your claims. And even if a court excuses your failure to exhaust state remedies, you will likely end up with another problem known as "procedural default."²⁰¹ In one case, a person incarcerated in New York state custody was found to have exhausted state remedies even though he did not clearly raise the issue on direct appeal.²⁰² In this case, New York

193. 28 U.S.C. § 2254(b)(1)(B).

194. *Stem v. Turner*, 370 F.2d 895, 897 (4th Cir. 1966).

195. *Stem v. Turner*, 370 F.2d 895, 897–898 (4th Cir. 1966).

196. *Evans v. Cunningham*, 335 F.2d 491, 492–494 (4th Cir. 1964).

197. *Evans v. Cunningham*, 335 F.2d 491, 492–494 (4th Cir. 1964).

198. *See Lowe v. Duckworth*, 663 F.2d 42, 43 (7th Cir. 1981) (holding that if the lower federal court determined that the state court delay of over three and a half years was not justified, state court remedies were to be considered exhausted and the lower federal court was required to hear the merits of the habeas corpus petition); *Dozie v. Cady*, 430 F.2d 637, 638 (7th Cir. 1970) (holding that if the lower federal court determined that the state court's seventeen-month delay was not justified, state court remedies were to be considered exhausted and the lower federal court was required to hear the merits of the habeas corpus petition).

199. Federal courts have not required exhaustion when the state courts have unconstitutionally delayed hearing the incarcerated person's appeal. The delay must be unusually long in order to fit within this exception. It is unlikely that a one-year delay would be enough to waive the exhaustion requirement, but a two-year delay might be. *See Harris v. Champion*, 15 F.3d 1538, 1556 (10th Cir. 1994) (determining that a "delay in adjudicating a direct criminal appeal beyond two years from the filing of the notice of appeal gives rise to a presumption that the state appellate process is ineffective"); *Calhoun v. Farley*, 913 F. Supp. 1218, 1221 (N.D. Ind. 1995) (holding that sufficient time had passed to excuse the need for exhausting state remedies where no action had been taken by the state or by the incarcerated person for almost two years on his petition for post-conviction relief); *Geames v. Henderson*, 725 F. Supp. 681, 685 (E.D.N.Y. 1989) (finding that a delay of three and a half years is excessive when the "[c]ourt views the issues on appeal as no more complex than in most criminal appeals").

200. *Simmons v. Blodgett*, 910 F. Supp. 1519, 1524 (W.D. Wash. 1996) ("Because petitioner's ability to prove his claim continues to diminish rapidly over time, and is at risk of being lost, justice requires that his habeas petition be heard expeditiously").

201. Procedural default is explained in Part D(3) ("Procedural Default") of this Chapter.

202. The incarcerated person filed a petition for federal habeas corpus on the ground that his confession was involuntary, even though he had not raised the issue of voluntariness on direct appeal. However, he was found to have adequately exhausted his state remedies because the judge had indirectly ruled on that issue through an evidentiary determination. *Quartararo v. Mantello*, 715 F. Supp. 449, 464 (E.D.N.Y. 1989), *aff'd*, 888 F.2d 126, 126 (2d Cir. 1989).

state law did not allow the incarcerated person to raise a claim in a collateral attack (Article 440 motion) if he failed to raise the claim on direct appeal in state court.²⁰³ Since the incarcerated person did not raise the claim in a collateral attack, he did not have any other remedies in state court. The federal court therefore excused his failure to exhaust the claim. However, the federal court will probably still bar his habeas petition because he committed procedural default by failing to raise the claim on direct appeal as required by state law.²⁰⁴ So even though this failure helped the incarcerated person avoid the exhaustion requirement, the same failure could still prevent him from getting his writ of habeas corpus.²⁰⁵ In short, you should not rely on exceptions to the exhaustion requirement because they are rarely granted.

(d) What Happens If You Do Not Exhaust State Remedies

If you present your claim to a federal court before you have exhausted all of your state remedies, the court may still look at the merits of your claim. However, you are taking a risk if you do this: if the court believes that your claim is without merit, it may deny you relief once and for all, even though you have not finished presenting your claim to the lower courts.²⁰⁶ Otherwise, the court will reject your petition for not exhausting state remedies, either with or without looking at the merits. You will need to finish presenting it to the state courts in order to fulfill the exhaustion requirement. This Subsection describes what you should do if a federal court dismisses your petition without prejudice due to the fact that you have not exhausted your state remedies. When this happens, you can still exhaust your claim in state court.

Upon dismissal, first you should check to see if the state has waived the exhaustion requirement in your case.²⁰⁷ A federal court will never assume that the state waived the exhaustion requirement in your case just because the state did not insist on exhaustion.²⁰⁸ There must be a clear statement by an authorized state attorney saying that the exhaustion requirement in your case has been waived; otherwise, there is no waiver.

If the state has not given you a waiver, you must return to state court and seek relief there. *Remember the one-year time limit!* To ensure that your claims will not later be barred from federal review because of the limitations period, you can ask the federal district court to hold your habeas petition in “abeyance” (delay the federal proceeding) while you return to state court to exhaust your state remedies. You should explain to the federal court that you are concerned that you will pass the statute of limitations, so you want a “stay and abeyance” order to make sure that you will be able to return to federal court after exhausting your state remedies. You also have to offer to dismiss your unexhausted claims in federal court.²⁰⁹ Often, courts issue a stay and abeyance order that will allow

203. See *Quartararo v. Mantello*, 715 F. Supp. 449, 464 (E.D.N.Y. 1989), *aff’d*, 888 F.2d 126, 126 (2d Cir. 1989) (holding that “[b]ecause there are no remedies available for petitioner to exhaust, the petition is not subject to dismissal even if petitioner had otherwise failed to exhaust his state remedies.”). See Chapter 20 of the *JLM* for a discussion of N.Y. CRIM. PROC. LAW § 440.10(2)(c).

204. See *Daye v. Attorney Gen. of New York*, 696 F.2d 186, 190 n.3 (2d Cir. 1982) (en banc) (explaining that failure to comply with a state rule, resulting in a procedural default that bars, under state law, the subsequent assertion of a challenge to the conviction, may also preclude federal habeas through the doctrine of procedural forfeiture unless the petitioner can demonstrate that there was “cause” for his failure to comply with the state procedure and that “prejudice” resulted).

205. See, e.g., *Castille v. Peoples*, 489 U.S. 346, 351–52, 109 S. Ct. 1056, 1060, 103 L. Ed. 2d 380, 386–87 (1989) (stating that a claim must be fairly presented in a procedural context to the state courts to meet the exhaustion requirement).

206. 28 U.S.C. § 2254(b)(2).

207. “Waived” means “decided not to apply.” A state waiver of a requirement means that you do not have to fulfill the requirement.

208. 28 U.S.C. § 2254(b)(3); see *Lurie v. Wittner*, 228 F.3d 113, 123 (2d Cir. 2000) (noting that state waivers of exhaustion are disfavored and that such a waiver must be made expressly).

209. *Pliler v. Ford*, 542 U.S. 225, 230–31, 124 S. Ct. 2441, 2445, 159 L. Ed. 2d 338, 347 (2004) (describing the Ninth Circuit’s procedure for granting a stay and abeyance, under which the unexhausted claims are

you to return to state court to exhaust remedies without fear of the one-year limitations period running out.²¹⁰ Without cause for equitable tolling (see the explanation of tolling in Part D(3)(b)(iii) of this Chapter), the court is not required to warn a *pro se* litigant that his federal claims would be time-barred upon his return to federal court if he opted to dismiss the petitions without prejudice and return to state court to exhaust all of his claims.²¹¹

If the time limit to raise the unexhausted claim in state court has run out, look for an exception to the exhaustion requirement.²¹² Because such exceptions are rarely successful, you should use this argument only as a last resort. If the time limit has not run out even after the federal court has dismissed your petition without prejudice for lack of exhaustion, file as quickly as possible in state court. This way, tolling will apply.²¹³ Once you re-file in state court and satisfy the exhaustion requirement, you can still re-file a federal habeas petition in federal court if the limitations have not run out. (Requesting a stay and abeyance order beforehand will ensure that your time has not run in federal court.) This petition—which follows your earlier petition that was dismissed by the district court without prejudice—will not count as a successive habeas petition and will not be subject to dismissal for that reason.²¹⁴

The strict timelines that AEDPA imposes on habeas petitions make it very difficult for your habeas petition to succeed if you failed to exhaust state remedies within the one-year time limit. Therefore, it is important to make sure you understand this, and that you have complied with the two requirements of exhaustion: (1) you have given the highest state court an opportunity to hear your claim, and (2) you have fairly presented each claim by identifying the facts and the federal law supporting it to the highest state court.

3. Procedural Default

If you are a person incarcerated in state custody and you present a habeas claim to the federal court that has not been presented to the state court, your claim may be in “procedural default,”²¹⁵ and the federal court will be barred from hearing your claim.²¹⁶ If you are a person incarcerated in federal custody and include a claim in your habeas petition that was not a part of your direct appeal to a federal court of appeals, your claim may be in procedural default. As a person incarcerated in federal custody, you can avoid procedural default by raising every habeas claim in your direct appeal. In some circumstances, you may be required to have raised the claims at your trial (for example, by making

dismissed, resolved in state court, and then re-added to the pending federal court claims that were already exhausted).

210. *Rhines v. Weber*, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (directing that federal courts should issue a stay and abeyance for a mixed petition if petitioner had “good cause” for failing to exhaust the unexhausted claims, the unexhausted claims are “potentially meritorious,” and there is no indication that the petitioner has engaged in tactics with the purpose of delaying the proceedings); *see, e.g.*, *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000) (agreeing to consider petitioner’s proper federal habeas claim as if it had been filed on the date that he originally filed an improper claim because the district court had incorrectly dismissed the original claim for having both unexhausted and exhausted claims, instead of allowing petitioner to resubmit his claim with only the exhausted claims, as was customary in that circuit).

211. *Pliler v. Ford*, 542 U.S. 225, 231, 124 S. Ct. 2441, 2446, 159 L. Ed. 2d 338, 348 (2004).

212. See Part D(2)(c) (“Exceptions to Exhaustion”) of this Chapter.

213. Tolling is discussed in Part D(3)(b)(iii) (“Time Limit”) of this Chapter.

214. *See Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1601, 146 L. Ed. 2d 542, 551 (2000). This issue is further discussed in Part D(4) (“Successive Petitions”) of this Chapter.

215. “Procedural default” is a concept that requires a person incarcerated in state custody to present his habeas corpus claim to a state court in compliance with state procedural rules. If he does not, he will be barred from presenting his claim to federal court on appeal. 28 U.S.C. § 2254 (b)(1),(c).

216. *See United States ex rel. Redding v. Godinez*, 900 F. Supp. 945, 948–950 (N.D. Ill. 1995) (finding procedural default where petitioner did not raise claims during direct appeal, during state petition for post-conviction relief, or during state petition to appeal from denial of post-conviction relief); *see also House v. Bell*, 547 U.S. 518, 522, 126 S. Ct. 2064, 2068, 165 L. Ed. 2d 1, 12 (2006) (“Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted.”).

appropriate objections) to be able to raise the claims in your direct appeal.²¹⁷ People incarcerated in state custody can avoid procedural default by raising every claim in state court. In many cases, people incarcerated in state custody will be required to have raised claims at trial, through motions or objections, in order to raise the claims on direct review.²¹⁸ People incarcerated in state custody must be certain to raise all claims in all state collateral proceedings, too.²¹⁹

(a) State Procedural Rules and Procedural Default

If you are incarcerated in state custody, your claim can also be in procedural default if you raised your claim to a state court that refused to review the merits of the claim due to a state procedural rule. This often occurs when incarcerated persons fail to pursue their claim in a timely manner.²²⁰ People incarcerated in state custody are not allowed to bring habeas claims in federal court if those claims were not reviewed on the merits in state court because the petitioner did not follow a state procedural rule.²²¹ But if a state procedural rule prevents you from bringing a claim in state court, and the state court ignores the rule and reviews the merits of your claim anyway, a federal court cannot later refuse to review your claim based on the state procedural rule.²²²

217. Some kinds of claims do not have to be raised at trial to be validly raised on direct appeal. For example, you may bring an ineffective assistance of counsel claim in a § 2255 motion even if you did not raise the issue on direct appeal. *See* *Massaro v. United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003) (holding that “an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.”); *see also* 28 U.S.C. § 2255.

218. Before your trial ends, you must object to any errors that occurred at trial in order to preserve these issues for review on appeal. *See* *Wainwright v. Sykes*, 433 U.S. 72, 90–91, 97 S. Ct. 2497, 2508, 53 L. Ed. 2d 594, 610 (1977) (describing how the “contemporaneous-objection rule” encourages the proceedings to be “as free of error as possible,” so criminal defendants should make their objections known if they think the trial court has deprived them of any federal constitutional rights). Otherwise, states like New York will consider only those appellate issues involving a violation of fundamental principles of law. For example, if the prosecutor at your trial in New York made inflammatory closing remarks that prejudiced the jury, but your lawyer did not object to this error at trial, you cannot raise this error on direct appeal. New York courts probably will not see prejudicial remarks by a prosecutor as a violation of fundamental principles of law. Thus, if you did not object to the prosecutor’s comments during trial, you probably cannot raise this issue on direct appeal or through an Article 440 motion (New York law gives courts discretion in refusing to accept 440 motions). *See* N.Y. CRIM. PROC. LAW § 440.10(3)(a)–(c) (McKinney 2009). *See* Chapter 20 of the *JLM* for more information about Article 440. Therefore, you will also be unable to raise the issue in your federal habeas petition. However, always remember that if your attorney was responsible for failing to object, you may have an ineffective assistance of counsel claim. *See JLM* Chapter 9 and Chapter 12 for more information on ineffective assistance of counsel claims.

219. In New York, you cannot raise claims in a post-conviction proceeding that you neglected to raise on direct appeal. *See* N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2009). *See also* *Anderson v. Harless*, 459 U.S. 4, 7–8, 103 S. Ct. 276, 278, 74 L. Ed. 2d 3, 7–9 (1982) (rejecting habeas relief because the incarcerated person’s constitutional argument had never been presented to, or considered by, the state court); *Smith v. Duncan*, 411 F.3d 340, 350 (2d Cir. 2005) (finding that the habeas claim was procedurally defaulted because the claim had not been fairly presented to the state court). If your lawyer failed to object to a prosecutor’s prejudicial remarks, and you were therefore barred from raising this issue on appeal, you are also barred from raising the issue in a habeas corpus petition. Remember, though, that ineffective assistance of counsel claims can be raised for the first time in a post-conviction proceeding, and your lawyer’s failure to raise objections in court may be grounds for an ineffective assistance of counsel claim. *See JLM*, Chapters 9 and 12, for more information on ineffective assistance of counsel claims.

220. *See* *O’Sullivan v. Boerckle*, 526 U.S. 838, 848 119 S. Ct. 1728, 1734 144 L. Ed.2d 1, 11 (1999) (concluding that petitioner who had failed to file an appeal with state supreme court in a timely fashion barred federal habeas review); *Coleman v. Thompson*, 501 U.S. 722, 749, 111 S. Ct. 2546, 2564, 115 L. Ed. 2d 640, 669 (1991) (holding that petitioner’s failure to file a timely notice of appeal under state law barred further federal habeas review).

221. *See* *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038, 1042, 103 L. Ed. 2d 308, 315 (1989) (reaffirming that the federal court will not review a federal issue if the state court’s judgment is based on an independent and adequate state law ground).

222. *See, e.g.,* *Freeman v. Attorney General*, 536 F.3d 1225, 1231 (11th Cir. 2008) (discussing how, as an exception to the general rule of procedural default, when a state ignores the procedural bar, a federal court cannot

4. New Laws: The *Teague* Rule²²³

You also cannot raise a federal habeas claim based on new law.²²⁴ This means that if the Supreme Court decides a rule, test, or standard in a case that is decided *after* your direct review was complete, you generally may not rely on this new law as a basis for habeas relief. This rule comes from the case *Teague v. Lane*²²⁵ and is therefore called the *Teague* Rule. The *Teague* Rule applies to people incarcerated in federal and state institutions. However, people incarcerated in state custody have an additional requirement that they must meet. People incarcerated by the state are subject to AEDPA, which says that state decisions can only be reversed if they were “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”²²⁶ This section discusses the requirement for people incarcerated in state custody that the law be “clearly established,”²²⁷ in addition to the requirement from *Teague* that habeas petitioners cannot rely on new law.²²⁸ If you are a person incarcerated in federal custody petitioning for habeas corpus, the AEDPA requirement that a law be “clearly established” does not apply to you, but the *Teague* Rule does.

These two standards (that the law is clearly established and that the law may not be new) mean almost the same thing. One important difference is that people incarcerated in federal custody can use cases from the federal district in which they were convicted to show that the law they are relying on is “not new” (even if the Supreme Court has not dealt with the law), while people incarcerated in state custody can only use cases from the U.S. Supreme Court since they need to show that the law is “not new” by showing that it is “clearly established” by the Supreme Court.²²⁹ This Section will address both standards at the same time. It is helpful to keep in mind that you only need to defend your petition as not based on new law if the government argues that it is.

(a) Difference between the *Teague* Rule and the AEDPA “Clearly Established” Rule

The fact that there are different rules for deciding what is new law for people incarcerated in federal custody and for people incarcerated in state custody can be confusing. It may be helpful for you to understand the different rules in the following way. Both people incarcerated in federal custody and people incarcerated in state custody cannot base their habeas petitions on new law. However, the definition of a new law is different for people incarcerated in federal custody and for people incarcerated in state custody. For people incarcerated in federal custody, only the *Teague* Rule defines what is a new law. For people incarcerated in state custody, AEDPA defines a new law as a law that

apply the bar on the state’s behalf and the federal court must then hear the claim (citing *Peoples v. Campbell*, 377 F.3d 1208, 1235 (11th Cir. 2004) and *Davis v. Singletary*, 119 F.3d 1471, 1479 (11th Cir.1997)).

223. *Teague v. Lane*, 489 U.S. 288, 308–310, 109 S. Ct. 1060, 1074–1075, 103 L. Ed. 2d 334, 354–356; 28 U.S.C. § 2254(d)(1).

224. Although a federal habeas petitioner cannot use a new rule as grounds for his petition, the courts can use a new rule to deny a habeas petition. *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180, 191 (1993) (holding that the retroactivity rule in *Teague* does not apply to federal habeas petitioners).

225. *Teague v. Lane*, 489 U.S. 288, 308–310, 109 S. Ct. 1060, 1074–1075, 103 L. Ed. 2d 334, 354–356 (1989).

226. 28 U.S.C. § 2254(d)(1).

227. For more information on the “contrary to or involving an unreasonable application” requirement of 28 U.S.C. § 2254(d)(1), see Part B(4)(a) of this Chapter.

228. *Teague v. Lane*, 489 U.S. 288, 308–310, 109 S. Ct. 1060, 1074–1075, 103 L. Ed. 2d 334, 354–256 (1989).

229. See *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389, 430 (2000) (“With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute ‘clearly established Federal law. . .’”). The one “caveat,” or exception, is 28 U.S.C. § 2254(d)(1), which restricts the source of clearly established law to the Supreme Court’s jurisprudence. You may be able to use non-Supreme Court federal court precedent to support your claim that the Supreme Court law was clearly established when your case was tried or to show whether the state court applied the law reasonably. See *Dulhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 1999).

has not been “clearly established” by Supreme Court case law. The differences between these two definitions of new law are discussed below.

Under *Teague*, new law is a rule of law that was not in force at the time of your trial and direct appeals.²³⁰ Under AEDPA, new law is law that is not “clearly established.”²³¹ Only people incarcerated in state custody are subject to the requirement that any law used in a habeas petition must be “clearly established” by the Supreme Court. This requirement was established by AEDPA and changed the way that federal habeas law is applied to people incarcerated by the state.

The final date for when a law begins to be considered “new law” differs depending on whether you are using the *Teague* Rule or the “clearly established” requirement of AEDPA. For the *Teague* Rule, the law you rely on must have been established by the time your conviction becomes final. The date your conviction becomes final is usually when the Supreme Court refuses to hear your appeal (the date the Supreme Court denies your writ of certiorari).²³²

As mentioned above, people incarcerated in state custody must show that a law is not new by proving that it is “clearly established” by Supreme Court case law. In contrast, people incarcerated in federal custody may use cases from the federal district in which they were convicted or the application federal circuit court of appeals to show that a law is not new.

(b) What Is New Law

There is no specific formula that the courts use to determine what is “new law” under the *Teague* Rule. Instead, the courts look at many factors. Because the courts use similar factors to determine whether law is clearly established, this section will not distinguish between the *Teague* Rule and the “clearly established” rule. However, you should keep in mind the differences between the two rules explained in the previous section. If the law you are relying on had not been clearly stated in another court case when your conviction became final, the courts may still find that the law was clearly established if it was *dictated* by previously decided cases, known as “precedent.” That means if a previously decided case requires a certain outcome in your case, even if a case exactly like yours has not yet been decided, the courts will consider the rule you are relying on to be established. For a rule of law to be dictated by precedent, and therefore not new law, the precedent does not have to *explicitly* state the rule of law. If precedent *implies* the rule of law, and a case that was decided after your conviction became final simply articulates the previously implied rule, that rule is already clearly established.²³³ Although dictum (the part of a judge’s opinion that does not count as a decision about the particular case that the judge is deciding) is not considered law, it may be used as support that an implied rule of law had been clearly established before it was actually stated.²³⁴

For example, in *Teague*, the prosecutor used “peremptory challenges” to keep all Black potential jurors off the jury (peremptory challenges are used by lawyers to disqualify potential jurors without giving any reason). The all-white jury then convicted the Black defendant of murder. Two and a half years after the defendant’s conviction, the Supreme Court ruled in a different case that a defendant

230. See *Teague v. Lane*, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed. 2d 334, 354–356 (1989).

231. See 28 U.S.C. § 2254(d)(1).

232. See *Stringer v. Black*, 503 U.S. 222, 227, 112 S. Ct. 1130, 1135, 117 L. Ed. 2d 367, 376–377 (1992) (“Subject to two exceptions, a case decided after a petitioner’s conviction and sentence became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent existing when the judgment in question became final.”). If you do not file for *certiorari* from the Supreme Court, your conviction becomes final when your time for filing a petition for *certiorari* has elapsed. *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 953 127 L. Ed. 2d 236, 246 (1994).

233. See *Roe v. Flores-Ortega*, 528 U.S. 470, 484–485, 120 S. Ct. 1029, 1038–1039 145 L. Ed. 2d 985, 999–1001 (2000) (finding that a newly articulated rule “breaks no new ground” because the court’s earlier decisions implicitly established the rule); *Ryan v. Miller*, 303 F.3d 231, 248 (2d Cir. 2002) (explaining that for a right to be clearly established, the Supreme Court must have acknowledged it, but “it need not have considered the exact incarnation of that right or approved the specific theory”).

234. See *Gibbs v. Frank*, 387 F.3d 268, 277 n.6 (3d Cir. 2004) (noting that because Supreme Court dictum “offers guidance about how the Supreme Court reasonably interprets its previous decision,” it is “relevant to determining whether a state court decision reasonably applies Supreme Court precedent”).

can prove a *prima facie* case of racial discrimination by showing that he is a member of a racial group and that the prosecutor used peremptory challenges to remove jury members of that racial group at the trial.²³⁵ The *Teague* defendant asked the habeas court to apply the second case to his trial. The Supreme Court ruled that the petitioner could not apply the second case because it was a “new rule of law.”²³⁶ That is, the second decision was not required by any prior cases.

A rule of law is considered “new” even if it is based *in part* on earlier cases. The Supreme Court has found that a law is “new” if lower courts disagree significantly about the question before the Supreme Court ruling.²³⁷ Unfortunately if you are in this situation, the law will usually be called “new.”²³⁸ If “debate among reasonable minds”²³⁹ is possible as to whether the law is clearly established, it is considered new law.

Consider the following four examples of the Supreme Court rejecting habeas relief because the petitioner’s habeas claim was based on new law:

- (1) In *Saffle v. Parks*,²⁴⁰ the petitioner sought habeas relief because, at his trial, the judge had instructed the jury to “avoid any influence of sympathy.”²⁴¹ The petitioner argued that this instruction was unconstitutional because it made the jury ignore evidence that mitigated the petitioner’s guilt (to mitigate means to make the petitioner less responsible for his actions or less guilty). The Supreme Court decided that even though the instruction was based on earlier cases, the earlier cases did not say *how* the court should ask the jury to listen to mitigating evidence. So the instruction violated a new rule, not a previously established one. Thus, the Court denied habeas relief.
- (2) In *Butler v. McKellar*,²⁴² petitioner sued four years after his murder conviction was finalized. Relying on another case *Arizona v. Roberson*, he said the police had violated his Constitutional rights by interrogating him about a murder after he had requested a lawyer on a separate charge.²⁴³ The Supreme Court rejected his petition because the *Roberson* case announced a “new” rule of law a couple of years after his conviction. His lawyer argued that the *Roberson* rule was not a new rule because it was decided based on an earlier case, *Edwards v. Arizona*,²⁴⁴ which was decided before his conviction became final. The Supreme Court did not agree that *Roberson* was determined by *Edwards* because the *Edwards* rule covered interrogations on the *same* charge while the *Roberson* rule covered interrogations on *separate* charges. The Court concluded no one could have predicted the *Edwards* rule would extend to the situation in *Roberson*. Thus, *Roberson* announced a new rule of law that the petitioner could not rely on.

235. *Batson v. Kentucky*, 476 U.S. 79, 91–92, 106 S. Ct. 1712, 1720–1721, 90 L. Ed. 2d 69 (1986).

236. *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334, 356 (1989).

237. *See Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347, 356 (1990) (explaining that a rule is new if there is a “significant difference of opinion on the part of several lower courts that had considered the question previously”).

238. Marc M. Arkin, *The Prisoner's Dilemma: Life In The Lower Federal Courts After Teague V. Lane*, 69 N.C. L. REV. 371, 401 (1991) (noting *Butler* broadened the definition of novelty so that “virtually every rule becomes ‘new’”).

239. *Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347, 356 (1990).

240. *Saffle v. Parks*, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

241. *Saffle v. Parks*, 494 U.S. 484, 486, 110 S. Ct. 1257, 1259, 108 L. Ed. 2d 415, 422 (1990).

242. *Butler v. McKellar*, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990).

243. *Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347, 356 (1990) (citing *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988)) (stating that a suspect who has requested counsel is not subject to further interrogation until counsel has been made available to him and that this request extends to police-initiated interrogation in a later investigation).

244. *Edwards v. Arizona*, 451 U.S. 477, 484–485, 101 S. Ct. 1880, 1884–1885, 68 L. Ed. 2d 378, 386 (1981) (holding that a defendant who had requested counsel during an interrogation but confessed the next day during another interrogation for the same offence had not waived his right to counsel).

- (3) In *Sawyer v. Smith*, the petitioner had been convicted of murder and sentenced to death. At his trial, the prosecutor had told the jury that if they sentenced him to death “you yourself will not be sentencing [the petitioner] to the electric chair.”²⁴⁵ A year after the petitioner’s conviction was final, the Supreme Court ruled in *Caldwell v. Mississippi*²⁴⁶ that a prosecutor can’t make remarks like that which reduce the jury’s sense of responsibility for the capital sentencing decision. The *Sawyer* petitioner asked the court to apply the *Caldwell* rule to his conviction. He argued that the *Caldwell* case did not create a “new rule” of law because earlier cases made the rule predictable. The Supreme Court disagreed and ruled that the *Caldwell* rule was a “new rule of law” because it was not foreseeable based on earlier cases.²⁴⁷
- (4) In *Caspari v. Bohlen*,²⁴⁸ the Supreme Court explained the three steps the habeas court must take to see if the *Teague* rule applies. First, the court must find out the date on which the petitioner’s conviction and sentence became final. Second, it must decide whether the trial court would have discovered the rule from earlier cases. Third, if the rule is “new,” meaning the trial court would not have taken it from earlier cases, then the habeas court must decide if the petitioner falls into one of the exceptions to the *Teague* rule. (For a discussion of those exceptions, see Part C(3) (“Exceptions to the New Law Rules”) below).

To summarize, the law you use cannot be new law, but it can be applied in a new way. Some rules will apply to many different fact situations. It is not necessary for the court to look at your exact fact situation and apply a rule of law to it. It is only necessary that the general legal principle which deals with your fact situation has been established.²⁴⁹ Although you should show the court that the law you are relying on is not new law, you should not actually mention the *Teague* standard in your habeas petition, even if you are making a claim based on an exception to the *Teague* standard. You do not need to argue that your habeas petition is not based on new law unless the government brings it up. Since the government is very likely to raise the *Teague* rule, you should be well prepared to show the court the rule of law in question was not new law at the time your conviction became final.

If you are in procedural default, you can try to use the “independent and adequate state grounds” doctrine to avoid procedural default.²⁵⁰ You can get out of procedural default if the procedural rule the state court used to deny you a hearing on the merits was (1) not “independent” of federal law, or (2)

245. *Sawyer v. Smith*, 497 U.S. 227, 230, 110 S. Ct. 2822, 2825, 111 L. Ed. 2d 193, 203 (1990) (holding that the *Caldwell* rule that prosecutors may not make remarks that diminish the jury’s sense of responsibility in capital cases was a new rule and did not apply retroactively).

246. *Caldwell v. Mississippi*, 472 U.S. 320, 329, 105 S. Ct. 2633, 2639, 86 L. Ed. 2d 231, 239 (1985) (finding that where, in a capital case, a prosecutor makes statements to the sentencing jury that diminish the jury’s sense of responsibility, the heightened requirements of the 8th Amendment are not met and the sentence of death cannot stand).

247. *Sawyer v. Smith*, 497 U.S. 227, 237, 110 S. Ct. 2822, 2829 111 L. Ed. 2d 193, 208 (1990).

248. *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 953, 127 L. Ed. 2d 236, 246 (1994) (holding that, at the time of petitioner’s conviction, a rule barring evidence of prior convictions for sentencing purposes did not yet exist).

249. *See Hart v. Attorney Gen.*, 323 F.3d 884, 892 n.16 (11th Cir. 2003) (holding that, when confronting issues such as the voluntariness of a confession, where the rule of law will have to be applied on a case-by-case approach, it is “acceptable to derive clearly established federal law from . . . general principles”).

250. *See Dretke v. Haley*, 541 U.S. 386, 392, 124 S. Ct. 1847, 1851–1852, 158 L. Ed. 2d 659, 668 (2004) (discussing the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds); *Coleman v. Thompson*, 501 U.S. 722, 729–730, 111 S. Ct. 2546, 2553–2554, 115 L. Ed. 2d 640, 655–656 (1991) (stating that the Supreme Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment); *Hoffman v. Arave*, 236 F.3d 523, 530 (9th Cir. 2001) (stating that “so long as the dismissal relies on a state law ground that is independent of the federal question and adequate to support the judgment, it will be insulated from federal review.”). *See, e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158, 159 (1935) (affirming the non-reviewability of the state law decision in a breach of contract action for leasing motion-picture films).

not “adequate” (in other words, good enough) to bar federal review of the claim. These are hard standards to meet but the terms are further described below.

(i) Showing the State Procedural Rule Is Not “Independent” of Federal Law

To show that the procedural rule the state court used was not independent of federal law, you must show that the state law is connected with federal law and not entirely separate from federal law.²⁵¹ State law is connected with federal law if judges must answer questions about federal law in order to decide the question of state law.²⁵² For example, if a state procedural rule says that when fundamental or constitutional errors of federal law are made, the claim is not considered untimely and can be reviewed, then the state court judges have to decide questions of federal law—the constitutional issue—before deciding if the state procedural rule applied to your case.²⁵³ If the procedural rule the state court used to deny your claim was not entirely separate from federal law, you can try to argue that the procedural rule is not “independent” of federal law and it should not stop the habeas court from reviewing your claim.

(ii) Showing the State Procedural Rule Was Not “Adequate” to Bar Federal Review

When you argue that your default of a state procedural rule is not an adequate (good enough) reason to deny review of your federal habeas petition, you are arguing that the state rule is unfair, interferes with enforcement of your federal rights, or is not applied consistently. Therefore, the state rule is not an adequate reason to bar review of your claim.²⁵⁴ Some common ways to argue that a state procedural rule is not adequate to bar review of your federal claims are:

251. *See Ake v. Oklahoma*, 470 U.S. 68, 74–75, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53, 60–61 (1985); *see also Boyd v. Scott*, 45 F.3d 876, 880 (5th Cir. 1994) (finding that state court decision was “interwoven with federal law, and did not express clearly that its decision was based on state procedural grounds”).

252. *See Stewart v. Smith*, 536 U.S. 856, 860, 122 S.Ct. 2578, 2581, 153 L.Ed.2d 762, 767 (2002) (stating that when resolving a matter of state procedural rules depends on a federal constitutional ruling, the state law ruling is not independent of the federal ruling).

253. *See Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011) (stating that state procedural rules must be both independent and adequate in order to bar federal habeas review); *La Crosse v. Kernan*, 244 F.3d 702, 706–707 (9th Cir. 2001) (holding that the state’s “untimeliness” rule did not constitute “independent” state grounds because at the time the petitioner defaulted his claim, the rule had a “fundamental constitutional error exception” that involved a ruling on federal law); *Johnson v. Gibson*, 169 F.3d 1239, 1249 (10th Cir. 1999) (holding that petitioner’s claim was not procedurally defaulted because “Oklahoma courts do review such claims for fundamental error—a review that necessarily includes review for federal constitutional error,” so procedural bar was not independent of federal law); *Jones v. Jerrison*, 20 F.3d 849, 854 (8th Cir. 1994) (holding that although petitioner failed to bring an objection at trial, the state courts may review for plain error); *Bradley v. Meachum*, 918 F.2d 338, 343 (2d Cir. 1990) (holding that a state waiver rule that resulted in procedural default of petitioner’s claim is not “independent of federal law” because, under Connecticut law, “procedural waiver cannot bar a defendant’s challenge ‘involv[ing] his constitutional right to a fair trial,’ and the state court had to first decide whether the petitioner received the constitutionally-required fair trial).

254. For a Supreme Court case that held that the state’s procedural rule was not adequate to bar federal habeas review, *see Lee v. Kemna*, 534 U.S. 362, 366, 122 S. Ct. 877, 880, 151 L. Ed. 2d 820, 830 (2002). *See also Monroe v. Kuhlman*, 433 F.3d 236, 245 (2d Cir. 2006) (finding state court’s application of the contemporaneous objection rule to a situation where jurors viewed evidence during the trial without the judge present inadequate to bar federal review of the claim); *Cotto v. Herbert*, 331 F.3d 217, 247 (2d Cir. 2003) (finding New York Court of Appeals’ application of the contemporaneous objection rule to a situation where there was no cross-examination of a witness who testified at petitioner’s trial, and whose out-of-court identification of petitioner was admitted at trial through testimony of police officers, was inadequate to bar federal habeas review of this claim).

- (1) The state's rule is not "firmly established," "consistently applied," or "strictly or regularly followed;"²⁵⁵
- (2) The state procedural rule did not provide you with a reasonable opportunity to have your federal claim heard in state court because the rule frustrates (interferes with) the enforcement of federal rights or is unreasonably hard to meet and has the effect of frustrating federal rights;²⁵⁶

255. See *Smith v. Texas*, 550 U.S. 297, 313, 127 S. Ct. 1686, 1697, 167 L. Ed.2d 632, 644 (2007) ("As a general matter, and absent some important exceptions, when a state court denies relief because a party failed to comply with a regularly applied and well-established state procedural rule, a federal court will not consider that issue."); *Ford v. Georgia*, 498 U.S. 411, 424, 111 S. Ct. 850, 857, 112 L. Ed. 2d 935, 949 (1991) (holding that state procedural rules "not strictly or regularly followed" may not bar federal review); see also *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987, 100 L. Ed. 2d 575, 585 (1988); *James v. Kentucky*, 466 U.S. 341, 348–349, 104 S. Ct. 1830, 1835, 80 L. Ed. 2d 346, 353 (1984) (holding that only state procedures that are "firmly established and regularly followed ... can prevent implementation of federal constitutional rights."); *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S. Ct. 1734, 1736, 12 L. Ed. 2d 766, 769 (1964) ("[S]tate procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."); *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001) (asserting that a state ruling that petitioner had procedurally defaulted claims would not bar federal review when the rule was not usually applied to defendants in petitioner's position); *Romano v. Gibson*, 239 F.3d 1156, 1170 (10th Cir. 2001) (asserting that state procedural rule was not adequate because state court applied the rule inconsistently in the cases of two co-defendants charged and tried together); *Moore v. Ponte*, 186 F.3d 26, 32–33 (1st Cir. 1999) (stating that procedural default resulting from defendant's violation of the contemporaneous objection rule does not bar federal review because state courts have overlooked the requirement in cases like petitioner's); *Gosier v. Welborn*, 175 F.3d 504, 507 (7th Cir. 1999) (asserting that state procedural rule was an inadequate bar to federal habeas corpus review because state courts applied the rule inconsistently and incompatibly); *Clayton v. Gibson*, 199 F.3d 1162, 1171 (10th Cir. 1999) (stating that default did not bar federal review because the state procedural rule was adopted after the default supposedly occurred and could not have been firmly established); *Forgy v. Norris*, 64 F.3d 399, 402 (8th Cir. 1995) (pointing out a previous holding that "unexpected state procedural bars are not adequate to foreclose federal review of constitutional claims."); *Morales v. Calderon*, 85 F.3d 1387, 1393 (9th Cir. 1996) (stating that California's state habeas time limits were not an adequate and independent state grounds to support procedural default where the time limits were not clear, well-established, and consistently applied prior to petitioner's filing of his first state habeas petition); *Cochran v. Herring*, 43 F.3d 1404, 1409 (11th Cir. 1995) (finding no bar to federal habeas review even though petitioner did not raise *Batson* claim on direct appeal because Alabama courts have not consistently applied a procedural bar to these types of cases), *modified*, 61 F.3d 20 (11th Cir. 1995); *Grubbs v. Delo*, 948 F.2d 1459, 1463 (8th Cir. 1991) ("If a state applies its rule inconsistently, we are not barred from reaching the federal law claim.").

256. See *Sivak v. Hardison*, 658 F.3d 898, 906 (9th Cir. 2011) (finding that state's filing deadline was "uniquely harsh" and therefore, inadequate to prevent federal review); *Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir. 2001) ("[I]f a state procedural rule frustrates the exercise of a federal right, that rule is 'inadequate' to preclude federal courts from reviewing the merits of the federal claim."); *Mapes v. Coyle*, 171 F.3d 408, 429 (6th Cir. 1999) (asserting that state procedural ground for denial of petition was not "adequate" because rulings resulted in "erroneous ... refus[al] to consider" petitioner's ineffective assistance of appellate counsel claims); *Jackson v. Shanks*, 143 F.3d 1313, 1318–1319 (10th Cir. 1998) (determining that state procedural rule procedurally barring claims not raised on direct appeal cannot be applied to ineffective assistance of counsel claims because doing so would "deprive [petitioner] of any meaningful review of his ineffective assistance of counsel claim"); *Morales v. Calderon*, 85 F.3d 1387, 1390 (9th Cir. 1996) (determining that federal habeas review was not barred due to procedural default because California timeliness rule was so unclear that it did "not 'provide ... the habeas petitioner with a fair opportunity to seek relief in state court'" (quoting *Harmon v. Ryan*, 959 F.2d 1457, 1462 (9th Cir. 1992))); *Wheat v. Thigpen*, 793 F.2d 621, 624–625 (5th Cir. 1986) (stating that state rules not regularly followed prevented the "implementation of federal constitutional rights."); *Williams v. Lockhart*, 873 F.2d 1129, 1131–1132 (8th Cir. 1989) (stating that violation of a "new [state] rule designed to thwart assertion of federal rights" is not an adequate bar to federal habeas review); *Walker v. Engle*, 703 F.2d 959, 967 (6th Cir. 1983) (holding that notions of comity do not require deference to state court decisions where procedural bars that had no foundation in state law were applied) (abrogated on other grounds).

- (3) The procedural rule required you to object to the error before you could realize that the error occurred, or that the rule was applied in your case in a way that you could not have anticipated;²⁵⁷ or
- (4) You tried to raise a claim, and even though you did not follow the rule exactly, the way you tried to bring up the claim served the same purpose as the state rule.²⁵⁸

If you have procedurally defaulted a claim, you can try to use the “independent or adequate state grounds” body of law to get around the procedural default. Remember, you have to show either that the state procedural rule is not independent of federal law or that the rule is not adequate to bar federal review.

(c) Exceptions to Procedural Default

If your claim is in procedural default, there are limited circumstances in which the federal court may still review your claim. These circumstances apply to people in both state and federal prisons. The court will review your claim if you satisfy either the (1) “cause and prejudice” test or the (2) “fundamental miscarriage of justice” test.²⁵⁹ The courts rarely find either of these, so *you should not depend on either of these exceptions to the procedural default rule*.²⁶⁰ You should work hard to avoid procedural default by first raising all of your claims in state court if you are incarcerated in state custody or on direct federal appeal if you are incarcerated in federal custody.

(i) Cause and Prejudice Test

The “cause and prejudice” test is a defense to procedurally defaulted claims. That means that if your claim is procedurally defaulted, the federal habeas court may still review your claim if you can prove that you had “cause” for not following the procedure and experienced “prejudice.” To pass this test you must: (1) show cause (in other words, give a good reason for why you failed to follow the state procedural rule, or failed to present the claim in your direct appeal if you are in a federal prison); and

257. See *Beuk v. Houk*, 537 F.3d 618, 634 (6th Cir. 2008) (“A habeas petitioner can show cause where he failed to raise a constitutional issue because it was ‘reasonably unknown to him’ at the time”); *Gonzales v. Elo*, 233 F.3d 348, 353–354 (6th Cir. 2000) (determining that the state rule that barred post-conviction review of claims not raised on direct appeal was inadequate to bar federal review of the claim because the rule was adopted after the petitioner’s direct appeal was complete); *Barnett v. Hargett*, 174 F.3d 1128, 1135 (10th Cir. 1999) (determining that state procedural rules deeming claims raised under *Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) as barred if not raised on direct appeal cannot be applied to cases in which the direct appeal occurred before the *Cooper* decision); *United States ex rel. Duncan v. O’Leary*, 806 F.2d 1307, 1314 (7th Cir. 1986) (determining that petitioner did not default by not raising his ineffective assistance of counsel claim under state law because disagreement between the federal and state courts over the proper standard was such that petitioner could not have known about the claim and could not have been said to waive it); *but see Perri v. Director Dept. of Corrections, State of Ill.*, cv, 451 (7th Cir. 1987) (finding that a state court’s determination of whether or not an incarcerated person had waived a constitutional right was a question of fact entitled to a presumption of correctness).

258. See *Albuquerque v. Bara*, 628 F.2d 767, 772–773 (2d Cir. 1980) (holding that “substantial compliance” with the state procedural rule is enough to overcome procedural default).

259. Two of the main cases on this issue are *Wainwright v. Sykes*, 433 U.S. 72, 84–85, 90–91, 97 S. Ct. 2497, 2505, 2508, 53 L. Ed. 2d 594, 606–607, 610 (1977) and *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640, 669 (1991). These exceptions were reaffirmed after the passage of AEDPA in *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L. Ed. 2d 518, 524 (2000) (“We ... require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim ... The one exception to that rule ... is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice.”).

260. See, e.g., *United States v. Mabry*, 536 F.3d 231, 243 (3d Cir. 2008) (holding there was no miscarriage of justice from petitioner’s claim that he did not fully understand what the phrase “miscarriage of justice” meant in his waiver of collateral and direct appeals in his guilty plea, because he had not satisfactorily identified any non-frivolous ground, had not produced any substantial appealable issues, and had failed to allege appealable issues that fell outside the terms of his waiver).

(2) show prejudice (that your case would have come out differently if you had been able to present your claim of constitutional violation).²⁶¹

The cause and prejudice standard can be the greatest obstacle you must overcome to obtain federal habeas review. Since the Supreme Court announced the standard in 1977,²⁶² federal courts have thrown out thousands of habeas petitions for failing to meet the standard. Therefore, you must think carefully and creatively about how to satisfy or get around the “cause and prejudice” standard.

a. Showing Cause

Showing “cause” for not following procedure is not easy. Generally, cause must be based on an outside factor that prevented you from avoiding a procedural mistake.²⁶³ Situations that courts consider “cause” include:

- (1) State officials prevented you from following the state procedural rule.²⁶⁴ For example, at your trial, a state officer led you to believe that a constitutional violation had not occurred, when in fact it had. In this case, the officer’s actions would be “cause” for why you did not object to the violation at trial. The court will allow you to argue this claim.²⁶⁵
- (2) State officials purposely lied about material information.²⁶⁶ For example, when a state tells you that all *Brady* material (exculpatory material) has been turned over to you, when in reality it has not been, you cannot be expected to be able to present this evidence—since you did not know about it.²⁶⁷ The fact that the state lied to you establishes a cause for failure to investigate that the court may consider.

261. See *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S. Ct. 2546, 2567, 115 L. Ed. 2d 640, 672 (1991) (holding that where petitioner had no independent constitutional right to counsel on appeal in state proceedings, his claim of ineffective counsel in state habeas petition did not constitute “cause” under the “cause and prejudice” standard); *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572–1573, 71 L. Ed. 2d 783, 801 (1982) (reaffirming that any incarcerated person bringing a constitutional claim to the federal court after a state procedural default must demonstrate cause and actual prejudice) (abrogated on other grounds). See also *Reed v. Ross*, 468 U.S. 1, 11–13, 104 S. Ct. 2901, 2908–2909, 82 L. Ed. 2d 1, 11–13 (1984) (affirming habeas relief, because state law did not allow for constitutional review of the jury’s instructions on burden of proof at the time of trial, and the incarcerated person was prejudiced, because he may not have been convicted had the jury been instructed correctly); but see *Prihoda v. McCaughtry*, 910 F.2d 1379, 1386 (7th Cir 1990) (stating that a change in law cannot be “cause” under the *Teague* Rule). It is important to note that the new laws issues discussed in Part C(2), “New Laws: The *Teague* Rule,” would still apply and may bar relief, even if procedural default were overcome in this situation.

262. *Wainwright v. Sykes*, 433 U.S. 72, 84–85, 90–91, 97 S. Ct. 2497, 2505, 2508, 53 L. Ed. 2d 594, 606–607, 610 (1977).

263. See *Banks v. Dretke*, 540 U.S. 668, 696, 124 S. Ct. 1256, 1275, 157 L. Ed. 2d 1166, 1192–1193 (2004) (“The ‘cause’ inquiry, we have also observed, turns on events or circumstances ‘external to the defense.’” (citing *Amadeo v. Zant*, 486 U.S. 214, 222, 108 S. Ct. 1771, 1776, 100 L. Ed. 2d 249, 260 (1988))).

264. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 408 (1986) (determining that “some interference by officials” would constitute “cause” (citing *Brown v. Allen*, 344 U.S. 443, 486, 73 S. Ct. 397, 422, 97 L. Ed. 469, 504 (1953))).

265. See *Strickler v. Greene*, 527 U.S. 263, 283, 119 S. Ct. 1936, 1949, 144 L. Ed. 2d 286, 303 (1999) (holding that petitioner had shown cause for not raising a *Brady* claim in state court since the prosecutor had withheld evidence and the petitioner had relied on the prosecution’s open file policy as fulfilling the prosecutor’s duty to disclose, but also finding that petitioner did not show prejudice); see also *Forman v. Smith*, 633 F.2d 634, 641 (2d Cir. 1980) (reversing grant of habeas petition, but affirming the principle that, if a police officer made a misleading statement that obscures an opportunity to develop a federal constitutional violation claim, such statement would be “cause” for not raising the claim on direct appeal).

266. *Banks v. Dretke*, 540 U.S. 668, 695–696, 124 S. Ct. 1256, 1274–1275, 157 L. Ed. 2d 1166, 1192–1193 (2004) (holding that, where prosecutors had lied and concealed information regarding a paid informant, the petitioner had made a showing of cause for not raising a *Brady* claim in prior proceedings).

267. See, e.g., *Banks v. Dretke*, 540 U.S. 668, 693, 124 S. Ct. 1256, 1273, 157 L. Ed. 2d 1166, 1191 (2004) (determining that because the prosecution persisted in hiding evidence and falsely representing that it had complied fully with its *Brady* disclosure obligations, the petitioner “had cause for failing to investigate, in state post-conviction proceedings”).

- (3) The legal basis of your constitutional claim was not reasonably available to you (or to your lawyer) at the time of your trial.²⁶⁸ In other words, a federal court will excuse your failure to object to an incident that occurred at your trial, if you can show that you could not have known from the case law existing at the time of your trial that the incident was a constitutional violation. Unfortunately, most attempts to show cause in this way are unsuccessful.²⁶⁹ You will not show “cause” by just claiming any of the following things: that your attorney was unaware of the claim;²⁷⁰ that your attorney believed it would be useless to raise the claim because the state court had rejected the claim before;²⁷¹ or that your attorney overlooked the claim.²⁷²
- (4) By failing to follow the state procedural rule (for example, failing to object at trial, failing to bring an appeal in time, etc.), your attorney provided you with “[i]neffective assistance of counsel.”²⁷³ Remember that you must exhaust your claim of ineffective assistance of counsel in the state courts before presenting the claim to the federal court as cause for why you failed to follow a state procedural requirement.²⁷⁴

It is important to understand that the reasons listed above are not the only possible ones: there may be other reasons in your specific case that would persuade a court to find that you have “cause.” By “Shepardizing” both *Wainwright*²⁷⁵ and *Coleman*²⁷⁶ and researching this issue, you will discover other reasons that courts have found “cause.”²⁷⁷

You should also be aware of various claims that the courts have determined *do not* constitute “cause.” The following list includes only a few possibilities:

268. See *Reed v. Ross*, 468 U.S. 1, 16, 104 S. Ct. 2901, 2910, 82 L. Ed. 2d 1, 15 (1984) (holding that, where well-settled law in the state placing the burden of proof on the defendant for self-defense and lack of malice could be challenged as unconstitutional under a new Supreme Court decision, the “novelty” of such a claim was proper cause for failing to raise the claim on direct appeal).

269. See, e.g., *Fernandez v. Leonardo*, 931 F.2d 214, 216–217 (2d Cir. 1991) (finding no cause where the law was unsettled on the claim raised in the habeas petition but where the defense should have known to raise the objection nonetheless). In addition, even if you succeed in arguing that you had “cause” for not raising the constitutional error in your appeal, because you could not have known at the time of your trial that a constitutional error had occurred, the court could decide that this error still cannot be considered because of the *Teague* case, which says you cannot make an argument that raises a “new” rule of law. See Part C(2), “New Laws: The *Teague* Rule,” of this Chapter for more information.

270. See *Engle v. Isaac*, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575, 71 L. Ed. 2d 783, 804 (1982) (“Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.”).

271. See *Engle v. Isaac*, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573, 71 L. Ed. 2d 783, 802 (1982) (“If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim.”).

272. See *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 408 (1986) (“We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made.”).

273. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 408–409 (1986). But see *Tsirizotakis v. Le Fevre*, 736 F.2d 57, 62–63 (2d Cir. 1984) (rejecting defendant’s attempt to show cause by alleging ineffective assistance of counsel).

274. See *Murray v. Carrier*, 477 U.S. 478, 488–489, 106 S. Ct. 2639, 2645–2646, 91 L. Ed. 2d 397, 409 (1986) (expressing that the exhaustion doctrine “generally requires” the claim for ineffective assistance of counsel to be presented independently in state court). In New York, exhaustion of the ineffective assistance of counsel claim is done through an Article 440 motion (for more information on Article 440 motions, see Chapter 20 of the *JLM*).

275. *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

276. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

277. By *Shepardizing*, you can also make sure that the law has not changed. See Chapter 2 of the *JLM* for an explanation of how to Shepardize a case.

- (1) Claims of ineffective assistance of counsel, if you did not have a constitutional right to counsel at that proceeding.²⁷⁸
- (2) Claims that there are important facts that were not fully developed in the trial court, if you failed to develop the facts due to your own or your attorney's neglect.²⁷⁹
- (3) Claims that rely on evidence that could have been reasonably available to you at the trial or on direct appeal.²⁸⁰ It is not enough to argue that you failed to make the claim earlier because you had not yet discovered the evidence. You have to show that you *could not* have discovered the evidence, even if you had tried. For example, if the prosecutor purposely withheld evidence from the defense counsel at trial, that might show cause.²⁸¹

b. Showing Prejudice

The Supreme Court has not explained the meaning of “prejudice” as thoroughly as “cause.” In *United States v. Frady*, the Court explained the meaning of “prejudice” by stating that “prejudice” requires that you show errors at your trial “worked to [your] actual and substantial disadvantage, infecting [your] entire trial with error of constitutional dimensions.”²⁸² Prejudice is a high standard for you to meet because the federal court will measure the effect of any violation you raise in the context of your whole trial.²⁸³ You should Shepardize the *Frady* case to see if courts in your jurisdiction have explained what types of errors show prejudice. For example, the Second Circuit has stated in *dicta*²⁸⁴ that it would find prejudice if a New York trial court accepted a defendant's guilty plea without holding a hearing on the defendant's competency when required to do so by state law. Such an error, the Second Circuit stated, would “infec[t]” the conviction and violate due process.²⁸⁵

278. See *Coleman v. Thompson*, 501 U.S. 722, 754, 111 S. Ct. 2546, 2567, 115 L. Ed. 2d 640, 672 (1991) (“[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel.”). But see *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272, 282 (2012) (“This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.”).

279. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 n.2, 112 S. Ct. 1715, 1717 n.2, 118 L. Ed. 2d 318, 326 n.2 (1992) (rejecting a rule that would require an evidentiary hearing for habeas corpus cases where the state court hearing did not adequately develop the material facts “due to petitioner's own neglect”).

280. *McCleskey v. Zant*, 499 U.S. 467, 498, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517, 547 (1991).

281. *Fairchild v. Lockhart*, 979 F.2d 636, 640 (8th Cir. 1992).

282. *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982) (emphasis omitted); see *McCoy v. Newsome*, 953 F.2d 1252, 1261–1262 (11th Cir. 1992) (applying the *Wainwright* standard, the court determined that the errors at trial did not actually and substantially disadvantage the defense, so the defendant was not denied fundamental fairness).

283. *U.S. v. Kleinbart*, 27 F.3d 586, 591 (D.C. Cir. 1994) (holding that the incarcerated person failed to show prejudice even though the judge did not properly instruct the jury regarding an element of the crime because the jury was otherwise informed of the element).

284. For a definition of *dictum* (the singular form of *dicta*), see Appendix V of the *JLM*, “Definitions of Words Used in the *JLM*.”

285. See *Silverstein v. Henderson*, 706 F.2d 361, 368 n.13 (2d Cir. 1983). In *Silverstein*, the petitioner sought habeas relief from a sentence for armed burglary on the grounds that he was mentally retarded and had not understood his guilty plea. The Second Circuit granted habeas relief despite the fact that the petitioner had not raised this claim on direct appeal. The court found that applying the procedural default rule to an incompetent defendant was unconstitutional, and, therefore, it was unnecessary to apply the “cause and prejudice” test. In a footnote, the court remarked that even if procedural default applied, the defendant would be entitled to a hearing concerning the cause for his failure to raise the issue of competence on direct appeal. See also *Pearson v. Secretary*, 273 Fed. Appx. 847, 850, (11th Cir. 2008) (holding that an incarcerated person raising a claim of cause and prejudice or miscarriage of justice based on the fact that he was proceeding *pro se* does not establish either of the exceptions to the procedural bar).

The “cause and prejudice” test is very difficult to meet.²⁸⁶ Do not rely on this excuse if another one is available to you.

(i) Fundamental Miscarriage of Justice

Another exception to procedural default is the “miscarriage of justice” exception. This exception is also difficult to meet, and you should not rely on this exception to get out of procedurally defaulted claims if you have another exception available to you. This exception usually works only if you can show that “failure to consider the claims [that are procedurally defaulted] will result in a fundamental miscarriage of justice.”²⁸⁷ Although the Supreme Court has not clearly said what a fundamental miscarriage of justice is, the Court in *Schlup v. Delo*, suggested that this exception requires a defendant to persuade the court of his “actual innocence.”²⁸⁸ If you use this exception, you are claiming that you are innocent and that your innocence is the reason that the court should consider your constitutional claim, even if it is in procedural default.²⁸⁹

To meet the requirements for the fundamental miscarriage of justice exception, you must present new evidence showing that you are innocent. This evidence must not have been presented at trial.²⁹⁰ You must show that with this new evidence, it is more likely than not that no reasonable juror would have convicted you.²⁹¹ This new evidence also must not be barred by the Federal Rules of Evidence. However, persuasive evidence of actual innocence that may not have been admissible in trial *can* be

286. Some incarcerated people have tried to avoid the “cause and prejudice” standard by arguing that the standard should not apply in death penalty cases. *See, e.g.,* *Smith v. Murray*, 477 U.S. 527, 538–539, 106 S. Ct. 2661, 2668, 91 L. Ed. 2d 434, 447 (1986). Some incarcerated people have argued that the standard should not apply to constitutional errors, such as faulty jury instructions, which directly affect a jury’s finding of guilt at trial. *See, e.g.,* *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572–1573, 71 L. Ed. 2d 783, 801 (1982). Other incarcerated people have argued that the standard should not apply to procedural defaults that occurred on appeal (such as failure to raise a particular claim on appeal), and not at trial. *See, e.g.,* *Murray v. Carrier*, 477 U.S. 478, 491–492, 106 S. Ct. 2639, 2647, 91 L. Ed. 2d 397, 410–411 (1986). The Supreme Court, however, has rejected all of these arguments. In addition, the Court has ruled that the “cause and prejudice” standard applies even in cases where you have defaulted on not only one but all of your federal constitutional claims, since you failed to file a notice of appeal within the required time. *Coleman v. Thompson*, 501 U.S. 722, 749–751, 111 S. Ct. 2546, 2564–2565, 115 L. Ed. 2d 640, 668–670 (1991).

287. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640, 669 (1991) (reaffirming that the “fundamental miscarriage of justice” exception applies to procedurally defaulted claims). *See also* *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397, 413 (1986) (“[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.”); *Engle v. Isaac*, 456 U.S. 107, 135, 102 S. Ct. 1558, 1575–1576, 71 L. Ed. 2d 783, 805 (1982) (stating that in some cases “cause” and “prejudice” will include the correction of a fundamentally unfair incarceration).

288. *Schlup v. Delo*, 513 U.S. 298, 321–322, 115 S. Ct. 851, 864, 130 L. Ed. 2d 808, 832–833 (1995).

289. If you are claiming that you are innocent and should be set free, meaning there was not enough evidence to convict you, the standard is much higher, and you should refer to *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791–2792, 61 L. Ed. 2d 560, 576–577 (1979) (holding that an incarcerated person can show that there was insufficient evidence to convict him “if it is found that upon the record evidence [produced] at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt”) (abrogated on other grounds). Remember that AEDPA created a stricter standard of review, so the *Jackson* standard will likely be applied in an even stricter fashion than described in the Court’s decision.

290. *See Schlup v. Delo*, 513 U.S. 298, 324, 327–328, 115 S. Ct. 851, 865, 867, 130 L. Ed. 2d 808, 834, 836–837 (1995) (stating that the new evidence does not have to be evidence that would be admissible at trial).

291. In *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397, 413 (1986), the Court first stated the standard for a fundamental miscarriage of justice and said an incarcerated person must show “a constitutional violation has probably resulted in the conviction of one who is actually innocent” in order to meet the fundamental miscarriage of justice exception. In *Schlup*, the Court explained that this standard requires the defendant to “show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt” if the constitutional error had not occurred. *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836 (1995). In *House v. Bell*, 547 U.S. 518, 539, 126 S. Ct. 2064, 2078, 165 L. Ed. 2d 1, 22–23 (2006), the Supreme Court determined that AEDPA’s higher standard of review does *not* apply in cases where there is a claim of actual innocence.

considered by the court in considering this claim.²⁹² If you can meet these standards, the court will consider your barred claims. The idea is that if you can convince the court that you are innocent, it will then look at the errors in your trial, even though it is normally barred from doing so, in order to make sure that a fundamental miscarriage of justice did not occur.

Finally, the fundamental miscarriage of justice exception can be used to challenge a procedurally defaulted claim if a constitutional violation has probably resulted in the conviction of someone who is “actually innocent” of a death sentence.²⁹³ To be “actually innocent” of the death penalty means that you are innocent of the elements of the crime that pushed your sentence from a murder sentence to a *capital* murder sentence. To prove this claim, you must show by clear and convincing evidence that, if the constitutional violation had not occurred, no reasonable juror would have found that you were eligible for the death penalty.²⁹⁴ This standard is difficult to meet, and you should not rely on it to get around a procedurally defaulted claim. Remember that this standard does not apply if you are claiming that you are “actually innocent” of the murder for which you were convicted and sentenced to the death penalty. Instead, in that instance the same standard applies as when you are attempting to show your “actual innocence” of any other crime under the fundamental miscarriage of justice exception.²⁹⁵

(ii) Time Limit

Time is an issue that may complicate the preparation of your habeas petition. People in both state and federal prisons have a one-year time limit for filing federal habeas petitions.²⁹⁶ This time limit applies even if the state’s post-conviction timeline is more than a year. Therefore, you must file both your state post-conviction petition and your federal habeas petition (if you are unsuccessful in your state petition) within the one-year time limit. Otherwise, the time runs out on your federal habeas petition, and you will be barred from seeking federal habeas review. Once you file the state post-conviction motion, however, your timeline for filing the federal habeas petition will be “tolled,” which means that your time limit for filing the federal habeas petition will be extended for as long as the time it takes for the state to consider your motion.²⁹⁷

Generally, the one-year timeline will start on the day your case becomes “final”²⁹⁸ following direct review.²⁹⁹ Remember, the end of your direct review (not the end of your post-conviction appeals or any other proceeding) triggers the date when your case becomes final. Your case will generally become

292. Schlup v. Delo, 513 U.S. 298, 327–328, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836–837 (1995).

293. See, e.g., Dugger v. Adams, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 1217 n.6, 103 L. Ed. 2d 435, 445 n.6 (1989) (stating that a court may grant a writ even in the absence of a showing of cause for procedural default, but only in an “extraordinary” case).

294. Sawyer v. Whitley, 505 U.S. 333, 347–350, 112 S. Ct. 2514, 2523–2525, 120 L. Ed. 2d 269, 284–287 (1992) (holding that the court must find that but for the alleged constitutional error, the sentencing body could not have found any aggravating factors, and thus the petitioner was ineligible for the death penalty). *But see* Busby v. Davis, 892 F.3d 735, 755 (5th Cir. 2018) (citing *McQuiggin v. Perkins*, 569 U.S. 383, 359–396, 133 S. Ct. 1924, 185 L. Ed.2d. 1019 (2013) (holding that *Sawyer* was decided before the passage of the federal AEDPA statute, limiting the application of the actual innocence test to “a first petition for federal habeas relief” and barring its application in second or successive habeas petitions, as in *Sawyer*)).

295. Schlup v. Delo, 513 U.S. 298, 326–327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836 (1995).

296. See 28 U.S.C. § 2244(d)(1) (people in state prisons); 28 U.S.C. § 2255(f)(1) (people in federal prisons). However, if you are in state prison convicted of the death penalty and your state qualifies as an opt-in state (meaning that, in exchange for providing competent counsel, the state can take advantage of faster resolution of federal habeas claims), your time limit is *much* shorter than one year.

297. See 28 U.S.C. § 2244(d)(2) (people in state prisons).

298. See 28 U.S.C. § 2244(d)(1)(A) (people in state prisons); 28 U.S.C. § 2255(f)(1) (people in federal prisons).

299. See 28 U.S.C. § 2244(d)(1)(A) (people in state prisons); 28 U.S.C. § 2255(f)(1) (people in federal prisons).

final when United States Supreme Court proceedings on direct review are completed,³⁰⁰ or, if you do not file for certiorari,³⁰¹ on the date when time expires for filing a petition for certiorari.³⁰²

However, there are three special circumstances that can extend the time you have to file your federal habeas petition:

- (1) If the state or federal government creates an impediment (obstruction or blockage) in violation of the Constitution or laws of the United States that prevents you from filing the application or motion, you have one year after the unconstitutional or illegal impediment is removed to file your federal habeas petition;³⁰³
- (2) If the Supreme Court announces a new retroactive legal right on which your habeas petition can be based, the petition is due one year from the announcement;³⁰⁴ or
- (3) If new facts become discoverable that were not discoverable before the one-year time limit, even with due diligence, your habeas petition is due one year from when the facts became discoverable through due diligence.³⁰⁵

300. See 28 U.S.C. § 2244(d)(1)(A) (people in state prisons); 28 U.S.C. § 2255(f)(1) (people in federal prisons).

301. “*Certiorari*,” or a “writ of *certiorari*,” is an appeal to the United States Supreme Court.

302. See 28 U.S.C. § 2244(d)(1)(A) (people in state prisons); *Clay v. United States*, 537 U.S. 522, 532, 123 S. Ct. 1072, 1079, 155 L. Ed. 2d 88, 97 (2003) (“[F]or federal criminal defendants who do not file a petition for certiorari with [the Supreme Court] on direct review, § 2255’s one-year limitation period starts to run when the time for seeking such review expires.”).

303. See 28 U.S.C. § 2244(d)(1)(B) (people in state prisons); 28 U.S.C. § 2255(f)(2) (people in federal prisons). The unconstitutional or illegal impediment must be created by the state. An example of an unconstitutional impediment is the withholding of exculpatory evidence (evidence favorable to the defendant) in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963). See, e.g., *Edmond v. U.S. Attorney*, 959 F. Supp. 1, 4 (D.D.C. 1997) (determining that, for petitioner claiming that the government is holding exculpatory evidence, the one-year limitation does not begin until the receipt of the evidence). Another example of a state-created impediment is inadequate prison libraries. See, e.g., *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (remanding case for evidentiary hearing on whether petitioner’s claim that an unconstitutional impediment existed because of lack of information in the prison law library may be upheld). The State can also create an impediment by interfering with your filing, for example, if prison officials place you in segregation and take away your legal materials. See *United States v. Gabaldon*, 522 F.3d 1121, 1126 (10th Cir. 2008) (finding *pro se* habeas petition from person in federal prison should not have been dismissed by district court because state interfered with his filing by placing him in segregation and confiscating his legal materials). But see *Monroe v. Beard*, 536 F.3d 198, 210 (3d Cir. 2008) (finding confiscation of incarcerated person’s legal materials by prison officials did not violate constitutional rights because the incarcerated person did not allege actual injury nor did he provide evidence that confiscation was constitutionally unreasonable where there was a legitimate interest in stopping him from filing fraudulent claims and the decision to confiscate materials was rationally related to this interest; and also noting due process only requires post-deprivation process for return of confiscated materials).

304. See 28 U.S.C. § 2244(d)(1)(C) (people in state prisons); 28 U.S.C. § 2255(f)(3) (people in federal prisons). See, e.g., *United States v. Adams*, No. 90–00431–08, 1996 U.S. Dist. Lexis 8875, at *5 n.2 (E.D. Pa. June 24, 1996) (*unpublished*) (noting that petitioner has one year from the date the right was initially recognized by the Supreme Court). Exactly when the one year ends depends on the circuit in which you are filing. See *Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000) (noting that the circuits disagree as to whether the one-year period starts when the new right is announced, or when the court holds it to be retroactive on collateral claims). However, note that the Supreme Court understood AEDPA to mean that the one year runs from the date a new right was recognized, not the date the right was made retroactive. See *Dodd v. United States*, 545 U.S. 353, 357, 125 S. Ct. 2478, 2482, 162 L. Ed. 2d 343, 349–350 (2005).

305. See 28 U.S.C. § 2244(d)(1)(D) (people in state prisons); 28 U.S.C. § 2255(f)(4) (people in federal prisons). See, e.g., *Dobbs v. Zant*, 506 U.S. 357, 358–359, 113 S. Ct. 835, 836, 122 L. Ed. 2d 103, 107 (1993) (holding that when petitioner’s habeas claim, which had been rejected by lower courts, was being reviewed by the federal circuit court, petitioner was allowed to supplement his record with a trial transcript because the delay in locating the transcript had been substantially caused by the state’s mistake). For a more recent case discussing the concept of “due diligence” in prison settings, see *Wims v. United States*, 225 F.3d 186, 190–191 (2d Cir. 2000) (finding that the district court erred in dismissing habeas petition filed 17 months after conviction became final because the time delay was reasonable).

The date on which your one-year timeline starts is called the “triggering date.” If more than one triggering date affects your case, you will have to apply within one year of the latest date of the above three options.³⁰⁶ But you should try to file within a year of the earliest triggering date, because it will often be difficult to show that a later triggering date applies to your case.

If you have multiple claims in your petition and the claims do not all have the same triggering date, you should try to file within one year of the earliest triggering date. If the time limit runs out on one of your claims, the court will probably not hear the claim even if your habeas petition also includes other claims with later triggering dates.³⁰⁷ For example, imagine that your conviction became final on January 1, and then on March 1 the Supreme Court announced a new retroactive legal right (a right that, when announced, applies to past cases as well as future ones) that applies to you. The triggering date for any claims that you have that are related to your trial is January 1, and the triggering date for the claim that you have that is based on the new Supreme Court case is March 1. You should file a habeas petition that contains *all* of your claims by January 1 of the following year. If you file in February, the court will hear your claim based on the new Supreme Court case, but will probably not hear any of the claims related to your trial.

The time limit for habeas petitions is *very strict*, but most federal courts have allowed the statute of limitations to be “tolled” (meaning that the time limit is put on hold) under certain circumstances. Tolling occurs while your state post-conviction appeal is pending, as long as you filed the petition correctly.³⁰⁸ This means that if you have filed the state post-conviction petition in the proper court, with all the paperwork submitted properly, and within the time allowed by state law,³⁰⁹ then the time that the state court spends considering your petition will not count against your one-year time limit. However, your time *does not* toll while a *federal* court is considering your petition.³¹⁰ As discussed above, because your time does not toll while a federal court reviews your petition, if the federal court

306. See 28 U.S.C. § 2244(d)(1) (people in state prisons); 28 U.S.C. § 2255(f) (people in federal prisons).

307. The Third and Sixth Circuits have held that each claim in a habeas petition must satisfy the one-year time limit, and claims not satisfying that time limit will be dismissed. *Bachman v. Bagley*, 487 F.3d 979, 984 (6th Cir. 2007); *Fielder v. Varner*, 379 F.3d 113, 118–120 (3d Cir. 2004). The Eleventh Circuit has held that, as long as at least one claim in a habeas petition satisfies the one-year time limit, the court can hear *all* claims in the petition, even if some of those claims would otherwise be untimely. *Walker v. Crosby*, 341 F.3d 1240, 1245 (11th Cir. 2003). The majority of district courts confronting the issue have rejected *Walker* and concluded that any individual claim in a habeas petition should be dismissed if it does not satisfy the time limit. See *Khan v. United States*, 414 F. Supp. 2d 210, 216 (E.D.N.Y. 2006) (declining to address the untimely claims in a habeas petition that also contained a timely claim based on a newly recognized right); *Murphy v. Espinoza*, 401 F. Supp. 2d 1048, 1052 (C.D. Cal. 2005) (stating that “this Court must assess the timeliness of an inmate’s [habeas] claims on a claim-by-claim basis”). But see *Ferreira v. Dept. of Corr.*, 494 F.3d 1286, 1289 (11th Cir. 2007) (discussing and upholding *Walker* as valid precedent); *Shuckra v. Armstrong*, 2003 U.S. Dist. LEXIS 4408, at *12–13 (D. Conn. March 21, 2003) (*unpublished*) (holding that where a habeas petition contains at least one timely claim, other claims cannot be dismissed for untimeliness).

308. See 28 U.S.C. § 2244(d)(2) (explaining that the limitations period is tolled during “the time . . . which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending”); *Artuz v. Bennett*, 531 U.S. 4, 8, 121 S. Ct. 361, 364–65, 148 L. Ed. 2d 213, 218 (2000) (holding that a state post-conviction motion is “properly filed” even if the motion is procedurally barred, as long as the “delivery and acceptance [of the papers] are in compliance with the applicable laws and rules governing filings”). The *Artuz* Court also noted that these rules usually include the form of the document, the time limits on its delivery, the place it must be filed, and the filing fee.

309. See *Allen v. Siebert*, 552 U.S. 3, 7, 128 S. Ct. 2, 4, 169 L. Ed. 2d 329, 334 (2007) (holding that a petition for post-conviction relief rejected by the court as untimely is not “properly filed” under 28 U.S.C. § 2244(d)(2) and thus does not toll the one-year limitation, even though an affirmative defense of the state’s statute of limitations may still be available).

310. See *Duncan v. Walker*, 533 U.S. 167, 172, 121 S. Ct. 2120, 2124, 150 L. Ed. 2d 251, 258 (2001) (holding that properly filed federal habeas petitions do not toll the one-year deadline). In this case, Walker’s state conviction became final in April 1996, and he filed a habeas petition that was dismissed in July 1996. In May 1997 he tried to file another federal habeas petition, and the Court held that this petition was time-barred because the time he was waiting for the decision on his first federal habeas petition did not stop the clock on the one-year timeline.

dismisses your petition without prejudice, you may not be able to re-submit your habeas petition to the federal court before the one-year deadline. In some extreme situations, you may qualify for “equitable tolling” (a situation where the time is not counted against you). Time that is “equitably tolled” does not count against your one-year time limit. However, equitable tolling is only available when “‘extraordinary circumstances’ beyond the petitioner’s control make it impossible to file a petition on time.”³¹¹

Think of the time limit as a stopwatch with one year on its face. Once the direct review of your case becomes final, the clock starts ticking. If you are incarcerated in a state prison, when an Article 440 motion or state post-conviction petition is filed in state court, the clock is stopped. Once the state court decides the case and all other appeals are completed,³¹² the clock starts ticking again, and a habeas petition must be filed in federal court before the one year is up. Note that the clock does not reset to one year. Rather, the only time remaining is what was left when the Article 440 motion or state habeas petition was filed in state court.

5. Successive Petitions³¹³

It is difficult to file more than one federal habeas corpus petition. It is important to file your habeas petition properly and completely the first time. You may not raise a habeas claim a second time after it has been adjudicated (decided by a judge) on the merits.³¹⁴ There are a few instances when you may bring new claims in a second habeas petition, but these instances are very limited. It is difficult to show the court that your claim falls into one of the exceptions where petitioners are allowed to file a second petition.

If your first petition was insufficient for one of a few reasons, the courts will allow you to file a new petition without considering the new petition successive. The following are the situations for which the courts will not consider your second petition successive:

311. See *Rhines v. Weber*, 544 U.S. 269, 277–278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (noting that in extraordinary circumstances the court may issue a stay so that the petitioner may have the opportunity to present his claim without the time limit running out). See also *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669, 679 (2005) (holding that habeas petitioner has the burden of establishing that he pursued his rights diligently and that some extraordinary circumstance stood in his way of filing within the time limit for equitable tolling to be proper). This is often a very high burden. For example, in the Third Circuit, the court rejected an equitable tolling argument when the petitioner was never informed that the state supreme court had denied his petition, even though his lawyer had been informed, since the lawyer never informed the petitioner. The court held attorney error was not sufficient to establish an extraordinary circumstance. *LaCava v. Kyler*, 398 F.3d 271, 275–276 (3d Cir. 2005). Courts also may allow equitable tolling of the statute of limitations to allow you to file a state exhaustion petition and an amended federal post-exhaustion petition.

312. Most courts have held that any time used to file a petition for *certiorari* to the Supreme Court after state post-conviction proceedings does not continue to toll the clock. See *Stokes v. Dist. Attorney*, 247 F.3d 539, 542 (3d Cir. 2001) (holding that the 90-day period during which a *certiorari* petition may be filed does not toll the statute of limitations); *Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001) (affirming that the limitations period is not tolled for those 90 days); *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 2001) (finding that the limitations period for filing a habeas petition was not tolled while defendant was seeking an appeal to the Supreme Court).

313. “Successive” means the one after. In other words, any petitions you file after your first one are considered “successive.”

314. 28 U.S.C. § 2244(b)(1). Section 2244 applies to all petitioners filing under §§ 2241, 2254, and 2255, which includes all state and federal habeas petitioners. You may consider reading the text of 28 U.S.C. § 2244 in full to better understand the restrictions on successive petitions. See *Burton v. Stewart*, 549 U.S. 147, 153–154, 127 S. Ct. 793, 796–797, 166 L. Ed. 2d 628, 633–635 (2007) (instructing the district court to dismiss incarcerated person’s petition and finding that since the person had not made a motion in the court of appeals for an order authorizing the district court to consider the application, the application was thus a “second or successive” habeas application that he did not have authorization to file).

- (1) If you failed to exhaust your state remedies, and your first petition is dismissed to allow you to exhaust your state remedies, your second petition, once all the claims are exhausted, is not considered successive.³¹⁵
- (2) If your first petition is rejected for failure to pay the filing fee or for mistakes in form, the second, corrected petition is not considered successive.³¹⁶
- (3) If the first petition you filed was mislabeled as a Section 2255 petition, but actually was a Section 2241 petition that challenged the execution instead of the validity of the sentence, the court will not bar (dismiss) your second petition for being successive.³¹⁷
- (4) If your second petition challenges parts of the judgment that came about as the result of an earlier, successful petition, the court will not bar that second petition.³¹⁸ In this case, you must obtain authorization to file a second petition.³¹⁹

In some cases, even if the court deems a second petition to be successive, it may still allow you to proceed with your submission. However, exceptions to the general prohibition on successive petitions are rare and difficult to meet. The court will only consider a successive petition in extraordinary situations where you are raising a “new” claim in a second petition for federal habeas relief. The exceptions for “new” claims are different for people in state and federal prisons.

If you are incarcerated in a *state prison*, these are the exceptions to the general prohibition on successive petitions:

- (1) Your new claim rests on a “new” and previously unavailable rule of constitutional law that the Supreme Court has deemed is applicable retroactively “to cases on collateral appeal.”³²⁰ This means, the Supreme Court has recently clarified or made a rule of constitutional law and noted that it applies, even to cases that were decided before they made the rule. See Part C(2) of this Chapter, “New Laws: The *Teague* Rules.”

315. See *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1601, 146 L. Ed. 2d 542, 551 (2000) (deciding that “a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a ‘second or successive’ petition as that term is understood in the habeas context”); *Carlson v. Pitcher*, 137 F.3d 416, 420 (6th Cir. 1998) (affirming that “a habeas petition filed after a previous petition has been dismissed on exhaustion grounds is not a ‘second or successive petition’”); *Camarano v. Irvin*, 98 F.3d 44, 46 (2d Cir. 1996) (*per curiam*) (“Application of the gatekeeping provisions to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review and thus, would conflict with the doctrine of writ abuse, as understood both before and after *Felker*. . . . To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether.”). See Part D(2), “Exhaustion of State Remedies and Direct Appeal,” of this Chapter for more information on exhaustion.

316. See *O'Connor v. United States*, 133 F.3d 548, 550 (7th Cir. 1998) (asserting that a petitioner’s “returned” petition will not be considered an “initial petition”); *Benton v. Washington*, 106 F.3d 162, 164 (7th Cir. 1996) (finding that petitioner’s failure to pay a filing fee is not to be considered an “unsuccessful petition” and therefore the subsequent petition is not considered “successive”).

317. See *Chambers v. United States*, 106 F.3d 472, 474–475 (2d Cir. 1997). See Part A(4) of this Chapter, “Which Laws Apply to Federal Habeas Corpus,” for more information on when people in federal prison would use § 2241 instead of § 2255.

318. See, e.g., *In re Taylor*, 171 F.3d 185, 187–188 (4th Cir. 1999) (holding that petitioner’s motion is not “second or successive” where petitioner seeks to raise only those issues that originated at the time of re-sentencing, after his first petition had been granted).

319. *Burton v. Stewart*, 549 U.S. 147, 157 127 S. Ct. 793, 799, 166 L. Ed. 2d 628, 637 (2007) (holding that where petitioner did not obtain authorization to file a second petition challenging the same judgment, the court lacked jurisdiction to hear it).

320. 28 U.S.C. § 2244(b)(2)(A). This provision only applies to you if the Supreme Court has announced a new right since your case was decided and has explicitly said that this new right would apply to cases that have already been decided. *Tyler v. Cain*, 533 U.S. 656, 662, 121 S. Ct. 2478, 2482, 150 L. Ed. 2d 632, 642 (2001) (allowing successive habeas petition if the claim relies “on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”).

- (2) Your new claim relies on facts that you could not have discovered earlier, even with “due diligence.”³²¹ Additionally, these facts combined with the other facts already on the record establish by “clear and convincing”³²² evidence that “but for”³²³ the constitutional error that you are challenging, no reasonable juror would have found you guilty of the offense with which you were charged.³²⁴ See Part D(3)(B)(ii) of this Chapter, “Fundamental Miscarriage of Justice.”

If you are incarcerated in a *federal prison*, these are the exceptions to the general prohibition:

- (1) A recent Supreme Court decision announces a retroactive legal right (a right that, when announced, applies to past cases as well as future ones) that was not available when you filed your first petition.³²⁵ In these cases, you do not need to show “the likelihood of innocence.” If, after the rejection of your first petition, the Supreme Court announces that a particular new law will be applied to all future and prior cases, you can submit a second petition on the same claims. In these cases, you do not need to show that ignoring the new law will harm you in some way.³²⁶
- (2) The combination of the “newly discovered evidence” with other facts on the record will provide “clear and convincing” evidence that, in the absence of a trial court’s error, the jury would have found you not guilty.³²⁷ In these cases, you need to show that the error caused by the court’s violation of the Constitution, federal laws, or treaties is not simply “harmless.”

Note that even if you can prove any of the above exceptions, other procedural difficulties could still keep you from filing a second request for habeas relief. In order to file a second petition in federal district court, you need to get permission from a panel of three federal circuit court judges. Upon your request, the panel of three judges will review your papers and make a decision within thirty days about whether or not they will allow your special second petition.³²⁸ If the court decides not to review your papers, then you cannot appeal their decision and, thus, you cannot file a second petition.

Because the rules are so strict, you should be careful when you are filing your petition for the first time. Be sure you include all the facts and do not assume that you will have a second chance if you get something wrong or if you do not follow a procedural rule correctly. The new law in AEDPA was meant to be harsh, and it is.³²⁹

E. The Mechanics of Petitioning for Federal Habeas Corpus

This Section explains the basic process surrounding habeas law: (1) when to file, (2) where to file, (3) whom to file against, (4) how to file, (5) what to expect after you file, and (6) how to appeal.

321. 28 U.S.C. § 2254(e)(2)(A)(ii). “Due diligence” means “good effort.”

322. “Clear and convincing evidence” is a standard between “preponderance of evidence” and “beyond a reasonable doubt.” According to the “clear and convincing evidence” standard, you must show that it is *highly likely* that the new facts would have changed the outcome of your trial. However, you do not have to show that the new facts *definitely* would have changed the outcome of your trial.

323. “But for,” in this context, means “without.”

324. 28 U.S.C. § 2254(e)(2)(B).

325. 28 U.S.C. § 2255(h)(2).

326. People in federal prison may be able to bring habeas claims by filing a § 2241 habeas motion even when the new law is not constitutional. To do this, the new law must meet a few conditions: (1) the new law must be substantive, and it must now deem the “criminal” conduct for which the petitioner was convicted no longer “criminal”; and (2) the new law must have been passed after the petitioner’s direct appeal, and before the first habeas motion. *See In re Jones*, 226 F.3d 328, 333–334 (4th Cir. 2000). See also Part A(4), “Which Laws Apply to Federal Habeas Corpus,” of this Chapter for more information on when people in federal prison should bring § 2241 petitions.

327. 28 U.S.C. § 2255(h)(1).

328. 28 U.S.C. § 2244(b)(3)(D).

329. *See Felker v. Turpin*, 518 U.S. 651, 654, 116 S. Ct. 2333, 2335, 135 L. Ed. 2d 827, 834 (1996) (finding AEDPA’s new restrictions on successive habeas corpus petitions constitutional).

1. When to File

You must file your writ for habeas corpus in federal district court within one year after your case becomes “final.”³³⁰ This is *very* important; if you miss this time limit, you will probably not be allowed to bring a federal habeas claim. The time limit is discussed in detail in Part D(3) of this Chapter, “Time Limit.”

If you are filing *pro se*,³³¹ you should file the following three documents within the one-year time limit: (1) a habeas petition,³³² (2) an application for appointment of counsel, and (3) an application for a stay (in death penalty cases only).³³³

2. Where to File

If you are incarcerated in a *state prison*, you may have a choice of federal courts in which to file your petition. You may file your petition in either the district court of the district where you are imprisoned, or in the district court of the district in which you were convicted.³³⁴ For some people, this may be the same district. For others, these may be two different districts.

There are several advantages to filing in the district court where you were convicted. First, the records of your trial and sentencing are located there. Second, it is likely that additional evidence or witnesses that you may wish to produce for the court can be found there. Third, if you were convicted in a city and are now imprisoned in a small town or rural area, more qualified attorneys may be available to you in the district where you were convicted. On the other hand, if you already have an attorney, it may be easier for a local attorney to travel to your prison to discuss the case with you. In that case, you may choose to file in the district court of the place where you are now imprisoned. In any case, regardless of where you file, the court in which you file will likely transfer your case to the district where you were convicted if the court decides that a transfer is proper.³³⁵

If you are incarcerated in a *federal prison*, you do not have a choice of where to file your habeas petition. You must file your petition in the district in which you were convicted and sentenced.

3. Whom to File Against

If you are a person incarcerated in state custody filing a Section 2254 petition, or a person incarcerated in federal custody filing under Section 2241,³³⁶ you need to name a respondent on your petition. If you are a person incarcerated in federal custody filing under Section 2255, you do not need to name a respondent on your petition.³³⁷

As a person incarcerated in state custody, your habeas petition is a civil, not a criminal, action. You can think of a habeas petition as a lawsuit—but instead of suing for money or damages, you are suing for a new trial, or for your release from imprisonment. Therefore, you cannot file a petition to the court; you must file a petition *against* the person currently responsible for detaining you. The person you file the petition against is called the “respondent.” The respondent will be the person who

330. See 28 U.S.C. § 2244(d)(1) (people in state prison); 28 U.S.C. § 2255(f) (people in federal prison).

331. “*Pro se*” means that you are appearing in court by yourself and are not represented by a lawyer.

332. Remember to raise all possible claims, as long as you can support them with factual details and explanations about how the violation of your rights harmed you by affecting the outcome of your trial.

333. A “stay” means a temporary court-ordered stop of the judicial proceeding.

334. 28 U.S.C. § 2241(d).

335. 28 U.S.C. § 2241(d).

336. If you are filing under 28 U.S.C. § 2241, the guidelines for your respondent will be similar to those for people in state prison filing under § 2254. See Part A(4), “Which Laws Apply to Federal Habeas Corpus,” of this Chapter for information on when people in federal prison should use § 2241.

337. This is because a § 2255 motion, unlike a § 2241 or § 2254 petition, is technically a criminal procedural motion. So, the respondent remains the party that prosecuted you—the United States.

has control over your custody.³³⁸ So, the person you name as the respondent will depend on the type of custody you are under.³³⁹

Generally, the person who has control over your custody and whom you should name as the respondent is the warden of your prison or the chief officer in charge of state penal institutions.³⁴⁰ However, there are a few situations where you should name a different party as respondent. If you are not currently in custody, but are challenging a future custodial sentence, you should name the attorney general of the state that will have custody over you.³⁴¹ If you are not under physical custody of the state,³⁴² you should name as respondent the person who has legal control over your custody.³⁴³ For example, if you are on parole, you should name the parole officer and the supervising agency, such as the parole board, as the respondents.³⁴⁴

4. How to File

To begin a habeas proceeding, you need to obtain a petition form for a writ of habeas corpus. You should write to the clerk of the federal district court in which you plan to file and request this form.³⁴⁵ If you are incarcerated in a state prison, you should request the standard form for a petition under 28 U.S.C. § 2254 for a writ of habeas corpus.³⁴⁶ If you are incarcerated in a federal prison, request a standard form for a 28 U.S.C. § 2255 motion.³⁴⁷ The clerk should send the form to you free of charge.³⁴⁸ Sample blank forms for 28 U.S.C. § 2254 petitions and 28 U.S.C. § 2255 motions are in the United States Code (“U.S.C.”) following each statute’s rules.³⁴⁹

338. This is called the “immediate custodian rule.” *Rumsfeld v. Padilla*, 542 U.S. 426, 435, 124 S. Ct. 2711, 2717, 159 L. Ed. 2d 513, 527 (2004).

339. See Part D(1), “In Custody,” of this Chapter for more information on custody.

340. “[T]he state officer having custody of the applicant [shall] be named as respondent.” Rules Governing § 2254 Cases, Rule 2(a), 28 U.S.C. § 2254 advisory committee’s note to 2004 amendment. You should name either the warden or officer based on who has “custody” over you. If you are unsure, you should name both the warden and the officer as respondents.

341. Rules Governing § 2254 Cases, Rule 2(a), 28 U.S.C. § 2254 advisory committee’s note to 2004 amendment.

342. See Part D(1), “In Custody,” of this Chapter for more information on custody.

343. See *Rumsfeld v. Padilla*, 542 U.S. 426, 439, 124 S. Ct. 2711, 2720, 159 L. Ed. 2d 513, 530 (2004) (“[I]dentification of the party exercising legal control only comes into play when there is no immediate physical custodian with respect to the challenged ‘custody.’”).

344. See *Hogan v. Hanks*, 97 F.3d 189, 190 (7th Cir. 1996) (“If the petitioner is on parole, the parole board or equivalent should be named [as respondent].”).

345. For a list of federal district court addresses, see Appendix I at the end of the *JLM*.

346. Rules Governing § 2254 Cases 2(d) (requiring federal district courts to supply incarcerated people with forms for habeas corpus petitions). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Mar. 2, 2019).

347. Rules Governing § 2255 Proc., 2(c). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Mar. 2, 2019).

348. Rules Governing § 2255 Cases, 2(c). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Mar. 2, 2019).

349. Petition for Relief From a Conviction or Sentence By a Person in State Custody, available at <https://www.ca4.uscourts.gov/docs/pdfs/ao241.pdf?sfvrsn=10> (last visited Mar. 2, 2019); Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody, available at <https://www.ca4.uscourts.gov/docs/pdfs/ao243.pdf?sfvrsn=8> (last visited Mar. 2, 2019). Note that these are citations to blank sample forms, and should be attached to the rules governing these statutes. If you have trouble locating these in your library, check with the federal district court clerk. Note that the Rules Governing § 2254 Cases, 2(d) and the Rules Governing § 2255 Proc., 2(c), state that individual districts may alter the exact format

The form will ask for a lot of information. The information requested includes the facts on which you base your claims, your custody status, the state court proceedings in which you exhausted your claims, the citations and results of any other federal habeas petitions, and the relief you seek.³⁵⁰ The petition or motion must also include all the grounds of relief available to you, the facts supporting each of your claims, and the relief you are requesting.³⁵¹ In providing this information, keep the following nine steps in mind.

(d) Write Plainly

Do not worry about using legal terminology with which you are uncomfortable. The court will not penalize you for not using formal legal terms. And, if you misuse legal phrases, you may confuse the court and prevent the judge from understanding your claim. Be sure to write as clearly as possible and to check your reasoning, grammar, and spelling.

(e) Tell the Facts

The most important thing you can do in your petition is to tell the court the relevant facts. Judges usually know the law but rarely know the facts of your case. If you have facts that relate to your legal claims—for example, that the government withheld a ballistics report from your trial lawyer—you should tell the court. Factual details you think are unimportant may be important to the court.

(f) Proofread

Ask someone you trust to read over your papers. Sometimes it is difficult to evaluate your own arguments. A fresh set of eyes can catch gaps in your reasoning or grammatical mistakes you might have missed.

(g) Argue Truthfully and Rely on the Law

Remember your audience. You are writing to a federal judge and his legal assistants. Federal judges and their assistants often have a great deal of experience handling habeas petitions, so you should not try to trick them or lie to them. Also, do not make a plea for mercy. Instead, you should appeal to a judge's sense of fairness by making an argument that the government has convicted or sentenced you unfairly. To do this, you should use the legal standards and information provided earlier in this Chapter and found through your own research.

(h) Provide Copies of Parts of the Record

Throughout the criminal justice process, you have probably received many papers like subpoenas, briefs, judgments, and transcripts. These papers make up the record of your case and are often helpful to a court reviewing your claim. Include copies of as much of the record as you can and point out the relevant parts of the record in your legal argument. If you are missing some of the record or do not have access to a copy machine, ask the court to get the relevant parts of the record from the trial court or the prosecution. If possible, identify the important parts of the record as specifically as you can. For example, do not simply say that the judge asked impermissible questions at your trial; instead, state (if possible) what those questions were and the transcript page numbers where the questions appear.

of the form, but both the forms the court uses and the sample forms should have the same substance. Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Mar. 2, 2019).

350. ADMIN OFFICE OF THE U.S. COURTS, FORM AO 241, PETITION FOR RELIEF FROM A CONVICTION OR SENTENCE BY A PERSON IN STATE CUSTODY (2017), *available at* https://www.uscourts.gov/sites/default/files/AO_241_0.pdf (last visited Mar. 1, 2019); ADMIN OFFICE OF THE U.S. COURTS, FORM AO 243, MOTION TO VACATE, SET ASIDE, OR CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY (2017), *available at* https://www.uscourts.gov/sites/default/files/AO_243_0.pdf (last visited Mar. 1, 2019).

351. 28 U.S.C. § 2254 note (R. GOVERNING § 2254 CASES IN THE U.S. DIST. CTS. 2(c)(1)-(3)); 28 U.S.C. § 2255 note (R. GOVERNING § 2255 CASES IN THE U.S. DIST. CTS. 2(b)(1)-(3)).

(i) Provide Citations

Statutes, administrative rules, and judicial opinions often have citations explaining where they can be found. Whenever possible, give citations to the laws and cases that apply to your factual situation. See Chapter 2 of the *JLM*, “Introduction to Legal Research,” to learn how to find these laws and cases and how to give citations. You do not have to give citations,³⁵² but they may help the judge make his or her decision efficiently. If you know only a part of the citation, like the name of a case, you should include that part. If you do not know the citation, do not include it and do not worry about it. Try not to include long lists of cases in your petition (“string cites”). Instead, use the best ones for your case. If a lot of cases say the same thing, pick the most recent decision from the highest court and cite it.

(j) Present All Possible Claims

As discussed in Part D(5) (“Successive Petitions”) of this Chapter, you probably have only one chance to submit a federal habeas petition. Thus, in your habeas petition, you should include any and all the claims that are supported by the facts of your case and by the law.

(k) Sign, Date, and Copy

After you complete the form, you must sign it.³⁵³ In addition, date the petition and/or swear to the date that it was given to a prison official to be mailed.³⁵⁴ Then, make three copies of the completed petition so that you have four in total. You must send the original and two copies to the clerk of the court.³⁵⁵ Keep the remaining copy for your own records.

(l) Pay Your Filing Fee

For people incarcerated in state custody and people incarcerated in federal custody filing 28 U.S.C. § 2241 petitions, the filing fee for a habeas petition is five dollars.³⁵⁶ If you cannot afford the fee, you should ask the clerk of the court for an “*in forma pauperis*” application.³⁵⁷ This application seeks the court’s permission to proceed in the manner of a poor person by not paying court fees and costs.³⁵⁸ In addition to completing the *in forma pauperis* form, you must write and sign an application of

352. See *Jones v. Jerrison*, 20 F.3d 849, 853 (8th Cir. 1994) (“No statute or rule requires that a petition identify a legal theory or include citations to legal authority.”).

353. See 28 U.S.C. § 2254 note (R. GOVERNING § 2254 CASES IN THE U.S. DIST. CTS. 2(c)(5)); 28 U.S.C. § 2255 note (R. GOVERNING § 2255 CASES IN THE U.S. DIST. CTS. 2(b)(5)).

354. Petition for Relief From a Conviction or Sentence By a Person in State Custody, p.16, 28 U.S.C. fol. § 2254 Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody, p.13, 28 U.S.C. fol. § 2255. It is important to note the date because the petition may not arrive at the court until a long time after you have given it to prison officials to be mailed. 28 U.S.C. § 2254 r. 3(d); 28 U.S.C. § 2255 r. 3(d) (stating that a petition is considered on time as long as it enters the prison internal mailing system on or before the last day of filing). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

355. 28 U.S.C. § 2254 r. 3(a); 28 U.S.C. § 2255 r. 3(a). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

356. 28 U.S.C. § 1914(a).

357. 28 U.S.C. § 2254 r. 3(a)(2). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

358. ADMIN OFFICE OF THE U.S. COURTS, FORM AO 240, APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (SHORT FORM) (2010), available at https://www.uscourts.gov/sites/default/files/ao240_0.pdf (last visited Mar. 1, 2019).

indigence.³⁵⁹ You must also provide a certificate from your prison warden stating how much money is in your prison account.³⁶⁰ When you have prepared the *in forma pauperis* form, the application of indigence, and the prison account certificate, you should make copies of them for your own records and send the originals to the clerk of the court. If the clerk accepts your application, you will not have to pay the filing fee or any other costs arising in your habeas proceeding.

People incarcerated in federal custody filing a motion under 28 U.S.C. § 2255 do not have to pay a filing fee.³⁶¹ However, all people incarcerated in federal custody should still complete the *in forma pauperis* form, discussed above, because it will be helpful to have the form on file in case the judge chooses to appoint you counsel.³⁶² Additionally, if you are a person incarcerated in federal custody filing 28 U.S.C. § 2241 petitions³⁶³ or a person incarcerated in state custody filing 28 U.S.C. § 2254³⁶⁴ petitions and you do not file the *in forma pauperis* application discussed above, you will have to pay the filing fee.

The Prison Litigation Reform Act (“PLRA”) requires incarcerated persons to make full or partial payment of the application fee for civil suits. When the PLRA was first passed, it raised a question about whether habeas petitioners would be required to pay filing fees regardless of their *in forma pauperis* status.³⁶⁵ However, federal courts of appeal have held that the requirements set out in the PLRA do not apply to incarcerated persons filing habeas corpus petitions.³⁶⁶

5. What to Expect After Filing

After you have filed your petition, you can expect the court to issue one or more of the following: (a) a dismissal, (b) an order to show cause, and/or (c) an evidentiary hearing. Generally, the court must conduct an evidentiary hearing if you “alleged facts, which, if found to be true, would have entitled

359. 28 U.S.C. § 2254 r. 3(a)(2)(requiring an affidavit that the incarcerated person is unable to pay the filing fee in accordance with 28 U.S.C. § 1915). *See also* 28 U.S.C. § 1915 (stating general requirements for proceedings *in forma pauperis*). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

360. 28 U.S.C. § 2254 r. 3(a)(2). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

361. *See* 28 U.S.C. § 2255 r. 3 advisory committee’s note (“There is no filing fee required of a movant under these rules.”). Note that this is a citation to an Advisory Committee Note to the Rules Governing Section 2255 Proceedings for the United States District Courts, available at <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2255&num=0&edition=prelim> (last visited Feb. 10, 2019).

362. *See* 28 U.S.C. § 2255 r. 3 advisory committee’s note (stating that affidavit for an *in forma pauperis* form will still be attached to the form provided for a § 2255 motion in case the movant will need the form at a later stage). Note that this is a citation to an Advisory Committee Note to the Rules Governing Section 2255 Proceedings for the United States District Courts, available at <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2255&num=0&edition=prelim> (last visited Feb. 10, 2019).

363. 28 U.S.C. § 1915 (general guidelines on proceedings *in forma pauperis*). For more information on when people incarcerated in federal custody should use 28 U.S.C. § 2241 instead of § 2255, see Part A(4), “Which Laws Apply to Federal Habeas Corpus?,” of this Chapter.

364. 28 U.S.C. § 2254 r. 3(a). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

365. Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e. Please see Chapter 14 of the *JLM* for a full discussion of the PLRA.

366. *See, e.g.,* *United States v. Levi*, 111 F.3d 955, 956, 324 U.S. App. D.C. 196, 197 (D.C. Cir. 1997) (*per curiam*) (holding that the PLRA filing fee provisions do not apply to habeas proceedings); *Smith v. Angelone*, 111 F.3d 1126, 1129–1131 (4th Cir. 1997) (holding that the PLRA filing fee provisions do not apply to habeas proceedings); *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996) (holding that the PLRA filing fee provisions do not apply to habeas proceedings).

[you] to habeas relief.”³⁶⁷ In other words, the court is supposed to give you the benefit of the doubt and assume the truth of your alleged facts when deciding whether to look at the evidence in an evidentiary hearing. However, the court may make its decision without you present.³⁶⁸

(a) Dismissal

After you file your habeas request, the judge may dismiss your entire petition. The judge will do so if it appears on the face of your petition that you are not entitled to relief—that is, even assuming your claims are true, habeas law does not give you any relief.³⁶⁹ For instance, the court will dismiss your claim if, in your federal habeas petition, you complain about a harmless error. The court may also reject your claim if the facts of your case on the record are not fully developed (in other words, if you have not fully stated that you have a federal claim), or if it is clear that your petition was not filed within the one-year time limit.

(b) Order to Show Cause

If the judge decides that, assuming the truth of your claim, you may have a case, he or she will issue an “order to show cause” to the person who has you in custody.³⁷⁰ If you are a person incarcerated in state custody, this person is probably the superintendent of your prison.³⁷¹ If you are a person incarcerated in federal custody, this person is the United States Attorney (the prosecutor) in charge of your case.³⁷² The “order to show cause” directs the warden or attorney to state why the judge should not issue a writ of habeas corpus.³⁷³ The warden or attorney must then reply by filing an “answer”

367. See *Ciak v. United States*, 59 F.3d 296, 307 (2d Cir. 1995) (requiring an evidentiary hearing where petitioner alleged trial counsel abandoned defense strategy because of conflict of interest); see also *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994) (dismissing habeas petition in order to allow district court to complete discovery on whether trial counsel failed to use exceptions to rape shield law); *United States v. Blaylock*, 20 F.3d 1458, 1465–1469 (9th Cir. 1994) (requiring evidentiary hearing where defendant claimed counsel’s failure to inform defendant of government’s plea offer constituted ineffective counsel); *Gov’t of V.I. v. Weatherwax*, 20 F.3d 572, 580, 29 V.I. 410, 424 (3d Cir. 1994) (requiring evidentiary hearing where defendant claimed counsel’s failure to seek *voir dire* constituted ineffective counsel because, if true, claim would be grounds for habeas corpus relief); *Frazer v. United States*, 18 F.3d 778, 781, 784–785 (9th Cir. 1994) (entitling incarcerated persons to evidentiary hearing unless files and record of the case conclusively show that the incarcerated person is not entitled to relief).

368. See 28 U.S.C. § 2243 (people incarcerated in state custody do not have to be present when the court is only dealing with issues of law); 28 U.S.C. § 2255(c) (people incarcerated in federal custody do not have to be present at the hearing determining a § 2255 motion).

369. 28 U.S.C. § 2254 r. 4 (“If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition”); 28 U.S.C. § 2255 r. 4(b). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

370. 28 U.S.C. § 2254 r. 4 (“If the petition is not dismissed, the judge must order the respondent to file an answer, motion or other response.”); 28 U.S.C. § 2255 r. 4(b). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

371. 28 U.S.C. § 2254 r. 2(a) (“If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody”). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

372. 28 U.S.C. § 2255 r. 4(b) (“If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response.”). Note that this is a citation to the Rules Governing § 2255 Proceedings in the United States District Courts, available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

373. The state attorney or a district attorney will usually represent the warden. 28 U.S.C. § 2254 r. 4; 28 U.S.C. § 2255 r. 4(b). Note that these are citations to the Rules Governing § 2254 Cases in the United States

within a time limit fixed by the court,³⁷⁴ and must supply you with a copy of his answer.³⁷⁵ If you object to any statement of fact in the answer, you need to challenge the statements in a document known as a “traverse.”³⁷⁶

(c) Evidentiary Hearing

For people incarcerated in state custody, under AEDPA, the court reviewing your habeas petition is required to assume the facts as found by the state court.³⁷⁷ This means that the habeas court must make its judgment on your habeas petition based on the version of the facts that your trial court found to be true. However, after receiving the petition, answer, and traverse, the habeas court may choose to hold an evidentiary hearing on facts that were not fully developed in state trial court.³⁷⁸ Facts that are not fully developed are those that are still in dispute. The habeas court’s decision to hold a hearing may depend on why the facts were not developed in the trial court. Whether a hearing will be held may be affected by (1) whether some error for which you are responsible prevented the development of the facts, or (2) whether the state’s error prevented the factual development.

6. Petitioner’s Error

For people incarcerated in state custody, if you or your lawyer failed to fully develop the facts in state court, this is referred to as a “petitioner’s error.” AEDPA has severely limited the opportunities

District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

374. 28 U.S.C. § 2254 r. 5(b); 28 U.S.C. § 2255 r. 5(b). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

375. 28 U.S.C. § 2254 r. 5 advisory committee’s note (“Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner”). Note that this is a citation to an Advisory Committee Note to the Rules Governing Section 2254 Cases in the United States District Courts, available at <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2254&num=0&edition=prelim> (last visited Feb. 10, 2019).

376. A “traverse” is your way of denying any important facts claimed by the warden. Under Rule 5 following § 2254 and § 2255, you may submit a “reply” in response to the other side’s answer within a time fixed by the judge. 28 U.S.C. § 2254 r. 5(e); 28 U.S.C. § 2255 r. 5(d). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

377. 28 U.S.C. § 2254(e)(1) (“a determination of a factual issue made by a State court shall be presumed to be correct.”).

378. See 28 U.S.C. § 2254 r. 8 advisory committee note (stating that the judge may hold an evidentiary hearing where the material facts of the case are in dispute (citing *Townsend v. Sain*, 372 U.S. 293, 319)); 28 U.S.C. § 2254(d) specifies the circumstances under which a hearing is mandatory. 28 U.S.C. § 2254 r. 8 advisory committee’s note. Note that this is a citation to an Advisory Committee Note to the Rules Governing Section 2254 Cases in the United States District Courts, available at <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2254&num=0&edition=prelim> (last visited Feb. 10, 2019).

Regardless of whether you are incarcerated in state or federal custody, the federal district court may designate a magistrate to conduct hearings on your petition. 28 U.S.C. § 2254 r. 8(b); 28 U.S.C. § 2255 r. 8(b). After the hearing, the magistrate judge must file their findings of facts and recommendations with the court, and then mail you a copy. 28 U.S.C. § 2254 r. 8(b); 28 U.S.C. § 2255 r. 8(b). You must serve and file written objections to the magistrate’s findings and recommendations *within 14 days* of receiving the magistrate’s proposals. 28 U.S.C. § 2254 r. 8(b); 28 U.S.C. § 2255 r. 8(b). While Rule 8(b) states only that you “may” file written objections, you should *always* file written objections if you disagree with any of the magistrate’s findings or recommendations. Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 10, 2019).

for evidentiary hearings in this situation. The rule states that you must show two things in order to receive an evidentiary hearing: cause and innocence.³⁷⁹

You can show cause in one of two ways:

- (1) By showing you are now relying on a retroactive right newly recognized by the Supreme Court,³⁸⁰ or
- (2) By showing you are now relying on newly discovered facts that could not be uncovered earlier during the state proceedings through “due diligence” (reasonable effort).³⁸¹

In addition to showing cause, you must also show innocence. You can show innocence if the “facts underlying [your] claim would be [enough] to establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found [you] guilty of the underlying offense.”³⁸² In other words, you must prove that, if the constitutional error you are alleging had never happened, a “reasonable” juror would have found you innocent of the crime of which you were convicted.

If you show both cause and innocence will you be granted an evidentiary hearing to further develop your facts. However, if you cannot show cause and innocence, the court will proceed with the facts as they appear in the state court record. Petitioner’s error is difficult to show if you made a mistake presenting your case. If the lack of factual development was caused by your error, the court will probably not grant you an evidentiary hearing. The possibility of not getting an evidentiary hearing explains why it is so important for you to investigate and raise all the facts supporting all your constitutional claims in state court. It is also why you must ask the state court to appoint an investigator and all the experts you need to help you discover and identify facts supporting your constitutional claims. Be sure to also request discovery of documents, and always request an evidentiary hearing at which you can present your witnesses and evidence and can prove your claims. If you do not request discovery of documents in state court, the cause and innocence standard means that you may not be able to request discovery of documents in your habeas court. Because the cause and innocence standard also makes it unlikely that the habeas court will give you an evidentiary hearing, you should request an evidentiary hearing in state court so that you can develop all of the facts necessary for your habeas petition.

379. The statute does not use the terms cause or innocence, but does require that you provide the court with a reason, based either on new law or facts, to hear your claim, as well as prove your likely innocence. *See* 28 U.S.C. § 2254(e)(2); *see also* *McQuiggin v. Perkins*, 569 U.S. 383, 396, 133 S. Ct. 1924, 1934, 185 L. Ed. 2d 1019, 1033 (2013) (“Under AEDPA, a petitioner seeking an evidentiary hearing must show diligence and, in addition, establish her actual innocence by clear and convincing evidence.”).

380. 28 U.S.C. § 2254(e)(2)(A)(i). This means that you are relying on a right that, even though it was recognized after your trial, can be applied to past situations like yours.

381. 28 U.S.C. § 2254(e)(2)(A)(ii). For a case providing an example of evidence not previously discoverable through “due diligence,” *see* *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). In that case, the Supreme Court held that, in order to obtain an evidentiary hearing in federal court, the petitioner had to show he exercised due diligence in trying to develop the facts in state court. If the petitioner could show he was “diligent in developing the record and presenting, if possible, all claims of constitutional error,” but the facts remained inadequately developed regardless, the petitioner may be entitled to a federal evidentiary hearing. *Williams v. Taylor*, 529 U.S. 420, 437, 120 S. Ct. 1479, 1491, 146 L. Ed. 2d 435, 452 (2000). Additionally, the requirement of due diligence does not depend on whether the efforts were successful, but on whether “the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” *Williams v. Taylor*, 529 U.S. 420, 435, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435, 451 (2000). The Court also held that “in the usual case ... the prisoner, [must] at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.” *Williams v. Taylor*, 529 U.S. 420, 437, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435, 452 (2000); *see also* *Dobbs v. Zant*, 506 U.S. 357, 359, 113 S. Ct. 835, 836, 122 L. Ed. 2d 103, 107 (1993) (finding that a trial transcript may not be excluded for delay in its being discovered where the delay mostly was a result of the state’s error).

382. 28 U.S.C. § 2254(e)(2)(B); *see* *Sawyer v. Whitley*, 505 U.S. 333, 345, 112 S. Ct. 2514, 2522, 120 L. Ed. 2d 269, 283–284 (1992) (citing the “actual innocence” exception, but not allowing an exception based solely upon a showing of additional mitigating evidence that related only to the discretionary decision between the death penalty and life imprisonment).

7. State's Error

If the state or the state court prevented the development of facts in your case, you will receive a mandatory hearing. The Supreme Court has listed six situations in which state errors require the federal court to hold an evidentiary hearing:³⁸³

- (1) The merits of the factual dispute were not resolved in the state hearing,
- (2) The state's factual determination is not fairly supported by the record as a whole,
- (3) The state court's fact-finding procedure did not adequately provide a full and fair hearing,
- (4) There is a substantial allegation of newly discovered evidence,
- (5) The material facts were not adequately developed at the state court hearing,³⁸⁴ or
- (6) The state judge did not afford the applicant a full and fair hearing for any reason.

Remember that these situations afford you a hearing only if the state or the court was at fault for not developing the facts during the state proceedings.

8. How to Appeal

If you filed a petition for habeas corpus in federal district court and your petition was denied, you may appeal to the appropriate United States Court of Appeals (also called the circuit court).³⁸⁵ Because AEDPA has severely restricted the opportunity to file a second or successive petition for habeas relief, the opportunity to appeal your first petition is even more important. Be sure to follow the procedures correctly. You must file a notice of appeal in the district court within thirty days of the district court judgment.³⁸⁶ You must be sure to file on time because it is unlikely the circuit court will grant an extension.³⁸⁷

An appeal is not mandatory, and you do not have an automatic right to appeal a denial of your habeas petition. In order to appeal you must get permission by obtaining a "certificate of appealability" from a federal district judge or circuit court judge.³⁸⁸ You do this by filing an application for a certificate of appealability with your notice of appeal in district court.³⁸⁹ If the district court denies your request for a certificate of appealability entirely, you may request one from the appeals court by filing an

383. *Townsend v. Sain*, 372 U.S. 293, 313, 83 S. Ct. 745, 757, 9 L. Ed. 2d 770, 786 (1963), *overruled on other grounds by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5–6, 112 S. Ct. 1715, 1717–18, 118 L. Ed. 2d 318, 326–327 (1992).

384. Under *Keeney v. Tamayo-Reyes*, federal courts will not provide an evidentiary hearing to a habeas petitioner who had an adequate opportunity to develop the relevant facts in state court proceedings unless the petitioner can show (1) cause for failure to develop the facts and that that failure resulted in actual prejudice to petitioner; or (2) he can show that a fundamental miscarriage of justice would result from not having an evidentiary hearing. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11–12, 112 S. Ct. 1715, 1721, 118 L. Ed. 2d 318, 330–331. *But see* *Rhoden v. Rowland*, 10 F.3d 1457, 1460 (9th Cir. 1993) (remanding for an evidentiary hearing because, unlike the petitioner in *Tamayo-Reyes*, petitioner here took all steps possible to develop a record of prejudice). Note that the standards of both *Townsend* and *Keeney* were superseded by the passage of the AEDPA in 1996.

385. 28 U.S.C. § 2253(a).

386. 28 U.S.C. § 2107(a).

387. Even though getting an extension is hard, Federal Rule of Appellate Procedure 4(a)(5)(A) allows federal courts to extend the time for filing if you can show excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A)(ii). For example, in *Mendez v. Knowles*, 556 F.3d 757, 764–67 (9th Cir. 2009), the court granted an extension based on excusable neglect, when the defendant's mailed habeas petition arrived to the court a day late. The court believed it was permissible to grant an extension because it would not prejudice the other party, the defendant acted in good faith when he filed the petition for an extension, and the delay was only for one day and had no impact on the judicial proceedings. Note that these are still very narrow circumstances, and different courts may be more or less open to granting extensions.

388. 28 U.S.C. § 2253(c)(1); *see, e.g., Hogan v. Zavaras*, 93 F.3d 711, 712 (10th Cir. 1996) (refusing to issue a certificate of appealability because the plaintiff failed to show a substantial denial of a constitutional right).

389. 28 U.S.C. § 2253.

application for a certificate of appealability with that court's clerk.³⁹⁰ If the district court grants a certificate for only some of your claims, you may ask the court of appeals to include additional claims the district court did not specify.³⁹¹

The circuit judge will permit an appeal only upon a "substantial showing of the denial of a constitutional right."³⁹² To satisfy this "substantial showing" standard, you must specify the issue(s) involved in the violation of your federal constitutional rights.³⁹³ Be sure to ask for a certificate of appealability on every issue you want to appeal. Your appeal will be limited to those issues on which the certificate is granted.

Some of the "appealable issues" that have been accepted in the past are listed below:

- (1) Even if the parties consent, does a magistrate judge have the authority under 28 U.S.C. § 636 and Article III of the Constitution to make a final judgment in a habeas corpus case?³⁹⁴
- (2) Did the trial court deny you the right to confront witnesses?³⁹⁵
- (3) Did the prosecutor commit a *Brady* violation concerning blood-testing evidence?³⁹⁶
- (4) Did the prosecutor commit a *Brady* violation by withholding witness statements at trial that were favorable to your case?³⁹⁷
- (5) Was your confession coerced by police beatings?³⁹⁸
- (6) Was your trial counsel constitutionally ineffective?³⁹⁹

If your petition was dismissed for procedural reasons, like failure to exhaust state remedies,⁴⁰⁰ a certificate of appealability will only be granted if reasonable jurors could debate whether (1) a constitutional violation occurred, and whether (2) the district court correctly dismissed your petition.⁴⁰¹ Issuing a certificate of appealability does not require showing that the appeal will succeed

390. 28 U.S.C. § 2253. If the court of appeals denies your request for a certificate of appealability, you may try to appeal this denial to the Supreme Court. The Supreme Court has held that it has jurisdiction to hear such appeals. *Hohn v. United States*, 524 U.S. 236, 247, 118 S. Ct. 1969, 1975, 141 L. Ed. 2d 242, 256 (1998).

391. See, e.g., Rule 22-1(e) of the Ninth Circuit Rules, which allows a defendant to present issues that did not appear in the application for the certificate of appealability and which submits this motion to expand the certificate of appealability to be decided by the merits panel as it sees appropriate. 9TH CIR. FED. R. APP. P. 22-1(e).

392. 28 U.S.C. § 2253(c)(2).

393. 28 U.S.C. § 2253(c)(3).

394. See *Orsini v. Wallace*, 913 F.2d 474, 476 (8th Cir. 1990) (finding that magistrate judges have authority to enter final judgment on a habeas petition where both parties consent because "Congress intended for magistrates to be authorized to conduct habeas proceedings within the limitations set forth in 28 U.S.C. § 636(c)(1).").

395. See *Norris v. Schotten*, 146 F.3d 314, 329-331 (6th Cir. 1998) (stating that an error in limiting cross-examination will yield a grant of habeas relief only when the error rises to the level of a "being a denial of fundamental fairness.>").

396. *Norris v. Schotten*, 146 F.3d 314, 334 (6th Cir. 1998) (stating that *Brady* principles—which require prosecutors to disclose certain evidence favorable to the defendant—only apply when prosecutors either fail to disclose evidence, or when they disclose evidence so late that it prejudices the defendant).

397. *Mahler v. Kaylo*, 537 F.3d 494, 503-504 (5th Cir. 2008) (reversing district court's denial of defendant's petition for habeas relief by finding that the lower court's determination that the witness statements were not material was contrary to established federal law).

398. See *Nelson v. Walker*, 121 F.3d 828, 832 (2d Cir. 1997) (finding that the defendant satisfied the requirement of a "substantial showing of a denial of a constitutional right" because the record indicated it was "debatable among jurists of reason ..." that his confession was coerced by beatings).

399. See Part B(2) ("Standards and Tests for Claims of Violations") of this Chapter for more information on ineffective assistance of counsel.

400. See Part B(5) ("Successive Petitions") of this Chapter for more information on failure to exhaust.

401. *Slack v. McDaniel*, 529 U.S. 473, 484, 489, 120 S. Ct. 1595, 1604, 1606-1067, 146 L. Ed. 2d 542, 555, 558 (2000) (reversing district court's denial of habeas petition because defendant had shown reasonable jurists could conclude that the district court's procedural rulings were wrong). The Second Circuit applied the same standard in *Matias v. Artuz*, 8 F. App'x. 9, 11-12 (2d Cir. 2001).

but that reasonable jurors could *debate* whether the petition should have been resolved differently.⁴⁰² The inquiry does not require full consideration of the factual or legal bases presented in support of the claim,⁴⁰³ which makes getting a certificate of appealability a bit easier.

F. How to Get Help from a Lawyer

You do not have a constitutional right to a court-appointed lawyer in a federal habeas corpus proceeding. In non-capital cases, a court may provide you with a lawyer when the “interests of justice” require the court to do so.⁴⁰⁴ If you are not appointed a lawyer, your right to access the courts includes at least some access to either a law library or “jailhouse” lawyers.⁴⁰⁵ See *JLM*, Chapter 3, “Your Right to Learn the Law and Go to Court,” for more information. It is important to note that even if you are appointed counsel for your habeas petition, you do not have a right to *effective* assistance of counsel.⁴⁰⁶

Generally, federal courts will appoint a lawyer to represent you if one of the following is true:

- (1) Your case involves complex legal issues;⁴⁰⁷
- (2) You are mentally or physically disabled;⁴⁰⁸

402. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034, 154 L. Ed. 2d 931, 944 (2003) (“A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues are adequate to deserve encouragement to proceed further.”).

403. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039, 154 L. Ed. 931, 950 (2003) (“This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.”).

404. 18 U.S.C. § 3006A(a)(2)(B); 28 U.S.C. § 2255(g); R. Governing § 2255 Cases 6(a), 8(c), *available at* <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 9, 2019). For incarcerated persons in state custody, the court may appoint counsel for an applicant who is or becomes unable to afford counsel. Again, the decision is governed by the “interests of justice.” 28 U.S.C. § 2254(h); R. Governing § 2255 Cases 6(a), 8(c), *available at* <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 9, 2019); *see also* *Reese v. Fulcomer*, 946 F.2d 247, 263–264 (3d Cir. 1991) (describing the factors the court should consider before appointing counsel to an indigent habeas petitioner as: (1) whether the habeas claim is frivolous; (2) whether appointment of counsel will benefit the petitioner and the court; (3) the complexity of the legal or factual issues in the case; and (4) the ability of the pro se petitioner to investigate facts and present claims).

405. *See* *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977) (holding that the right of access to the courts “requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing incarcerated persons with adequate law libraries or adequate assistance from persons trained in the law.”). *See also* *Lewis v. Casey*, 518 U.S. 343, 351–353, 116 S. Ct. 2174, 2180–2181, 135 L. Ed. 2d 606, 617–619 (1996) (affirming the view from *Bounds* that incarcerated persons’ rights includes access law libraries and librarian staff, but limiting the decision by holding that incarcerated persons need to show an actual injury suffered to prove a violation of the right to access to the courts).

406. 28 U.S.C. § 2254(i) (“The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”).

407. *See, e.g.,* *Battle v. Armontrout*, 902 F.2d 701, 702 (8th Cir. 1990) (stating the district court was wrong for failing to appoint counsel because the factual and legal issues were sufficiently complex and numerous; also finding that petitioner’s imprisonment significantly hurt his ability to investigate the issues); *United States ex rel. Jones v. Franzen*, 676 F.2d 261, 267 (7th Cir. 1982) (holding that counsel should be appointed for complex legal issues like allegations regarding withholding evidence, admission of co-defendant’s statements, and improper jury sequestration). “Jury sequestration” is when the court orders that the jurors be isolated from the public and have limited access to outside influences, like television news or newspapers). But you should know a court won’t always appoint counsel. *See* *Williams v. Groose*, 979 F.2d 1335, 1337 (8th Cir. 1992) (refusing to appoint counsel when petitioner had assistance in his earlier judicial proceedings that raised substantially similar claims as his habeas claim).

408. *See* *Hearn v. Dretke* 376 F.3d 447, 455 (5th Cir. 2004) (holding that a incarcerated person’s petition for appointment of counsel need rest only on a colorable claim of mental retardation); *In re Hearn*, 389 F.3d 122, 123 (5th Cir. 2004) (clarifying that even if counsel is appointed, this does not grant capital defendants a right to automatic stay of execution pending review); *Merritt v. Faulkner*, 697 F.2d 761, 764–766 (7th Cir. 1983) (appointing counsel to a recently blinded petitioner in a non-habeas petition that had the same requirements for

- (3) You cannot investigate key facts, or the issues in your case require expert testimony to be resolved;⁴⁰⁹
- (4) The court decides to hold a hearing to investigate the facts of your case;⁴¹⁰
- (5) The court allows you to conduct discovery;⁴¹¹ or
- (6) Your habeas petition is denied in district court but a certificate of appealability is granted in the court of appeals.⁴¹²

The federal district judge usually has full discretion in determining whether you should get assigned a lawyer for one of these reasons. This means that the appellate court normally will not overturn the district judge's decision about the appointment of counsel. However, at least one jurisdiction has made a general rule that counsel should be appointed whenever an indigent incarcerated person has a strong legal claim in a habeas petition.⁴¹³

To request a court-appointed lawyer, you must prepare a motion for appointment of counsel, a brief document stating the legal and factual reasons why the court should appoint a lawyer, and an *in forma pauperis* application⁴¹⁴, including the supporting documents discussed in Part E(4) of this Chapter.

You may file these papers at several different times during your habeas proceeding. For example, you may request a lawyer even before you file your petition, so that the lawyer can help you prepare the petition. Courts, however, are unlikely to appoint an attorney at this early stage because they do not know the nature or complexity of your claims. So, you may want to wait until you submit your petition or until a later stage in the proceeding, such as during discovery or a hearing, when the rules favor appointment of a lawyer because the issues become more complex.

appointment of counsel as habeas petitions). *But see* Phelps v. United States, 15 F.3d 735, 738 (8th Cir. 1994) (refusing to appoint counsel to a petitioner committed to a mental health institution where the court found that he was “fully capable of arguing the issues” and there was “no inference that [petitioner] was unable to understand the legal proceedings in which he was participating.”).

409. *See, e.g.*, Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) (requiring because, among other things, petitioner's imprisonment significantly impaired his ability to investigate the issues); United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960) (ruling that when complex factual data must be developed and incarcerated person does not have sufficient ability or training to recognize, organize, or elicit testimony to develop such data, appointment of counsel may be necessary); Al Odah v. United States, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (determining that incarcerated person who did not have access to a law library, had an “obvious language barrier,” and were “almost certainly lack[ing] a working knowledge of the American legal system” were entitled to appointed counsel because it was “impossible” for them to investigate their claim); Lemeshko v. Wrona, 325 F. Supp. 2d 778, 788 (E.D. Mich. 2004) (finding counsel should be appointed in a habeas action where incarcerated person “has made a colorable claim, but lacks the means to adequately investigate, prepare, or present the claim.”).

410. Rule 8 (c) of the Rules Governing § 2254 Cases and of the Rules Governing § 2255 Cases require a court to appoint a lawyer if the court decides to hold a hearing to investigate the facts of your case and you are financially eligible under 18 U.S.C. § 3006A. These rules can be viewed at the follow location: <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (last visited Feb. 9, 2019). *See also* United States v. Duarte-Higareda, 68 F.3d 369, 370 (9th Cir. 1995) (finding court appointment of counsel mandatory for indigent applicants when evidentiary hearings are required for habeas petitions under 28 U.S.C. § 2255 or 28 U.S.C. § 2254).

411. Rule 6(a) of the Rules Governing § 2254 Cases, and of the Rules Governing § 2255 Cases suggest that a court should provide you with a lawyer if the court believes a lawyer is necessary for effective use of discovery proceedings, and you are financially eligible under 18 U.S.C. § 3006A. *See* Chapter 8 of the *JLM*, “Obtaining Information to Prepare Your Case: The Process of Discovery,” for a discussion of discovery.

412. *See* 18 U.S.C. 3006A(a)(2)(B); ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY: DEFENDER SERVICES § 210.20.20 (2019), *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-210-representation-under-cja#a210_20 (last visited Mar. 2, 2019).

413. The court's rule extends to civil actions in general, not just habeas petitions. Hahn v. McLey, 737 F.2d 771, 774 (8th Cir. 1984) (holding that “when an indigent [person] presents a colorable civil claim to a court, the court, upon request, should order the appointment of counsel” if satisfied that the incarcerated person has made out a *prima facie* case).

414. An application submitted by someone who cannot afford a lawyer.

G. Conclusion

This Chapter explains the writ of habeas corpus and lays out the procedures you will need to follow to petition for the writ. Remember, your imprisonment is unlawful if your arrest, trial, or sentence violated a federal statute, treaty, or the U.S. Constitution. However, the process and standards for your habeas claim will differ depending on whether you are incarcerated in state or federal custody. If you are incarcerated in state custody, for your writ of habeas corpus to succeed, your imprisonment must violate the U.S. Constitution. In either case, a federal habeas petition claims that your imprisonment is illegal because your arrest, trial, or sentence violated federal law.

APPENDIX A:

THE NINE-STEP APPEALS PROCESS

This chart represents the steps you must take when appealing a decision as person incarcerated in state custody. The chart starts from the initial trial and goes all the way through to the habeas petition.

The first column, on the left, shows you how to make direct appeals. Box 1 is your initial trial. After this trial you make your direct appeals to the higher state courts, shown in box 2. After your direct appeals to the higher state courts, you appeal to the United States Supreme Court. This is the last step in your direct appeals process. This is shown in box 3.

The second column (the middle of the chart) represents your state post-conviction proceedings. You begin state post-conviction proceedings *after* your direct appeals are complete. You begin this process in the same court where your trial was. Box 4 shows the first step of a state post-conviction appeal. In box 5, you appeal to the higher state courts. Finally, in box 6, you appeal to the United States Supreme Court, the last step in your state post-conviction proceedings.

The final step is to begin your federal habeas corpus petition. You begin the federal habeas process after completing your direct appeals process, in the first column, and after you have completed your state post-conviction proceedings, in the second column. You start in the appropriate federal district court, shown in box 7. In box 8, you appeal to the appropriate circuit court. Finally, you appeal to the United States Supreme Court in box 9.

You can always ask the Supreme Court to hear your case, but it does not have to grant your request. If you do ask the Supreme Court to hear your case, it is called petitioning for a *writ of certiorari*. The Supreme Court will either grant your petition (hear your case) or deny your petition (refuse to hear your case). It is worth noting that the Supreme Court rarely grants these petitions. It is important to file, even if you think you might not be successful.

DIRECT APPEAL	STATE POST-CONVICTION	FEDERAL HABEAS
(1) Trial in the Court	(4) Post-Conviction in Court Where Convicted	(7) Federal District Court
↓	↓	↓
(2) Direct Appeal to State Intermediate Court and State Supreme Court	(5) Appeal to State Intermediate Court and State Supreme Court	(8) Court of Appeal (Circuit Court)
↓	↓	↓
(3) U.S. Supreme Court	(6) U.S. Supreme Court	(9) U.S. Supreme Court

APPENDIX B:

CHECKLIST FOR FIRST-TIME FEDERAL HABEAS CORPUS PETITIONERS

Before submitting your habeas petition, make sure that you can answer “yes” to each of the following questions:

For people incarcerated in state OR federal custody:

- (1) Have you tried to get help from an attorney?
- (2) Does your conviction or sentence violate the Constitution, federal law, or treaties?
- (3) Have you described how your conviction or sentence violates the Constitution, federal law, or treaties?
- (4) Have you discussed every possible violation and included a detailed explanation of the facts for each violation?
- (5) If the violation concerns the illegal search and seizure clause of the Fourth Amendment, have you shown that you were denied the opportunity to discuss this claim in the trial or appeals process?
- (6) If possible, does your petition avoid relying on “new” law (“new” laws are laws that passed after your trial; see Sections 2 and 3 of this Chapter)?
- (7) Does the violation have a substantial effect on the verdict or sentence? Was the violation not “harmless?”
- (8) Have you explained why the violation was not harmless?
- (9) Can you file your habeas petition within one year from when your case became final?
- (10) Have you written to the clerk to ask for a model form?
- (11) Have you checked your petition to see if your arguments are logical and organized and have the correct spelling and grammar?
- (12) If possible, have you asked someone to read and check your papers?
- (13) Have you made four copies of the petition and kept one for yourself?

For people incarcerated in state custody:

- (1) Are you in state custody?
- (2) Have you followed state procedures in exhausting the state remedies or have you challenged your procedural default?
- (3) Have you chosen where you will file your petition?

For people incarcerated in federal custody:

- (1) Are you in federal custody?
- (2) Have you finished your initial appeal motion to your sentencing court?

For people sentenced to the death penalty for a state criminal conviction:

- (1) Have you sought the advice of an attorney?
- (2) Have you applied for a stay of execution?
- (3) If your state meets the guidelines in Section 2261 (if your state is an “opt-in” state), can you file your habeas petition within six months of the date your conviction becomes final?

APPENDIX C:

Examples of Habeas Claims Based on the Constitution

- 1) Investigation and Policing: A witness identified you through a police line-up or photograph in which the police were (impermissibly) suggestive,⁴¹⁵ violating your Fourteenth Amendment right to due process.
- 2) Your Confession: Your confession was obtained involuntarily in violation of your Fourteenth Amendment due process rights.⁴¹⁶ In order to prove that your confession was involuntary, you must prove that your will was overborne (overtaken).⁴¹⁷ Some facts that may support a claim that your will was overborne include threats of physical violence,⁴¹⁸ threats against loved ones,⁴¹⁹ repeated coercive questioning after you indicated that you wanted to stop answering questions,⁴²⁰ fraudulent promises by police,⁴²¹ and other forms of ill treatment.⁴²²
- 3) Right to Counsel Violations: You were denied your Fifth and Sixth Amendment rights to counsel. You would claim this if (1) you were denied counsel that the State should have provided because you were indigent (poor); (2) you were denied the opportunity for new counsel when an irreconcilable difference arose between you and your appointed counsel;

415. Suggestiveness is generally determined by five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977); *see also* *Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972) (discussing suggestiveness and the possible danger from police suggestiveness, but ultimately finding that the totality of circumstances showed that the suggestiveness was overcome in that case); *Dickerson v. Fogg*, 692 F.2d 238, 244–247 (2d Cir. 1982) (granting habeas relief because the identification was impermissibly suggestive based on the five-factor assessment). *Dickerson* involved both a pretrial and in-court identification. The court held that the suggestiveness of the pretrial identification must be weighed against the independent reliability of the in-court identification. *Dickerson v. Fogg*, 692 F.2d 238, 244 (2d Cir. 1982).

416. *See Miller v. Fenton*, 474 U.S. 104, 110–112, 106 S. Ct. 445, 449–451, 88 L. Ed. 2d 405, 411–412 (1985) (holding that the voluntariness of a confession is not a factual question but a legal question that requires independent consideration in a habeas proceeding, and that such a finding would therefore not be subject to the § 2254(d) presumption of correctness for state court findings of fact). In *Miller*, the police got a confession by questioning a suspect with a mental problem and telling him that, if he confessed, he would receive medical help instead of punishment. *Miller v. Fenton*, 474 U.S. 104, 106–107, 106 S. Ct. 445, 447–448, 88 L. Ed. 2d 405, 408–409 (1985).

417. *See Dickerson v. United States*, 530 U.S. 428, 434, 120 S. Ct. 2326, 2331, 147 L. Ed. 2d 405, 413 (2000) (affirming that when a defendant claims his confession was involuntary, the question is whether his will was overborne by the circumstances surrounding the giving of the confession).

418. *See Brown v. Mississippi*, 297 U.S. 278, 286, 56 S. Ct. 461, 465, 80 L. Ed. 682, 687 (1936) (stating that due process is violated when violence is used to coerce confession).

419. *See Lynum v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 920, 9 L. Ed. 2d 922, 926 (1963) (finding that defendant's confession was involuntary because her will was overborne when the police threatened to take her young children from her if she did not confess).

420. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1100 (6th Cir. 1990) (holding that portions of the confession were invalid because they were obtained after the police ignored defendant's statements that he did not want to talk and they threatened to arrest his girlfriend).

421. *See United States v. Rutledge*, 900 F.2d 1127, 1129–1131 (7th Cir. 1990) (holding that police are allowed to pressure, cajole, conceal facts, actively mislead, and commit minor acts of fraud, but are not allowed to feed the defendant false promises in a manner that "seriously distorts his choice" to the point where a rational decision becomes impossible).

422. *See Davis v. North Carolina*, 384 U.S. 737, 752, 86 S. Ct. 1761, 1770, 16 L. Ed. 2d 895, 904 (1966) (finding that where police held an incarcerated person in a cell and questioned him off and on for sixteen days with a meager diet, the incarcerated person's confession was an involuntary end product of coercive influences and therefore constitutionally inadmissible).

- (3) you were denied counsel at arraignment; (4) you did not voluntarily, knowingly, and intelligently waive your right to counsel during interrogation or discussions with police officers while in custody; 5) you were temporarily banned from consulting with your attorney.⁴²³ 6) you were convicted based on information provided by an informant who was “bugged” or who reported jail cell conversations between you and him in violation of the Fifth or Sixth Amendments.⁴²⁴; or 7) your lawyer provided such poor representation as to amount to ineffective assistance of counsel.
- 4) Right to Self-Representation: The trial court unreasonably denied your request to proceed *pro se* (as your own attorney).⁴²⁵
- 5) Your Competency: You were denied your Fourteenth Amendment right to an examination to determine whether you were competent to stand trial, whether you were competent to waive counsel, or whether you were competent to plead guilty.⁴²⁶

423. See *Jones v. Vacco*, 126 F.3d 408, 415–417 (2d Cir. 1997) (finding that an overnight ban on petitioner’s consultation with his attorney, which was imposed when the trial judge declared an overnight recess during petitioner’s cross-examination, violated petitioner’s 6th Amendment right to counsel).

424. See *Massiah v. United States*, 377 U.S. 201, 206–207, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250–251 (1964) (finding that evidence from a conversation between defendant on bail and a co-defendant that was radio transmitted without defendant’s knowledge violated his 6th Amendment right to assistance of counsel); see also *Maine v. Moulton*, 474 U.S. 159, 177, 106 S. Ct. 477, 488, 88 L. Ed. 2d 481, 497 (1985) (finding that the state violated the 6th Amendment right of the defendant when they recorded conversations between him and a co-defendant who was operating as an undercover agent for the state); *United States v. Henry*, 447 U.S. 264, 274, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 125 (1980) (omitting from trial the defendant’s incriminating statements made to a paid informant who was confined in the same cell block as defendant because the government was found to have violated the defendant’s 6th Amendment right to counsel by intentionally creating a situation that was likely to induce the defendant to make incriminating statements). But see *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 106 S. Ct. 2616, 2630, 91 L. Ed. 2d 364, 384–385 (1986) (holding that it is not a constitutional violation if the informant merely listens to the defendant without questioning or inciting him to speak); *United States v. Rommy*, 506 F.3d 108, 136 (2d Cir. 2007) (explaining that it could potentially not be a constitutional violation if the informant’s questions to the defendant do not stimulate discussion, but only seek to clarify information already volunteered).

425. *Faretta v. California*, 422 U.S. 806, 818–819, 95 S. Ct. 2525, 2532–2533, 45 L. Ed. 2d 562, 572–573 (1975) (finding that the 6th and 14th Amendments provide the right to self-representation); *United States v. Hernandez*, 203 F.3d 614, 620–621 (9th Cir. 2000) (finding that a denial of a *pro se* request may be unconstitutional if the request was made before jury selection and if the request was not a delay tactic), *overruled on other grounds by* *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008); see also *Moore v. Haviland*, 531 F.3d 393, 403–404 (6th Cir. 2008) (holding that petitioner’s habeas relief was warranted because he was denied the right to proceed *pro se* where petitioner had requested during trial to proceed *pro se* and did not waive this right merely by responding to questions posed by his attorney). But see *Indiana v. Edwards*, 554 U.S. 164, 174–178, 128 S. Ct. 2379, 2386–2388, 171 L. Ed. 2d 345, 355–357 (2008) (holding that defendant could be denied his right to self-representation if he is deemed not competent to defend himself at trial, even if he is competent enough to stand trial). Note that this does not mean that you have a constitutional right to *any* counsel. The court may reject your request to have a non-lawyer, other than yourself, represent you. *United States v. Gigax*, 605 F.2d 507, 517 n.1 (10th Cir. 1979) (finding that the 6th Amendment does not protect the right to be represented by a lay person).

426. The Supreme Court has held that the standard of competency is the same for these three matters. That is, if a defendant is found competent to stand trial, he is necessarily competent to waive counsel and to plead guilty. *Godinez v. Moran*, 509 U.S. 389, 391, 402, 113 S. Ct. 2680, 2682, 2688, 125 L. Ed. 2d 321, 327, 334 (1993). The court identified the test for legal competency as “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Drope v. Missouri*, 420 U.S. 162, 171–172, 183, 95 S. Ct. 896, 904, 909, 43 L. Ed. 2d 103, 113, 119 (1975) (finding that a psychiatric evaluation was also required when, among other indications, defendant had attempted suicide during trial); see also *Cooper v. Oklahoma*, 517 U.S. 348, 369, 116 S. Ct. 1373, 1384, 134 L. Ed. 2d 498, 515 (1996) (finding that a state law presuming defendant is competent unless he proves his incompetence by clear and convincing evidence violates due process); *Pate v. Robinson*, 383 U.S. 375, 385, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815, 822 (1966) (holding that defendant is entitled to a competency hearing when there has been evidence presented in trial showing his insanity, since convicting an incompetent defendant violates the 14th Amendment); *Johnson v. Norton*, 249 F.3d 20, 22, 27–28 (1st Cir. 2001) (finding a violation of due process when the trial court did not hold a competency hearing when defendant

- 6) Your Guilty Plea: Your guilty plea was unconstitutional because you pleaded guilty involuntarily.⁴²⁷
 - (a) You pleaded guilty as part of a plea bargain agreement that was broken.⁴²⁸
 - (b) You pleaded guilty without understanding the charges against you,⁴²⁹ or language difficulties prevented you from understanding the charges against you.⁴³⁰
 - (c) You pleaded guilty without understanding the consequences of pleading guilty.⁴³¹
- 7) Timing of Conviction and Trial:

stated that he did not know “what’s going on” because he had been hit on the head and lost consciousness just before the start of trial); *Bouchillon v. Collins*, 907 F.2d 589, 592–594 (5th Cir. 1990) (finding that there was sufficient evidence at trial to establish a reasonable probability that defendant was incompetent at the time of a guilty plea due to post-traumatic stress disorder).

427. See *Fontaine v. United States*, 411 U.S. 213, 213–215, 93 S. Ct. 1461, 1462–1463, 36 L. Ed. 2d 169, 171–172 (1973) (holding that a defendant is entitled to a hearing to determine whether or not his guilty plea was voluntary even though he had declared in open court that his plea was given voluntarily and knowingly); *Machibroda v. United States*, 368 U.S. 487, 493–494, 82 S. Ct. 510, 513, 7 L. Ed. 2d 473, 478 (1962) (holding that petitioner was entitled to a hearing on the issue of whether his guilty plea, which was based on the prosecutor’s threats and unkept promises, was made involuntarily); *Fair v. Zant*, 715 F.2d 1519, 1520–1522 (11th Cir. 1983) (holding that defendant’s guilty plea was not voluntary where trial judge told defendant he could plead guilty but later withdraw his plea if he did not want to accept the sentence, but then refused to allow withdrawal of plea after sentencing); *United States ex rel. Hill v. Ternullo*, 510 F.2d 844, 846–847 (2d Cir. 1975) (holding that defendant was entitled to a hearing to determine whether his guilty plea was voluntary when his guilty plea was made based on his attorney’s assurances that he would receive a lesser sentence than what was allowed under state law).

428. See *Santobello v. New York*, 404 U.S. 257, 262–263, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971) (holding that when pleas rest on an implied promise or on an agreement by a prosecutor that he will make no sentencing recommendations, such promises and agreements must be fulfilled); *Brown v. Poole*, 337 F.3d 1155, 1160–1162 (9th Cir. 2003) (granting habeas relief and release of incarcerated person when state breached oral plea agreement that incarcerated person would only have to serve half of her 15-year sentence if she maintained a good prison record, even though prosecutor never had authority to make such a promise); *Johnson v. Beto*, 466 F.2d 478, 479–480 (5th Cir. 1972) (holding that if a prosecutor says he will make a sentencing recommendation in exchange for a guilty plea, but then actually recommends a harsher sentence in court, the plea bargain has been broken and defendant is entitled to resentencing or withdrawal of his guilty plea).

429. See *Marshall v. Lonberger*, 459 U.S. 422, 436, 103 S. Ct. 843, 852, 74 L. Ed. 2d 646, 660 (1983) (ruling that a guilty plea cannot be voluntary unless the accused has “received real notice of the true nature of the charge against him”); *Henderson v. Morgan*, 426 U.S. 637, 647, 96 S. Ct. 2253, 2258–2259, 49 L. Ed. 2d 108, 116 (1976) (ruling that where neither defense counsel nor the trial court had explained the elements of the offense of second degree murder to a defendant with an especially low mental capacity, the guilty plea was involuntary); *United States v. Andrades*, 169 F.3d 131, 134–136 (2d Cir. 1999) (holding that defendant’s guilty plea was invalid because he did not understand the nature of the charges against him due to his poor education and drug addiction).

430. The Court Interpreters Act, 28 U.S.C. §§ 1827–1828, requires the court to supply you with an interpreter if you do not understand English. See also *United States v. Mosquera*, 816 F. Supp. 168, 177 (E.D.N.Y. 1993) (setting requirements for translation in cases where the defendant does not speak English), *aff’d* 48 F.3d 1214 (2d Cir. 1994).

431. See *Marvel v. United States*, 380 U.S. 262, 262, 85 S. Ct. 953, 953, 13 L. Ed. 2d 960, 960 (1965) (ordering a rehearing to determine whether the trial judge misled the defendant about maximum possible sentence); *United States ex rel. Leeson v. Damon*, 496 F.2d 718, 722 (2d Cir. 1974) (reversing a conviction because the appellant did not understand that his plea could result in confinement in a reformatory for five years rather than a shorter state prison term); *Jones v. United States*, 440 F.2d 466, 468 (2d Cir. 1971) (ruling a defendant was entitled to a hearing on whether he was aware of the maximum possible sentence at the time of his guilty plea and, if not, whether he would have pled guilty had he known).

- (a) The statute of limitations had already run out when you were charged with the offense,⁴³² or you were charged with a federal, non-capital crime more than five years after the crime occurred.⁴³³
 - (b) You were denied your Sixth Amendment right to a speedy trial.⁴³⁴
- 8) Right to be Free from Self-Incrimination: You were made to testify before a grand jury in violation of your Fifth Amendment right against self-incrimination.⁴³⁵

432. A statute of limitations is a period of years, set by state law, after which the government cannot prosecute a suspect. Statutes of limitations vary depending on the crime with which you are charged. The clock starts running on a statute of limitations once the *crime is committed*. The statute of limitations *cannot* be waived. This time limit is different than the 6th Amendment right to a speedy trial. The right to a speedy trial does not start running until *you are indicted*; you *can* waive the right to a speedy trial right, and the court balances this right against other considerations.

433. See 18 U.S.C. § 3282 (requiring the federal government to issue an indictment within five years of the commission of a non-capital offense). There is an important new exception to this rule for crimes of sexual abuse: the government can issue a “DNA profile indictment” that contains a set of DNA identification characteristics but not the identity of the accused. It must be issued within the five-year limit, but the indictment can be modified to include the defendant’s name after the five-year limit has run. See 18 U.S.C. § 3282(b). There are many other federal laws that govern the procedure to be followed in federal criminal trials and sentencing.

434. Courts follow the guidelines set out in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972), to determine whether a defendant was denied his right to a speedy trial. Courts balance the conduct of the prosecution and defendant and look at these factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asked for a speedy trial; and (4) whether the delay prejudiced the defendant. *Barker v. Wingo*, 407 U.S. 514, 533–536, 92 S. Ct. 2182, 2193–2395, 33 L. Ed. 2d 101, 118–120 (1972) (ruling that, where defendant did not want a speedy trial and was not seriously prejudiced by the delay, a five-year delay between arrest and trial did not violate defendant’s 6th Amendment rights); *see also* *Klopfer v. North Carolina*, 386 U.S. 213, 221–223, 87 S. Ct. 988, 992–993, 18 L. Ed. 2d 1, 7 (1967) (ruling that a state may not postpone prosecution for an unlimited period even when the accused remains free to go wherever he desires). *But see* *Reed v. Farley*, 512 U.S. 339, 349–352, 114 S. Ct. 2291, 2297–2299, 129 L. Ed. 2d 277, 288–290 (1994) (ruling that a violation of a federal statute that limits trial length is not necessarily a violation of the constitutional right to a speedy trial when defendant did not object to delay and showed no prejudice from the delay); *United States v. Marion*, 404 U.S. 307, 313, 92 S. Ct. 455, 459, 30 L. Ed. 2d 468, 474 (1971) (ruling that the right to a speedy trial guaranteed by the 6th Amendment does not apply until you have been accused of a crime, which may not occur until indictment).

435. See *United States v. Mandujano*, 425 U.S. 564, 574–575, 96 S. Ct. 1768, 1775–1776, 48 L. Ed. 2d 212, 221 (1976) (ruling that a witness cannot be compelled to answer questions that are self-incriminating, a determination that the judge may make if necessary). *But see* *Kastigar v. United States*, 406 U.S. 441, 462, 92 S. Ct. 1653, 1666, 32 L. Ed. 2d 212, 227 (1972) (finding that a defendant may be forced to testify over a claim of privilege from self-incrimination when defendant has been granted immunity from use of the compelled testimony, or evidence derived from the testimony, in future criminal proceedings).

1. After you were promised immunity in exchange for testimony before a grand jury, the grand jury used your testimony against you in violation of your Fifth Amendment right against self-incrimination.⁴³⁶
2. During trial, the prosecutor commented on your post-arrest silence in violation of your Fifth Amendment right against self-incrimination;⁴³⁷ or the prosecutor made an improper summation.⁴³⁸ (A summation, or closing argument, is the argument made to the jury at the end of a trial.)
3. Statements that you made at a court-ordered competency hearing before a state-appointed psychologist or psychiatrist were used against you in violation of your Fifth and Fourteenth Amendment rights against self-incrimination.⁴³⁹

9) Access-to-Evidence Violations:

4. The prosecution withheld requested⁴⁴⁰ evidence that could have helped your case, in violation of the Fourteenth Amendment.⁴⁴¹
5. The state failed to preserve important evidence in your investigation.⁴⁴²
6. You were denied needed expert assistance at trial in violation of the Fourteenth Amendment.⁴⁴³
7. The prosecution admitted hearsay, or out-of-court statements against you in violation of the Confrontation Clause of the Sixth Amendment,⁴⁴⁴ and the admitted hearsay did not qualify as one of the many exceptions to the hearsay rule.⁴⁴⁵

10) Witness Violations:

- (a) You were denied the right to cross-examine a witness who testified against you.⁴⁴⁶
- (b) A witness lied on the stand about having been granted leniency from the police in exchange for testifying against you.⁴⁴⁷

436. Two types of immunity may be granted to witnesses who testify before grand juries. “Transactional immunity” gives a potential defendant full immunity from prosecution for any offense related to the incident in question. “Use immunity,” on the other hand, only guarantees that the government will not use any of the information revealed in your testimony in future proceedings against you. *See Kastigar v. United States*, 406 U.S. 441, 458, 92 S. Ct. 1653, 1664, 32 L. Ed. 2d 212, 225 (1972) (ruling that a court can compel witnesses to testify simply by giving them use immunity and that the court does not also need to give transactional immunity); *see also United States ex rel. Gasparino v. Butler*, 398 F. Supp. 127, 129–130 (S.D.N.Y. 1974) (ruling that, in New York, use immunity is the usual kind of immunity intended and that transactional immunity must be expressly authorized by a grand jury vote). Note, however, that habeas petitions are rarely granted on these grounds.

437. *See Doyle v. Ohio*, 426 U.S. 610, 617–619, 96 S. Ct. 2240, 2244–2245, 49 L. Ed. 2d 91, 97–98 (1976) (holding that due process rights are violated when the prosecutor questions defendant about why he didn’t tell his story to police after *Miranda* warnings at time of his arrest); *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (ruling that a defendant’s 5th Amendment rights were violated where judge instructed the jury that they may take into account the failure of defendant to testify about evidence to indicate the truthfulness of that evidence); *Gravley v. Mills*, 87 F.3d 779, 790 (6th Cir. 1996) (holding that a prosecutor violated due process by repeatedly making references to petitioner’s post-arrest silence; also finding that defendant had ineffective assistance of counsel because counsel had not objected to prosecutor’s comments at trial); *Hill v. Turpin*, 135 F.3d 1411, 1416 (11th Cir. 1998) (granting habeas corpus where prosecutor’s references to petitioner’s post-*Miranda* assertions of right to remain silent were “repeated and deliberate”). *But see Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312, 71 L. Ed. 2d 490, 494 (1982) (finding that it is not a constitutional violation for prosecutors to use post-arrest silence to impeach a defendant where the defendant had not been told that he had a right to remain silent); *Roberts v. United States*, 445 U.S. 552, 561, 100 S. Ct. 1358, 1364–1365, 63 L. Ed. 2d 622, 631 (1980) (refusing to consider petitioner’s 5th Amendment claim when he was given a harsher sentence due to his refusal to answer questions about drug suppliers because his purpose in keeping silent was not to prevent self-incrimination); *Jenkins v. Anderson*, 447 U.S. 231, 240–241, 100 S. Ct. 2124, 2130, 65 L. Ed. 86, 96 (1980) (finding that it is not a constitutional violation for prosecutors to use a defendant’s pre-arrest two-week

silence to impeach his testimony that he had acted in self-defense); *Splunge v. Parke*, 160 F.3d 369, 371–373 (7th Cir. 1998) (holding that prosecutor’s comment on petitioner’s post-arrest silence was not a 5th Amendment violation when not used for the purpose of impeaching petitioner at trial). Therefore, the mere fact that the prosecution or judge improperly commented on your silence will not necessarily afford you relief.

438. See *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144, 157 (1986) (announcing that, where prosecutor called defendant an animal and made offensive emotional remarks, the comments were improper but did not merit relief because the comments did not “so infect the trial with unfairness as to make the resulting conviction a denial of due process”); *United States v. Elias*, 285 F.3d 183, 190, 192 (2d Cir. 2002) (noting that remarks of a prosecutor during summation do not amount to a due process violation unless they constitute egregious misconduct); *Moore v. Morton*, 255 F.3d 95, 100 n. 4, 119–120 (3d Cir. 2001) (ruling that habeas relief was appropriate when prosecutor made improper race-based comments and trial judge’s curative instructions to the jury were not adequate to ensure a fair trial, and listing in footnotes 15 and 16 cases where habeas relief was granted or denied for improper racial comments).

439. See *Satterwhite v. Texas*, 486 U.S. 249, 260, 108 S. Ct. 1792, 1799, 100 L. Ed. 2d 284, 296 (1988) (ruling that where defendant was not afforded right to consult with counsel before submitting to psychiatric examination, admission of testimony based on examination was a constitutional violation and not harmless error); *Estelle v. Smith*, 451 U.S. 454, 467–469, 101 S. Ct. 1866, 1875–1876, 68 L. Ed. 2d 359, 372 (1981) (finding that defendant’s statements in a court-ordered psychiatric examination could not be admitted at a capital trial when the defendant had not been warned of his 5th Amendment privilege against compelled self-incrimination); *Buchanan v. Kentucky*, 483 U.S. 402, 421–424, 107 S. Ct. 2906, 2916–2918, 97 L. Ed. 2d 336, 354–356 (1987) (ruling that the prosecution may use a psychologist’s report solely to rebut petitioner’s psychological evidence).

440. A defendant’s failure to request evidence that could have helped his case does not leave the government free of all obligations. See *United States v. Agurs*, 427 U.S. 97, 103–108, 96 S. Ct. 2392, 2397–2399, 49 L. Ed. 2d 342, 349–352 (1976) (finding that there are three situations in which a *Brady* claim might arise: (1) where new evidence revealed that the prosecution introduced trial testimony that it knew or should have known was false; (2) where the prosecution failed to obey a defense request for specific exculpatory evidence (evidence that helps to prove defendant’s innocence); and (3) where the prosecution failed to volunteer exculpatory evidence that was never requested, or requested only in a general way; and noting the existence of a duty on the part of the government in this last situation when suppression of the evidence would be “of sufficient significance to result in the denial of the defendant’s right to a fair trial”); see also *United States v. Bagley*, 473 U.S. 667, 678–681–682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985) (finding that regardless of whether the request for the evidence was specific or general, favorable evidence is material, and the government violates the Constitution by suppressing such evidence “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”); *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 507 (1995) (finding that once a court applying *Bagley* has found constitutional error, there is no need for further harmless-error review).

441. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963) (holding that the prosecution must turn over evidence to the defense if evidence is exculpatory, impeaching, or material). The *Brady* standard says that the prosecution must disclose evidence that is exculpatory (helps to prove the defendant’s innocence) or impeaching (shows one of the prosecution’s witnesses might not be believable). Exculpatory or impeaching evidence must also be material, which means that there must be a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985); see also *Kyles v. Whitley*, 514 U.S. 419, 421–422, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) (“[B]ecause the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, [defendant] is entitled to a new trial.”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59–60, 107 S. Ct. 989, 1002–1003, 94 L. Ed. 2d 40, 58–59 (1987) (finding that a defendant has the right to ask the court to review confidential files to see if evidence is material, but the defendant does not have the right to examine the confidential files himself); *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985) (holding that evidence impeaching a witness’ credibility falls within the *Brady* rule); *United States v. Agurs*, 427 U.S. 97, 112–114, 96 S. Ct. 2392, 2401–2402, 49 L. Ed. 2d 342, 354–356 (1976) (holding that evidence of a murder victim’s prior criminal record was not “material” and did not have to be turned over to the defense because it did not change the probability that the result of the trial would have been different); *Boyette v. Lefevre*, 246 F.3d 76, 93 (2d Cir. 2001) (holding that a state’s non-disclosure of information relating to the witness’ ability to identify the defendant was a *Brady* violation because the non-disclosure seriously undermined “confidence in the outcome of the trial”); *Carriger v. Stewart*, 132 F.3d 463, 478–479 (9th Cir. 1997) (*en banc*) (finding a violation of due process when the prosecutor failed to disclose that the man whom the defendant claimed had committed the murder and who was also the prosecutor’s main witness had a long history of prior crimes, of lying to police, and of shifting blame to others, and there was evidence that he had boasted about committing the murder).

442. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution”); *Killian v. Poole*, 282 F.3d 1204, 1209–1210 (9th Cir. 2002) (holding that the prosecution’s failure to turn over letters in which the prosecution’s witness admitted to perjury in order to gain sentencing concessions amounted to a constitutional violation and, with other violations at trial, amounted to reversible error). But see *Arizona v. Youngblood*, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988) (holding that to show a denial of due process, defendant must show that the prosecution acted in bad faith in failing to preserve evidence if the evidence is only *potentially* exculpatory); *California v. Trombetta*, 467 U.S. 479, 490–491, 104 S. Ct. 2528, 2534–2535, 81 L. Ed. 2d 413, 423 (1984) (finding that the state’s failure to retain breath samples for defendants was not a violation of procedural due process when defendants had alternative means of demonstrating their innocence); *United States v. Garza*, 435 F.3d 73, 75–76 (1st Cir. 2006) (ruling that the destruction of evidence is a violation of due process if the exculpatory value of the evidence was apparent before its destruction and if the evidence is of such a nature that the defendant cannot obtain comparable evidence, but finding in this situation that the violation was harmless). The case law establishing that destruction of evidence can be a constitutional violation is based on the case law that withholding evidence is a constitutional violation.

443. See *Ake v. Oklahoma*, 470 U.S. 68, 82–83, 105 S. Ct. 1087, 1096, 84 L. Ed. 2d 53, 66 (1985) (noting that when an indigent defendant shows that his sanity will be a significant factor in his defense, due process entitles the defendant to the services of a court-appointed expert to “conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense”); *Schultz v. Page*, 313 F.3d 1010, 1017–1018 (7th Cir. 2002) (finding that the competency evaluation ordered by the court and conducted at the time of trial was insufficient to establish defendant’s sanity at the time of the crime and that denial of defendant’s request for an evaluation of his sanity at the time of the crime violated due process where defendant had shown sanity was a significant factor at trial); *Starr v. Lockhart*, 23 F.3d 1280, 1287 (8th Cir. 1994) (holding that the denial of petitioner’s request for appointment of a mental health expert to develop evidence of diminished capacity and mitigating circumstances violated his due process rights) *abrogated on other grounds by* *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347, 158 L. Ed. 2d 64 (2004).

444. The “Confrontation Clause” of the 6th Amendment, which protects your right to confront witnesses who testify against you, generally prohibits the prosecution from using hearsay as evidence against you at trial. Hearsay is testimony, or comments, presented at trial by someone other than the person who originally spoke. The rules on hearsay are found in the Federal Rules of Evidence, at Fed. R. Evid. 801–807, in Title 28 of the United States Code. For more information on the hearsay rules and their exceptions, see an evidence textbook or evidence treatise. See, e.g., Charles T. McCormick, *McCormick on Evidence* (John W. Strong et al. eds., 6th ed. 2006); Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* (3d ed. 2003). See also *Murillo v. Frank*, 402 F.3d 786, 791 (4th Cir. 2005) (admitting that hearsay statements made by another suspect during interrogation violated the 6th Amendment); *Brown v. Keane*, 355 F.3d 82, 87–88 (2d Cir. 2004) (finding that the admission of an anonymous 911 call was unconstitutional, despite prosecution’s argument that the call fell within the “present sense impression” exception to the 6th Amendment’s hearsay prohibition).

445. The Federal Rules of Evidence list exceptions to the hearsay rule. Fed. R. Evid. 803, 804, 807. When out-of-court statements fall within a category listed in the Federal Rules of Evidence, it is admissible as evidence despite the Confrontation Clause of the 6th Amendment. Some of the exceptions include “excited utterances” and statements for medical diagnosis. Fed. R. Evid. 803. Some out-of-court statements are *not* defined as hearsay and are not protected by the hearsay rule. For example, courts do not consider as hearsay any statements that are made by a co-conspirator in furtherance of a conspiracy; since such statements are not considered hearsay, they may generally be admitted as evidence. Fed. R. Evid. 801. The Supreme Court may make exceptions to the hearsay rule in addition to those listed in the Federal Rules. Fed. R. Evid. 802. See also *United States v. Inadi*, 475 U.S. 387, 399–400, 106 S. Ct. 1121, 1128–1129, 89 L. Ed. 2d 390, 401–402 (1986) (finding that the prosecution does not need to show that a person is unavailable to appear in court for his or her out-of-court statements to be used in a trial if the person was a co-conspirator).

446. See *Crawford v. Washington*, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1373, 158 L. Ed. 2d 177, 203 (2004) (ruling that a defendant must have the opportunity to confront a person giving testimonial evidence against the defendant either before or during trial, unless that person is unavailable; noting that the reliability of the person testifying is irrelevant); see also *Giles v. California*, 554 U.S. 353, 377, 128 S. Ct. 2678, 2693, 171 L. Ed. 2d 288 (2008) (holding that the uncontroverted testimony of a murder victim cannot be admitted under a theory that defendant forfeited his 6th Amendment right to confront the victim/witness because he murdered her and thereby made her unavailable to testify); *Lilly v. Virginia*, 527 U.S. 116, 139, 119 S. Ct. 1887, 1901, 144 L. Ed. 2d 117, 136 (1999) (finding that a defendant has a 6th Amendment right to confront an accomplice whose confession is offered as evidence against that defendant); *Davis v. Alaska*, 415 U.S. 308, 320, 94 S. Ct. 1105, 1112, 39 L. Ed. 2d 347, 356 (1974) (ruling that a defendant was denied his 6th Amendment right to confront and to cross-examine a

11) The Jury:

- (a) You were denied your Sixth Amendment right to a trial by a fair and impartial jury because you were denied a trial by jury.⁴⁴⁸
- (b) You were tried by a jury of fewer than six members,⁴⁴⁹ or you were convicted by a non-unanimous jury vote.⁴⁵⁰
- (c) The community where members of the jury work or live was exposed to inflammatory media accounts about your case.⁴⁵¹

witness when the state prevented the defendant from questioning a juvenile witness about the juvenile's probationary status); *Howard v. Walker*, 406 F.3d 114, 132–133 (2d Cir. 2005) (finding that limiting a defendant's cross-examination of the state's expert witness and impeding the defendant's presentation of a counter expert witness violated the Confrontation Clause); *Hill v. Hofbauer*, 337 F.3d 706, 717 (6th Cir. 2003) (ruling that it is a violation of the Confrontation Clause to admit a non-testifying co-defendant's confession that implicates the defendant); *Lewis v. Wilkinson*, 307 F.3d 413, 420–421 (6th Cir. 2002) (finding a violation of the Confrontation Clause in a rape case when defendant was barred from cross-examining complainant about diary passages that supported a consent defense); *United States ex rel. Negron v. New York*, 434 F.2d 386, 389–390 (2d Cir. 1970) (holding that an inadequate translation during trial violated non-English-speaking petitioner's right to confront witnesses). *But see United States v. Hendricks*, 395 F.3d 173, 179 (3d Cir. 2005) (finding that defendant does not always have the right to cross-examine hearsay evidence that is not "testimonial").

447. *Giglio v. United States*, 405 U.S. 150, 154–155, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) (holding that the government has a due process duty to disclose impeachment evidence, including promises that the prosecution makes to key witnesses in exchange for their testimony); *see Brown v. Wainwright*, 785 F.2d 1457, 1464–1465 (11th Cir. 1986) (finding prosecutors had deliberately withheld fact that the main witness against defendant lied on the stand by saying he had not received leniency from prosecution in exchange for his testimony against defendant); *see also DuBose v. Lefevre*, 619 F.2d 973, 979 (2d Cir. 1980) (finding that the prosecution cannot make agreements in general terms to a witness and therefore escape the fact that it gave the witness reason to believe that his testimony would lead to favorable treatment by the State). *But see Shabazz v. Artuz*, 336 F.3d 154, 162–166 (2d Cir. 2003) (finding that evidence that prosecution witnesses ultimately received favorable sentencing treatment in their own cases did not alone show that prosecutor failed to disclose promises of leniency because there was no evidence that anything was promised before the witnesses' testimony).

448. U.S. CONST. amend. VI; *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (U.S. 1968) (applying the sixth amendment right to a trial by jury to state criminal trials because "trial by jury in criminal cases is fundamental to the American scheme of justice.") Note, however, that you may waive your right to trial by jury. There are various reasons why you may choose not to have a jury trial: you may wish to plead guilty, for instance, or you may think that the nature of your case is best decided by a judge, alone. If you waived this right, the fact that you were not tried by a jury will not be considered a violation of your Sixth Amendment rights.

449. *Ballew v. Georgia*, 435 U.S. 223, 228, 98 S. Ct. 1029, 1033, 55 L. Ed. 2d 234, 239 (1978) (holding that juries must consist of at least six people or else there is a 6th Amendment violation); *see Williams v. Florida*, 399 U.S. 78, 86, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446, 452 (1970) (holding that refusal to impanel more than six members for the jury does not violate the defendant's 6th Amendment rights). *But see People v. Dean*, 80 A.D.2d 695, 696, 436 N.Y.S.2d 455, 456 (2d Dept. 1981) (granting that a defendant is denied due process of law when he is tried before a jury of six rather than 12 people if the state constitution says that "crimes prosecuted by indictment shall be tried by a jury composed of twelve persons").

450. *See United States v. Gipson*, 553 F.2d 453, 456 (5th Cir. 1977) (holding that a federal criminal defendant has a constitutional right to a unanimous jury verdict); *see also Richardson v. United States*, 526 U.S. 813, 815, 119 S. Ct. 1707, 1709, 143 L. Ed. 2d 985, 991 (1999) (finding that the jury in a federal criminal case cannot convict unless it unanimously finds that the government has proven each element of the crime). Fed. R. Crim. P. 31(a) requires a unanimous verdict in all federal jury cases. *But see McKoy v. North Carolina*, 494 U.S. 433, 449–450, 110 S. Ct. 1227, 1236–1237, 108 L. Ed. 2d 369, 385 (1990) (finding that the constitutional requirement for a unanimous verdict requires only a "substantial agreement as to the principal factual elements underlying a specified offense"). *See also Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972). Note that both *Apodaca* and *Johnson*, which allow convictions in state court with jury majorities of 10–2 and 9–3 respectively, apply only to certain non-capital cases.

451. *See Irvin v. Dowd*, 366 U.S. 717, 724–725, 81 S. Ct. 1639, 1643–1644, 6 L. Ed. 2d 751, 757–758 (1961) (holding that failure to grant change of venue, despite build-up of prejudice and a jury that was not impartial, is unconstitutional); *superseded on other grounds*; *Woods v. Dugger*, 923 F.2d 1454, 1460 (11th Cir. 1991) (finding

- (d) Members of certain racial, religious, gender, or age-based (the elderly) groups were excluded from the jury pool,⁴⁵² or the prosecutor intentionally used his or her peremptory challenges (peremptory challenges are when the prosecutor or defendant eliminates potential jurors without a reason) to remove members of a particular racial group or gender from the jury.⁴⁵³
- (e) Members of a distinct class or group, such as Black people or women, were systematically excluded from the grand jury in violation of the Fourteenth Amendment.⁴⁵⁴

deprivation of a fair trial after extensive pretrial publicity and presence of uniformed prison guards in audience at trial when victim was a prison guard).

452. See *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 82–83 (1986) (holding that use of peremptory challenges to exclude African-Americans from a jury when the defendant was African-American violates the 14th Amendment's equal protection guarantee); *Taylor v. Louisiana*, 419 U.S. 522, 531, 95 S. Ct. 692, 698, 42 L. Ed. 2d 690, 698 (1975) (holding that sex discrimination in selection of jury violates the 6th Amendment); *Smith v. Texas*, 311 U.S. 128, 132, 61 S. Ct. 164, 166, 85 L. Ed. 84, 87 (1940) (holding that the 14th Amendment prohibits racial discrimination in selection of grand jury); see also *Snyder v. Louisiana*, 552 U.S. 472, 474, 128 S. Ct. 1203, 1206, 170 L. Ed. 2d 175, 179 (2008) (holding that the Supreme Court of Louisiana's rejection of a *Batson* claim was erroneous and that the prosecutor at trial improperly excluded blacks from a jury that convicted defendant of capital murder); *United States v. Barnes*, 520 F. Supp. 2d 510, 514 (2d Cir. 2007) (finding that in order to establish a prima facie case of a violation of the fair cross-section requirement of the 6th Amendment, a defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process); *People v. Snow*, 44 Cal.3d 216, 225–226 (Cal. 1987) (generally upholding principle against excluding members of a certain race from a jury); *Gilmore*, 103 N.J. 508, 543 (N.J. 1986) (finding a violation where prosecutor excluded members of a cognizable group—in this case, black jurors—from a jury because of prosecutor's presumption that those jurors had a group bias). Although the Supreme Court has never expressly held that religious discrimination in jury selection is unconstitutional, many lower courts have. See, e.g., *United States v. Somerstein*, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (stating that *Batson* applies to religious discrimination and "only if the religion of the jurors is directly relevant to the crimes at issue" can the strike based on religion of a juror be proper); *State v. Hodge*, 248 Conn. 207, 240 (Conn. 1999) (stating peremptory challenges based on religious affiliation are unconstitutional).

453. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89, 107 (1994) (holding that the use of peremptory challenges to exclude members of a particular gender violates the Equal Protection Clause); *Amadeo v. Zant*, 486 U.S. 214, 228–229, 108 S. Ct. 1771, 1780, 100 L. Ed. 2d 249, 264 (1988) (finding prosecutor's jury selection scheme to limit number of African-Americans and women on the jury constituted serious error); *Batson v. Kentucky*, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69, 79 (1986) (holding that the use of peremptory challenge to exclude members of a racial group violates the Equal Protection Clause); *Galarza v. Keane*, 252 F.3d 630, 640 (2d Cir. 2001) (vacating denial of habeas petition since the state trial court failed to resolve the factual issue of whether it credited the prosecution's race-neutral explanations for striking potential jurors); *Jordan v. Lefevre*, 206 F.3d 196, 202 (2d Cir. 2000) (reversing denial of habeas petition because of lack of meaningful inquiry into the question of discrimination); *Turner v. Marshall*, 121 F.3d 1248, 1250 (9th Cir. 1997) (holding prosecutor's use of peremptory challenges to strike African-Americans from jury venire not justified by stated reasons). But see *Smulls v. Roper*, 535 F.3d 853, 859 (8th Cir. 2008) (finding that since prosecution's reasons for the strike were "credible," which was the standard—as opposed to giving "persuasive" reasons or "plausible" reasons—he was not motivated by racial discrimination).

454. See *Campbell v. Louisiana*, 523 U.S. 392, 398, 118 S. Ct. 1419, 1423, 140 L. Ed. 2d 551, 559 (1998) (holding that a white defendant, convicted by an all-white jury and alleging discriminatory selection of jurors, has standing to challenge whether he was convicted by means that violate due process, even though the claim is based upon exclusion of blacks from the grand jury); *Vasquez v. Hillery*, 474 U.S. 254, 264, 106 S. Ct. 617, 624, 88 L. Ed. 2d 598, 609 (1986) (holding that habeas relief is appropriate where blacks were systemically excluded from the grand jury that indicted petitioner); *Johnson v. Puckett*, 929 F.2d 1067, 1068–1069 (5th Cir. 1991) (granting black incarcerated person's habeas corpus petition where his grand jury foreman was white because petitioner had shown a *prima facie* claim of racial discrimination by showing that for 20 years every grand jury foreman in the county had been white, despite a 43% black population in the county). But see *Hobby v. United States*, 468 U.S. 339, 345–346, 104 S. Ct. 3093, 3096–3097, 82 L. Ed. 2d 260, 266–267 (1984) (holding that discrimination in grand jury foreman selection, as distinguished from discrimination in the selection of the grand jury itself, does

- (f) The jury instructions⁴⁵⁵ were unconstitutional because they did not tell the jury the prosecution must prove all crucial elements of guilt beyond a reasonable doubt,⁴⁵⁶ or the instructions did not tell the jury the prosecution must overcome a presumption of innocence to convict you.⁴⁵⁷
- (g) Evidence was insufficient to sustain the jury's verdict of guilty beyond a reasonable doubt.⁴⁵⁸
- 12) The Judge: The judge was biased against you because he was corrupt and you did not bribe him.⁴⁵⁹
- 13) Your Lawyer:
 - (a) Your lawyer did not represent you effectively at trial.⁴⁶⁰

not threaten defendant's due process rights); *United States v. Taylor*, 154 F.3d 675, 681 (7th Cir. 1988) (holding that *Vasquez* is a limited ruling).

455. Jury instructions are read by the judge to inform the jury of the elements of the crime and to explain the legal standards by which the jury must weigh the evidence against you. An example of a jury instruction is to find guilt "beyond a reasonable doubt."

456. *See Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S. Ct. 2450, 2459, 61 L. Ed. 2d 39, 51 (1979) (holding that the prosecution must prove every element of a crime beyond a reasonable doubt; therefore, trial court may not shift the burden of proof to defendant by instructing jury to presume intent in jury instructions); *Patterson v. New York*, 432 U.S. 197, 215, 97 S. Ct. 2319, 2329, 53 L. Ed. 2d 281, 295 (1977) (holding that the state must prove every element of an offense beyond a reasonable doubt); *see also* *Boyd v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316, 329 (1990) (holding that in an ambiguous case the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence"); *Patterson v. Gomez*, 223 F.3d 959, 961 (9th Cir. 2000) (holding that jury instructions that assumed the defendant was sane at the time of offense constituted an unconstitutional shifting of the prosecution's burden of proof).

457. *See Kentucky v. Whorton*, 441 U.S. 786, 789, 99 S. Ct. 2088, 2090, 60 L. Ed. 2d 640, 643 (1979) (holding that a judge's refusal to instruct the jury that a defendant is innocent until proven guilty may violate the Constitution if the "totality of the circumstances" indicates that the trial was constitutionally unfair); *Taylor v. Kentucky*, 436 U.S. 478, 490, 98 S. Ct. 1930, 1937, 56 L. Ed. 2d 468, 478 (1978) (finding that the judge's refusal to give jury instruction that defendant is presumed to be innocent was a violation of due process).

458. *See Jackson v. Virginia*, 443 U.S. 307, 318–319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979) (ruling that a reviewing court will determine whether any rational jury, viewing the evidence in the light most favorable to the prosecution, could have found the defendant guilty beyond a reasonable doubt). However, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies a stronger standard to this determination, so a federal reviewing court must give strong deference to the state court's findings. 28 U.S.C. § 2254(d). *See* Part B(4) of this Chapter ("Standard for Getting Relief") for more information on how the AEDPA standard is applied. *See also* *Juan H. v. Allen*, 408 F.3d 1262, 1276 (9th Cir. 2005) (finding that evidence was insufficient to establish defendant's guilt beyond a reasonable doubt); *United States v. Desena*, 260 F.3d 150, 154–156 (2d Cir. 2001) (reversing a conviction where no evidence linked the defendant to the general conspiracy charge).

459. Usually, a judge's qualifications are not considered to be a constitutional issue. However, the Due Process Clause requires "a fair trial in a fair tribunal" before a judge with no actual bias against the defendant. *See Bracy v. Gramley*, 520 U.S. 899, 904–905, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97, 104 (1997) (finding a due process violation where the judge imposed excessively harsh treatment on petitioner in order to hide or to compensate for the fact that he was taking bribes and giving light sentences in other cases). Note that this is a serious charge. You must have proof that the judge was corrupt and that your sentence was unusually harsh. The Supreme Court has made it clear that there is a presumption of legitimacy to public officers' actions, and clear evidence to the contrary must be presented in order to contradict that presumption. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174–175, 124 S. Ct. 1570, 1581–1582, 158 L. Ed. 3d 319, 336 (2004) (holding that a privacy interest against the government's release of public information—photographs—is only overcome by clear evidence showing that the government engaged in some wrongdoing).

460. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (confirming that the proper standard for judging attorney performance is "reasonably effective assistance," considering all circumstances). Ineffective assistance of counsel is among the most promising habeas claims. The standard for determination of ineffective assistance of counsel is discussed in Part B(2) of this Chapter ("Standards and Tests for Claims of Violations"). Your trial counsel may have been ineffective for any number of

- (b) Your lawyer did not file an appeal although you would have wanted to file one.⁴⁶¹
- (c) Your lawyer did not represent you effectively in your direct appeal (also known as a “first appeal as of right”).⁴⁶²
- 14) The Law and Statutes:
 - (a) You were convicted under a statute that is unconstitutional.⁴⁶³

reasons. *See, e.g.,* Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (finding ineffective assistance of counsel where counsel conducted no pretrial discovery and failed to file a timely suppression motion against prosecution’s evidence); Cossel v. Miller, 229 F.3d 649 (7th Cir. 2000) (holding that the victim’s in-court identification of petitioner lacked sufficient independent reliability to be admissible, that petitioner’s counsel was ineffective for failing to object to its admission, and that the state court’s rejection of petitioner’s ineffective assistance claim was an unreasonable application of clearly established federal law); Brown v. Myers, 137 F.3d 1154, 1156–1157 (9th Cir. 1998) (ruling counsel was ineffective in failing to investigate and present available testimony supporting petitioner’s alibi); Alston v. Garrison, 720 F.2d 812, 815–816 (4th Cir. 1983) (holding defendant was denied effective assistance of counsel where counsel failed to object to evidence that defendant exercised right to remain silent); *but see* Wilson v. Vaughn, 533 F.3d 208 (3d Cir. 2008) (holding that defendant was not prejudiced by failure to object to evidence because the court concluded that such evidence would have been admitted even without the racketeering charge).

461. This claim is a subset of an ineffective assistance of counsel claim that was decided by the Supreme Court in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). The Supreme Court held that there is a constitutionally imposed duty on an attorney to consult with a defendant about an appeal if there is reason to believe that a rational defendant would want an appeal or that the particular defendant has reasonably demonstrated that he was interested in appealing. Additionally, the defendant must show that had he been consulted about an appeal he would have made a timely appeal. *See Nnebe v. United States*, 534 F.3d 87, 91–92 (2d Cir. 2008) (finding a violation of the right to effective assistance of counsel where lawyer who is appointed under statute that requires pursuing appeals to the Supreme Court fails to file petition despite requests by defendant); *Restrepo v. Kelly*, 178 F.3d 634, 640–641 (2d Cir. 1999) (finding that failure of petitioner’s counsel to file timely notice of appeal despite repeated requests by petitioner and reassurances by counsel constituted a denial of constitutional right to effective assistance); *Alston v. Garrison*, 720 F.2d 812, 816 (4th Cir. 1983) (holding that “the content of an appeal is heavily controlled by counsel, and where ... the defendant’s trial lawyer also prosecuted the appeal, it is obvious that ineffective assistance of counsel is not likely to be raised at trial or to appear among the assignments of constitutional error” on appeal).

462. *See Cannon v. Berry*, 727 F.2d 1020, 1022 (11th Cir. 1984) (affirming writ of habeas corpus where counsel failed to file a brief on direct appeal of defendant’s murder conviction, which thus constituted ineffective assistance of counsel). Defective counsel is a ground for habeas relief only if counsel was constitutionally required. Therefore, the defective representation must have been at the trial or on direct appeal because there is no constitutional right to counsel in post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 755–757, 111 S. Ct. 2546, 2567–2568, 115 L. Ed. 2d 640, 672–674 (1991) (refusing to grant federal habeas relief for counsel errors in state habeas proceedings because there was no constitutional right to counsel). Still, an indigent criminal defendant is constitutionally entitled to an effective attorney in his “one and only appeal as of right,” which usually occurs in a state court of appeals. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) (“[A] first appeal as of right therefore is not adjudicated in accord with due process of law if appellant does not have the effective assistance of an attorney.”); *Douglas v. California*, 372 U.S. 353, 357–358, 83 S. Ct. 814, 816–817, 9 L. Ed. 2d 811, 814–815 (1963); *Mason v.* (holding that “where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor”); *Mason v. Hanks*, 97 F.3d 887, 902 (7th Cir. 1996) (“[W]hen we are convinced that a petitioner might well have won his appeal on a significant and obvious question of state law that his counsel omitted to pursue, we are compelled to conclude . . . that the appeal was not fundamentally fair and that the resulting affirmation of his conviction is not reliable.”). For more information on ineffective assistance of counsel claims, see *JLM*, Chapter 12, “Appealing Your Conviction Based on Ineffective Assistance of Counsel,” and Part H in *JLM*, Chapter 9, “Appealing Your Conviction or Sentence.”

463. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–374, 6 S. Ct. 1064, 1073, 30 L. Ed. 220, 227–228 (1886) (finding imprisonment of the petitioners illegal because the ordinance upon which their conviction was based violated the equal protection clause of the 14th Amendment as applied); *Ex parte Siebold*, 100 U.S. 371, 376–377, 25 L. Ed. 717, 719 (1879) (finding that the question of the constitutionality of the laws involved was a proper ground for considering a writ of habeas corpus); *Vuitch v. Hardy*, 473 F.2d 1370, 1370 (4th Cir. 1973) (finding defendant doctor entitled to habeas corpus because the state abortion statute was unconstitutional).

- (b) You received a certain type of punishment, and the law now forbids this type of punishment.⁴⁶⁴
- (c) You were convicted for an act that is no longer a crime under the new law.⁴⁶⁵
- (d) A state statute cancels your provisional early release credits after you have already earned them.⁴⁶⁶
- 15) Double Jeopardy:
 - (a) You were convicted for an act that is no longer a crime under the new law.⁴⁶⁷
 - (b) A state statute cancels your provisional early release credits after you have already earned them.⁴⁶⁸
 - (c) Your conviction violates your Fifth Amendment right against “double jeopardy” because you were convicted of a crime for which you had already been tried in the same state.⁴⁶⁹
 - (d) You were convicted in a second trial after your first trial was declared a mistrial in violation of the Fifth Amendment.⁴⁷⁰
 - (e) You were tried a second time for the same offense after a reviewing court had reversed your earlier conviction on the grounds that the evidence at your first trial was insufficient to support a conviction.⁴⁷¹
- 16) Other Procedural Problems at Trial:

464. See Part C(3)(a)(i) (“Prohibited Punishments”) of this Chapter.

465. See Part C(3)(a)(ii) (“Decriminalized Behavior”) of this Chapter for further explanation.

466. See *Lynce v. Mathis*, 519 U.S. 433, 447, 117 S. Ct. 891, 899, 137 L. Ed. 2d 63, 75–76 (1997) (holding retroactive cancellation, which actually increased the incarcerated person’s punishment through re-arrest, violated the *Ex Post Facto* Clause).

467. See Part C(3)(a)(ii) (“Decriminalized Behavior”) of this Chapter for further explanation.

468. See *Lynce v. Mathis*, 519 U.S. 433, 447, 117 S. Ct. 891, 899, 137 L. Ed. 2d 63, 75–76 (1997) (holding retroactive cancellation, which actually increased the incarcerated person’s punishment through re-arrest, violated the *Ex Post Facto* Clause).

469. See *Green v. United States*, 355 U.S. 184, 190, 78 S. Ct. 221, 225, 2 L. Ed. 2d 199, 205 (1957) (determining that where jury had been instructed on first and second degree murder and convicted defendant of second degree murder with no comment on first degree charge, defendant may not be tried again for first degree murder); *Dye v. Frank*, 355 F.3d 1102, 1104 (7th Cir. 2004) (barring a criminal drug charge because defendant had previously been sanctioned under a state civil penalty “so punitive in purpose and effect that it constituted a criminal punishment”); *Terry v. Potter*, 111 F.3d 454, 459–460 (6th Cir. 1997) (holding that where petitioner’s wanton murder conviction was reversed, and where the first jury was discharged without convicting him of intentional murder, petitioner could not be retried for intentional murder). Footnote 475 below describes when jeopardy attaches in a criminal trial.

470. Generally, once jeopardy “attaches” to a charge in a trial the state may not try you for that charge in another trial without violating the 5th Amendment. If there is a mistrial declared after jeopardy has attached, you may not be tried again for that charge unless you consented to the mistrial declaration or there was a “manifest necessity” for declaring the mistrial. *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 830, 54 L. Ed. 2d 717, 728 (1978) (explaining that the prosecutor has the burden of showing this “manifest necessity”); see also *United States v. Razmilovic*, 507 F.3d 130, 141–142 (2d Cir. 2007) (finding that double jeopardy bars a second trial where defendant initially joined in a co-defendant’s motion for mistrial but almost immediately changed his position after mistrial was to be finalized); *Love v. Morton*, 112 F.3d 131, 137 (3d Cir. 1997) (affirming grant of habeas relief from conviction on retrial after first trial court judge declared a mistrial soon after jury was sworn due to the judge’s inability to complete the trial and without consent from counsel). Jeopardy “attaches” to your jury trial when the jury is sworn and empaneled. See *Crist v. Bretz*, 437 U.S. 28, 38, 98 S. Ct. 2156, 2162, 57 L. Ed. 2d 24, 33 (1978) (holding federal double jeopardy rule, which states that jeopardy attaches after jury is sworn and empaneled, overrides a Montana state rule that jeopardy attaches after the first witness is sworn).

471. See *Burks v. United States*, 437 U.S. 1, 18, 91 S. Ct. 2141, 2151, 57 L. Ed. 2d 1, 14 (1978) (holding that double jeopardy prohibits a second trial after a reviewing court has found the evidence legally insufficient to justify conviction); *Hudson v. Louisiana*, 450 U.S. 40, 44–45, 101 S. Ct. 970, 973, 67 L. Ed. 2d 30, 34–35 (1981) (holding double jeopardy protection was violated when petitioner was prosecuted after trial judge had already granted petitioner’s motion for new trial based on insufficiency of evidence supporting guilty verdict).

- (a) You were denied the right to be present at your trial.⁴⁷²
- (b) You were prohibited from testifying on your own behalf.⁴⁷³
- (c) The court in which you were convicted did not have the power to convict you because it did not have jurisdiction.⁴⁷⁴
- (d) You were convicted without using a certain procedure that the law now says is necessary to ensure the fundamental fairness of a trial.⁴⁷⁵
- (e) An error occurred during trial that made the trial fundamentally unfair in violation of the Fourteenth Amendment.⁴⁷⁶

Remember that the above list does not include every possible example. If you think you experienced a violation of your rights not listed above, try to identify what kind of right may have been violated. Look carefully through a criminal procedure handbook in your prison library. Read the amendments to the Constitution carefully. Read many cases, especially cases dealing with a situation like yours. For example, if you were convicted of drug trafficking, read other cases involving drug trafficking. Start by looking at Supreme Court cases because the Supreme Court is the strongest authority on Constitutional rights and how those rights should apply to actual cases. The Supreme Court's decisions are what all the other courts look to when they make their own decisions. If you find a case that deals with something similar to the situation you experienced, then read the cases the

472. See *McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S. Ct. 944, 951, 79 L. Ed. 2d 122, 133 (1984) (stating that a defendant has a right to be present at all important stages of trial); *Drope v. Missouri*, 420 U.S. 162, 182–183, 95 S. Ct. 896, 909, 43 L. Ed. 2d 103, 119–120 (1975) (noting that the trial court failed to adequately determine whether the defendant waived his right to be present at trial); *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990) (holding that defendant's absence from the courtroom at critical junctures in his trial violated his due process rights because he was unable to provide assistance to his counsel or have a psychological impact on the jury). However, you will likely only be granted habeas relief for denial of this right if it resulted in "substantial and injurious effect." *Rice v. Wood*, 77 F.3d 1138, 1144 (9th Cir. 1996) (holding that a writ should not be granted for petitioner's absence during the jury's announcement of a death sentence if his absence did not have a "substantial and injurious effect" on him because his absence was not a structural error); see also *Sturgis v. Goldsmith*, 796 F.2d 1103, 1108–09 (9th Cir. 1986) (holding that petitioner's absence from his competency hearing warrants habeas relief if the absence was not harmless error).

473. See *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708, 97 L. Ed. 2d 37, 44–45 (1987) (holding that defendants have a fundamental constitutional right to testify on their own behalf); *People v. Allen*, 187 P.3d 1018, 1030, 44 Cal. 4th 843, 860, 80 Cal. Rptr. 3d 183, 198 (Cal. 2008) (holding that a defendant who was found to be a sexually violent predator had a right to testify under the California and federal constitutions even though his lawyer told him not to testify). But see *Taylor v. United States*, 287 F.3d 658, 661–62 (7th Cir. 2002) (holding defense counsel does not have a duty to tell defendant about his constitutional right to testify).

474. See *Sunal v. Large*, 332 U.S. 174, 178–79, 67 S. Ct. 1588, 1591, 91 L. Ed. 1982, 1987 (1947) (finding habeas relief appropriate where (1) conviction was under a federal statute alleged to be unconstitutional, (2) federal court's jurisdiction was challenged, or (3) specific constitutional guarantees were violated); *Butler v. King*, 781 F.2d 486, 490 (5th Cir. 1986) (finding that defendant was entitled to federal writ of habeas corpus because state district court lacked jurisdiction over him at time of trial); *Lowery v. Estelle*, 696 F.2d 333, 336–38 (5th Cir. 1983). Having "jurisdiction" means that the court has the power to hear your case. If a court holds a trial without jurisdiction, it violates the Due Process Clause of the 5th or 14th Amendments. In *Lowery*, a Texas trial court dismissed an indictment for firearm use, and then convicted the defendant on other charges. The court violated a Texas state law that strips a court of jurisdiction over a case if it dismisses an indictment. The incarcerated person filed a habeas petition claiming that the trial court lacked jurisdiction to hold his trial. The federal court would not consider this claim for habeas corpus, however, because the petitioner had not exhausted state procedures, which means he had not raised the claim in the state courts before petitioning in federal court.

475. See Part C(3)(b) ("Exception: Fundamental Fairness at Trial") of this Chapter.

476. See *Riggins v. Nevada*, 504 U.S. 127, 137–138, 112 S. Ct. 1810, 1816–1817, 118 L. Ed. 2d 479, 490–91 (1992) (finding that the forced administration of an antipsychotic drug to defendant may have impermissibly violated his constitutional right to receive a fair trial by compromising the substance of his testimony, interaction with counsel, and comprehension); *Young v. Callahan*, 700 F.2d 32, 37 (1st Cir. 1983) (finding that a trial court committed a constitutional error by requiring petitioner to sit in prisoner's block rather than at counsel's table even though there was no finding that restraint was necessary and petitioner objected). But see *Moore v. Ponte*, 186 F.3d 26, 36 (1st Cir. 1999) (finding no constitutional error when it appeared the court had considered security concerns in deciding to make defendant sit in prisoner's block).

court relies on to determine whether something was a violation or not. Shepardize⁴⁷⁷ the case to find lower court decisions in your district that may give you more information on how violations are interpreted in your district. You should look out for a rule or standard used to review your violation. Then, you will develop your case around how the standard or rule was violated in your arrest, trial, or sentence. (This process is explained further in Section 2 below.)

Another approach is to start by getting an idea of what a constitutional violation looks like, and then examining what happened at your arrest, trial, and sentence to determine if there was a similar error. If you can, look at a transcript of your trial and pay close attention to where your lawyer raised an objection. You should look at any records relating to your case, including pretrial proceedings. Also, speak to family members, your trial attorney, and investigators to help discover violations. If you are unable to identify a violation, federal habeas will not be able to help you.

And remember, if you can identify violations, you should list every possible violation and every instance of each violation.

477. By *Shepardizing*, you can make sure that the law has not changed over time. See Chapter 2 of the *JLM* for an explanation of how to *Shepardize* a case.

CHAPTER 14

THE PRISON LITIGATION REFORM ACT*

A. Introduction

The Prison Litigation Reform Act (“PLRA”) changes various parts of the United States Code that address civil rights litigation and “*in forma pauperis*” (“IFP”) proceedings. Proceeding IFP means that you file a lawsuit as a poor person and thereby avoid paying many of the normal fees and costs. Overall, the PLRA is designed to make it harder for incarcerated people to file complaints in federal court.

This Chapter will tell you about the PLRA’s various provisions and court decisions applying them. It will also suggest ways you might be able to defend yourself in *pro se* litigation if prison officials argue that the PLRA bars or limits your lawsuit. There are important questions about the PLRA that the courts have not yet settled, so some of the information in this Chapter may need to be changed in the future.¹ As with every legal issue described in the *JLM*, it is important that you do your own research to make sure you have the most up-to-date information about how the PLRA affects your particular case. To learn more about how to do legal research, read Chapter 2 of the *JLM*, “Introduction to Legal Research.”

The PLRA makes it extremely important to be sure your legal claim is strong before you file it. Under the PLRA, even if you proceed *in forma pauperis*, you have to pay the full \$350 filing fee (and another \$450 if you wish to appeal the court’s decision) in installments. You also run the risk of getting a “strike” under the PLRA’s “three strikes” provision. Under this provision, if you have three cases dismissed as frivolous, malicious, or for failing to state a valid legal claim, you can no longer use the IFP procedure for future suits,² and you will have to pay the entire filing fee in advance without the option of paying in installments.³ A lawsuit is considered frivolous when there can be no dispute (or question) that it has no basis in either law or fact,⁴ and it is considered malicious when it is abusive of the judicial process.⁵

Part B of this Chapter talks about the PLRA’s effect on your responsibility for paying filing fees. Part C provides an overview of the PLRA’s “three strikes” provision. Part D explains the requirement that directs a court to dismiss any incarcerated person’s case that it believes is frivolous or malicious, or that fails to state a legal claim, or seeks damages from a defendant who is protected from such claims. Part E explains in detail one of the most important aspects of the PLRA: the requirement that you exhaust all administrative remedies before you will be allowed into court. Part F describes the physical injury requirement of the PLRA, which says you cannot bring a suit in federal court for mental

* This Chapter was written by John Boston of The Legal Aid Society and over time has been revised and updated by *JLM* staff and by John Boston. If you would like to learn more or have questions about the PLRA, you are encouraged to write to The Legal Aid Society, Prisoners’ Rights Project, 199 Water Street, New York, NY 10038.

1. Unfortunately, many significant decisions interpreting the PLRA are unreported, which means they do not appear in the Federal Reporter and Federal Supplement volumes available in prison law libraries. They are available on the Lexis and Westlaw computer services. Citations like “1999 WL 12345” are Westlaw citations. Citations like “1999 U.S. App. LEXIS 19764” are Lexis citations. Some jurisdictions do not allow you to cite to these decisions, that is, use them to support your legal argument. For additional important information about unpublished cases, see Chapter 2 of the *JLM*, “Introduction to Legal Research.”

2. 28 U.S.C. § 1915(g).

3. See *In re Tyler*, 110 F.3d 528, 529 (8th Cir. 1997).

4. *Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir. 1991); see also *Black v. Warren*, 134 F.3d 732, 734 (5th Cir. 1998).

5. *Johnson v. Edlow*, 37 F. Supp. 2d 775, 776 (E.D. Va. 1999).

or emotional injury without showing a physical injury.⁶ Parts G through L briefly discuss the parts of the PLRA that (1) limit the “attorney’s fees” incarcerated people can recover in a successful suit; (2) allow defendants in a suit not to respond to the incarcerated person’s complaint unless the court tells them to do so; (3) allow for proceedings that happen before the trial to be conducted by telephone or video; (4) allow the court to order the loss of earned good-time credit if it finds that your claim was filed for a malicious or harassing purpose; (5) require that any damages awarded to an incarcerated person for a loss or injury he suffered be paid directly to satisfy any restitution orders (money owed by an incarcerated person for any damages to a victim); and (6) change how injunctions can be issued and maintained.

B. Filing Fees

The PLRA requires all incarcerated people to pay court filing fees, including poor incarcerated people who haven’t been granted IFP status by a federal court. Payments may be made in installments based on the amount of money in your prison account. You may wonder why you should bother seeking IFP status if you are going to have to pay the filing fees anyway. The reason is that if you do not have IFP status, you will have to pay the entire fee before you can file the case. Also, IFP litigants can have their summonses and complaints served by officers of the court, such as the U.S. Marshals Service⁷ and can be excused from payment of some costs (though not fees) on appeal.⁸ Without IFP status, you will have to take care of service and pay appeal costs yourself.⁹

If you are seeking IFP status, you must submit certified statements¹⁰ of your prison accounts for the six months before you filed the complaint or notice of appeal.¹¹ If these submissions are delayed because prison authorities do not respond to your requests, your case will not be dismissed.¹² If prison officials fail or refuse to provide a certified statement, the court can order them to do so.¹³ District courts in various states have different procedures for acquiring the certified statements.¹⁴ You should

6. Please note that although the statute states that you cannot bring a suit without first showing a physical injury, in practice this is impossible. You will have to show your injury after you have filed your suit.

7. 28 U.S.C. § 1915(d).

8. 28 U.S.C. § 1915(c).

9. See *JLM*, Chapter 6, “An Introduction to Legal Documents” for information on necessary documents.

10. 28 U.S.C. § 1915(a)(2).

11. See *Spaight v. Makowski*, 252 F.3d 78, 79 (2d Cir. 2001) (holding that the relevant time period on appeal is six months before filing the notice of appeal, not six months before moving for *in forma pauperis* status). As a practical matter, courts have accepted information supplied by prison officials that was a little out of date. See *Jackson v. Wright*, No. 99 C 1294, 1999 U.S. Dist. LEXIS 3487, at *2 n.2 (N.D. Ill. Mar. 10, 1999) (*unpublished*) (accepting statement ending the month before the complaint was filed in light of the small amounts involved); *Lam v. Clark*, No. 99 C 558, 1999 U.S. Dist. LEXIS 1573, at *2–3 (N.D. Ill. Feb. 10, 1999) (*unpublished*) (accepting account information ending three and a half weeks before the filing of the complaint, since there was a consistent pattern for the six months covered).

12. See *Lawton v. Ortiz*, No. 06-1167 (FSH), 2006 U.S. Dist. LEXIS 66905, at *2 (D.N.J. Sept. 19, 2006) (*unpublished*) (granting IFP status where prisoner said officials did not respond to his requests for an account statement and other evidence showed he was indigent). In addition, a delay in submitting the financial information will not cause you to miss the statute of limitations as long as the complaint itself is submitted in time. See *Garrett v. Clarke*, 147 F.3d 745, 746 (8th Cir. 1998) (“[T]he prisoner should be allowed to file the complaint, and then supply a prison account statement within a reasonable time.”) (citations omitted).

13. See *Stinnett v. Cook Cnty. Med. Staff*, No. 99 C 1696, 1999 U.S. Dist. LEXIS 4605, at *2 (N.D. Ill. Mar. 19, 1999) (*unpublished*) (requiring prison officials to send a certified copy of prisoner’s financial statement to the court).

14. In the New York federal courts, for example, three of the four district courts (the Southern, Western, and Northern Districts) get the certified statement directly from prison officials; prisoner plaintiffs must submit a form to the court authorizing the disclosure of this information and the payment of the fee from their prison accounts. In the Eastern District of New York, prisoners must sign such an authorization and must also get

obtain the necessary forms and instructions from the clerk of the court in which you plan to bring suit.¹⁵

If you are granted IFP status, you must pay the *entire* fee for filing either a complaint or an appeal¹⁶ according to the following formula:

- (1) . . . The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—
 - (A) the average monthly deposits to the incarcerated person's account; or
 - (B) the average monthly balance in the incarcerated person's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.
- (2) After payment of the initial partial filing fee, the incarcerated person shall be required to make monthly payments of 20 percent of the preceding month's income credited to the incarcerated person's account. The agency having custody of the incarcerated person shall forward payments from the incarcerated person's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.¹⁷

Your case should not be dismissed if you cannot pay the initial fee.¹⁸ The statute says that the initial fee is to be collected “when funds exist,”¹⁹ and that incarcerated people should not be stopped from bringing suit or appealing a judgment simply because they cannot pay.²⁰ A case should not be dismissed for nonpayment without a court first determining if the incarcerated person has had the opportunity to pay.²¹ However, if you do not pay on purpose, or if you do not take the necessary steps to pay, your case is likely to be dismissed.²² Incarcerated people generally may not be stopped from filing suit simply because they owe fees from a prior action.²³ However, one federal circuit has held that incarcerated people who try to avoid paying filing fees by lying or who fail to pay fees because

certification from the prison of their funds. In the certification, the prison should include the average balances for the preceding six months.

15. The addresses of the federal district courts (organized by Circuit) are provided in Appendix I of the *JLM*.

16. The fee for filing a federal court civil complaint is \$350.00. 28 U.S.C. § 1914(a). For appeals, there is a \$500.00 filing fee, plus an additional \$5 fee for filing your notice to appeal. *See* U.S. Courts, Federal Court Fees, *available at* <https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule> (last visited Oct. 15, 2020). The fee for filing for habeas corpus is \$5. *See* 28 U.S.C. § 1914, *available at* <https://www.law.cornell.edu/uscode/text/28/1914> (last visited Oct. 15, 2020).

17. 28 U.S.C. § 1915(b)(1)–(2).

18. 28 U.S.C. § 1915(b)(4); *see* Taylor v. Delatorr, 281 F.3d 844, 850–851 (9th Cir. 2002) (holding that an incarcerated person who cannot pay the initial fee must be allowed to proceed with his case and not merely be granted more time to pay).

19. 28 U.S.C. § 1915(b)(1).

20. 28 U.S.C. § 1915(b)(4).

21. Redmond v. Gill, 352 F.3d 801, 804 (3d Cir. 2003) (holding that the district court abused its discretion in dismissing a case when the plaintiff failed to return an authorization form for payment of fees within 20 days, and requiring that the plaintiff be given more time); Hatchett v. Unknown Nettles, 201 F.3d 651, 652 (5th Cir. 2000) (“[I]t is an abuse of discretion for a district court to dismiss an action for failure to comply with an initial partial filing fee order without making some inquiry regarding whether the prisoner has complied with the order by submitting any required consent forms within the time allowed for compliance.”); Beyer v. Cormier, 235 F.3d 1039, 1041 (7th Cir. 2000) (holding that the court should have communicated with prison officials or granted an extension of payment deadline). *But see* Cosby v. Meadors, 351 F.3d 1324, 1332–1333 (10th Cir. 2003) (holding that a court that issued repeated orders for the plaintiff to show cause could dismiss where the plaintiff did not document any reasons for his failure to pay).

22. *See* Cosby v. Meadors, 351 F.3d 1324, 1332–1333 (10th Cir. 2003) (affirming dismissal of case where plaintiff said he could not pay the fees but had spent his money on other items); Jackson v. N.P. Dodge Realty Co., 173 F. Supp. 2d 951, 952 (D. Neb. 2001) (affirming dismissal incarcerated person's claim when he refused to pay the initial payment by the court's deadline, despite paying other fees associated with the lawsuit).

23. *See* Walp v. Scott, 115 F.3d 308, 309 (5th Cir. 1997) (reversing a dismissal based on a pending action and stating that there is no requirement that an incarcerated person complete payment of fees before beginning another action).

they are subject to the “three strikes” provision of the PLRA²⁴ can be denied IFP status or stopped completely from filing suit.²⁵

If you lose a case, a federal court may decide to charge you with the costs of the lawsuit.²⁶ Courts are free to choose whether they will make you pay the costs.²⁷ If a court decides to charge you with costs, you cannot appeal that decision.²⁸

There are no exceptions to the fee requirement. Once your case is filed, you owe the fee. The court cannot delay payment until after your release.²⁹ You usually must pay these filing fees even if your case is dismissed immediately, you fail to submit the necessary financial information,³⁰ or you paid a fee in connection with a previous appeal.³¹ You cannot get the fee back by choosing to withdraw the complaint or appeal.³² Prison officials must keep collecting fees from your account if you remain within their legal custody, even if you are transferred to another jurisdiction.³³ They are required to treat these fees as more important and collect them before any other deductions can be taken out of your account.³⁴

Filing fee payments are based on all money the incarcerated person receives, not just prison wages. Deductions from the fee may not be made for money you spent on legal copies and postage.³⁵ Filing

24. 28 U.S.C. § 1915(g). For more information on the “three strikes” provision, see the next section.

25. *See* Campbell v. Clarke, 481 F.3d 967, 969–970 (7th Cir. 2007) (reasoning that a judge’s discretion allows for the rejection of an action filed without fees when the filing incarcerated person still owes fees from previous actions and has struck out under 28 U.S.C. § 1915(g)); Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999) (barring an incarcerated person who had “struck out” under 28 U.S.C. § 1915(g) from filing further litigation, especially considering evidence that at least one of the incarcerated person’s IFP applications contained fraud). However, a recent decision held that an incarcerated person who is subject to the “three strikes” provision of the PLRA and who has not paid filing fees owed from prior suits cannot be barred from filing under the “imminent danger of serious physical injury” exception to that provision. Miller v. Donald, 541 F.3d 1091, 1096–1097 (11th Cir. 2008).

26. 28 U.S.C. § 1915(f)(2). In one case, an incarcerated person was assessed \$7,989.90 in costs and \$15,750 in attorneys’ fees. *See* Sanders v. Seabold, No. 98-5470, 1999 U.S. App. LEXIS 19764 at *2 (6th Cir. Aug. 13, 1999) (*unpublished*).

27. Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000) (noting “the ability of a court to require, as a matter of discretion, that the indigent [(poor/need)] prisoner pay the costs, or some part of them”).

28. 28 U.S.C. § 1915(f)(2)(A); Whitfield v. Scully, 241 F.3d 264, 273 (2d Cir. 2001) (holding that § 1915 forbids incarcerated people from appealing an award of costs on the ground of indigency).

29. Ippolito v. Buss, 293 F. Supp. 2d 881, 883 (N.D. Ind. 2003) (denying an incarcerated person’s request to defer payments).

30. *See* Todd v. Acevedo, No. 16-CV-2741 (JNE/SER), 2016 U.S. Dist. LEXIS 162291, at *2–4 (D. Minn. Oct. 13, 2016) (*unpublished*) (“[W]ithout financial information from Todd’s prison trust account, the Court had no basis to conclude that he lacks the assets....to pay an initial partial filing fee.”); Leonard v. Lacy, 88 F.3d 181, 186 (2d Cir. 1996) (“[W]e will apply the PLRA to impose any required obligation for filing fees (subject to installment payments) upon all prisoners who seek to appeal civil judgments without prepayment of fees,” even if the action is later deemed frivolous); *but see* Smith v. District of Columbia, 182 F.3d 25, 29 (D.C. Cir. 1999) (not requiring incarcerated people to pay the full filing fee whenever their *in forma pauperis* application is denied and they decide to no longer pursue their lawsuit).

31. Lebron v. Russo, 263 F.3d 38, 42 (2d Cir. 2001) (refusing to grant an exception to filing fee requirement even where plaintiff filed a second appeal that arose out of the same district court action).

32. Goins v. Decaro, 241 F.3d 260, 261 (2d Cir. 2001) (“The PLRA makes no provision for return of fees partially paid or for cancellation of the remaining indebtedness in the event that an appeal is withdrawn.”).

33. Beese v. Liebe, 153 F. Supp. 2d 967, 970 (E.D. Wis. 2001) (holding that state officials are obligated “to put into place procedures for continuing the collection of the filing fees . . . The payments *do not stop*, nor are they even temporarily placed on hold, just because the Secretary has chosen to send [the incarcerated people] out-of-state.”) (citation omitted).

34. Smith v. Huibregtse, 151 F. Supp. 2d 1040, 1043 (E.D. Wis. 2001) (finding “funds exist within the meaning of the PLRA whenever a prisoner has funds or receives income and prison officials must give payment of federal court filing fees priority”).

35. Rutledge v. Romero, No. 99 C 3453, 1999 U.S. Dist. LEXIS 9021, at *2–5 (N.D. Ill. June 2, 1999)

fees may be assessed and collected from “release accounts” or “gate savings,” money intended to be provided to the prisoner upon release from prison, at least when doing so is consistent with state law.³⁶

The 20% monthly payment is to be made separately for each case. The Supreme Court has held that if you have more than one case on which you owe fees, you must pay on all the fees at the same time.³⁷

In class actions, only the incarcerated people who signed the complaint or notice of appeal are responsible for payment of fees.³⁸ In cases involving more than one plaintiff, the courts have disagreed about payment of filing fees. One federal appeals court held that each plaintiff must pay an equal amount of the fee saying that, “each prisoner should be proportionally liable for any fees and costs that may be assessed.”³⁹ Another appeals court held that multiple incarcerated people joining similar claims in a single suit must each pay a filing fee, but also have to file separate complaints.⁴⁰ More recently, other federal appeals courts agreed that each incarcerated plaintiff must pay the full filing fee, but they do not need to file a separate complaint.⁴¹ However, a number of district courts have held that incarcerated people proceeding IFP must file separate complaints, often citing the practical difficulties involved in multiple-plaintiff litigation.⁴²

(*unpublished*) (establishing that funds calculation is based on all money in the account, including money from third parties and money intended for legal communication). Courts have disagreed about whether money that is withheld from an incarcerated person’s income and held until release should be counted in calculating the fees or used to pay the fees.

36. *Kennedy v. Huibregtse*, 831 F.3d 441, 442 (7th Cir. 2016) (noting that state law permits release account’s use to pay filing fees upon judicial order and that federal courts in the state had so used them (citing *State ex rel. Coleman v. Sullivan*, 229 Wis.2d 804, 601 N.W.2d 335, 337–38 (Wis. App. 1999), and *Spence v. McCaughtry*, 46 F.Supp.2d 861, 863 (E.D. Wis. 1999))); *Jackson v. Kallas*, 17-cv-350-bbc, 2017 U.S. Dist. LEXIS 145331, *4–5 (W.D. Wis., Sept. 8, 2017) (*unpublished*) (noting state law governs use of release account funds and authorizes courts only to order the payment of initial filing fee from them); *Dean v. King*, Civil No. 09–1745 (RHK/SRN), 2009 U.S. Dist. LEXIS 76195, *5–6 (D. Minn., Aug. 26, 2009) (holding “gate savings” appropriately considered in initial fee calculation). It is not clear why state law limits on the use of these funds are not preempted by the PLRA under the Supremacy Clause, U.S. CONST., art. VI.

37. *Bruce v. Samuels*, 577 U.S. 82, 84, 89–90, 136 S. Ct. 627, 629, 632–633, 193 L. Ed. 2d 496, 499, 502–503 (2016).

38. *Talley-Bey v. Knebl*, 168 F.3d 884, 887 (6th Cir. 1999) (“[I]n cases involving class actions, . . . the responsibility of paying the required fees and costs rests with the prisoner or prisoners who signed the complaint . . . [O]n appeal, the prisoner or prisoners signing the notice of appeal are obligated to pay all appellate fees and costs.”).

39. *In re Prison Litigation Reform Act*, 105 F.3d 1131, 1138 (6th Cir. 1997) (holding that any fees the district court or appeals court may impose should be equally divided among the plaintiffs). One lower court has taken a different approach to dividing the filing fee, holding that the parties can divide the fee as they like. Every person is responsible if the fee goes unpaid, even if they have already paid more than their share. *See Alcala v. Woodford*, No. C 02-0072 TEH (pr), 2002 U.S. Dist. LEXIS 9504, at *2–3 (N.D. Cal. May 20, 2002) (*unpublished*) (holding that all parties are responsible for seeing that the fee is paid in full, and that all may be penalized for a failure to pay).

40. *Hubbard v. Haley*, 262 F.3d 1194, 1197 (11th Cir. 2001) (holding that the clear language of the PLRA requires each incarcerated person to bring a separate suit).

41. *Boriboune v. Berge*, 391 F.3d 852, 854–856 (7th Cir. 2004); *see also Hagan v. Rogers*, 570 F.3d 146, 155 (3d Cir. 2009) (endorsing the Seventh Circuit’s approach in *Boriboune v. Berge*); *Suarez v. A1*, No. 06-2782 (JBS), 2006 U.S. Dist. LEXIS 93720, at *11–13 (D.N.J. Dec. 13, 2006) (*unpublished*) (acknowledging the difficulties of joint litigation, but holding different plaintiffs who sought the same remedy could proceed jointly though they each had to pay a separate filing fee).

42. *See, e.g., Sutcliffe v. S.C. Supreme Court*, No. 0:16-992-TMC-PJG, 2016 U.S. Dist. LEXIS 59180 (D.S.C. May 4, 2016) (citing cases); *Lebon v. Mo. State Pub. Def. Sys.*, No. 4:13-CV-1834-SPM, 2013 U.S. Dist. LEXIS 153911 (E.D. Mo. Oct. 28, 2013) (*unpublished*); *Benford v. Madison Cty. Bd. of Supervisors*, No. 3:09-cv-785-WHB-LRA, 2010 U.S. Dist. LEXIS 7212 (S.D. Miss. Jan. 15, 2010) (*unpublished*); *Proctor v. Applegate*, 661 F. Supp. 2d 743, 780 (E.D. Mich. 2009); *Caputo v. Belmar Municipality & County*, No. 08-1975 (MLC), 2008 U.S. Dist. LEXIS 36883, at *5–7 (D.N.J. May 2, 2008) (*unpublished*); *Osterloth v. Hopwood*, No. CV 06-152-M-JCL, 2006 U.S. Dist. LEXIS 83461, at *2–3 (D. Mont. Nov. 15, 2006) (*unpublished*); *Horton v. Evercom, Inc.*, No. 07-3183-SAC, 2008 U.S. Dist. LEXIS 299, at *3 (D. Kan. Jan. 2, 2008) (*unpublished*).

The joinder rules lay out the process of combining two or more legal issues into one court case. Joinder of parties allows a plaintiff to sue multiple defendants. Joinder of claims allows a plaintiff to bring multiple claims at the same time. However, plaintiffs can only use joinder if their injuries all come from the same “transaction, occurrence, or series of transactions or occurrences” *and* when there is “any question of law or fact common to all defendants.”⁴³ This means that plaintiffs can only combine claims against people who were involved in one event or a series of events that are connected. These rules have sometimes been enforced loosely to allow plaintiffs to combine more claims and parties together. However, some courts are now strongly enforcing the joinder rules against incarcerated people. This is to prevent incarcerated people from paying one filing fee to bring claims that should be brought as separate complaints and fees.⁴⁴

Many constitutional challenges to the filing fees provisions have failed.⁴⁵ Courts have said that the filing fees rules are constitutional because they do not stop anyone from bringing suit.⁴⁶

The filing fees rules of the PLRA are used in federal court, and probably do not apply in state court. We are aware of no decisions on this issue in state courts.

43. FED. R. CIV. P. 20(a)(1) (joinder of plaintiffs). FED. R. CIV. P. 18 (joinder of claims).

44. *See* George v. Smith, 507 F.3d 605, 607–608 (7th Cir. 2007) (rejecting plaintiff’s lawsuit because “unrelated claims against different defendants belong in different suits”). An example of how this works is *Vasquez v. Schueler*, No. 06-cv-00743-bbc, 2007 U.S. Dist. LEXIS 88193, at *1–2 (W.D. Wis. Nov. 29, 2007) (*unpublished*). The plaintiff in that case raised several different claims that arose at four different times. The court said that the plaintiff had to pursue his claims in four separate lawsuits, one for each different time. The only claims that could be combined in the same lawsuit were those of excessive force and of denial of medical care following the use of force, since they involved the same series of transactions or events. *But see* Griggs v. Holt, No. CV 117-089, 2018 U.S. Dist. LEXIS 182592, at *11 (S.D. Ga. Oct. 24, 2018) (*unpublished*) (holding claims of excessive force against multiple defendants in different incidents were properly joined where plaintiff alleged “the use of excessive force is a routine practice at ASMP and prison administrators are aware of this practice but refuse to take reasonable steps to prevent further assaults”), *appeal filed*, No. 19-12048 (11th Cir., May 28, 2019); Gates v. Gomez, No. 17-cv-00901-WQH-BGS, 2018 U.S. Dist. LEXIS 128417, at *12 (S.D. Cal. July 30, 2018) (*unpublished*) (holding claim of excessive force by one defendant followed by denial of medical care by another were properly joined where the claims were “logically related and provide context for one another” and where the plaintiff alleged a shared motivation between those defendants (footnote omitted)), *report and recommendation adopted*, No. 17CV901-WQH-BGS, 2018 U.S. Dist. LEXIS 147520 (S.D. Cal. Aug. 28, 2018); Alford v. Mohr, No. 1:15-cv-645, 2018 U.S. Dist. LEXIS 33680, at *22 (S.D. Ohio Mar. 1, 2018) (*unpublished*) (holding joinder was proper where claims against multiple defendants were “part of a campaign of retaliation or harassment in response to plaintiff’s filing of complaints, grievances and complaints originally stemming from [one defendant’s] actions”), *report and recommendation adopted*, No. 1:15cv645, 2018 U.S. Dist. LEXIS 229616 (S.D. Ohio July 26, 2018) (*unpublished*).

45. *Lefkowitz v. Citi-Equity Group*, 146 F.3d 609, 612 (8th Cir. 1998) (rejecting an equal protection claim and holding the filing fee provision does not unconstitutionally restrict access to the courts); *Lucien v. DeTella*, 141 F.3d 773, 775–776 (7th Cir. 1998) (finding the statute does not violate incarcerated people’s due process rights); *Mitchell v. Farcass*, 112 F.3d 1483, 1489 (11th Cir. 1997) (finding no equal protection violation); *Nicholas v. Tucker*, 114 F.3d 17, 21 (2d Cir. 1997) (holding the provisions constitutional both generally and as applied to the incarcerated person); *Hampton v. Hobbs*, 106 F.3d 1281, 1288 (6th Cir. 1997) (“[W]e find that the fee provisions of the Prison Litigation Reform Act violate neither a prisoner’s constitutional right of access to the courts, nor his rights under the First Amendment, the Due Process Clause, the Equal Protection Clause, or the Double Jeopardy Clause of the United States Constitution.”).

46. *See, e.g.,* *Nicholas v. Tucker*, 114 F.3d 17, 21 (2d Cir. 1997) (upholding 28 U.S.C. §§ 1915(b)(1)–(4)).

The filing fees rules only apply to civil (not criminal) actions. Habeas corpus petitions and other post-judgment proceedings are generally *not* considered civil actions for this purpose.⁴⁷ Motions to vacate a criminal sentence under 28 U.S.C. § 2255 are also generally not considered civil actions.⁴⁸

Writs of mandamus and other “extraordinary writs” are considered civil actions and are subject to the PLRA, including the filing fee requirement, when they ask the court for relief that is similar to what you would ask for in a civil action.⁴⁹

Bankruptcy cases and challenges to seizures of property have been treated as civil actions. This means they are subject to the filing fees rules.⁵⁰

47. See *Skinner v. Wiley*, 355 F.3d 1293, 1294 (11th Cir. 2004) (holding that the PLRA does not apply to habeas petitions about prison disciplinary proceeding); *Malave v. Hedrick*, 271 F.3d 1139, 1140 (8th Cir. 2001) (holding that the PLRA does not apply when challenging a delayed parole revocation hearing); *Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000) (holding that proper habeas actions are not civil actions governed by PLRA, no matter the subject matter); *Blair-Bey v. Quick*, 151 F.3d 1036, 1039–1041 (D.C. Cir. 1998) (holding that PLRA does not apply to challenges to parole procedures or other habeas actions), *on reh'g*, 159 F.3d 591 (D.C. Cir. 1998); *Anderson v. Singletary*, 111 F.3d 801, 805 (11th Cir. 1997) (holding that the filing fee requirement of PLRA does not apply to IFP habeas petitions or appeals). But see *Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997) (stating that prisoners may not “cloak” civil actions as habeas/post-conviction cases). A habeas petition challenges your custody. Most courts hold you cannot challenge prison conditions in a federal habeas corpus claim. See, e.g., *Beardslee v. Woodford*, 395 F.3d 1064, 1068–1069 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005) (holding that a challenge to the *conditions* of the incarcerated person's confinement is more appropriately brought under 42 U.S.C. § 1983, not as a federal habeas claim). The main exceptions to this rule involve confinement, segregation, and disciplinary proceedings. Some courts have held that getting out of segregation, like getting out of prison entirely, may be sought by a habeas petition. See, e.g., *Medberry v. Crosby*, 351 F.3d 1049, 1053 (11th Cir. 2003) (finding that administrative segregation may be challenged through habeas action). Others have held that it cannot. See, e.g., *Montgomery v. Anderson*, 262 F.3d 641, 643–644 (7th Cir. 2001) (holding that habeas is improper because “segregation affects the severity rather than the duration of custody”). Disciplinary proceedings resulting in loss of good time instead of or in addition to placement in segregation must be challenged by petitioning for habeas corpus. See *Edwards v. Balisok*, 520 U.S. 641, 643–644, 117 S. Ct. 1584, 1587, 137 L. Ed. 2d 906, 911 (1997) (“[T]he sole remedy in federal court for a prisoner seeking restoration of good-time credits is a writ of habeas corpus”).

48. *Kincade v. Sparkman*, 117 F.3d 949, 950 (6th Cir. 1997) (examining the history and purpose of the Prison Litigation Reform Act); *United States v. Cole*, 101 F.3d 1076, 1077 (5th Cir. 1996) (determining that the absence of filing fees in the Antiterrorism and Effective Death Penalty Act shows that the PLRA was not meant to apply to motions to vacate under § 2255).

49. *Washington v. Los Angeles County Sheriff's Department*, 833 F.3d 1048, 1058–1059 (9th Cir. 2016) (adopting view of other circuits that mandamus is civil where the underlying action it is concerned with is civil but not where it is criminal); *In re Grant*, 635 F.3d 1227, 1230 (D.C. Cir. 2011) (holding “the filing-fee requirements of the PLRA apply to a petition for a writ of mandamus filed in connection with a civil proceeding in the district court,” though not addressing mandamus petitions about a criminal or habeas matter); *In re Steele*, 251 F. App'x 772, 772–773 (3d Cir. 2007) (per curiam) (*unpublished*) (holding “if a prisoner files a ‘mandamus petition’ that actually would initiate an appeal or a civil action, the PLRA applies”); *In re Smith*, 114 F.3d 1247, 1250 (D.C. Cir. 1997) (holding writ of prohibition in question was within the scope of PLRA because it contained “underlying claims that are civil in nature”); *In re Tyler*, 110 F.3d 528, 529 (8th Cir. 1997) (“[A] mandamus petition arising from an ongoing civil rights lawsuit falls within the scope of the PLRA.”); *In re Washington*, 122 F.3d 1345, 1345 (10th Cir. 1997) (determining that writs for mandamus are civil actions under PLRA). *Contra*, *Madden v. Myers*, 102 F.3d 74, 76 (3d Cir. 1996) (finding “a writ of mandamus is by its very nature outside the ambit of [PLRA] taxonomy”); *Martin v. United States*, 96 F.3d 853, 854 (7th Cir. 1996) (holding “a petition for mandamus in a criminal proceeding is not a form of prisoner litigation” and thus is not covered by PLRA); *In re Nagy*, 89 F.3d 115, 116 (2d Cir. 1996) (denying PLRA coverage “to writs directed at judges conducting criminal trials”).

50. See *United States v. Howell*, 354 F.3d 693, 695–696 (7th Cir. 2004) (holding that incarcerated people challenging administrative forfeiture are required to follow the limitations set by PLRA); *United States v. Jones*, 215 F.3d 467, 469 (4th Cir. 2000) (holding that a motion under the Federal Rule of Criminal Procedure 41(e) for the return of seized property is a civil action); *Lefkowitz v. Citi-Equity Group*, 146 F.3d 609, 612 (8th Cir. 1998) (concluding that “under the plain language of [PLRA], the phrase ‘civil action or appeal’ is not limited to challenges to conditions of confinement, and includes the instant commercial litigation.”); *Pena v. United States*, 122 F.3d 3, 4 (5th Cir. 1997) (holding that a motion under Federal Rule of Criminal Procedure 41(e) for the return of seized property is a “civil action” subject to the PLRA filing fee requirements).

Courts disagree about whether motions made within criminal prosecutions to address prison problems related to the prosecution are civil actions subject to PLRA provisions.⁵¹

The filing fees provisions apply only to “prisoners.” Under the PLRA, a “prisoner” is “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.”⁵² This definition applies to all PLRA provisions concerning litigation brought by “prisoners,” and it includes pretrial detainees,⁵³ military prisoners,⁵⁴ people in privately operated prisons and jails,⁵⁵ in juvenile facilities,⁵⁶ and in “halfway houses” (drug treatment programs), if the “prisoner” is in the program because of a criminal charge or conviction.⁵⁷ If you are in jail because of civil proceedings, you are not a “prisoner” under the PLRA,⁵⁸ unless you are civilly committed in

51. See *United States v. Mohamed*, 103 F.Supp.3d 281, 285–287 (E.D.N.Y. 2015) (holding district court in a criminal cases has jurisdiction despite the PLRA to consider a challenge to Special Administrative Measures (“SAMs”) affecting access to counsel and imposing isolation); *United States v. Savage*, NO.07-550-03, 2010 U.S. Dist. LEXIS, at *7–12 (E.D.Pa., Oct. 21, 2010) (*unpublished*); *United States v. Hashmi*, 621 F. Supp. 2d 76, 84–85 (S.D.N.Y. 2008); *United States v. Lopez*, 327 F. Supp. 2d 138, 140–142 (D.P.R. 2004) (finding that a motion challenging placement in administrative segregation after the government decided to seek the death penalty against the defendant was not a civil action). But see also *United States v. Antonelli*, 371 F.3d 360, 361 (7th Cir. 2004) (holding that a motion in a long-completed criminal case challenging a prison policy forbidding incarcerated people from keeping their pre-sentence reports should have been treated as a separate civil action); *United States v. Morales*, No. 4:13-CR-00200-MAC-CAN, 2017 WL 1457168, *2 (E.D.Tex., Mar. 20, 2017) (*unpublished*) (holding that a challenge to a separation order barring a criminal defendant from communicating with his brothers must be exhausted because it is about prison conditions, even though it was imposed by the Department of Justice and not the Bureau of Prisons), *report and recommendation adopted*, *United States v. Morales*, No. 4:13-CR-200, 2017 WL 1435222 (E.D.Tex., Apr. 20, 2017) (*unpublished*); *U.S. v. Schrenko*, No. 1:04-CR-568-CC-1, 2011 WL 13315132, *2 (N.D.Ga., Sept. 29, 2011) (*unpublished*) (vacating prior order requiring medical attention for detained defendant; holding defendant must exhaust before seeking relief in an “action” challenging the quality of her medical care); *United States v. Khan*, 540 F. Supp. 2d 344, 349–352 (E.D.N.Y. 2007) (finding PLRA and the PLRA’s exhaustion requirement applies to motion challenging SAMs and other pretrial jail restrictions).

52. 28 U.S.C. § 1915(b) (requiring prisoner to pay a filing fee); see also 28 U.S.C. § 1915(h) (defining “prisoner”).

53. *Kingsley v. Hendrickson*, 576 U.S. 389, 402 (2015) (noting “the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e, which is designed to deter the filing of frivolous litigation against prison officials, applies to both pretrial detainees and convicted prisoners”); *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 792 (9th Cir. 2018).

54. See *Marrie v. Nickels*, 70 F. Supp. 2d 1252, 1262 (D. Kan. 1999) (finding PLRA applies to military prisoners).

55. See, e.g., *Roles v. Maddox*, 439 F.3d 1016, 1017–1018 (9th Cir. 2006) (holding the PLRA applicable to people held in private prisons); *Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 993–994 (6th Cir. 2004) (also holding the PLRA applicable to people held in private prisons).

56. See *Troy D. v. Mickens*, 806 F.Supp.2d 758, 767 (D.N.J., Aug. 25, 2011) (holding the exhaustion requirement applies to juveniles who are incarcerated); *Lewis v. Gagne*, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003) (holding exhaustion requirement applies to juveniles); *Alexander S. v. Boyd*, 113 F.3d 1373, 1385 (4th Cir. 1997) (holding that the attorney fee limits apply to counsel representing juveniles who are incarcerated).

57. See *Jackson v. Johnson*, 475 F.3d 261, 266–267 (5th Cir. 2007) (holding that parolee in a halfway house, which he could not leave without permission as a result of his criminal conviction, was a prisoner); *Ruggiero v. County of Orange*, 467 F.3d 170, 174–175 (2d Cir. 2006) (holding that, despite state law, a “drug treatment campus” was a “jail, prison, or other correctional facility” under 42 U.S.C. § 1997e(a), even though state law said it was not a correctional facility, because that term “includes within its ambit all facilities in which prisoners are held involuntarily as a result of violating the criminal law”); *Witzke v. Femal*, 376 F.3d 744, 753 (7th Cir. 2004) (holding that an “intensive drug rehabilitation halfway house” was the equivalent of a “correctional facility” under PLRA).

58. See *Merryfield v. Jordan*, 584 F.3d 923, 927 (8th Cir. 2009) (holding a person civilly detained under a sexually violent predator statute was not subject to the PLRA); *Michau v. Charleston County, S.C.*, 434 F.3d 725, 727–728 (4th Cir. 2006) (same as *Merryfield*); *Andrews v. King*, 398 F.3d 1113, 1121–1122 (9th Cir. 2005) (stating that PLRA “three strikes” provision did not apply to dismissals of actions brought while a plaintiff was in INS custody “so long as the detainee did not also face criminal charges”); *Perkins v. Hedricks*, 340 F.3d 582, 583 (8th Cir. 2003) (holding that a person who was civilly detained in prison Federal Medical Center was not subject to the

connection with pending criminal charges. If you are civilly committed in connection with pending criminal charges, you are subject to the PLRA as a pretrial detainee.⁵⁹

Formerly incarcerated people who file complaints or notices of appeal after they are released are not considered “prisoners” under the PLRA and are not subject to PLRA rules in those proceedings.⁶⁰ People released on parole are not “prisoners,”⁶¹ unless they are paroled to a restrictive institutional setting where they continue to be “incarcerated or detained in [a] facility” during their period of parole for criminal violations.⁶² They are not bound by the PLRA’s filing fees and can apply for *in forma pauperis* status like any other free poor person. And if it is granted, they may move forward without any prepayment or installment payment of fees.

Incarcerated people who are released *after* they have filed suit generally remain subject to PLRA rules in that litigation, since those cases were brought by incarcerated people.⁶³ The filing fees provisions are different. They call for fees to be collected from an incarcerated persons’ institutional accounts, and an incarcerated person who is released no longer has an institutional account.

Some courts have therefore held that the formerly incarcerated person must move for IFP status like any other poor person.⁶⁴ Several others have held that any amount due from the period of

PLRA); *Kolocotronis v. Morgan*, 247 F.3d 726, 728 (8th Cir. 2001) (holding that a person committed after a finding of not guilty by reason of insanity is not a “prisoner” under the PLRA); *LaFontant v. INS*, 135 F.3d 158, 165 (D.C. Cir. 1998) (finding immigration detainees not “prisoners” subject to fee provisions of PLRA).

59. *See Kalinowski v. Bond*, 358 F.3d 978, 979 (7th Cir. 2004) (holding that persons committed under the Illinois Sexually Dangerous Persons Act while they wait their felony trials are pretrial detainees are subject to the PLRA).

60. *Olivas v. Nevada ex rel. Department of Corrections*, 856 F.3d 1281, 1283–1284 (9th Cir. 2017); *Lesesne v. Doe*, 712 F.3d 584, 586, 588 (D.C. Cir. 2013) (pretrial release); *Talamantes v. Leyva*, 575 F.3d 1021, 1023–1024 (9th Cir. 2009); *Cofield v. Bowser*, 247 F. App’x 413, 414 (4th Cir. 2007) (per curiam) (*unpublished*); *Norton v. The City of Marietta, OK*, 432 F.3d 1145, 1150 (10th Cir. 2005) (per curiam); *Nerness v. Johnson*, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam).

61. *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999) (per curiam) (noting that a parolee is not “incarcerated or detained”); *Kerr v. Puckett*, 138 F.3d 321, 322–23 (7th Cir. 1998); *Robinson v. Sheppard*, NO. H-11-3397, 2012 U.S. Dist. LEXIS 85245, *1 n.2 (S.D. Tex., June 20, 2012) (*unpublished*); *Connor v. California*, 1:10-cv-01967-AWI-GSA, 2011 U.S. Dist. LEXIS 45504, *3 (E.D. Cal., Apr. 27, 2011) (*unpublished*), *report and recommendation adopted*, *Connor v. California*, 1:10-cv-01967-AWI-GSA, 2011 U.S. Dist. LEXIS 77071 (E.D. Cal., July 15, 2011) (*unpublished*).

62. *Jackson v. Johnson*, 475 F.3d 261, 265–267 (5th Cir. 2007) (holding that parolee in a halfway house, which he could not leave without permission, was a prisoner, since his placement was pursuant to his criminal conviction); *Clemens v. SCI Albion*, No. 05-325 Erie, 2006 U.S. Dist. LEXIS 91543, at *5 (W.D. Pa., Dec. 19, 2006) (*unpublished*) (holding halfway house with random urine tests and limited visiting was an “other correctional facility”); *Fernandez v. Morris*, No. 08-CV-0601 H (PCL), 2008 U.S. Dist. LEXIS 54298, *2 (S.D. Cal., July 16, 2008) (*unpublished*) (holding plaintiff involuntarily confined in a drug program was a prisoner under the PLRA); *Clemens v. SCI Albion*, No. 05-325 Erie, 2006 U.S. Dist. LEXIS 91543, at *5 (W.D. Pa., Dec. 19, 2006) (*unpublished*) (holding prisoner confined to a “residential community corrections program” which was also a “minimum security work release facility” was a prisoner).

63. *Perez v. Westchester Cnty. Dept. of Corrections*, 587 F.3d 143, 154–155 (2d Cir. 2009) (discussing attorney’s fees provisions); *Harris v. City of New York*, 607 F.3d 18, 21–22 (2d Cir. 2010) (detailing three strikes provision); *Cox v. Mayer*, 332 F.3d 422, 425 (6th Cir. 2003) (explaining exhaustion requirement); *Harris v. Garner*, 216 F.3d 970, 973–976 (11th Cir. 2000) (en banc) (describing physical injury requirement); *Banos v. O’Guin*, 144 F.3d 883, 885 (5th Cir. 1998) (describing “imminent danger” exception to three strikes provision).

64. *Brown v. Eppler*, 725 F.3d 1221, 1231 & n.7 (10th Cir. 2013).

incarceration must be paid first.⁶⁵ Some have held that the need to pay ends on the prisoner's release.⁶⁶ Some have said that released prisoners must still pay the full filing fee, though they have differed about how to accomplish this.⁶⁷

C. The "Three Strikes" Provision

Filing fees are also affected by the "three strikes" provision. This is one of the harshest parts of the PLRA. It says:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.⁶⁸

65. *Robbins v. Switzer*, 104 F.3d 895, 899 (7th Cir. 1997) (holding that a formerly incarcerated person must provide an account statement as of release and pay any part of the filing fee that they could have paid before release. Afterwards, continuation under IFP provisions can be considered); *accord, In Re Smith*, 114 F.3d 1247, 1251-52 (D.C. Cir. 1997) (following *Robbins*; requiring incarcerated people who failed to submit account information or make payments before release to do so after release; stating plaintiff can rely on IFP provisions after satisfying pre-release obligation); *see Smalls v. State Bd. of Pardons and Paroles*, No. CV414-031, 2014 U.S. Dist. LEXIS 67133, *15–17 (S.D. Ga., May 15, 2014) (*unpublished*) (holding a formerly incarcerated person must ordinarily make all payments due up to release, holding this plaintiff didn't need to because his short incarceration made the amount de minimis; directing plaintiff to file a new IFP motion).

66. *See, e.g., DeBlasio v. Gilmore*, 315 F.3d 396, 398–399 (4th Cir. 2003) (holding that a formerly incarcerated person doesn't need to pay fees due before release because "[a] released prisoner should not have to shoulder a more difficult financial burden than the average indigent [poor] plaintiff in order to continue his lawsuit") (citations omitted); *McGann v. Comm'r, Soc. Sec. Admin.*, 96 F.3d 28, 29–30 (2d Cir. 1996) (holding that the PLRA fee requirements do not apply to a formerly incarcerated person, but dismissing the suit as frivolous).

67. *See Gay v. Tex. Dept. of Corr. State Jail Div.*, 117 F.3d 240, 242 (5th Cir. 1997) (holding that a formerly incarcerated person who filed a "notice to appeal" before his release from prison was required to pay the filing fees for the appeal, without explaining how it was to be collected without a prison account); *Vaughn v. Griesbach*, No. 17-cv-437-pp, 2018 U.S. Dist. LEXIS 39925, at*1 (E.D. Wis., Mar. 12, 2018) (*unpublished*) ("Because it appears that the plaintiff is now out of custody, however, the court cannot direct the institution to collect the filing fee according to 28 U.S.C. § 1915(b)(2). The court will require the plaintiff to make payments to the court as he is able."); *Kilgore v. Kendrick*, No. 5:17-cv-144-MTT-TQL, 2017 U.S. Dist. LEXIS 214413, at *2 (M.D. Ga., Oct. 17, 2017) (*unpublished*) (holding that after release, "plaintiff remains obligated to continue making monthly payments to the clerk toward the balance due until said amount has been paid in full"; authorizing collection "by any means permitted by law"); *report and recommendation adopted, Kilgore v. Kendrick*, No. 5:17-CV-144(MTT), 2018 U.S. Dist. LEXIS 2584 (M.D. Ga., Jan. 8, 2018) (*unpublished*); *Flynn v. Canlas*, No. 15-cv-2115 WQH (PCL), 2015 U.S. Dist. LEXIS 166493, *3–4 (S.D. Cal., Dec. 10, 2015) (*unpublished*) (holding that a released IFP incarcerated person must pay the full unpaid amount of the filing fee in installments "dependent on Plaintiff's post-release ability to pay"; directing plaintiff to file a supplemental IFP motion within 30 days since court lacks information about plaintiff's post-incarceration finances); *McColm v. California*, No. 1:14-cv-00580-RRB, 2015 U.S. Dist. LEXIS 23564, *3 (E.D. Cal., Feb. 26, 2015) (*unpublished*) (holding that released IFP incarcerated person must pay the full unpaid amount of the fee in order to proceed, without explaining why she can't seek new IFP status); *Murphy v. Maricopa County Sheriff's Office*, No. CV-05-2553-PHX-DGC (DKD), 2005 U.S. Dist. LEXIS 34828, at *1 (D. Ariz., Dec. 1, 2005) (*unpublished*) (holding a person who was released from prison must pay the entire filing fee within 30 days or show cause why they cannot).

68. 28 U.S.C. § 1915(g). As with the filing fees provisions discussed in the previous Section, this provision only applies to people who are incarcerated when they file suit. *See Brown v. Taylor*, 677 F. App'x 924, 931 (5th Cir. 2017) (*unpublished*) and cases cited (holding provision does not apply to person who was a civil detainee when they filed suit); *Kolocotronis v. Morgan*, 247 F.3d 726, 728 (8th Cir. 2001) (holding provision does not apply to person committed after finding of not guilty by reason of insanity).

This provision means that if you have had three actions or appeals dismissed as frivolous (lacking “an arguable basis either in law or fact”),⁶⁹ or malicious (filed for an improper purpose,⁷⁰ repetitive of other litigation,⁷¹ or otherwise abusive of the judicial process⁷²), you cannot file a new complaint or appeal *in forma pauperis* (“IFP”). The only exception is that you can file IFP if you can show that you are in “imminent danger of serious physical injury.” If you cannot file IFP, you have to pay the entire filing fee *up front*. If you can’t pay up front, your case will almost certainly be dismissed,⁷³ and you will still have to pay the fee in installments.⁷⁴ If you have not paid the fee, and the court rules that

69. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338, 347 (1989), *superseded by statute*, 28 U.S.C. §1915A(b). A claim may be legally frivolous if it fails to raise an “arguable question of law” or is based on an “indisputably meritless legal theory,” *Neitzke v. Williams*, 490 U.S. 319, 325, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 349 (1989), *superseded by statute*, 28 U.S.C. §1915A(b); or if the factual allegations in the complaint make it absolutely clear that the case is barred by a defense—for example, the statute of limitations has run, *see Street v. Vose*, 936 F.2d 38, 39 (1st Cir. 1991), or that the claim is barred by immunity, *Neitzke v. Williams*, 490 U.S. 319, 325, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348 (1989), *superseded by statute*, 28 U.S.C. §1915A(b), or by *res judicata*, *Magee v. Hamline University*, 775 F.3d 1057, 1058–1059 (8th Cir. 2015). A complaint is factually frivolous only if the “claims describ[e] fantastic or delusional scenarios,” *Neitzke v. Williams*, 490 U.S. 319, 325, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 349 (1989), *superseded by statute*, 28 U.S.C. §1915A(b), which means that “the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*, 504 U.S. 25, 33, 112 S. Ct. 1728, 1734, 118 L. Ed. 2d 340, 350 (1992), *superseded by statute on other grounds*, 28 U.S.C. §1915A(b)(1).

70. *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (stating a claim is malicious when “filed with the intention or desire to harm another” (citing *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005))); *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981) (per curiam) (complaint filed for purposes of vengeance and not to redress a legal wrong was malicious).

71. *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981) (per curiam) (“A complaint plainly abusive of the judicial process is properly typed malicious. . . . A complaint that merely repeats pending or previously litigated claims may be considered abusive, and a court may look to its own records to determine whether a pleading repeats prior claims.”). Repetitive litigation is not malicious in every instance, depending on the circumstances of each case. *See, e.g., Washington v. Los Angeles County Sheriff’s Dept.*, 833 F.3d 1048, 1060 (9th Cir. 2016) (holding a repetitive complaint “was not frivolous or malicious by virtue of being repetitive. . . . Rather, it reflects a *pro se* litigant’s inartful attempt to amend the first pleading, . . . by revising his requested relief and causes of action. . . .”).

72. *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998) (describing plaintiff’s misrepresentation of his prior litigation history on a complaint form as abusive), *abrogated on other grounds*, *Jones v. Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 921, 166 L. Ed. 2d 798, 813 (2007); *Arango v. Butler*, 14-61706-CIV-MORENO, 2014 U.S. Dist. LEXIS 129319, at *2 (S.D. Fla., Sept. 16, 2014) (holding failure to obey court orders to be abusive) (*unpublished*).

73. *See Flemming v. Fischer*, No. 9:09-CV-0005 (LEK), 2009 U.S. Dist. LEXIS 134065, at *1 (N.D.N.Y., July 15, 2009) (*unpublished*) (noting rejection of offer to pay in seven installments of \$50; granting final three-week extension to pay the entire fee); *Jones v. Federal Bureau of Prisons*, No. 5:07-cv-158, 2008 U.S. Dist. LEXIS 47775, at *3 (E.D. Tex. June 19, 2008) (*unpublished*) (rejecting request for a “payment plan,” since that would amount to proceeding IFP). One court has said that district courts have the ability to let a litigant with three strikes to pay fees over time, though the court did not exercise that ability. *See Dudley v. United States*, 61 Fed. Cl. 685, 688 (Fed. Cl. 2004). Some courts have granted incarcerated people some extra time to pay the fee. *See Watts v. Pickett*, No. 5:17-CV-38-DCB-MTP, 2018 U.S. Dist. LEXIS 193737, at *1 (S.D. Miss., Nov. 14, 2018) (*unpublished*) (after ordering payment of fee within 60 days and accepting two installment payments, the court granted another 30 days to pay the remaining \$150); *Wilkins v. Gonzalez*, No. 2: 16-cv-347 KJM KJN P, 2018 U.S. Dist. LEXIS 44048, at *1 (E.D. Cal., Mar. 14, 2018) (*unpublished*) (granting a one-time 30-day extension for an incarcerated person who had made a partial payment to pay the full balance of the fee). In addition, a notice of appeal filed on time grants appellate jurisdiction even if the filing fee is not paid on time, *see Daly v. United States*, 109 F. App’x 210, 212 (10th Cir. 2004) (*unpublished*), which may allow you additional time to pay the fee if you can’t do so within the 30 days allowed for a notice of appeal. One recent federal circuit decision holds that the court has ability to decide an appeal even if the filing fee has not been paid; *Isby v. Brown*, 856 F.3d 508, 520 (7th Cir. 2017). But do not count on getting an extension. Most likely, if you have received three strikes and cannot pay the fee quickly, your appeal will be dismissed.

74. *Jerelds v. Smith*, No. 1:07-cv-00111-MP-AK, 2008 U.S. Dist. LEXIS 21562, at *1 (N.D. Fla. Mar. 6, 2008) (*unpublished*) (stating that a plaintiff whose suit was dismissed for three strikes could not get a refund of his partial fee payment, “since by filing an action he agreed to a full payment of the filing fees”).

you are subject to the three strikes provision, most courts say you should still be given time to pay in order to avoid dismissal.⁷⁵ One court, however, has said that an incarcerated person who sought IFP status, even though he had already been found to have three strikes, had committed “a fraud on the federal judiciary,” and so his appeal was dismissed.⁷⁶ That same court has also held that a litigant with three strikes can be barred from filing any more papers in court until all previously incurred fees have been paid.⁷⁷ However, that rule cannot be extended to block IFP filings by incarcerated people who fit into the “imminent danger of serious physical injury” exception.⁷⁸

The three strikes rule makes it important to be sure that the facts in any complaint you file describe a specific violation of law. If you file lawsuits based just on your general feeling that someone has mistreated you, you will probably be given strikes and may not be able to proceed IFP in the future.

The three strikes provision, like the filing fees provisions, only applies to incarcerated people who are incarcerated when they file suit,⁷⁹ or when they file a notice of appeal.⁸⁰ It applies only to civil actions or appeals, and does not normally apply to habeas corpus or other challenges to criminal convictions or sentences.⁸¹

Rule 60(b) of the Federal Rules of Civil Procedure can sometimes be used to remove a strike from your record. However, courts only do this in unusual situations.⁸²

75. See *In re Alea*, 286 F.3d 378, 382 (6th Cir. 2002) (allowing 30 days to pay the filing fee); *Smith v. District of Columbia*, 182 F.3d 25, 29–30 (D.C. Cir. 1999) (stating that a person stopped from filing as a poor person has 14 days to pay the filing fee so his suit may continue); *Craig v. Cory*, No. 98-1128, 1998 U.S. App. LEXIS 26602, at *4 (10th Cir. Oct. 20, 1998) (*unpublished*) (holding that PLRA does not bar an incarcerated person with three strikes from suing, so long as they pay the filing fee); *Windham v. Franklin*, No. CV 16-5888-SVW (JEM), 2018 U.S. Dist. LEXIS 53503, at *4 n.1 (C.D.Cal., Jan. 25, 2018) (allowing 30 days to pay the filing fee) (*unpublished*, report and recommendation adopted, *Windham v. Franklin*, No. CV 16-5888-SVW (JEM), 2018 U.S. Dist. LEXIS 53503 (C.D.Cal., Mar. 22, 2018) (*unpublished*); *But see Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002) (holding a suit must be dismissed without prejudice and refiled, since the statute says fees must be paid when the suit starts).

76. *Sloan v. Lesza*, 181 F.3d 857, 859 (7th Cir. 1999) (“Litigants to whom [the three strikes provision] applies take heed! An effort to bamboozle the court by seeking permission to proceed *in forma pauperis* after a federal judge has held that § 1915(g) applies to a particular litigant will lead to immediate termination of the suit.”).

77. *Sloan v. Lesza*, 181 F.3d 857, 859 (7th Cir. 1999).

78. *Miller v. Donald*, 541 F.3d 1091, 1098–1099 (11th Cir. 2008). Subsection C(1)(a) below discusses that exception.

79. *Jackson v. Johnson*, 475 F.3d 261, 266–267 (5th Cir. 2007) (noting that people released on parole into the general public are not “prisoners” under PLRA, but holding that a person confined to a halfway house remained a prisoner subject to the three strikes rule); *Andrews v. King*, 398 F.3d 1113, 1121–1122 (9th Cir. 2005) (stating that PLRA “three strikes” rule did not apply to dismissals of actions brought while a plaintiff was in INS custody “so long as the detainee did not also face criminal charges”)

80. *Schuhaiber v. Illinois Dept. of Corrections*, --- F.3d ---, 2020 U.S. App. LEXIS 36389, *1–6 (7th Cir., Nov. 19, 2020) (holding a person who was incarcerated when he filed suit, but was no longer incarcerated when he appealed, was not subject to the three strikes provision on appeal).

81. See *Al-Pine v. Richerson*, 763 F. App’x 717, 718 (10th Cir. 2019) (*unpublished*) (holding habeas corpus petitions are not “civil actions” for purposes of 28 U.S.C. § 1915); *Jennings v. Natrona Cty. Det. Ctr. Med. Facility*, 175 F.3d 775, 779 (10th Cir. 1999); *In re Crittendom*, 143 F.3d 919, 920 (5th Cir. 1998) (deciding the character of a writ of mandamus depends on the underlying suit; here, because it was a civil action, the three strikes rule required the incarcerated person to pay the filing fee first). See Part B of this Chapter for the definition of civil actions.

82. See FED. R. CIV. P. 60(b) (stating that there are some instances where a court may “relieve a party or its legal representative from a final judgment, order, or proceeding”); see also *Ceara v. Clark-Dirusso*, No. 1:13-CV-3041-LAP, 2019 U.S. Dist. LEXIS 130620, at *4 (S.D.N.Y., Aug. 5, 2019) (*unpublished*) (changing a judgment of dismissal under Rule 60 where the incorrect citation of statute suggested it should be treated as a strike despite the lack of a finding the action was frivolous or malicious); *Dalvin v. Beshears*, 943 F. Supp. 578, 578–579 (D. Md. 1996) (holding plaintiff’s suit to get a standing order of the court was not frivolous for PLRA purposes because he believed it was the only way he could get it); . Prisoners who have been charged with a strike for failure to exhaust administrative remedies may wish to pursue this remedy in light of the Supreme Court’s decision that failure to exhaust under the PLRA is not a failure to state a claim. See *Jones v. Bock*, 549 U.S. 199, 213–215, 127 S. Ct.

The three strikes provision of the PLRA governs actions brought in federal court, but state courts don't necessarily have to follow it.⁸³ A poor person who is incarcerated with three strikes may prefer to file in state court if the state law permits. Most courts have held that if you file in state court, and the defendants remove the case to federal court, the case is not affected by Section 1915(g).⁸⁴ Section 1915(g) applies to those who "bring a civil action or appeal a judgment in a civil action or proceeding *under this section*," *i.e.*, litigants who invoked the federal IFP provisions when the case was "brought." A case brought in state court is not "brought under" those provisions, but rather under the state court's rules, whatever they may be.⁸⁵ When the defendants remove your case from state court to federal court, they are responsible for paying the federal court filing fee, and you are not asking for IFP status at that point, so Section 1915(g) is irrelevant. Most courts have also held that a removed case cannot be remanded to state court on the ground that the plaintiff has three strikes.⁸⁶ Some courts have resisted these conclusions because they believe prisoners are evading their obligations under Section 1915(g) by filing in state court,⁸⁷ ignoring the fact that as Section 1915(g) is written, it has no application to cases brought in state courts.⁸⁸

910, 920–921, 166 L. Ed. 2d 798, 812–813 (2007). For more information on exhaustion, see Part E of this Chapter.

83. *See* Woodson v. McCollum, 875 F.3d 1304, 1307 (10th Cir. 2017) (noting States may have less restrictive rules than § 1915(g)); Abdul-Akbar v. McKelvie, 239 F.3d 307, 314–315 (3d Cir. 2001) (en banc) (same); Abreu v. Kooi, No. 9:14-CV-1529 (GLS/DJS), 2016 U.S. Dist. LEXIS 120681, at *4 (N.D.N.Y., Aug. 4, 2016) (*unpublished*) (noting the absence of a § 1915(g)-type provision in New York State law), *report and recommendation adopted*, Abreu v. Kooi, No. 9:14-cv-1529 (GLS/DJS), 2016 U.S. Dist. LEXIS 120463 (N.D.N.Y., Sept. 7, 2016) (*unpublished*); Crooker v. U.S., No. 3:2009-206, 2009 U.S. Dist. LEXIS 126460, at *4 (W.D.Pa., Nov. 20, 2009) (*unpublished*) (noting lack of three strikes rule in Pennsylvania law); Lakes v. State, 333 S.C. 382, 386, n.2, 510 S.E.2d 228, 230, n.2 (S.C. Ct. App. 1998) (noting that South Carolina has no equivalent to PLRA's three strikes rule).

84. Woodson v. McCollum, 875 F.3d 1304, 1305 (10th Cir. 2017); Harris v. Mangum, 863 F.3d 1133, 1140–1141 (9th Cir. 2017).

85. Woodson v. McCollum, 875 F.3d at 1306; Blevins v. O'Malley, 2010 LEXIS 127589, at *1 n.2 (N.D. Ind., Dec. 2, 2010) (*unpublished*) (noting three-strike plaintiff had obtained a leave to proceed without payment of fees before removal); Pickett v. Hardy, No. 09–1116, 2010 U.S. Dist. LEXIS 110619, *4–9 (C.D. Ill., Oct. 18, 2010) (*unpublished*) (noting there was "no cause to consider the *in forma pauperis* statute" in removed case); Carrea v. California, No. EDCV 07-1148-CAS (MAN), 2010 U.S. Dist. LEXIS 1007902, at *8 (C.D. Cal., Aug. 25, 2010) (*unpublished*) (noting that state court IFP decision was governed by state law and federal court lacked power to revoke or change it after removal), *report and recommendation adopted*, Carrea v. California, No. EDCV 07-1148-CAS (MAN), 2011 U.S. Dist. LEXIS 68546 (C.D. Cal., June 23, 2011) (*unpublished*), *affirmed in part, vacated in part, remanded on other grounds*, Carrea v. California, 551 F. App'x 368 (9th Cir. 2014) (*unpublished*).

86. Lloyd v. Benton, 686 F.3d 1225, 1227–1228 (11th Cir. 2012); Lisenby v. Lear, 674 F.3d 259, 262–263 (4th Cir. 2012); *accord*, Johnson v. Rock, No. 9:14-CV-815 (DNH/ATB), 2014 U.S. Dist. LEXIS 178637, at *6–7 (N.D.N.Y., Dec. 31, 2014) (*unpublished*); Dotson v. Shelby County, No. 13-2766-JDT-tmp, 2014 U.S. Dist. LEXIS 95953, *19–23 (W.D. Tenn., July 15, 2014) (*unpublished*); Hartley v. Comerford, No. 3:13cv488/MCR/EMT, 2014 WL 241759, *5–6 (N.D. Fla., Jan. 22, 2014) (*unpublished*) (declining to remand on grounds not specified in the removal statute; § 1915(g) does not defeat removal jurisdiction).

87. *See, e.g.*, Crooker v. Global Tel Link, No. C.A. 11-229L, 2012 U.S. Dist. LEXIS 25183, *2 (D.R.I., Jan. 6, 2012) (dismissing removed case subject to the plaintiff's paying the filing fee and reinstating it, ignoring the statutory rule that *defendants* pay filing fee in removed cases), *report and recommendation adopted*, Crooker v. Global Tel Link, No. C.A. 11-229L, 2012 LEXIS 25185 (D.R.I., Feb. 28, 2012) (*unpublished*), *appeal dismissed*, No. 12-1318 (1st Cir., June 14, 2012); Mitchell v. Dallas County Sheriff Dept., No. 3:12-CV-1960-O-BK, 2012 U.S. Dist. LEXIS 186320, *4 (N.D. Tex., July 12, 2012) (*unpublished*) (punishing incarcerated person for filing in state court to avoid three strikes order), *supplemented*, Mitchell v. Dallas County Sheriff Dept., No. 3:12-CV-1960-O-BK, 2013 U.S. Dist. LEXIS 24609 (N.D. Tex., Jan. 7, 2013) (*unpublished*), *report and recommendation adopted*, Mitchell v. Dallas County Sheriff Dept., No. 3:12-CV-1960-O-BK, 2013 U.S. Dist. LEXIS 23420 (N.D. Tex., Feb. 20, 2013).

88. Abreu v. Kooi, No. 9:14-CV-1529 (GLS/DJS), 2016 U.S. Dist. LEXIS 120681, at *4 (N.D.N.Y., Aug. 4, 2016) (*unpublished*) ("Even if removal is foreseeable, a three strikes prisoner who files an action in state court is not thereby 'circumventing' the PLRA because the PLRA does not address prisoner filings in state court."), *report and recommendation adopted*, Abreu v. Kooi, No. 9:14-CV-1529 (GLS/DJS), 2016 U.S. Dist. LEXIS 120681 (N.D.N.Y., Sept. 7, 2016) (*unpublished*).

1. What is a Strike?

The PLRA is very specific about which dismissals count as strikes: dismissals for failure to state a claim, frivolousness, or maliciousness. “Failure to state a claim” means that even if all facts in your complaint are true, they still do not show a violation of law that the court could fix.⁸⁹ A legally “frivolous” suit is one that fails to raise an arguable question of law,⁹⁰ a suit based on an unsupported legal theory,⁹¹ or one that alleges as fact “fantastic or delusional scenarios.”⁹² A malicious suit is one filed for an improper purpose or one that is an abuse of the legal system.⁹³

A case dismissed on grounds other than frivolousness, maliciousness, or failure to state a claim is *not* a strike.⁹⁴ Dismissals on grounds such as lack of prosecution,⁹⁵ lack of jurisdiction,⁹⁶ or expiration of the statute of limitations⁹⁷ are not automatically strikes. They might be strikes if the court finds that the suit was frivolous or malicious, for example, if the claim of jurisdiction was so unfounded as to be frivolous, or the failure to prosecute had an improper purpose.

A case that is dismissed on summary judgment—which means there are no material disputes of fact—is generally not a strike.⁹⁸ It is important to know that lawyers who represent the government

89. *See* Jones v. Bock, 549 U.S. 199, 215, 127 S. Ct. 910, 920–921, 66 L. Ed. 2d 798, 812–813 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868, 874 (1957) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929) (holding that a claim does not require “detailed factual allegations,” but does require facial plausibility).

90. Neitzke v. Williams, 490 U.S. 319, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 349 (1989).

91. Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348 (1989).

92. Neitzke v. Williams, 490 U.S. 319, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348 (1989).

93. *See* Pittman v. Moore, 980 F.2d 994, 994–995 (5th Cir. 1993) (stating that repetitive litigation is malicious); Spencer v. Rhodes, 656 F. Supp. 458, 464 (E.D.N.C. 1987) (holding that a case started out of desire for vengeance and not to remedy a violation of legal rights was malicious), *aff’d*, Spencer v. Rhodes, 826 F.2d 1061 (4th Cir. 1987). Please see footnote 70 in Part C of this Chapter for the definition of maliciousness.

94. *See* Harris v. Harris, 935 F.3d 670, 674 (9th Cir. 2019) (holding policy concerns, however warranted, cannot justify expanding the statute’s reach beyond its plain language); Daker v. Commissioner, Georgia Department of Corrections, 820 F.3d 1278, 1283–1284 (11th Cir. 2016) (“Three specific grounds render a dismissal a strike: . . . Under the negative-implication canon, these three grounds are the only grounds that can render a dismissal a strike.” (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 107–111 (2012))), *cert. denied*, Daker v. Commissioner, Georgia Department of Corrections, 137 S. Ct. 1227 (2017); Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007) (refusing to treat an appeal dismissed as premature as a strike, stating the PLRA “was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws”); Fortson v. Kern, No. 05-CV-73223-DT, 2005 U.S. Dist. LEXIS 38466, at *4–5 (E.D. Mich. Dec. 19, 2005) (*unpublished*) (holding dismissal for failure to pay initial filing fee is not a strike); Maree-Bey v. Williams, No. 04-1759 (RCL), 2005 U.S. Dist. LEXIS 35722, at *7 (D.D.C. Aug. 1, 2005) (*unpublished*) (holding that dismissal under Rule 8 of the Federal Rules of Civil Procedure is not a strike).

95. Butler v. Dept. of Justice, 492 F.3d 440, 443–445 (D.C. Cir. 2007) (holding that dismissal for lack of prosecution is not a strike); Harden v. Harden, No. 8:07CV68, 2007 U.S. Dist. LEXIS 56922, at *3 (D. Neb. Aug. 3, 2007) (*unpublished*) (holding that dismissals for lack of jurisdiction or failure to prosecute are not strikes).

96. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 440 (D.C. Cir. 2007) (holding that “[d]ismissals for lack of jurisdiction do not count as strikes unless the court expressly states that the action or appeal was frivolous or malicious.”); *see also* Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007) (holding that dismissal for a jurisdictional flaw resulting from premature filing does not warrant a strike).

97. Myles v. United States, 416 F.3d 551, 553 (7th Cir. 2005) (noting that dismissal based on statute of limitations is not a strike since it is based on an affirmative defense). If a statute of limitations defense, or other defense, is evident on the face of the complaint, the complaint may fail to state a claim. Jones v. Bock, 549 U.S. 199, 215, 127 S. Ct. 910, 920, 166 L. Ed. 2d 798, 812 (2007).

98. *See* Stallings v. Kempker, No. 04–1585, 2004 U.S. App. LEXIS 19312, at *4 (8th Cir. Sep. 24, 2004) (*unpublished*) (modifying a judgment to remove the strike from a case ended by summary judgment); Chappell v. Pliler, No. CIV S–04–1183 LKK DAD P, 2006 U.S. Dist. LEXIS 92538, at *9 (E.D. Cal. Dec. 21, 2006) (*unpublished*) (stating that “[t]he granting of summary judgment on some claims precludes a determination that the case was dismissed for failure to state a claim on which relief could be granted”), *recommendation adopted*, Chappell v. Pliler, No. CIV S–04–1183 LKK DAD P, 2007 U.S. Dist. LEXIS 5984 (E.D. Cal. Jan. 26, 2007).

often improperly file motions to dismiss for failure to state a claim in cases that raise disputed material. In such a case you must show that the case raises material factual disputes and that defendants may only pursue dismissal by way of a motion for summary judgment.⁹⁹ That way, even if you lose, you will lose by summary judgment, and it will usually not count as a strike. If, however, your suit is dismissed for failure to state a claim, you will get a strike.

The failure to exhaust administrative remedies is not a failure to state a claim unless it is clear from the complaint itself that you did not exhaust.¹⁰⁰ This means that if your suit is dismissed for non-exhaustion it should not be a strike unless the dismissal is based solely on what you wrote in your complaint about exhaustion.¹⁰¹ Courts have differed over whether a dismissal for non-exhaustion that was a strike under the law at the time of the dismissal should still continue to be a strike.¹⁰² Most courts have held a partial dismissal—an order throwing out some claims or some defendants, but letting the rest of the case go forward—is not a strike.¹⁰³ A case is also not a strike if some of the claims are dismissed on grounds specified in Section 1915(g) (failure to state a claim, frivolousness, or maliciousness) but other claims in the lawsuit are dismissed on other grounds.¹⁰⁴ Two circuits have

(*unpublished*).

99. Motions to dismiss for failure to state a claim are distinct from motions for summary judgment as a matter of law. *Compare* FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted) *with* FED. R. CIV. P. 56 (summary judgment). In deciding a motion to dismiss, a judge will only look at the plaintiff's complaint to determine if the plaintiff stated a legal claim. In deciding a motion for summary judgment, a judge may look at any facts provided by either the plaintiff or the defendant. For more information on the difference between a motion to dismiss for failure to state a claim and a motion for summary judgment, see *JLM* Chapter 6, "An Introduction to Legal Documents."

100. *Jones v. Bock*, 549 U.S. 199, 212–213, 127 S. Ct. 910, 920–921, 166 L. Ed. 2d 798, 812–813 (2007) ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense.").

101. Some courts have held a case dismissed for non-exhaustion is a strike because it seeks "relief to which [the plaintiff] is not entitled" and is therefore frivolous. *See, e.g.,* *Wallmark v. Johnson*, No. 2:03-CV-0060, 2003 U.S. Dist. LEXIS 7088, at *4 (N.D. Tex. Apr. 28, 2003) (*unpublished*). You can argue that these courts are wrong because an unexhausted case does not necessarily fail to raise "an arguable question of law" or rest on an "indisputably meritless legal theory," which, as discussed above, is what "frivolous" means. Further, as the Second Circuit has said, PLRA "was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws." *Tafari v. Hues*, 473 F.3d 440, 443 (2d Cir. 2007). Of course, if you have an argument that what you did should have satisfied the exhaustion requirement or that no administrative remedy was really available to you, that case should not be seen as frivolous and should not be treated as a strike.

102. *Compare* *Strope v. Cummings*, 653 F.3d 1271, 1274 (10th Cir. 2011) (holding that *Jones v. Bock* does not apply retroactively and that past claims which have been dismissed for failure to state a claim based on non-exhaustion are still strikes) *with* *Hale v. Collier*, 690 F. App'x 247, 248 (5th Cir. 2017) (per curiam) (*unpublished*) (holding a partial dismissal which would have been a strike under prior law should not be treated as one since the law had changed); *Richey v. Dahne*, 807 F.3d 1202, 1207–1208 (9th Cir. 2015) (holding dismissal that was formerly a strike should no longer be treated as one because the law had changed); *Feathers v. McFaul*, 274 F. App'x 467, 468–469 (6th Cir. 2008) (*unpublished*) (holding dismissals for failure to plead exhaustion, previously treated as strikes, should no longer be so treated because the law had changed so plaintiffs were not required to plead exhaustion).

103. *Escalera v. Samaritan Vill.*, 938 F.3d 380, 381–382 (2d Cir. 2019) (per curiam) ("The plain language of § 1915(g) defines a strike as 'an action or appeal' that was dismissed on an enumerated ground, not as an individual claim that was dismissed as frivolous, malicious, or for failure to state a claim."); *Taylor v. First Medical Management*, 508 F. App'x 488 (10th Cir. 2012) (*unpublished*) ("Even if an action only has one meritorious claim amidst a sea of frivolous ones, the case cannot count as a § 1915(g) strike."); *Tolbert v. Stevenson*, 635 F.3d 646, 651 (4th Cir. 2011); *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 432 (D.C. Cir. 2007) (noting that statute does not apply to actions "containing at least one claim falling within none of the three strike categories,").

104. *See Harris v. Harris*, 935 F.3d 670, 675 (9th Cir. 2019) ("But we evaluate the 'case as a whole' and dismissal of even one claim for an unenumerated reason saves the entire case from counting as a strike."); *Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2010) (holding that a case is not a strike when some claims are dismissed for failure to state a claim but others are resolved on the merits); *Juarez v. Frank*, No. 05–C–738–C, 2006 U.S. Dist. LEXIS 571, at *14 (W.D. Wis. Jan. 6, 2006) (*unpublished*) (holding that where state law claim was dismissed because court declined to exercise supplemental jurisdiction, case was not a strike); *Fortson v. Kern*, No. 05–CV–73223–DT, 2005 U.S. Dist. LEXIS 38466, at *4–5 (E.D. Mich. Dec. 19, 2005) (*unpublished*) (holding that a case

held that a dismissal can be a strike if part of the case is dismissed on “three strikes grounds,” and the rest of it is dismissed for failure to exhaust administrative remedies,¹⁰⁵ though there is no discernible basis in the statute for treating exhaustion-related dismissals differently from other dismissals not set out in Section 1915(g).

A case that you voluntarily withdraw is not a strike.¹⁰⁶ An action that was never accepted for filing cannot be a strike.¹⁰⁷ Only *federal* court dismissals count as strikes, since a state court is not a “court of the United States” under the statute.¹⁰⁸

A motion filed in an existing case and then denied is not a strike.¹⁰⁹ The Supreme Court has held that dismissals on the enumerated § 1915(g) grounds are strikes even if they are without prejudice.¹¹⁰ A dismissal under Rule 8 of the Federal Rules of Civil Procedure, meaning the complaint was not understandable, may be a strike if the plaintiff repeatedly fails to correct it.¹¹¹ If a dismissed case is re-filed in a separate action (for example, with a new complaint used to correct the problems that led

deemed frivolous as to one defendant and otherwise dismissed for failure to pay filing fee was not a strike); *Barela v. Variz*, 36 F. Supp. 2d 1254, 1259 (S.D. Cal. 1999) (holding that a case was not a strike where some claims were dismissed for failure to state a claim and defendants were granted summary judgment in others). *But see* *Jones v. Cimarron Corr. Facility*, No. CIV-04-1361-F, 2005 U.S. Dist. LEXIS 21982, at *4 (W.D. Okla. Aug. 25, 2005) (*unpublished*) (holding that a case was a strike even though one claim was dismissed without prejudice for failure to exhaust).

105. *Thomas v. Parker*, 672 F.3d 1182, 1184 (10th Cir. 2012); *Pointer v. Wilkinson*, 502 F.3d 369, 376 (6th Cir. 2007).

106. *Carbajal v. McCann*, 808 F. App’x 620, 630 (10th Cir. 2020) (*unpublished*); *Andrews v. Persley*, 669 F. App’x 529, 530 (11th Cir. 2016); *Tiedemann v. Church of Jesus Christ of Latter Day Saints*, 631 F. App’x 629, 631 (10th Cir. 2015) (*unpublished*); *Tolbert v. Stevenson*, 635 F.3d 646, 654 (4th Cir. 2011). Some courts have held that an incarcerated person who receives a magistrate judge’s recommendation for dismissal cannot avoid a strike by dismissing voluntarily. *See, e.g., Johnson v. Edlow*, 37 F. Supp. 2d 775, 776–778 (E.D. Va. 1999); *Sumner v. Tucker*, 9 F. Supp. 2d 641, 644 (E.D. Va. 1998). More recent decisions have rejected this idea. *Andrews v. Persley*, 669 F. App’x at 530; *Aldrich v. United States*, No. 13-12085-NMG, 2015 U.S. Dist. LEXIS 94098, at *3–*4 (D. Mass. July 17, 2015) (*unpublished*).

107. *Wilson v. Yaklich*, 148 F.3d 596, 603 (6th Cir. 1998) (finding cases never filed do not count as strikes).

108. *Harris v. Mangum*, 863 F.3d 1133, 1140–1141 (9th Cir. 2017); *Rambert v. Krasner*, No. 19-CV-5249, 2020 U.S. Dist. LEXIS 3346 at *13 (E.D. Pa. Jan. 9, 2020) (*unpublished*); *Moffit v. Fagerman*, No. 1:18-cv-916, 2018 U.S. Dist. LEXIS 154168 at *12 (W.D. Mich. Sept. 11, 2018) (*unpublished*); *D’Amico v. Montoya*, No. 4:14cv127-MW/CAS, 2016 U.S. Dist. LEXIS 91785 at *6 (N.D. Fla. June 13, 2016) (*unpublished*, *report and recommendation adopted*); *D’Amico v. Montoya*, No. 4:14cv127-MW/CAS, 2016 U.S. Dist. LEXIS 91776 (N.D. Fla., July 14, 2016) (*unpublished*); *Townsel v. Washington State Dept. of Corrections*, No. 12-CV-5095-JTR 2013 U.S. Dist. LEXIS 150281 at *5 (E.D. Wash. Oct. 11, 2013) (*unpublished*) (“Because this case was originally filed in Walla Walla County Superior Court, the dismissal of Plaintiff’s claims does not result in a strike under § 1915(g).”); *Miller v. John Doe*, No. 05-C-185, 2005 WL 1308408 at *1 (E.D. Wis. May 31, 2005) (*unpublished*) (holding that actions dismissed from state and local courts cannot be strikes); *Freeman v. Lee*, 30 F. Supp. 2d 52, 54 (D.D.C. 1998).

109. *Ortiz v. Kelly*, No. 3:05-CV-00113-LRH-VPC, 2010 U.S. Dist. LEXIS 100328 at *4–5 (D. Nev., Sept. 20, 2010) (*unpublished*) (holding denial of a temporary restraining order was not a strike); *Belton v. U.S.*, No. 07-C-925, 2008 U.S. Dist. LEXIS 68964 at *33 (E.D. Wis. June 2, 2008) (*unpublished*) (holding a decision on a motion under Rule 60(b) is not a strike; statute “does not apply to motions, only ‘actions’ or ‘appeals’”).

110. *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 207 L. Ed.2d 132 (2020).

111. *Knapp v. Hogan*, 738 F.3d 1106, 1110 (9th Cir. 2013) (“We hold that dismissals following the repeated violation of Rule 8(a)’s ‘short and plain statement’ requirement, following leave to amend, are dismissals for failure to state a claim under § 1915(g). . . . When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply cannot state a claim.”); *Paul v. Marberry*, 658 F.3d 702, 705 (7th Cir. 2011) (holding that a complaint that is “irremediably unintelligible” and is not corrected gives rise to an inference that the plaintiff cannot state a claim). *Contra*, *Carbajal v. McCann*, 808 F. App’x 620, 629 (10th Cir. 2020) (*unpublished*) (declining to find a strike where an action was dismissed for failure to prosecute for failing to correct a Rule 8 violation); *Maree Bey v. Williams*, No. 04-1759 (RCL), 2005 U.S. Dist. LEXIS 35722 at *5 (D.D.C. Aug. 1, 2005) (*unpublished*) (holding a Rule 8 violation is not a strike because § 1915(g) does not list such dismissals as strikes).

to dismissal), rather than by amending the original complaint, and is then dismissed again, you will receive a second strike.¹¹²

A dismissal is not a strike if the reason for it cannot be determined.¹¹³ Some older decisions have held that incarcerated people should not be given a strike based on law that was unclear or that changed after they filed.¹¹⁴

Dismissals may be strikes even if they were not IFP cases.¹¹⁵ Courts have also counted as strikes cases filed or dismissed before the enactment of the PLRA.¹¹⁶ A dismissal in a habeas corpus action is not a strike, unless it is a “misabeled” 42 U.S.C. § 1983 action (that is, a civil rights claim, and not a habeas corpus action).¹¹⁷ Courts have sometimes treated these incorrectly filed habeas petitions as Section 1983 cases and gone forward with them in adjudication as if they were Section 1983 cases.¹¹⁸ But courts have warned that this should not be done automatically since there may be significant consequences (like being charged a strike and having to pay the higher civil action filing fee) and incarcerated people ought to have a chance to think over whether they want to proceed.¹¹⁹ Most courts

112. See *Orr v. Clements*, 688 F.3d 463, 465–466 (8th Cir. 2012) (finding that two strikes was appropriate since there were two separate actions with separate complaints and separate case numbers).

113. See *Williams v. PA Department of Corrections*, 695 F. App'x 654, 656–657 (3d Cir. 2017) (per curiam) (*unpublished*) (noting that no case of the plaintiff's could be identified that “conclusively qualifies as a strike”); *Andrews v. King*, 398 F.3d 1113, 1120 (9th Cir. 2005) (holding that, where defendants want to show a plaintiff had three strikes, they must produce court records or documentation to allow district courts to determine whether a prior case was dismissed because it was “frivolous, malicious, or failed to state a claim,” and where docket records do not reflect “the basis for dismissal ... the defendants may not simply [rely] on the fact of dismissal [alone].”); *Lyons v. Beard*, No. 1:13-CV-2952, 2014 U.S. Dist. LEXIS 71123 at *13 (M.D.Pa., May 23, 2014) (*unpublished*) (holding ambiguous docket records did not establish that dismissals were strikes); *Deen-Mitchell v. Lappin*, NO. 1:09-cv-02069-RJL, 2010 U.S. Dist. LEXIS 59355, at *2–*3 (D.D.C., June 8, 2010) (*unpublished*) (holding docket summary which did not rule out non-§ 1915(g) reasons for dismissal did not establish a strike); *Freeman v. Lee*, 30 F. Supp. 2d 52, 54 (D.D.C. 1998) (finding there was no strike because since the order dismissing the prisoner's action did not explain the reason for dismissal, the court refused to assume it was eligible for a strike, stating that “[the court] is unaware of any principle that would permit [it] to presume that the dismissal was on one of the grounds referenced in § 1915(g).”).

114. See, e.g., *Clemente v. Allen*, 120 F.3d 703, 705 n.1 (7th Cir. 1997) (holding appeal was not a strike in the absence of published law on the question before the court); *Hairston v. Falano*, No. 99-C-2750, 1999 U.S. Dist. LEXIS 9027, at *3–4 (N.D. Ill. May 28, 1999) (*unpublished*) (holding dismissal of plaintiff's claim based on a later Supreme Court decision was not a strike since it had stated a valid civil rights claim *at the time it was filed*).

115. See *Belanus v. Clark*, 796 F.3d 1021, 1028–1030 (9th Cir. 2015); *Byrd v. Shannon*, 715 F.3d 117, 122–124 (3d Cir. 2013); *Burghart v. Corrections Corp. of America*, 350 F. App'x 278, 279 (10th Cir. 2009) (*unpublished*); *Hyland v. Clinton*, 3 F. App'x 478, 479 (6th Cir. 2001) (*unpublished*); *Duvall v. Miller*, 122 F.3d 489, 490 (7th Cir. 1997) (holding that “a dismissal need not, to qualify as a strike, be of an action or appeal filed [IFP].”). *Contra*, *Jones v. Moorjani*, No. 13 Civ. 2247 (PAC) (JLC), 2013 U.S. Dist. LEXIS 175290 at *26–36 (S.D.N.Y. Dec. 13, 2013) (*unpublished*), *report and recommendation adopted*, *Jones v. Moorjani*, No. 13 Civ. 2247 (PAC) (JLC) 2014 U.S. Dist. LEXIS 12664 (S.D.N.Y. Jan. 31, 2014) (*unpublished*).

116. See, e.g., *Ibrahim v. District of Columbia*, 208 F.3d 1032, 1036 (D.C. Cir. 2000); *Welch v. Galie*, 207 F.3d 130, 131 (2d Cir. 2000) (holding that lawsuits filed before Section 1915(g) was enacted can still count as strikes); *Wilson v. Yaklich*, 148 F.3d 596, 602–604 (6th Cir. 1998) (rejecting retroactivity-based challenge to counting pre-PLRA dismissals as strikes); *Rivera v. Allin*, 144 F.3d 719, 730–31 (11th Cir. 1998).

117. *El-Shaddai v. Zamora*, 833 F.3d 1036, 1047 (9th Cir. 2016); *Jones v. Smith*, 720 F.3d 142, 147–148 (2d Cir. 2013) (holding dismissal of habeas petition or of appeal in a habeas proceeding is not a strike; expressing no view as to habeas petitions directed to conditions of confinement); *Andrews v. King*, 398 F.3d 1113, 1122–1123, 1123 n.12 (9th Cir. 2005).

118. See *Carson v. Johnson*, 112 F.3d 818, 819 (5th Cir. 1997) (construing habeas corpus petition as a Section 1983 case).

119. *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999) (dismissing habeas corpus actions and indicating plaintiffs may re-file complaints as civil rights claims); *Reed v. Paramo*, No. 1:17-cv-01347-AWI-MJS (HC), 2017 U.S. Dist. LEXIS 192949, at *5 (E.D. Cal. Nov. 21, 2017) (*unpublished*); *Raia v. Aviles*, No. 11-3374 (WJM), 2011 U.S. Dist. LEXIS 74940, at *4 (D.N.J. July 6, 2011) (*unpublished*); *Brock v. White*, No. 2:09-CV-14005, 2011 U.S. Dist. LEXIS 44145, at *9 (E.D. Mich. Apr. 25, 2011) (*unpublished*).

have held that civil rights actions dismissed because they should have been filed as habeas corpus petitions (“*Heck*-barred” cases) are strikes,¹²⁰ but some have disagreed.¹²¹ One federal circuit has taken a more analytical approach, noting that *Heck*-barred cases are not all frivolous; some incarcerated people may have claims that are valid even if they have been brought prematurely. A *Heck*-barred action may be a strike only “when the pleadings present an ‘obvious bar to securing relief’ under *Heck*,” and only if the entire case can be dismissed under *Heck*.¹²²

In a class action, only named plaintiffs, and not unnamed class members, are subject to the three strikes provision.¹²³

The statute refers only to previous actions brought “while [the plaintiff is] incarcerated or detained” as claims which can result in a strike.¹²⁴

Appeals count as strikes under Section 1915(g) only if they are “dismissed . . . [as] frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted.”¹²⁵ It is usually not enough for an appeals court to simply affirm a district court decision that dismissed under Section 1915(g).¹²⁶

120. *Heck*-barred refers to the Supreme Court decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L. Ed. 2d 383 (1994). See, e.g., *In re Jones*, 652 F.3d 36, 38–39 (D.C. Cir. 2011) (per curiam) (holding *Heck*-barred claim fails to state a claim and is therefore a strike); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011) (citing *Davis v. Kan. Dept. of Corr.*, 507 F.3d 1246, 1248, 1249 (10th Cir. 2007)); *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996) (holding *Heck*-barred claim was frivolous); *Schafer v. Moore*, 46 F.3d 43, 45 (8th Cir. 1995) (“[I]n light of *Heck*, the complaint was properly dismissed for failure to state a claim.”); *Wright v. East Point Police Dept.*, No. 1:12-CV-2062-TWT, 2014 WL 1908648, *2 n.4 (N.D. Ga. May 12, 2014) (*unpublished*) (“A dismissal based on the prematurity of a civil rights action counts as a strike.”); *Sharp v. Montana*, No. CV 13–88–GF–DWM, 2014 WL 824820, *6 (D. Mont. Mar. 3, 2014) (*unpublished*) (noting “the Supreme Court in *Heck* stated its ruling was based on a denial of ‘the existence of a cause of action’”); *Berner v. Hill*, No. 1:11-cv-1373, 2012 U.S. Dist. LEXIS 29349, at *4 (W.D.Mich., Mar. 6, 2012) (*unpublished*).

121. See, e.g., *Mejia v. Harrington*, 541 F. App’x 709, 710 (7th Cir. 2013) (*unpublished*) (stating “*Heck* and *Edwards* [v. *Balisok*] deal with timing rather than the merits of litigation” so dismissal under them is not a strike); *McCotter v. Repischak*, No. 12-CV-314-JPS, 2012 U.S. Dist. LEXIS 81701, at *8 (E.D. Wis., June 13, 2012) (*unpublished*) (holding “because the plaintiff may pursue a separate petition for a writ of habeas corpus, . . . the plaintiff will not incur a strike under 28 U.S.C. § 1915(g).”); see also *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 n.2, 207 L.Ed.2d 132, 136 n.2 (2020) (acknowledging circuit split over whether dismissals as *Heck*-barred are for failure to state a claim).

122. *Washington v. Los Angeles Cty. Sheriff’s Dept.*, 833 F.3d 1048, 1055–1057 (9th Cir. 2016).

123. *Spotts v. Jones*, No. 1:18-CV-41, 2018 U.S. Dist. LEXIS 141168, at *1 (E.D. Tex. Aug. 20, 2018) (*unpublished*); *Meisberger v. Donahue*, 245 F.R.D. 627, 630 (S.D. Ind. 2007).

124. 28 U.S.C. § 1915(g). See *Arvie v. Lastrapes*, 106 F.3d 1230, 1232 (5th Cir. 1997) (*per curiam*) (remanding to determine whether the plaintiff was a prisoner when he filed his previous actions such that he would have three strikes under Section 1915(g)); *Robbins v. Switzer*, 104 F.3d 895, 897 (7th Cir. 1997) (holding dismissal would count as strike if ex-prisoner ever returns to prison, but his appeals outside of his time in prison did not count).

125. 28 U.S.C. § 1915(g). Compare *Newlin v. Helman*, 123 F.3d 429, 433 (7th Cir. 1997), *overruled on other grounds by Walker v. O’Brien*, 216 F.3d 626 (7th Cir. 2000) (holding that a frivolous appeal of a dismissed claim counts as a second strike, since “bringing an action and filing an appeal are separate acts.”), with *Andrews v. King*, 398 F.3d 1113, 1120–1121 (9th Cir. 2005) (holding that an appeal dismissed for lack of jurisdiction was not necessarily a strike, since the lower court did not perform an independent assessment to determine if it was frivolous or malicious as required under Section 1915(g)).

126. See, e.g., *Ladeairous v. Sessions*, 884 F.3d 1172, 1175–1176 (D.C. Cir. 2018); *El-Shaddai v. Zamora*, 833 F.3d 1036, 1045 (9th Cir. 2016); *Ball v. Famiglio*, 726 F.3d 448, 464 (3d Cir. 2013); *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 436 (D.C. Cir. 2007) (“[Congress’s] choice of the word ‘dismiss’ rather than ‘affirm’ in relation to appeals was unlikely an act of careless draftsmanship.”); *Jennings v. Natrona County Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999), *overruled on other grounds by Coleman v. Tollefson* 135 S. Ct. 1759, 191 L. Ed. 2d 803 (2015) (“Under the plain language of the statute, only a dismissal may count as strike, not the affirmance of an earlier decision to dismiss.”); *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 135 S. Ct. 1759, 191 L. Ed. 2d 803 (2015) (“It is straightforward that affirmance of a district court dismissal as frivolous counts as a single ‘strike.’”). One federal appeals court has taken a different view. The Seventh Circuit has held that “the appeal following a frivolous complaint is yet another ‘strike.’” *Kalinowski v. Bond*, 358 F.3d 978, 979 (7th Cir. 2004), without distinguishing between affirmance and dismissal of the appeal. The court in *Kalinowski* noted its view that the appeal too was

The appeals court itself must dismiss under Section 1915(g). An appeal dismissed on grounds not related to Section 1915(g) does not count as an additional strike. Even if the district court decision that you appealed counts as a strike, if the appeals court dismisses the appeal on any grounds other than Section 1915(g), the appeals court decision should not count as a strike.¹²⁷

A dismissal on the grounds enumerated in § 1915(g) takes effect as a strike immediately. Many courts held that dismissals only become strikes when all appeals are exhausted or waived, but the Supreme Court rejected that position.¹²⁸ The Supreme Court left open the question whether its decision means that an incarcerated person who receives a third strike in the district court is barred from IFP status in appealing that district court decision. Lower court decisions on the point are divided.¹²⁹ The Seventh Circuit had previously said this problem is a non-problem, since incarcerated people have “a perfectly good remedy” in the appeals court itself: seek IFP status from the appeals court, which in the course of deciding whether the incarcerated person actually does have three strikes will review the correctness of the district court’s determination, at least to the extent of determining whether the appeal should be allowed to go forward.¹³⁰

The defendants (or the court) have the burden of providing evidence to show that you have three strikes. If they do, the burden shifts to you to show that you do not have three strikes.¹³¹ Defendants do not meet their burden just by showing dismissals. They must also show that the reason for each dismissal was a failure to state a claim, frivolousness, or maliciousness.¹³² This may be done with docket entries *if* those entries actually show that cases were dismissed on Section 1915(g) grounds.¹³³

frivolous. *Id.* However, it affirmed the decision below, rather than dismissing the appeal. The practice in the Seventh Circuit is to treat appellate affirmances of district court dismissals on the § 1915(g) grounds as strikes. *See, e.g.,* Ealy v. Griffin, 803 F. App’x 41, 43 (7th Cir. 2020) (*unpublished*) (affirming dismissal for failure to state a claim, declaring affirmance a strike); Kupsy v. Outagamie Cty., 747 F. App’x 431, 432 (7th Cir. 2019) (*unpublished*) (same). This practice contradicts the statutory language, which counts as strikes only an action or appeal “dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(g) (emphasis supplied).

127. *See, e.g.,* Tafari v. Hues, 473 F.3d 440, 442–444 (2d Cir. 2007) (holding an appeal dismissed as premature does not count as a strike); Cosby v. Knowles, No. 97-1400, 1998 U.S. App. LEXIS 7845, at *4–5, 145 F.3d 1345 (10th Cir. Apr. 23, 1998) (*unpublished*) (noting that dismissal based on denial of IFP status, not the merits, is not a strike even though merits were frivolous); Perkins v. Lora, No. 11-10794, 2011 U.S. Dist. LEXIS 49730, at *7 (E.D. Mich. 2011) (*unpublished*) (finding that dismissal based on a failure to exhaust administrative remedies does not count as a strike under Section 1915(g)).

128. *Coleman v. Tollefson*, 135 S. Ct. 1759, 1761–1762, 191 L. Ed. 2d 803, 808–809 (2015).

129. *Richey v. Dahne*, 807 F.3d 1202, 1209 (9th Cir. 2015) (holding the district court third strike does not bar IFP status on appeal in that same case); *Taylor v. Grubbs*, 930 F.3d 611, 615–20 (4th Cir. 2019) (same); *Dawson v. Coffman*, 651 F. App’x 840, 842 n.2 (10th Cir. 2016) (*unpublished*) (same). *Contra* *Parker v. Montgomery County Correctional Facility/Business Office Manager*, 870 F.3d 144, 151–154 (3rd Cir. 2017).

130. *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002).

131. *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 435–436 (D.C. Cir. 2007); *Andrews v. King*, 398 F.3d 1113, 1116, 1120 (9th Cir. 2005) (holding that defendant bears the burden of establishing that Section 1915(g) bars the plaintiff’s IFP status). *See also* *Green v. Morse*, No. 00-CV-6533-CJS, 2006 U.S. Dist. LEXIS 52085, at *7–9 (W.D.N.Y. May 26, 2006) (*unpublished*) (affirming the burden shifting framework). In practice, courts often raise three strikes on their own at initial screening.

132. *Andrews v. King*, 398 F.3d 1113, 1120 (9th Cir. 2005). *See also* *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 436 (D.C. Cir. 2007) (holding that once the burden of evidence shifts to the prisoner, he must “explain *why* the past dismissals should not count as strikes”) (emphasis added).

133. *Harris v. City of New York*, 607 F.3d 18, 23–24 (2d Cir. 2010) (holding docket entries may be used if they show clearly the nature of the disposition); *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 433–435 (D.C. Cir. 2007); *Andrews v. King*, 398 F.3d 1113, 1119–1120 (9th Cir. 2005)

Otherwise, more complete information must be obtained.¹³⁴ Courts have reached different conclusions about how specific they must be in identifying each case they consider to be a strike.¹³⁵

The three strikes rule cannot revoke IFP status in a case filed before you had three strikes. The statute is a limit on your ability to “bring” suit, not on your ability to maintain or continue suits already brought.¹³⁶ A case is “brought” when you submit the complaint to the court.¹³⁷ The three strikes provision also does not stop you from amending your complaint in a suit filed before you had three strikes.¹³⁸

(a) The “Imminent Danger of Serious Physical Injury” Exception

The three strikes provision does not keep you from proceeding IFP if you are in “imminent danger of serious physical injury.”¹³⁹ “Imminent” means you must be in danger at the time you file the suit¹⁴⁰ or when you file a notice of appeal and seek IFP status on appeal.¹⁴¹

Most courts have held that claims of imminent danger are to be assessed on the basis of the allegations in the complaint, which are to be assumed true for purposes of the imminent danger decision.¹⁴² Courts may also look to allegations in other documents submitted by the plaintiff that

134. See, e.g., *Lewis v. Healy*, No. 9:08-CV-148 (LEK/DEP), 2008 U.S. Dist. LEXIS 124378, at *9 (N.D.N.Y. Oct. 29, 2008) (*unpublished*) (noting that since “determination of whether a prior dismissal does in fact constitute a strike is dependent upon the precise nature of the dismissal and the grounds supporting it,” court obtained copies of actual orders of dismissal rather than relying on docket entries).

135. See *Parks v. Samuels*, 540 F. App’x 146, 149 n.1 (3d Cir. 2014) (*unpublished*) (noting that the “preferred practice” is for the district court to “make a record” of the prisoner’s strikes for appellate review, but that the court could review the prisoner’s strikes regardless); *Gibson v. City Municipality of New York*, 692 F.3d 198, 200 n.2 (2d Cir. 2012) (per curiam) (holding district courts need not specify the dismissals they deem to be strikes, but the case may need to be remanded if they don’t); *Muhammad v. Workman*, 479 F. App’x 871, 872 (10th Cir. 2012) (*unpublished*) (vacating and remanding three strikes finding where district court did not include opinions and judgments in the record for appellate review); *Evans v. Ill. Dept. of Corr.*, 150 F.3d 810, 812 (7th Cir. 1998) (“[I]n the order denying leave to proceed in forma pauperis IFP] the district court must cite specifically the case names, case docket numbers, districts in which the actions were filed, and the dates of the orders dismissing the actions.”). See also *Jennings v. Dist. Court for Seventh Judicial Dist.*, No. 98-8068, 1999 U.S. App. LEXIS 2386, at *2–3 (10th Cir. Feb. 16, 1999) (*unpublished*) (remanding because the district court did not specify which prior actions or appeals were frivolous).

136. See, e.g., *Nicholas v. American Detective Agency*, 254 F. App’x 116, 117 (3d Cir. 2007) (per curiam) (*unpublished*); *Mills v. White*, 182 F. App’x 615 (8th Cir. 2006) (per curiam) (*unpublished*); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996) (“Section 1915(g) governs bringing new actions or filing new appeals—the events that trigger an obligation to pay a docket fee—rather than the disposition of existing cases.”).

137. *O’Neal v. Price*, 531 F.3d 1146, 1151–1152 (9th Cir. 2008).

138. *Elkins v. Schrubbe*, No. 04-C-85, 2005 WL 1154273, at *1 (E.D. Wis. Apr. 20, 2005) (*unpublished*) (allowing submission of an amended complaint after a third strike because the new claims related back to the original complaint).

139. 28 U.S.C. § 1915(g).

140. *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015); *Pinson v. Samuels*, 761 F.3d 1, 4–5 (D.C. Cir. 2014), *aff’d on other grounds sub nom.* *Bruce v. Samuels*, 577 U.S. 82, 136 S. Ct. 627 (2016); *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1179 (10th Cir. 2011); *Vandiver v. Vasbinder*, 416 F. App’x 560, 560 (6th Cir. 2011) (*unpublished*); *Andrews v. Cervantes*, 493 F.3d 1047, 1052–1053 (9th Cir. 2007); *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003).

141. *Pinson v. United States Dept. of Justice*, 964 F.3d 65, 69 (D.C. Cir. 2020); *Williams v. Paramo*, 775 F.3d 1182, 1187–1188 (9th Cir. 2015). *But see* *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015) (holding “a prisoner who was found by the district court to sufficiently allege an imminent danger is entitled to a presumption that the danger continues at the time of the filing of the notice of appeal.”).

142. *Vandiver v. Vasbinder*, 416 F. App’x 560, 562–563 (6th Cir. 2011) (*unpublished*) (holding that plaintiff “sufficiently alleged [imminent danger], and that is all that is required by § 1915(g)”; *Jackson v. Jackson*, No. 08-13009, 335 F. App’x 14, 14–15 (11th Cir. 2009) (per curiam) (*unpublished*) (“Based on these allegations, which we must construe liberally, accept as true, and view as a whole, . . . we conclude that Jackson has sufficiently demonstrated that he was in imminent danger of serious physical injury when he filed suit.”); *Andrews v. Cervantes*, 493 F.3d 1047, 1050 (9th Cir. 2007) (holding that courts must rely on complaint’s allegations and that “the three-strikes rule is a screening device that does not judge the merits of prisoners’ lawsuits”); *Martin v.*

address conditions around the time of the complaint.¹⁴³ On appeal, where there is no new complaint, allegations of imminent danger tend to be made (and will be considered) when the incarcerated person submits a request for *in forma pauperis* status on appeal, or may be made in other documents filed in the same time period.¹⁴⁴

Even when courts credit the plaintiff's allegations of imminent danger of serious physical harm, they may reject them as alleging harm that is not imminent enough,¹⁴⁵ not serious enough,¹⁴⁶ or too vague, speculative, or conclusory to be credited.¹⁴⁷ Past danger is not imminent danger.¹⁴⁸ Conditions that are generally dangerous do not satisfy the imminent danger standard unless they are shown to be personally dangerous to the plaintiff.¹⁴⁹

Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003) (requiring “specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury”); Ciarpiaglini v. Saini, 352 F.3d 328, 330–331 (7th Cir. 2003) (describing standard as “amorphous,” disapproving extensive inquiry into seriousness of allegations at pleading stage).

143. Barber v. Krepp, 680 F. App'x 819, 820–822 (11th Cir. 2017) (*unpublished*) (quoting Asemani v. U.S. Citizenship and Immigration Servs., 797 F.3d 1069, 1074–1075 (D.C. Cir. 2015)) (referring to plaintiff's “various filings in the district court” in assessing imminent danger); Miller v. United States, No. 15-646C, 2015 U.S. Claims LEXIS 1015, at *2 (Fed. Cl. Aug. 7, 2015) (*unpublished*) (relying on allegations in a “separate filing”). In *Asemani*, the relevant facts appeared in plaintiff's response to a motion to vacate IFP status. *Asemani v. U.S. Citizenship and Immigration Servs.*, 797 F.3d 1069, 1075 (D.C. Cir. 2015).

144. Dopp v. Larimer, 731 F. App'x 748, 750–752 (10th Cir. 2018) (*unpublished*) (noting plaintiff had sufficiently alleged imminent danger in his complaint, and alleged that his untreated medical condition was worsening in response to the appeals court's order to show cause why the appeal should not be dismissed for nonpayment of the fee); Hafeed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1180 (10th Cir. 2011) (stating “[a]n appellant should make his allegations of imminent danger in his motion for leave to proceed ifp”[sic] and acknowledging that a litigant may “point[] to other papers to establish his allegations of imminent harm”); Williams v. Paramo, 775 F.3d 1182, 1190 (9th Cir. 2015) (citing imminent danger allegations in response to order to show cause why IFP should not be revoked).

145. For example, courts have said exposure to second-hand smoke can be dangerous but not imminent enough. Hart v. Sec'y, Fla. Dept. of Corr., No. 4:18cv322-RH/CAS, 2018 U.S. Dist. LEXIS 158621, at *1 (N.D. Fla. Sept. 18, 2018) (noting that “exposure to tobacco smoke can cause serious physical injury, even death. Most tobacco-caused serious physical injuries result from long-term exposure and cannot fairly be characterized as imminent” and holding plaintiff did not explain how his exposure presented a danger that was imminent.); Johnson v. Mercer, No. 4:13cv321-RH/CAS, 2013 U.S. Dist. LEXIS 122564, at *1 (N.D. Fla. Aug. 28, 2013) (“Second-hand smoke does pose a risk of serious physical injury, but the risk is not sufficiently imminent to qualify under § 1915(g).”).

146. Gresham v. Meden, 938 F.3d 847, 850 (6th Cir. 2019) (“A physical injury is ‘serious’ for purposes of § 1915(g) if it has potentially dangerous consequences such as death or severe bodily harm. Minor harms or fleeting discomfort don’t count.”) In *Gresham*, the Court held that being forced to take an antipsychotic drug against your will does not count as imminent danger.

147. See, e.g., Fourstar v. United States, 950 F.3d 856, 859 (Fed. Cir. 2020) (holding claim of imminent injury to plaintiff incarcerated in Montana from possible breakage or leakage of Keystone XL Pipeline in the Dakotas was “too speculative and attenuated” to satisfy imminent danger standard); Asemani v. U.S. Citizenship and Immigration Servs., 797 F.3d 1069, 1076 (D.C. Cir. 2015) (holding that allegations that plaintiff might face danger because he has “inmate enemies” and there is a generic threat in a maximum security prison population did not establish imminent danger to him).

148. Vandiver v. Prison Health Servs., Inc., 727 F.3d 580, 585 (6th Cir. 2013) (quoting Percival v. Gerth, 443 F. App'x 944, 946 (6th Cir. 2011) (*unpublished*) (explaining that the threat or prison condition must exist at the time the complaint is filed, and that “assertions of past danger will not satisfy the ‘imminent danger’ exception”); Brown v. Johnson, 387 F.3d 1344, 1349 (11th Cir. 2004) (holding that incarcerated person faced imminent danger when the prison's medical staff stopped treating his HIV and hepatitis, and his medical condition declined).

149. Hart v. Jones, No. 4:18-cv-51-RH-GRJ, 2018 U.S. Dist. LEXIS 63630, at *2 (N.D. Fla. Feb. 9, 2018) (*unpublished*) (holding allegation of placement in a high custody dormitory where plaintiff “was threatened by gang violence and where there were four ‘eruptions’ of gang violence” in one month before suit was filed, done in retaliation for filing lawsuits against prison officials, did not sufficiently allege that he personally faced imminent danger), *report and recommendation adopted*, Hart v. Jones, No. 4:18-cv-51-RH-GRJ, 2018 U.S. Dist. LEXIS 63329 (N.D. Fla. Apr. 16, 2018); Harris v. Nink, No. 2:13-cv-304, 2013 U.S. Dist. LEXIS 126747, at *1 (S.D. Ohio Sept. 5, 2013) (holding that allegations of understaffing, overcrowding, medical care and violence do not show

If claims of imminent danger are disputed, the court may hold a hearing or review depositions and affidavits to determine whether you are in enough danger to meet the requirement.¹⁵⁰ Some courts, however, may make *ad hoc* (“*ad hoc*” means “unique to your particular case”) judgments about the credibility or seriousness of your *pro se* complaint’s allegations.¹⁵¹ The more specific you can be about the danger you are in, the more likely you are to qualify for the exception.

Allegations of failure to protect from the risk of assault from other incarcerated people may constitute imminent danger of serious injury.¹⁵² The same is true for assault by staff members.¹⁵³ As

imminent danger without allegations of specific risk to the plaintiff); *Jemison v. Thomas*, Civ. Action No. 12-0557-CG-M, 2012 U.S. Dist. LEXIS 171208, at *2 (S.D. Ala. Nov. 1, 2012) (holding that allegations of health-threatening heat and unsanitary food service and living conditions did not establish imminent danger where the plaintiff did not specifically allege current or future injury to himself), *report and recommendation adopted*, *Jemison v. Thomas*, Civ. Action No. 12-0557-CG-M, 2012 U.S. Dist. LEXIS 170282 (S.D. Ala. Nov. 29, 2012).

150. *McLeod v. Sec’y, Fla. Dept of Corr.*, 778 F. App’x 663, 665 (11th Cir. 2019) (*unpublished*) (“Once a district court has made an initial finding of imminent danger, it retains the authority to revisit that determination and revoke IFP status when new evidence bearing on the IFP determination comes to light.”) *Shepherd v. Annucci*, 921 F.3d 89, 95 (2d Cir. 2019) (approving “limited probe into the plausibility of a prisoner-litigant’s claim of imminent danger,” by resorting to outside evidence and holding that “a narrow evidentiary challenge to a provisional determination that a prisoner is in imminent danger of serious physical injury should not metastasize into ‘a full-scale merits review.’” (citation omitted)); *Sanders v. Melvin*, 873 F.3d 957, 961–962 (7th Cir. 2017) (stating “if a claim [of imminent danger] is challenged by the defense, or seems fishy to the judge, it must be supported by facts presented in affidavits or, if appropriate, hearings”); *Stine v. U.S. Fed. Bureau of Prisons*, 465 F. App’x 790, 794 (10th Cir. 2012) (*unpublished*) (noting that if defendants contest imminent danger after a grant of IFP status, they may “mount a facial challenge, based on full development of the facts” (citation omitted)); *Taylor v. Watkins*, 623 F.3d 483, 485–86 (7th Cir. 2010) (holding that “when a defendant contests a plaintiff’s claims of imminent danger, a court must act to resolve the conflict” by having a hearing of limited scope on the issue of limited danger); *Gibbs v. Roman*, 116 F.3d 83, 86–87 (3d Cir. 1997), *overruled on other grounds by Abdul-Akbar v. McKelvie*, 239 F.3d 307 (3d Cir. 2001) (instructing the district court to explore allegations and the state’s response before dismissal).

151. *See, e.g., Davis v. Stephens*, 589 F. App’x. 295, 296 (5th Cir. 2015) (per curiam) (*unpublished*) (holding plaintiff’s “allegation that he might be seriously injured at an indefinite point in the future because he has been required to wear shoes that are the wrong size and are damaged is insufficient to establish that he was in imminent danger of serious physical injury at the relevant times”); *Senator v. Cates*, No. 2:11-cv-2029 DAD P, 2012 U.S. Dist. LEXIS 78067, at *2 (E.D. Cal., June 5, 2012) (*unpublished*) (finding no imminent danger based on court’s lay reading of medical records attached to the complaint, relying on boilerplate phrases like “not in ‘acute distress’” and “alert and oriented”), *reconsideration denied*, *Senator v. Cates*, No. 2:11-cv-2029 DAD P, 2012 U.S. Dist. LEXIS 34229 (E.D. Cal., Mar. 12, 2013); *Pruden v. Mayer*, No. 3:CV-08-0559, No. 3:CV-08-0560, No. 3:CV-08-0561, No. 3:CV-08-0562, No. 3:CV-08-0571, 2008 U.S. Dist. LEXIS 26700, at *3–4 (M.D. Pa. Apr. 2, 2008) (*unpublished*) (concluding that prisoner’s medical care claims did not pose imminent danger because they had occurred over a long period of time).

152. *Smith v. Dewberry*, 741 F. App’x 683, 686–687 (11th Cir. 2018) (per curiam) (*unpublished*) (holding prisoner assaulted and then subjected to ongoing threats of assault showed imminent danger even though his housing unit was on lockdown when he filed, since a lockdown can end “any time”); *Valenzuela v. Monts*, 731 F. App’x 693, 693 (9th Cir. 2018) (*unpublished*) (holding plaintiff’s allegation that “one or more inmates had sexually assaulted her and threatened her life, that these threats and assaults were ongoing, and that she had reported these matters and nothing had been done” satisfied the imminent danger requirement); *Williams v. Buenostrome*, 764 F. App’x 573, 574 (9th Cir. 2019) (*unpublished*) (holding allegations “that defendant . . . repeatedly assaulted him without justification, encouraged other inmates to attack him, and threatened his life” and that even after he was moved to a different building, [the defendant] continued to have access to him and threaten him with physical harm” . . . are sufficient to plausibly allege imminent danger of serious physical injury”); *Lindsey v. Hoem*, 799 F. App’x 410, 412–413 (7th Cir. 2020) (*unpublished*) (finding imminent danger where plaintiff’s requests for separation from prisoners who had threatened or attacked him were denied, and where after one attack, staff members had “threatened to make sure that he ‘get[s] [his] ass beat again’”); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (*unpublished*) (finding that enduring repeated attacks from a prisoner housed nearby and filing only days after an attack proved imminent danger).

153. *Williams v. Ortega*, 757 F. App’x 636, 636 (9th Cir. 2019) (*unpublished*) (holding allegation that plaintiff was physically assaulted by one defendant causing serious injury and that he and another defendant threatened plaintiff with further attacks and worse injuries if he were to report the assaults or file any grievances or lawsuits about it are sufficient to plausibly allege imminent danger of serious physical injury); *Newkirk v. Kiser*, 812 F.

the cited cases illustrate, the plaintiff must show not only that he was attacked, but that there is reason to believe there will be more attacks. Ongoing failure to treat serious medical¹⁵⁴ or dental¹⁵⁵ problems is often held to satisfy the imminent danger standard, as is the failure to accommodate disabilities if it creates an actual risk of physical injury.¹⁵⁶ Exposure to dangerous living conditions

App'x 159, 160 (4th Cir. 2020) (per curiam) (*unpublished*) (directing grant of IFP where the plaintiff "described one incident in which he was allegedly subjected to excessive force and asserted that this was not an isolated occurrence. To the contrary, he claimed that prison staff members regularly assault inmates without cause and threaten inmates who complain."); Ball v. Hummel, 577 F. App'x 96, 96 (3d Cir. 2014) (per curiam) (*unpublished*) (motion that "describes being beaten and sexually assaulted by guards, with threats to harm her further the next time" in a case that alleged physical abuse by staff satisfied the imminent danger standard); Mendez v. Ariz. Dept. of Corr., 478 F. App'x 437, 437 (9th Cir. 2012) (*unpublished*) (holding allegation of recent brutal beating and threats of death if plaintiff sought legal redress met the imminent danger standard); Tucker v. Pentrich, 483 F. App'x 28, 29–30 (6th Cir. 2012) (per curiam) (*unpublished*) (holding allegations of an assault, followed by five explicit threats related to plaintiff's complaints about the assault, within two months of the complaint's filing met the imminent danger standard); Smith v. Clemons, 465 F. App'x 835, 837 (11th Cir. 2012) (per curiam) (*unpublished*) (holding incident of physical abuse followed by recent threats of more violence from the same officers in retaliation for plaintiff's filing suit satisfied imminent danger standard); Prall v. Bocchini, 421 F. App'x 143, 145 (3d Cir. 2011) (per curiam) (*unpublished*) (holding allegation of ongoing physical abuse "at least once a week" clearly stated an ongoing danger that was imminent when the complaint was filed); Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) ("An allegation of a recent brutal beating, combined with three separate threatening incidents, some of which involved officers who purportedly participated in that beating, is clearly the sort of ongoing pattern of acts that satisfies the imminent danger exception.").

154. See, e.g., McFadden v. Koenigsmann, 798 F. App'x 699, 700 (2d Cir. 2020) (*unpublished*) (holding allegation that plaintiff "had ongoing heart disease, that his pacemaker battery had expired, and that the defendants refused to replace the battery" met imminent danger requirement); Boles v. Colo. Dept. of Corr., 794 F. App'x 767, 771 (10th Cir. 2019) (*unpublished*) (holding allegation that failure to provide a fresh food diet for a prisoner with irritable bowel syndrome, resulting in severe pain and aggravation of a degenerative bone condition, met imminent danger requirement); O'Connor v. Backman, 743 F. App'x 373, 376 (11th Cir. 2018) (per curiam) (*unpublished*) (holding ongoing gastrointestinal issues involving "severe cramping, causing him to curl up in the fetal position with clenched fists and teeth and forcing him to crawl to and from the toilet; bloody stools; acid reflux; heartburn; and significant weight loss, resulting in a weight of 137 pounds on his six-foot tall frame" satisfied the imminent danger requirement, as does allegation of a two-year delay in surgery for gallstones that "could lead to an infection of his gallbladder, the eruption of which, like appendicitis, could be fatal"); Mitchell v. Nobles, 873 F.3d 869, 874 (11th Cir. 2017) (holding allegation of total lack of treatment for symptomatic Hepatitis C satisfies imminent danger requirement); Brown v. Wolf, 705 F. App'x 63, 66–67 (3d Cir. 2017) (*unpublished*) (holding plaintiff's allegations of defendants' refusal to treat him for Hepatitis C despite his symptoms sufficiently alleged imminent danger); Reberger v. Koehn, 683 F. App'x 607, 607 (9th Cir. 2017) (*unpublished*) (holding plaintiff plausibly alleged imminent danger "because defendants continue to refuse to give him his HIV and seizure medications regularly").

155. Stine v. Oliver, 644 F. App'x 857, 859 (10th Cir. 2016) (*unpublished*) (holding allegations of failure to provide dental care for infected and abscessed teeth showed imminent danger); Tierney v. Unknown Dentist, 596 F. App'x 576, 577 (9th Cir. 2015) (*unpublished*) (holding plaintiff's allegation of "extreme and continuing pain, inability to sleep, and infection of his gums" sufficiently alleged imminent danger notwithstanding offer of tooth extraction); McAlphin v. Toney, 281 F.3d 709, 710–711 (8th Cir. 2002) (holding allegations of a spreading mouth infection and a need for two tooth extractions showed imminent danger); McAlphin v. Correct Care Sols., LLC, No. 2:17CV00093-KGB-JTK, 2018 U.S. Dist. LEXIS 84028, at *2 (E.D. Ark. Mar. 29, 2018) (*unpublished*) (holding refusal to extract five rotten teeth, which caused infection, abscesses, swollen lymph nodes, fever blisters, and other medical problems, established imminent danger), *report and recommendation adopted*, McAlphin v. Correct Care Sols., LLC, No. 2:17-cv-00093-KGB, 2018 U.S. Dist. LEXIS 83206 (E.D. Ark. May 17, 2018) (*unpublished*); Thomas v. Cate, No. C 13-04052 DMR (PR), 2014 U.S. Dist. LEXIS 65169, at *2 (N.D. Cal. May 12, 2014) (*unpublished*) (holding allegations of "severe gingival inflammation and palpation and severe periodontitis" could satisfy standard).

156. See, e.g., Fuller v. Wilcox, 288 F. App'x 509, 511 (10th Cir. 2008) (*unpublished*) (holding denial of a wheelchair, meaning that plaintiff must crawl, and could not walk to the shower or lift himself to his bed, "could result in a number of serious physical injuries" and sufficiently alleged imminent danger); Dye v. Bartow, No. 13-cv-284-bbc, 2013 U.S. Dist. LEXIS 134000, at *2 (W.D. Wis. Sept. 19, 2013) (*unpublished*) (holding requirement that prisoner with malformed thumb and degenerative arthritis use a short-handled toothbrush, causing pain, meets the "low bar" of imminent danger); McDonald v. Maue, No. 12-cv-1183-JPG, 2012 U.S. Dist. LEXIS 170801, at *1–*2 (S.D. Ill. Dec. 3, 2012) (*unpublished*) (holding failure to heed plaintiff's post-surgery medical restrictions

may constitute imminent danger,¹⁵⁷ though in such cases courts often look closely at whether the allegations describe a specific risk to the plaintiff him- or herself.¹⁵⁸

Most federal appeals courts that have considered the question have held that if you sufficiently allege imminent danger, your whole complaint should go forward, even if portions of it are not related to the specific allegations and defendants currently responsible for the danger.¹⁵⁹ However, many district courts only allow the specific claims related to the imminent danger to proceed.¹⁶⁰

satisfied imminent danger standard), *reconsideration denied*, McDonald v. Maue, No. 12-cv-1183-JPG-PMF, 2013 U.S. Dist. LEXIS 5685 (S.D. Ill. Jan. 15, 2013) (*unpublished*) (S.D. Ill. Jan. 15, 2013); Dye v. Grisdale, No. 11-cv-443-slc, 2011 U.S. Dist. LEXIS 123748, at *2 (W.D. Wis. Oct. 25, 2011) (*unpublished*) (holding rescission of single-cell feed-in status to prisoner with eating disorder/phobia that prevented him from eating around others, resulting in “serious hunger pains, lack of bowel movements for days at a time, headaches, weakness,” constituted imminent danger); Claiborne v. Blauser, No. CIV. S-10-2427 LKK EFB P, 2011 U.S. Dist. Lexis 68876, at *2 (E.D. Cal. June 27, 2011) (*unpublished*) (holding policy of rear-handcuffing mobility-impaired prisoners despite medical recommendations and taking their crutches and canes when moving them satisfied imminent danger standard); Williams v. Walker, No. CIV S-11-0805 DAD P, 2011 U.S. Dist. LEXIS 55925, at *1 (E.D. Cal. May 9, 2011) (*unpublished*) (stating prisoner with multiple mobility disabilities creating a risk of further injury unless he is placed in a bottom bunk sufficiently pled imminent danger)

157. See, e.g., Brown v. Sec’y, Penn. Dept. of Corr., 486 F. App’x 299, at *301–*302 (3d Cir. June 21, 2012) (per curiam) (*unpublished*) (holding allegations of lack of open windows, no air conditioning, a ventilation system that is faulty and dirty, excessive heat, and polluted air sufficiently pled imminent danger); Smith v. Wang, 370 F. App’x 377, 378 (4th Cir. 2010) (per curiam) (*unpublished*) (citing exposure to environmental tobacco smoke allegedly causing nosebleeds and headaches in finding imminent danger adequately pled); Jackson v. Heyns, No. 1:13cv636, 2014 U.S. Dist. LEXIS 100632, at *5–*6 (W.D. Mich. July 24, 2014) (*unpublished*) (holding allegations concerning the effect of chemical sprays and mold on plaintiff’s asthma rise to the level of imminent danger, as do another plaintiff’s allegations of nausea, vomiting, and coughing up blood as a result of unsanitary conditions); Cochran v. Geit, No. 11-cv-134-wmc, 2011 U.S. Dist. LEXIS 81720, at *2 (W.D. Wis. July 26, 2011) (*unpublished*) (holding risk of having to climb to a top bunk without a ladder met imminent danger standard); Cole v. Ellis, No. 5:10-cv-00316-RS-GRJ, 2010 U.S. Dist. LEXIS 139420, at *2 (N.D. Fla. Dec. 28, 2010) (*unpublished*) (holding “the continuing harm of sleeping without heat during the winter months without additional clothing or blankets, could constitute an ongoing threat of serious physical harm” showing imminent danger), *report and recommendation adopted*, Cole v. McNeil, No. 5:10cv316/Rs-GRJ, 2011 U.S. Dist. LEXIS 2521 (N.D. Fla. Jan. 11, 2011), *aff’d*, Cole v. Sec’y Dept of Corr., 451 F. App’x. 827 (11th Cir. 2011) (per curiam) (*unpublished*); Williams v. Lopez, No. 1:10-cv-00952-DLB PC, 2010 U.S. Dist. LEXIS 61622, at *1 (E.D. Cal. May 28, 2010) (allegation inter alia that defendants were about to transfer HIV-positive prisoner to prison where he would be exposed to potentially fatal Valley Fever met imminent danger standard). Note the difference between *Smith v Wang*, cited above, and the cases about second-hand tobacco smoke cited in footnote 145, above: *Smith* cited current symptoms the plaintiff alleged he personally experienced, while the others relied more on potential future harm.

158. See, e.g., Frazier v. Fla. Dept. of Corr., No. 1:18-cv-186-MW-GRJ, 2018 U.S. Dist. LEXIS 205166, at *2 (N.D. Fla. Sept. 26, 2018) (holding allegation that plaintiff and others are “forced to drink contaminated water” causing “headaches, sore throat, chest pain, stomach pain, kidney pain, side pain, fever, diarrhea, and infection” to be “too vague and generalized” to show imminent danger without details as to the plaintiff’s being “‘forced’ to drink the contaminated water, or what, if any, of the alleged physical side effects he has personally suffered”), *report and recommendation adopted*, Frazier v. Fla. Dept. of Corr., No. 1:18-cv-186-MW-GRJ, 2018 U.S. Dist. LEXIS 204049 (N.D. Fla. Dec. 3, 2018).

159. See Boles v. Colo. Dept. of Corr., 794 F. App’x 767, 772 (10th Cir. 2019) (*unpublished*); Chavis v. Chappius, 618 F.3d 162, 171–172 (2d Cir. 2010) (“Nothing in the text of § 1915 provides any justification for dividing an action into individual claims and requiring a filing fee for those that do not relate to imminent danger.”); Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007) (holding “qualifying prisoners can file their entire complaint IFP; the exception does not operate on a claim-by-claim basis or apply to only certain types of relief”); Ibrahim v. District of Columbia, 463 F.3d 3, 5–7 (D.C. Cir. 2006); Ciarpiglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (holding damages claim could go forward even though injunctive claim on which “imminent danger” allegation was based was moot and stating § 1915(g) “only limits when frequent filers can proceed IFP, and says nothing about limiting the substance of their claims”); Gibbs v. Roman, 116 F.3d 83, 87 n.7 (3d Cir. 1997), *overruled on other grounds*, Abdul-Akbar v. McKelvie, 239 F.3d 307 (3rd Cir. 2001) (en banc). But see McAlphin v. Toney, 375 F.3d 753, 755–756 (8th Cir. 2004) (holding that a complaint that satisfies the imminent danger exception cannot be amended to include claims that do not involve imminent danger).

160. See, e.g., Bostic v. Tenn. Dept. of Corr., No. 3:18-cv-00562, 2018 U.S. Dist. LEXIS 122597, at *10 (M.D. Tenn. July 23, 2018) (*unpublished*); Rivera v. Stirling, No. 8:17-cv-02087-JMC, 2018 U.S. Dist. LEXIS 101906, at

Mental health conditions generally do not satisfy the imminent danger requirement because they generally do not involve physical injury.¹⁶¹ If they do involve physical harm in some fashion, then they may constitute imminent danger.¹⁶² Many courts have held that the risk of self-inflicted physical injury resulting from mental illness may establish imminent danger.¹⁶³ That makes sense because many prison suicides and attempted suicides are a result of serious mental illness aggravated by prison conditions and practices.¹⁶⁴ However, some courts maintain that self-inflicted injury cannot meet the

*3 (D.S.C. June 19, 2018) (*unpublished*); *Gorbey v. Bowles*, No. 7:17cv00091, No. 7:17cv00192, 2018 U.S. Dist. LEXIS 14402, at *11 (W.D. Va. Jan. 30, 2018), *report and recommendation adopted sub nom.* *Gorbey v. Avery*, No. 7:17-cv-00192, 2018 U.S. Dist. LEXIS 106547 (W.D. Va., June 26, 2018) (*unpublished*); *White v. Jindal*, No. 13-15073, 2014 U.S. Dist. LEXIS 85506, at *4 (E.D. Mich. June 24, 2014) (*unpublished*); *Buhl v. Sproul*, No. 14-cv-00302-BNB, 2014 U.S. Dist. LEXIS 59010, at *1 (D. Colo. Apr. 25, 2014) (*unpublished*); *Custard v. Allred*, No. 13-cv-02296-BNB, 2013 U.S. Dist. LEXIS 171662, at *2 (D. Colo. Dec. 4, 2013) (*unpublished*) (dismissing two of eight claims because they did not allege imminent danger), *order clarified*, *Custard v. Allred*, No. 13-cv-02296-BNB, 2013 U.S. Dist. LEXIS 180997 (D. Colo. Dec. 23, 2013); *Redmond v. Univ. of Tex. Med. Branch Hosp. Galveston*, No. 2:13-CV-268, 2013 U.S. Dist. LEXIS 126258, at *2 (S.D. Tex. Sept. 4, 2013) (*unpublished*) (holding claim for injunction re medical care should be “explored” under imminent danger exception but claims of past mistreatment causing the problem would not be cognizable).

161. *Sanders v. Melvin*, 873 F.3d 957, 959–960 (7th Cir. 2017) (“Mental deterioration, however, is a psychological rather than a physical problem. Physical problems can cause psychological ones, and the reverse, but the statute supposes that it is possible to distinguish them. A claim of long-term psychological deterioration is on the psychological side of the line. Prisoners facing long-term psychological problems can save up during that long term and pay the filing fee.”).

162. In *Custard v. Allred*, No. 13-cv-02296-BNB, 2013 U.S. Dist. LEXIS 171662, at *2 (D. Colo. Dec. 4, 2013), *order clarified*, *Custard v. Allred*, No. 13-cv-02296-BNB, 2013 U.S. Dist. LEXIS 180997, at *2 (D. Colo. Dec. 23, 2013) (*unpublished*), the court first observed: “An untreated psychological condition does not meet the imminent danger exception.” However, it held that the plaintiff’s condition did meet that standard in light of his additional allegation that the defendants’ practice of pounding on his cell door at night caused him to wake in a terrified state and harm himself. Similarly, in *Annabel v. Michigan Dept. of Corrections*, No. 1:14-cv-756, 2014 U.S. Dist. LEXIS 116440, at *1 n.1 & *5 (W.D. Mich. Aug. 21, 2014) (*unpublished*), the court held that the plaintiff “alleges facts that, if believed, are sufficient to show that he is in imminent danger of serious bodily injury” where he alleged in connection with claims of retaliation, discrimination, religious rights violation, and unhygienic conditions that “his post-traumatic stress disorder has been aggravated to the point that he experiences frequent nightmares, severe paranoia, thoughts of suicide and self-injury, weight loss, extreme depression, anger, rage and fear.”

163. See, e.g., *Lindsey v. Hoem*, 799 F. App’x 410, 412 (7th Cir. 2020) (*unpublished*) (“Suicidal ideation and a risk of self-harm, particularly for a mentally ill prisoner like Lindsey in prolonged segregation, satisfy the statutory imminent-danger exception. . . .”); *Sanders v. Melvin*, 873 F.3d 957, 959–960 (7th Cir. 2017); *Irby v. Gilbert*, No. 16-35373, 2016 U.S. App LEXIS 23591, at *1 (9th Cir. Nov. 14, 2016) (*unpublished*) (rejecting district court holding that “a prisoner’s allegations that he may harm himself or commit suicide are insufficient to constitute imminent danger”); *Walker v. Scott*, No. 10-56970, 472 F. App’x 514, 515 (9th Cir. 2012) (*unpublished*) (holding allegation that “repeated placement in double-cell housing without first completing treatment for coping in that environment caused his mental health to deteriorate such that he became suicidal and violent towards others” satisfied imminent danger standard); *Hairston v. Maria*, No. 2:18-cv-378, 2018 U.S. Dist. LEXIS 213586, at *5 (S.D. Ohio Dec. 19, 2018) (*unpublished*) (holding plaintiff whose mental health problems resulted in a suicide attempt causing dizzy spells, migraines, and coughing up blood satisfied imminent danger requirement); *Cassady v. Dozier*, No. 5:17-CV-495 (MTT), 2018 U.S. Dist. LEXIS 43216, at *2 (M.D. Ga. Mar. 16, 2018) (*unpublished*) (holding risk of further self-injury resulting from ongoing gender dysphoria after defendants refused to provide gender reassignment surgery satisfied imminent danger requirement); *Marshall v. Weber*, No. RWT-11-2755, 2012 U.S. Dist. LEXIS 178169, at *1 (D. Md. Dec. 17, 2012) (*unpublished*) (noting plaintiff was allowed to proceed IFP based on allegations he “felt suicidal” and had previously swallowed razor blades and had bitten his tongue during a panic attack), *appeal dismissed*, No. 13-6096 (4th Cir. Apr. 3, 2013).

164. See, e.g., *Lindsey v. Hoem*, 790 F. App’x 410, 412 (7th Cir. 2020) (*unpublished*) (noting enhanced risk of self-harm for prisoner with mental illness held in long-term segregation); *Sanville v. McCaughtry*, 266 F.3d 724, 728 (7th Cir. 2001) (alleging prison officials’ failure to medicate mentally ill prisoner resulted in prisoner’s suicide); *Eng v. Smith*, 849 F.2d 80, 81–83 (2d Cir. 1988) (affirming injunction based on findings that state prison’s policies did not adequately protect mentally ill prisoners).

imminent danger standard because “[e]very prisoner would then avoid the three strikes provision by threatening suicide.”¹⁶⁵

The danger you are in must have some “nexus” (be related) to the allegations in the complaint to satisfy the imminent danger exception.¹⁶⁶

A claim of imminent danger does not excuse you from meeting the PLRA’s administrative exhaustion requirement.¹⁶⁷

The federal circuit (appeals) courts have upheld the three strikes provision as constitutional.¹⁶⁸ No circuit court has held the three strikes provision unconstitutional on First Amendment grounds. Still, some incarcerated people advocates have argued that the rule does violate the First Amendment because it limits your right to access and petition the courts.¹⁶⁹

165. *Wallace v. Cockrell*, No. 3:02-CV-1807-M, 2003 U.S. Dist. LEXIS 3602, at *10 (N.D. Tex. Mar. 10, 2003) (*unpublished*), *approved as supplemented*, *Wallace v. Cockrell*, No. 3:02-CV-1807-M, 2003 U.S. Dist. LEXIS 4897, at *1–4 (N.D. Tex. Mar. 27, 2003) (*unpublished*); *accord, e.g.*, *Morrill v. Holmes Cty. Jail*, No. 5:15-cv-324-WTH-GRJ, 2018 U.S. Dist. LEXIS 219853, at *9 (N.D. Fla. Jan. 30, 2018) (*unpublished*), *report and recommendation adopted*, *Morrill v. Holmes Cty. Jail*, No. 5:15cv324/MCR/GRJ, 2019 U.S. Dist. LEXIS 9944 (N.D. Fla. Jan. 22, 2019) (*unpublished*); *Ochoa v. Nakashima*, No. 3:12-cv-00239-RCJ-VPC, 2012 U.S. Dist. LEXIS 177538, at *2 (D. Nev. Oct. 22, 2012) (*unpublished*) (holding plaintiff with fanciful food complaint who had stopped eating in order to meet the imminent-harm standard at the time of the complaint was not allowed to proceed IFP), *report and recommendation adopted*, *Ochoa v. Nakashima*, No. 3:12-cv-00239-RCJ-VPC, 2012 U.S. Dist. LEXIS 176068 (D. Nev. Dec. 12, 2012) (*unpublished*); *Cash v. Bernstein*, No. 09 Civ.1922(BSJ)(HBP), 2010 U.S. Dist. LEXIS 134948, at *1–*2 (S.D.N.Y. Dec. 20, 2010) (*unpublished*) (declining to find imminent danger where plaintiff thwarted defendants’ efforts to treat his medical problem (citing *Nelson v. Scoggy*, No. 9:06-CV-1146 (NAM/DRH), 2009 U.S. Dist. LEXIS 121257, at *4 (N.D.N.Y. Dec. 30, 2009) (*unpublished*)).

166. *Pinson v. U.S. Dept. of Justice*, 964 F.3d 65, 71 (D.C. Cir. 2020); *Meyers v. Comm’r of Soc. Sec. Admin.*, 801 F. App’x 90, 96 (4th Cir. 2020) (per curiam) (*unpublished*); *Fourstar v. United States*, 950 F.3d 856, 859 (Fed. Cir. 2020) (holding complaint of imminent danger from denial of prison medical care lacked a nexus to Tucker Act assertions concerning management of Indian properties and resources); *Lomax v. Ortiz-Marquez*, 754 F. App’x 756, 759 (10th Cir. 2018) (adopting Pettus nexus test), *aff’d*, *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 207 L. Ed. 2d 132 (2020); *Ball v. Hummel*, 577 F. App’x 96, 96 n.1 (3d Cir. 2014) (per curiam) (*unpublished*); *Pettus v. Morgenthau*, 554 F.3d 293, 298–299 (2d Cir. 2009).

167. *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010); *McAlphin v. Toney*, 375 F.3d 753, 755 (8th Cir. 2004) (upholding the rule that prisoners must fulfill the administrative exhaustion requirement); see Part E of this Chapter for more on the exhaustion requirement.

168. *See, e.g.*, *Polanco v. Hopkins*, 510 F.3d 152, 156 (2d Cir. 2007) (rejecting claims of unconstitutionality); *Lewis v. Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002) (rejecting access to courts claim); *Higgins v. Carpenter*, 258 F.3d 797, 799–801 (8th Cir. 2001) (rejecting equal protection and access to courts claims); *Medberry v. Butler*, 185 F.3d 1189, 1192 (11th Cir. 1999) (rejecting *Ex Post Facto* Clause argument); *Rodriguez v. Cook*, 169 F.3d 1176, 1178–1182 (9th Cir. 1999) (rejecting due process, equal protection, access to courts, *Ex Post Facto* Clause, and separation of powers arguments); *White v. Colorado*, 157 F.3d 1226, 1233–1234 (10th Cir. 1998) (rejecting access to courts and equal protection challenges); *Wilson v. Yaklich*, 148 F.3d 596, 604–606 (6th Cir. 1998) (rejecting equal protection, due process, and other claims); *Rivera v. Allin*, 144 F.3d 719, 723–729 (11th Cir. 1998) (stating IFP status is “a privilege, not a right”; upholding provision against 1st Amendment, access to courts, separation of powers, due process, and equal protection challenges), *repealed by* *Jones v. Bock*, 549 U.S. 199, 214–215, 127 S. Ct. 910, 920–921 (2007).

169. In other contexts, the Supreme Court has found that the right to court access “is part of the right of petition protected by the First Amendment.” *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 92 S. Ct. 609, 613 (1972). *See also* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542–543, 121 S. Ct. 1043, 1049–1050 (2001) (stating that advocacy in litigation *is* speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272, 84 S. Ct. 710, 721 (1964) (finding that the 1st Amendment requires “breathing space” and a margin for error for inadvertent false speech so that true speech will not be deterred). This “breathing space” principle has been applied in other areas of law. *See, e.g.*, *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511, 92 S. Ct. 609, 612 (1972) (applying rule in antitrust context); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 2169 (1983) (applying rule in labor context). Under the principle, sanctions may not be imposed against plaintiffs unless the litigation is both objectively and subjectively baseless. *See* *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61, 113 S. Ct. 1920, 1928 (1993) (requiring both subjective and objective intent). Applied to the three strikes provision, the “breathing space” principle would mean that prisoners could only be punished for knowing falsehood or intentional abuse of the judicial system—a category far narrower than

D. Screening and Dismissal of Incarcerated People's Cases

The PLRA requires federal courts to examine all suits by incarcerated people against government employees *and* all IFP cases at the start of litigation, and to dismiss cases that are frivolous or malicious, that fail to state a claim on which relief may be granted, or that seek damages from a defendant immune from damage claims.¹⁷⁰ These dismissals may be done without prior notice or an opportunity to respond,¹⁷¹ though one court has cautioned that this should only be done where “it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective.”¹⁷²

Incarcerated people are entitled to try to amend complaints that do not state a claim before they are finally dismissed unless the court is certain that they cannot be saved.¹⁷³ Courts may dismiss the case with leave to amend,¹⁷⁴ or may dismiss the *complaint*, which keeps the case alive;¹⁷⁵ if the plaintiff does not amend the complaint, or does not do so adequately, a separate order dismissing the case may be entered. Complaints the court has deemed frivolous or malicious need not be afforded an opportunity for amendment.¹⁷⁶

Dismissal under these screening statutes is reviewed on appeal *de novo* (granting no deference to the district court's ruling), at least with respect to dismissals for failure to state a claim.¹⁷⁷ Some courts

the scope of the provision. A few courts have rejected the “breathing space” argument, but have not addressed the Supreme Court decisions cited above. *Daker v. Jackson*, 942 F.3d 1252, 1258 (11th Cir. 2019), *pet. for cert. filed*, No. 19-1387 (June 18, 2020); see *Daker v. Bryson*, 784 F. App'x 690 (11th Cir. 2019) (*per curiam*) (*unpublished*) (ruling similarly); *Clardy v. Byerly*, No. 6:18-cv-01200-CL, 2018 U.S. Dist. LEXIS 222735, at *2 (D. Or. Oct. 15, 2018) (*unpublished*) (rejecting argument “that the ‘breathing space’ principle of the First Amendment affords this Court the discretion to grant IFP status to a prisoner litigant with three strikes if the case is deemed to have factual and legal merit”), *report and recommendation adopted*, *Clardy v. Byerly*, No. 6:18-cv-01200-CL, 2018 U.S. Dist. LEXIS 43010 (D. Or. Mar. 15, 2018) (*unpublished*), *aff'd*, *Clardy v. Byerly*, 800 F. App'x 594 (9th Cir. 2020) (*unpublished*).

170. These requirements appear in three related statutes: 28 U.S.C. § 1915(e)(2), 28 U.S.C. § 1915A, and 42 U.S.C. § 1997e(c)(1).

171. *Plunk v. Givens*, 234 F.3d 1128, 1129 (10th Cir. 2000) (upholding lower court *sua sponte* dismissal where no hearing was provided); *Carr v. Dvorin*, 171 F.3d 115, 116 (2d Cir. 1999) (*per curiam*) (“The statute clearly does not require that process be served or that the plaintiff be provided an opportunity to respond before dismissal.”); *Allen v. Zavaras*, 430 F. App'x 709, 712 (10th Cir. 2011) (*unpublished*).

172. *Giano v. Goord*, 250 F.3d 146, 151 (2d Cir. 2001) (quoting *Carr v. Dvorin*, 171 F.3d 115, 116 (2d Cir. 1999)) (noting that where a colorable (plausible; not unreasonable) claim is filed, the court should not dismiss the claim if the defendant did not move for the dismissal).

173. *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795–796 (2d Cir. 1999) (holding dismissal of a *pro se* complaint under Section 1915(e)(2)(B) should be done with leave to amend “unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim”); *accord*, *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013); *Brown v. Johnson*, 387 F.3d 1344, 1348–1349 (11th Cir. 2004); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 111 (3d Cir. 2002); *Razzoli v. Fed. Bureau of Prisons*, 230 F.3d 371, 377 (D.C. Cir. 2000), *overruled by* *Davis v. U.S. Sentencing Comm'n*, 405 U.S. App. D.C. 93, 98, 716 F.3d 660, 665 (2013); *Perkins v. Kansas Dept. of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999); *Murphy v. City of Stamford*, CIVIL ACTION NO. 3:13-CV-00942 (JCH), 2013 U.S. Dist. LEXIS 153441 at *12–*13 (D. Conn. Oct. 25, 2013) (*unpublished*), *amended by* *Murphy v. City of Stamford*, CIVIL ACTION NO. 3:13-CV-00942 (JCH), 2014 U.S. Dist. LEXIS at *5 (D. Conn. Apr. 14, 2014).

174. *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724, 207 L. Ed. 2d 132, 136 (2020).

175. *Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005); *accord*, *Paul v. Marberry*, 658 F.3d 702, 705 (7th Cir. 2011).

176. *Coleman v. Tollefson*, 733 F.3d 175, 177 (6th Cir. 2013) (“Under the PLRA, a court may dismiss an action that it finds ‘frivolous or malicious’, without permitting the plaintiff to amend the complaint.”), *aff'd*, 575 U.S. 532 (2015).

177. See *Hutchinson v. Watson*, 607 F. App'x 116, 116 (2d Cir. 2015) (*unpublished*) (28 U.S.C. § 1915(e)(2); citing *Giano v. Goord*, 250 F.3d 146, 149–150 (2d Cir. 2001)); *Douglas v. Yates*, 535 F.3d 1316, 1319–1320 (11th Cir. 2008) (28 U.S.C. § 1915(e)(2)(B)(ii)); *Brown v. Bargery*, 207 F.3d 863, 866–867 (6th Cir. 2000) (28 U.S.C. §§ 1915(e)(2) and 1915A(b)); *Moore v. Sims*, 200 F.3d 1170, 1171 (8th Cir. 2000) (*per curiam*) (28 U.S.C. § 1915(e)(2)(B)(ii)); *Liner v. Goord*, 196 F.3d 132, 134 (2d Cir. 1999) (28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c)(2)); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998); *Black v. Warren*, 134 F.3d 732, 734 (5th Cir. 1998);

have held that dismissals as frivolous or malicious are reviewed under an “abuse of discretion” standard, which means that the appeals court will not overrule the district court’s decision unless it thinks the district court made a very big mistake.¹⁷⁸

The PLRA screening provisions do not change the standards for assessing complaints to determine whether they state a claim upon which relief can be granted. The court must take as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor.¹⁷⁹ It is still the case that “[a] document filed pro se is ‘to be liberally construed,’ and ‘a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’”¹⁸⁰

The screening provisions have been held not to violate due process,¹⁸¹ equal protection,¹⁸² or the right of access to the courts.¹⁸³

E. Exhaustion of Administrative Remedies

The PLRA exhaustion requirement says:

No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.¹⁸⁴

More incarcerated people lose their cases because they fail to exhaust administrative remedies than from any other part of the PLRA.

Mitchell v. Farcass, 112 F.3d 1483, 1489–1490 (11th Cir. 1997); Atkinson v. Bohn, 91 F.3d 1127, 1128 (8th Cir. 1996).

178. See *Ejikeme v. Dir., Fed. Bureau of Intelligence.*, 639 F. App’x 75, 75 (3d Cir. 2016) (per curiam) (*unpublished*); *Johnson v. Darr*, 368 F. App’x 822 (9th Cir. 2010) (*unpublished*); *Mosely v. Highsmith*, 311 F. App’x 932, 933 (8th Cir. 2009) (per curiam) (*unpublished*); *Hughes v. Lott*, 350 F.3d 1157, 1160 (11th Cir. 2003); *Gladney v. Pendleton Corr. Facility*, 302 F.3d 773, 775 (7th Cir. 2002); *Bilal v. Driver*, 251 F.3d 1346, 1348–1349 (11th Cir. 2001) (holding that abuse of discretion standard was proper for review of dismissal based on frivolity); *Harper v. Showers*, 174 F.3d 716, 718 n.3 (5th Cir. 1999) (stating that *de novo* review is only appropriate for dismissals for failure to state a claim on which relief may be granted). In practice, the “abuse of discretion” standard makes it very unlikely that an appellate court will overturn the district court’s ruling.

179. *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Gomez v. USAA Federal Savings Bank*, 171 F.3d 794, 795–796 (2d Cir. 1999).

180. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200 (2007) (citation omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285 (1976)).

181. Section 1915(e)(2)(B)(i), which only addresses procedures to be followed by the district court once a claim is presented before the court, did not impede or restrict the prisoner’s ability to prepare, file, and bring to the court’s attention his complaint. See *Vanderberg v. Donaldson*, 259 F.3d 1321, 1323 (11th Cir. 2001) (addressing a dismissal for failure to state a claim under § 1915(e)(2)(B)(ii)). Similarly, there is no due process violation where Johnson filed objections to the magistrate’s report and recommendation, and the district court conducted a *de novo* review before dismissing his complaint under § 1915(e)(2)(B). *Id.* at 1324.” *Johnson v. Patterson*, 519 F. App’x 610, 612 (11th Cir. 2013) (*unpublished*). *Curley v. Perry*, 246 F.3d 1278, 1283–1284 (10th Cir. 2001) (finding no due process violation).

182. *Vanderberg v. Donaldson*, 259 F.3d 1321, 1324 (11th Cir. 2001) (holding that section 1915(e)(2)(B)(ii) does not violate the Equal Protection Clause); *Curley v. Perry*, 246 F.3d 1278, 1285 (10th Cir. 2001) (finding no equal protection violation).

183. *Martin v. Scott*, 156 F.3d 578, 580 n.2 (5th Cir. 1998) (finding provision does not unconstitutionally restrict access to federal courts).

184. 42 U.S.C. § 1997e(a).

The PLRA makes exhaustion of prison remedies required before you can file suit.¹⁸⁵ This is true even if you are suing for money damages and the grievance system does not provide them.¹⁸⁶ If you do not exhaust your administrative remedies, your case will be *dismissed* instead of stayed (held pending exhaustion).¹⁸⁷ For this reason, you should use all of your administrative remedies before filing. You must exhaust *before* you file suit, not afterward, or your case will be dismissed.¹⁸⁸ Most courts have said that dismissal for non-exhaustion should be “without prejudice,”¹⁸⁹ meaning the case could be refiled if you were able to exhaust after the dismissal, though a few have said it can be dismissed with prejudice if there are reasons to believe the case can’t be brought again, for example if the statute of limitations or the deadline to file a grievance has passed.¹⁹⁰ See Part E(6) of this Chapter for more information about time limits.

So, it is very important to exhaust your administrative remedies within the prison correctly the first time. You may not get a second chance. You need to be careful to get it right because some prison remedies are complicated or they may not be administered according to the rules. Also, any mistake may be used against you. If something happens to you that you may want to bring suit about, here is what you should do:

- (1) Find out what remedies are available within the prison administrative system right away. Many times, deadlines are very short. If you wait until you have definitely decided to sue, it may be too late to exhaust your administrative remedies.
- (2) Always use the prison grievance system or any other available remedy, such as a disciplinary appeal.
- (3) If you think there is a reason why you should not have to exhaust your administrative remedies, forget it. Exhaust them anyway.

185. *Porter v. Nussle*, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (requiring “exhaustion in cases covered by [U.S.C.] § 1997e(a)”). Though mandatory, exhaustion is not “jurisdictional”. *Woodford v. Ngo*, 548 U.S. 81, 101, 126 S. Ct. 2378, 2392, 165 L. Ed. 2d 368, 385 (2006). That means if you didn’t exhaust and you think you have a good enough reason, the court at least has the power to consider your argument—but these arguments rarely work, as discussed.

186. *Booth v. Churner*, 532 U.S. 731, 738–739, 121 S. Ct. 1819, 1823–1824, 149 L. Ed. 2d 958, 964–965 (2001).

187. *McKinney v. Carey*, 311 F.3d 1198, 1199–1200 (9th Cir. 2002) (per curiam); *Medina-Claudio v. Rodriguez-Mateo*, 292 F.3d 31, 36 (1st Cir. 2002); *Neal v. Goord*, 267 F.3d 116, 121–123 (2d Cir. 2001); *Perez v. Wis. Dept. of Corr.*, 182 F.3d 532, 534–535 (7th Cir. 1999). A few decisions have granted stays pending exhaustion under very unusual circumstances. *See Kennedy v. Mendez*, No. 3:CV-03-1366, 2004 U.S. Dist. LEXIS 20170, at *5–*6 (M.D. Pa. Oct. 7, 2004) (*unpublished*) (stating that a stay was appropriate because the defendants argued the plaintiff had not exhausted his remedies when the litigation had already been going on for a long time, and claims that were *not* exhausted were closely related to those that *had* been exhausted); *Campbell v. Chaves*, 402 F. Supp. 2d 1101, 1108–1109 (D. Ariz. 2005) (telling the prison system to consider a grievance where a staff member had told the prisoner to file a tort claim instead of a grievance. The tort claim was rejected for jurisdictional reasons, and the grievance system rules had been changed so the matter would have been grievable).

188. *Gonzalez v. Seal*, 702 F.3d 785, 787–788 (5th Cir. 2012) (per curiam); *Johnson v. Jones*, 340 F.3d 624, 627–628 (8th Cir. 2003); *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001); *Jackson v. District of Columbia*, 254 F.3d 262, 269 (D.C. Cir. 2001).

189. *Pelino v. Sec’y, Penn. Dept. of Corr.*, 791 F.App’x 371, 373 (3d Cir. 2020) (per curiam) (*unpublished*) (citing *Nyhuis v. Reno*, 204 F.3d 65, 78 (3d Cir. 2000)); *Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019); *Porter v. Sturm*, 781 F.3d 448, 452 (8th Cir. 2015); *French v. Warden*, 442 F. App’x 845, 846 (4th Cir. 2011) (per curiam) (*unpublished*); *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009); *Bryant v. Rich*, 530 F.3d 1368, 1379 (11th Cir. 2008); *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059 (9th Cir. 2007); *Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 994 (6th Cir. 2004); *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004); *see, e.g., Berry v. Kerik*, 366 F.3d 85, 88 (2d Cir. 2003).

190. *See, e.g., Thompson v. Coulter*, 680 F. App’x 707, 712 (10th Cir. 2017) (*unpublished*), *cert. denied*, *Thompson v. Coulter*, 138 S. Ct. 180 (2017); *Bryant v. Rich*, 530 F.3d 1368, 1375 n.11 (11th Cir. 2008) (dicta); *Berry v. Kerik*, 366 F.3d 85, 88 (2d Cir. 2003). To the contrary, one federal appeals court has explained that all dismissals for non-exhaustion should be without prejudice, since states can allow litigants to fix their failure to exhaust, or plaintiffs may be able to go ahead without exhaustion in state court, and defenses to a new suit should be addressed in that suit. *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004).

- (4) Take all the available appeals, even if you get what you think is a good decision.
- (5) If you do not get an answer to a grievance, try to appeal anyway. Many grievance systems say that if a certain amount of time passes and there's no decision, you can treat the non-response as a denial of the grievance, and appeal.
- (6) If you're not sure which remedy to use, try all available remedies.
- (7) If prison employees tell you an issue is not grievable but you think it is, request that they process your grievance anyway so you will have a record. If there is a way to appeal or grieve a decision which says that something is not grievable, do that too! As long as there is another step you can take, take it.
- (8) If prison employees tell you something will be taken care of and you do not need to file a grievance, exhaust your remedies anyway if you think there is any chance you might want to file suit.
- (9) Follow the rules of the grievance system or other remedy as best you can.
- (10) If the people running the grievance system or in charge of the remedy tell you that you filed your grievance incorrectly, ask them how to fix it and follow their instructions. Make a record of what you were told.
- (11) If you make a mistake, like missing a time deadline, do not give up. File the grievance anyway, explain the reasons for your mistakes, and ask that your grievance be considered despite your mistake. Appeal as far as you can if you lose.

Always remember that once you file suit, prison officials and their lawyers will use anything they can to get your case thrown out of court. They will look for any possible basis to say that you filed incorrectly and should not be allowed to sue. You want to show the court that you did everything you could to follow the exhaustion requirement, including following the prison's rules for grievances and other complaints or appeals.

If your suit is dismissed and then you manage to exhaust your administrative remedies, you *may* have to pay a new fee to re-file your case (but not all courts agree about whether this is necessary).¹⁹¹ You could also be charged a "strike," which could affect your ability to proceed *in forma pauperis* in the future.¹⁹² (See Part C above for more information on the PLRA's "three strikes" provision.)

The exhaustion provision of the PLRA applies to any case brought by "a prisoner confined in any jail, prison, or other correctional facility" about prison conditions under federal law.¹⁹³ A case is "brought by a prisoner" if the plaintiff is a prisoner at the time he files the complaint. If you are no longer a prisoner when the suit is filed, you do not need to have exhausted your administrative remedies.¹⁹⁴ PLRA exhaustion does not apply to petitions for habeas corpus—habeas has its own

191. The only federal appeals court to have ruled on this point held that a new filing fee is not necessary to re-file the same case. *Owens v. Keeling*, 461 F.3d 763, 772–774 (6th Cir. 2006). Some courts have declined to follow that holding. *See, e.g., Ellis v. Kitchin*, No. 2:07cv367, 2010 U.S. Dist. LEXIS 113248, at *1 (E.D. Va. 2010) (*unpublished*) (declining to follow *Owens v. Keeling*). Others have interpreted *Owens* narrowly. *See Barrett v. Pearson*, No. CIV 06-299-RAW-SPS, 2008 U.S. Dist. LEXIS 9156, at *3–4 (E.D. Okla. 2008) (*unpublished*) (holding, in part, that because the prisoner sued different people in each complaint, he had to pay a second filing fee). Courts have generally said that a new case must be filed after dismissal for non-exhaustion, instead of reopening the dismissed case. *See Williams v. Ramirez*, No. CIV S-06-1882 MCE DAD P, 2006 U.S. Dist. LEXIS 61617, at *3–4 (E.D. Cal. Aug. 28, 2006) (*unpublished*) (advising plaintiff that a new post-exhaustion complaint should not have the docket number of the dismissed action; the plaintiff has to file a new *in forma pauperis* application). Some courts, however, may allow prisoners to reopen their cases after exhaustion of administrative remedies. *See Roberts v. Taminga*, 20 F. App'x 455, 456–457 (6th Cir. 2001) (*unpublished*) (discussing the District Court's order that the prisoner be able to reopen his case but finding that the prisoner had still not exhausted administrative remedies in the six months the court had given him).

192. For more information about this issue, see Part C(1) of this Chapter. As explained there, if your complaint is dismissed because non-exhaustion is obvious on the face of the complaint, the dismissal may be a strike. Otherwise, it should not be a strike, but some courts have used weaker justifications for charging prisoners a strike for exhaustion-related dismissals.

193. 42 U.S.C. § 1997e(a). For more discussion of when a person is a "prisoner" for PLRA purposes, see footnotes 52–63 and the related text.

194. *Olivas v. Nevada ex rel. Dept. of Corr.*, 856 F.3d 1281, 1283–1284 (9th Cir. 2017); *Lesesne v. Doe*, 712

exhaustion requirement.¹⁹⁵ The PLRA exhaustion requirement, has been applied in Section 1983 actions filed in state court, including those that were later removed to federal court.¹⁹⁶

Most courts have held there is no emergency exception to the exhaustion requirement.¹⁹⁷ There are a few decisions that have allowed cases to go forward without exhaustion to avoid irreversible harm.¹⁹⁸ However these cases do not provide much legal justification for not following the exhaustion requirement. One federal appeals court has held that district courts retain their usual discretion to grant relief to maintain the status quo *pending* exhaustion,¹⁹⁹ which probably means you'd better have a grievance filed if you ask the court for relief pending exhaustion. Another court has said: "If a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available."²⁰⁰ However, if the prison makes available an emergency grievance procedure that could provide timely relief, the prisoner is obliged to use it before bringing suit.²⁰¹

The only exception to the exhaustion requirement that the courts recognize is the one "baked into its text," *i.e.*, the requirement that remedies be "available."²⁰² The meaning of that exception is discussed further in part E(3) of this Chapter.

For information about the New York State prison grievance system, see *JLM* Chapter 15, "Inmate Grievance Procedures."

F.3d 584, 586, 588 (D.C. Cir. 2013); Greig v. Goord, 169 F.3d 165, 167–168 (2d Cir. 1999); *see also* Jasperson v. Fed. Bureau of Prisons, 460 F. Supp. 2d 76, 87 (D.D.C. 2006) (plaintiff who filed a challenge to restrictions on placement in halfway house *before* he surrendered to the Bureau of Prisons did not have to exhaust because he was not confined yet, even if he was legally in the Bureau's custody). PLRA's administrative exhaustion requirement, discussed in Part E of this Chapter, applies to "a prisoner confined in any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(a). The difference in phrasing does not seem to be important.

195. Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 633–634 (2d Cir. 2001). For more information on habeas corpus claims, see Chapter 13 of the *JLM*, "Federal Habeas Corpus."

196. *See, e.g.*, Jennings v. Dowling, 642 F. App'x 908, 913 (10th Cir. 2016) (*unpublished*) (citing Marziale v. Silas, No. 4:15CV00655-JLH-JJV, 2015 U.S. Dist. LEXIS 164879, at *2 (E.D. Ark. Nov. 10, 2015) (*unpublished*) (collecting cases), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 164878 (E.D. Ark. Dec. 8, 2015) (*unpublished*); Johnson v. Louisiana *ex rel.* Dept. of Public Safety & Corr., 468 F.3d 278, 280 (5th Cir. 2006) ("The PLRA's exhaustion requirement applies to all Section 1983 claims regardless of whether the inmate files his claim in state or federal court."); Chapman v. Wyo. Dept. of Corr., 366 P.3d 499, 508 (Wyo. 2016); Berry v. Feil, 357 P.3d 344, 346 & n.3 (Nev. App. 2015) (citing cases).

197. *See, e.g.*, Bovarie v. Giurbino, 421 F. Supp. 2d 1309, 1314 (S.D. Cal. 2006) (holding as "irrelevant" prisoner's claim that the litigation limited his time and did not let him complete grievance process concerning law library access).

198. *See* Evans v. Saar, 412 F. Supp. 2d 519, 527 (D. Md. 2006) (declining to dismiss the case for non-exhaustion, because "given the shortness of time, [the] Court [was] unprepared to decide whether [plaintiffs] failure to exhaust [was] attributable to his delay in filing his administrative claim or the State's delay in deciding it."); Howard v. Ashcroft, 248 F. Supp. 2d 518, 533–534 (M.D. La. 2003) (holding that prisoner fighting transfer from community corrections to a prison did not have to exhaust where it was clear that her claim would be rejected, her appeal would take months, and that prison officials wanted to transfer her despite her pending appeal).

199. Jackson v. District of Columbia, 254 F.3d 262, 267–268 (D.C. Cir. 2001). This holding has not been cited much in litigation brought by incarcerated people. In one case where it was, the court threatened to grant relief, and jail officials very quickly addressed the problem. Tvelia v. Dept. of Corr., No. Civ. 03-537-M, 2004 U.S. Dist. LEXIS 2227, at *5 (D.N.H. Feb. 13, 2004) (*unpublished*). Other courts have declined to grant relief under the *Jackson v. D.C.* theory. *See, e.g.*, Blain v. Bassett, No. 7:07-cv-00552, 2007 U.S. Dist. LEXIS 86167, at *6–7 (W.D. Va. Nov. 21, 2007) (*unpublished*) (refusing to order delay of new prison rule pending plaintiff's exhaustion and dismissing action).

200. Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1173 (7th Cir. 2010).

201. Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1174 (7th Cir. 2010); *accord*, Smith v. Moon, No. 1:12-cv-01153-GBC (PC), 2012 U.S. Dist. LEXIS 159195, at *4–*7 (E.D. Cal. Nov. 6, 2012) (*unpublished*); Nowell v. Hickey, No. 11-CV-00027-KSF, 2011 U.S. Dist. LEXIS 10799, at *8–*13 (E.D. Ky. Feb. 1, 2011) (*unpublished*).

202. Ross v. Blake, 136 S. Ct. 1850, 1862, 195 L.Ed.2d 117, 124 (2016).

1. What Is Exhaustion?

Exhaustion under the PLRA means “proper exhaustion,” which is “compliance with an agency’s deadlines and other critical procedural rules.”²⁰³ Part E(5) of this Chapter discusses this point in detail. Exhaustion also means taking your complaint all the way to the end of the internal prison complaint process that applies to your problem. That is usually the prison’s grievance system. You must use every appeal available to you²⁰⁴ and complete the process *before* you file suit.²⁰⁵ Some courts have held that incarcerated people cannot add additional claims by amending their complaints unless the new claims were exhausted before the initial complaint was filed.²⁰⁶ Most courts, however, have said that as long as the new issues were exhausted before you try to add them to the case, you can amend your complaint to add them.²⁰⁷ That view is consistent with the Supreme Court’s decision in *Jones v. Bock*,²⁰⁸ which held that the exhaustion requirement should be interpreted consistently with the usual practices of litigation under the Federal Rules of Civil Procedure. The ability to amend complaints freely is part of normal federal procedural practice under those Rules.²⁰⁹

Most courts have held that once the deadline for the final decision of your last appeal has passed, you can file suit even if you have not received the decision,²¹⁰ even if the authorities then issue a late decision after you file.²¹¹ It is not clear how long you have to wait if the system has no deadline for deciding your final appeal.²¹²

203. *Woodford v. Ngo*, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2385–2386, 165 L. Ed. 2d. 368, 378 (2006).

204. *See Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001) (holding that PLRA required incarcerated person to make use of all the administrative remedies available to him and that his failure to do so prevented him from going forth with his lawsuit); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997) (affirming dismissal for failing to appeal denial of grievance). *See also Lopez v. Smiley*, No. 3:02CV1020 (RNC), 2003 U.S. Dist. LEXIS 16724, at *4 (D. Conn. Sept. 22, 2003) (*unpublished*) (holding that an incarcerated person who appealed, but whose appeal was not received and was told it was too late to file another, had exhausted).

205. *Johnson v. Jones*, 340 F.3d 624, 627–628 (8th Cir. 2003) (stating that by the time of the filing of the lawsuit, inmates must have exhausted their administrative remedies); *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001) (stating that you must exhaust administrative remedies before suing).

206. *See, e.g., Miller v. Hall*, Civil Action No.: 4:18CV77-RP, 2018 U.S. Dist. LEXIS 134135, *17 (N.D.Miss., Aug. 9, 2018) (*unpublished*) (noting claims added by amended complaint “occurred subsequent to the filing of this lawsuit in March 2018. . . . Accordingly, it is impossible that Miller achieved pre-filing exhaustion with regard to these claims, and therefore, any claim presented that could not have been exhausted prior to March 2018”); *Lee v. Urieta*, No. 5:13-CT-3155-F, 2014 U.S. Dist. LEXIS 86602, *6 (E.D.N.C., June 24, 2014) (“Because these amended claims arose after the filing of the complaint, Plaintiff could not have exhausted his administrative remedies for these claims prior to the filing of this action.”).

207. *See Mattox v. Edelman*, 851 F.3d 583, 591–595 (6th Cir. 2017); *Cano v. Taylor*, 739 F.3d 1214, 1220–1221 (9th Cir. 2014); *Cannon v. Washington*, 418 F.3d 714, 719–720 (7th Cir. 2005) (rejecting defendants’ argument that new claims could not be added by amendment even if the administrative remedies had been exhausted).

208. *Jones v. Bock*, 549 U.S. 199, 210–212, 127 S. Ct. 910, 918–919, 166 L. Ed. 2d. 798, 810–811 (2007) 209; *see* FED. R. CIV. P. 15(a).

210. *Hayes v. T. Dahlke*, 976 F.3d 259, 266 (2d Cir. 2020); *Smith v. U.S.*, 432 F. App’x 113, 117 (3rd Cir. 2011) (*per curiam*) (*unpublished*) (citing federal regulation providing prisoners may treat the absence of a timely response as a denial); *Whittington v. Ortiz*, 472 F.3d 804, 807–808 (10th Cir. 2007); *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002); *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (*per curiam*) (“A prisoner’s administrative remedies are deemed exhausted when a valid grievance has been filed and the state’s time for responding thereto has expired.”); *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir. 1998); *see Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (rejecting interpretations that would “permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances.”).

211. *See, e.g., Robinson v. Superintendent Rockview SCI*, 831 F.3d 148, 154 & n.4 (3d Cir. 2016) (“Robinson’s decision to accept that response in good faith and pursue his claim through the remainder of a belated administrative process does not rectify the prison’s errors. . . . We reject the prison’s invitation to hold Robinson’s diligence against him.”).

212. *See McNeal v. Cook Cnty. Sheriff’s Dept.*, 282 F. Supp. 2d 865, 868 n.3 (N.D. Ill. 2003) (holding 11 months is long enough to wait and citing cases holding that seven months is long enough but one month is not). However, the Seventh Circuit said, in connection with a grievance system that called for appeal decisions within 60 days “whenever possible,” that the remedy did not become “unavailable” because it took six months to get a decision. *Ford v. Johnson*, 362 F.3d 395, 400 (7th Cir. 2004).

Some courts have said that if you do not get a response to your initial grievance, you have exhausted your available internal remedies.²¹³ However, most have said that if the grievance system allows you to treat a non-response as a denial and appeal it, you must do so.²¹⁴ When in doubt, try to appeal, even if officials have failed to respond. You should do this even if your grievance just “disappears” and never shows up in the records even at the first step of the process.²¹⁵ Technically you are only required to follow up on unanswered grievances if the grievance policy provides instructions for doing so.²¹⁶ However, sometimes courts hold that failure to follow up on a non-response is a failure to exhaust regardless of whether the policy so requires.²¹⁷ Also, if you make a record of following up, you are more likely to win if the defendants claim that you never really filed the grievance.²¹⁸

Courts have said that if you *win* your grievance before the final stage and do not appeal you have exhausted, since it makes no sense to appeal if you win.²¹⁹ You are best advised not to rely on that

213. See, e.g., *Brengettcy v. Horton*, 423 F.3d 674, 682 (7th Cir. 2005) (holding prisoner who received no decision regarding his initial grievance had exhausted his remedies where the grievance policy does not tell the prisoner what to do when there is no decision); *Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 996 (6th Cir. 2004) (holding that “administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance.”).

214. See *Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019); *Mitchell v. Warden, Baldwin State Prison*, 777 F. App’x 472, 473 (11th Cir. 2019) (per curiam) (*unpublished*); *Cicio v. Wenderlich*, 714 F. App’x 96, 97–98 (2d Cir. 2018) (*unpublished*); *Wilson v. Epps*, 776 F.3d 296, 300–301 (5th Cir. 2015) (holding an incarcerated person who did not receive a grievance decision must follow policy provision that “expiration of response time limits without receipt of a written response shall entitle the offender to move on to the next step in the process”); *Jolliff v. Corr. Corp. of Am.*, 626 F. App’x 783, 784 (10th Cir. 2015) (*unpublished*); *Risher v. Lappin*, 639 F.3d 236, 241 (6th Cir. 2011) (holding an incarcerated person who did not receive a response timely was entitled under the rules to appeal and was not obliged to track down the errant response; “When pro se inmates are required to follow agency procedures to the letter in order to preserve their federal claims, we see no reason to exempt the agency from similar compliance with its own rules.”); *Turner v. Burnside*, 541 F.3d 1077, 1083–1085 (11th Cir. 2008) (finding that where an incarcerated person alleged that the warden tore up his grievance, he would have been obliged to file an appeal from the lack of a decision, except that the warden also threatened him); *Cox v. Mayer*, 332 F.3d 422, 425 n.2 (6th Cir. 2003) (finding that an incarcerated person who sued after not receiving a response to a grievance form, had not exhausted administrative remedies because the prison grievance procedure required prisoners to pursue grievances to the next level even without a response from the prison); *Clarke v. Thornton*, 515 F. Supp. 2d 435, 438–441 (S.D.N.Y. 2007) (holding that an incarcerated person had not exhausted when that individual filed suit after receiving no response from levels one and two of a three-tiered grievance policy). The New York State grievance rules provide that issues not decided within the prescribed time limits can be appealed unless the incarcerated person has consented to an extension of time. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(g)(2) (2012).

215. *Dole v. Chandler*, 438 F.3d 804, 809, 809–812 (7th Cir. 2006).

216. *Jones v. Bock*, 549 U.S. 199, 218 (2007) (holding “it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion”); *Williams v. Priatno*, 829 F.3d 118, 124 (2d Cir. 2016) (holding remedy unavailable where incarcerated person’s grievance submitted per policy never got filed, and the policy had no instruction for appealing grievances that were never acknowledged).

217. See *Lockett v. Bonson*, 937 F.3d 1016, 1026 (7th Cir. 2019) (holding prisoner who alleged he filed a grievance appeal and got no response, in a system that provided after 45 days without a response the plaintiff was free to go to court, the regulations “in their totality” required the plaintiff to regard the failure to provide a receipt as a “red flag” and file a new grievance about the fate of his prior grievance, despite lack of such a requirement in the rules); *Williams v. LaClair*, 128 Fed.App’x. 792, 793 (2d Cir. 2005) (*unpublished*) (affirming dismissal for non-exhaustion where the plaintiff alleged that an unidentified prison official had discarded his grievance, but failed to explain why he did not pursue the matter when he realized his grievance had not been filed).

218. See, e.g., *Mojica v. Murphy*, No. 9:17-CV-0324 (DNH/ML), 2020 U.S. Dist. LEXIS 11857, at *47 n. 26 (N.D.N.Y., Jan. 23, 2020) (*unpublished*), *report and recommendation adopted*, *Mojica v. Murphy*, No. 9:17-CV-0324 (DNH/ML), 2020 U.S. Dist. LEXIS 40175 (N.D.N.Y., Mar. 9, 2020) (*unpublished*), and cases cited.

219. See *Williams v. Dept. of Corr.*, 678 F. App’x 877, 880–881 (11th Cir. 2017) (per curiam) (*unpublished*) (holding incarcerated person whose “informal grievance” requesting a transfer for safety reasons resulted in his transfer had exhausted without further proceedings), *cert. denied sub nom.*, *Williams v. Fla. Dept. of Corr.*, 138 S. Ct. 1586, 200 L.Ed.2d 751 (2018); *Patterson v. Stanley*, 547 F. App’x 510, 512–513 (5th Cir. 2013) (per curiam) (*unpublished*) (holding plaintiff whose disciplinary conviction was reversed at Step 1, with no indication he could

statement. because some courts have also held that if you do not win *all* possible relief in the grievance, then you have not technically exhausted all available remedies.²²⁰ Prison officials and their lawyers will almost always be able to think of some relief you could possibly have obtained, and the court may accept their arguments.²²¹ Courts have held that if you have been “reliably informed by an administrator that no remedies are available,” you do not have to keep appealing.²²² If you have not been told this and you want to bring suit, you should probably appeal any decision all the way up, no matter what. If you have to explain why you are appealing a positive decision or decision that you have won, you can respond by saying something like “to exhaust my administrative remedies by calling this problem to the attention of high-level officials so they can take whatever action is necessary to make sure it never happens again.”²²³

have gotten more relief at Step 2, had exhausted); *Toomer v. BCDC*, 537 F. App’x 204, 206 (4th Cir. 2013) (per curiam) (*unpublished*) (“After receiving a favorable outcome on the merits of his grievance at a lower step in the process, Toomer was not obligated to pursue an administrative appeal to Step III in order to exhaust his administrative remedies.”); *Diaz v. Palakovich*, 448 F. App’x 211, 216 (3rd Cir. 2011) (*unpublished*) (holding there is no need to appeal outcomes of “grievance resolved” or “uphold inmate”); *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (holding “a prisoner need not press on to exhaust further levels of review once he has either received all ‘available’ remedies at an intermediate level of review or been reliably informed by an administrator that no remedies are available”); *Abney v. McGinnis*, 380 F.3d 663, 669 (2d Cir. 2004) (holding an incarcerated person who repeatedly got favorable decisions that later were not carried out had exhausted despite failure to appeal the favorable decisions); *Sulton v. Wright*, 265 F. Supp. 2d 292, 298–299 (S.D.N.Y. 2003) (noting that an incarcerated person is not required to complain after his grievance has been addressed but not corrected).

220. *Rozenberg v. Knight*, 542 F. App’x 711, 713 (10th Cir. 2013) (*unpublished*) (holding that an incarcerated person removed by Inspector General from job he complained about did not thereby exhaust because he did not also get relief on his grievance requests seeking reprimand of staff and reform of kitchen supervision); *Johnson v. Thyng*, 369 F. App’x 144, 148–149 (1st Cir. 2010) (per curiam) (*unpublished*) (holding that an incarcerated person who sought protective custody did not exhaust where his assailant was transferred as a result of his initial grievance, he did not appeal, but he continued to complain that other people who were incarcerated were threatening him, and other relief could have been granted); *Carter v. Rojas*, No. 1:06-cv-00251-OWW-DLB (PC), 2009 U.S. Dist. LEXIS 10758, *8–*10 (E.D. Cal., Feb. 4, 2009) (*unpublished*) (holding that plaintiff who did not take his final appeal because his problem had been solved did not exhaust, since he had also asked for a detailed description of the offending employee’s conduct, and he could also have received an apology or a change in rules and regulations), *report and recommendation adopted*, *Carter v. Rojas*, No. 1:06-cv-00251-OWW-DLB (PC), 2009 U.S. Dist. LEXIS 25559 (E.D. Cal. Mar. 27, 2009) (*unpublished*); *see also* *Rivera v. Pataki*, 01 Civ. 5179 (MBM), 2003 U.S. Dist. LEXIS 11266, at *27 (S.D.N.Y. Feb. 14, 2005) (noting it “made sense” for a prisoner to appeal when prisoner had been granted partial relief but the relief did not change the challenged policy).

221. *See, e.g.,* *Macias v. Zenk*, 495 F.3d 37, 44 (2d Cir. 2007) (holding that putting prison officials on notice is not enough because “[t]he benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance” and “[t]he prison grievance system will not have such an opportunity unless the grievant complies with the system’s critical procedural rules” (citations omitted)); *Ruggiero v. County of Orange*, 467 F.3d 170, 177–178 (2d Cir. 2006) (holding that an incarcerated person who prevailed informally needed to exhaust grievances because of “the larger interests at stake”). However, the Seventh Circuit has rejected this idea, stating that “we do not think it [is the prisoner’s] responsibility to notify persons higher in the chain when this notification would be solely for the benefit of the prison administration.” *Thornton v. Snyder*, 428 F.3d 690, 696–697 (7th Cir. 2005).

222. *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005); *Cahill v. Arpaio*, No. CV 05-0741-PHX-MHM (JCG), 2006 U.S. Dist. LEXIS 80772, at *7–8 (D. Ariz. Nov. 2, 2006) (*unpublished*) (holding plaintiff reasonably relied on grievance hearing officer telling him that “(1) the matter was under investigation and he would not be notified of the results, (2) he could not appeal and would not be given a form, and (3) he should proceed to federal court,” even though the preprinted decision form said an appeal was available). Similarly, courts have held that if a prisoner’s grievance is rejected on the ground that the prisoner has already received the relief sought, he has exhausted. *Elkins v. Schrubbe*, No. 04-C-85, 2006 U.S. Dist. LEXIS 43157, at *154–155 (E.D. Wis. June 15, 2006) (*unpublished*) (holding that an incarcerated person who had no remaining available remedy where grievances were “rejected as moot because the issue had already been resolved in his favor in that he received the requested relief”).

223. *See* *Ruggiero v. County of Orange*, 467 F.3d 170, 177 (2d Cir. 2006) (holding that an incarcerated person who obtained what he wanted informally was still required to exhaust because a grievance “still would have allowed prison officials to reconsider their policies and discipline any officer who had failed to follow existing policies”).

“Exhaustion” generally means using whatever formal complaint process is available (usually a grievance system or administrative appeal). The PLRA requires “Proper Exhaustion,” meaning that you follow all of the rules of the prison process.²²⁴ If you do that, you cannot be required to do more.²²⁵ Letters and other informal means of complaint, like participating in an internal affairs or inspector general investigation, generally will not be considered proper exhaustion.²²⁶ They might be if the prison rules specifically identify them as an alternative means of complaint.²²⁷ In a few cases, courts have said that non-grievance complaints that were actually reviewed at the highest levels of authority in the prison system satisfied the exhaustion requirement,²²⁸ but this result is less likely after the Supreme Court’s “proper exhaustion” holding in *Woodford v. Ngo*.

The exhaustion requirement refers only to administrative remedies. You do not need to go to court and exhaust judicial remedies before you go to federal court.²²⁹ The administrative remedies Congress

224. *Woodford v. Ngo*, 548 U.S. 81, 93, 126 S. Ct. 2378, 2387, 165 L. Ed. 2d 368, 380 (2006) (“[T]he PLRA exhaustion requirement requires proper exhaustion”).

225. *Jones v. Bock*, 549 U.S. 199, 218, 127 S. Ct. 910, 922–923, 166 L. Ed. 2d 798, 815 (2007) (“Compliance with prison grievance procedures . . . is all that is required by the PLRA to ‘properly exhaust.’”)

226. *See Pavey v. Conley*, 663 F.3d 899, 905 (7th Cir. 2011) (“The benefits of exhaustion can be realized only if the *prison grievance system* is given a fair opportunity to consider the grievance.” (emphasis supplied)); *Ruggiero v. County of Orange*, 467 F.3d 170, 177 (2d Cir. 2006) (holding that talking with Sheriff’s Department investigators rather than filing a jail grievance did not satisfy the exhaustion requirement); *Panaro v. City of N. Las Vegas*, 432 F.3d 949, 953 (9th Cir. 2005) (holding that participation in an internal affairs investigation did not amount to exhaustion because it did not provide a remedy for the incarcerated person, even though the officer was disciplined); *Scott v. Gardner*, 287 F. Supp. 2d 477, 488 (S.D.N.Y. 2003) (holding that letters of complaint are not part of the grievance process).

227. In *Pavey v. Conley*, 170 F. App’x 4, 8 (7th Cir. 2006) (*unpublished*), the plaintiff alleged that prison staff had broken his arm and he could not write, and the grievance rules said that prisoners who could not write could be assisted by staff. The court held that any memorialization of his complaint by investigating prison staff might qualify as a grievance—and even if they did not write it down, he might have “reasonably believed that he had done all that was necessary to comply with” the policy. *See also* *Amador v. Andrews*, 655 F.3d 89, 103–104 (2d Cir. 2011) (holding that an incarcerated person exhausted where her letter was treated as a grievance and she completed the grievance process); *Ruffin v. Knowlton*, No. 2:17-cv-00152-LEW, 2019 U.S. Dist. LEXIS 6867, at *6 (D. Me. Jan. 15, 2019) (*unpublished*) (holding prisoner’s letter to State Jail Inspector appeared to satisfy the final appeal requirement of the jail); *Kocsis v. Cty. of Sedgwick*, No. 14-2167-CM, 2014 U.S. Dist. LEXIS 161882, at *3–4 (D. Kan. Nov. 19, 2014) (*unpublished*) (declining to dismiss where investigation followed plaintiff’s verbal (sic) complaint, since defendants’ policy provided for acceptance of and response to such complaints); *Carter v. Symmes*, No. 06-10273-PBS, 2008 U.S. Dist. LEXIS 7680, at *8 (D. Mass. Feb. 4, 2008) (*unpublished*) (holding that a timely letter from the prisoner’s lawyer served to exhaust remedies where grievance rules did not specify use of a form, and stating that the letter could be considered as part of prisoner’s grievance); *Shaheed-Muhammad v. Dipaolo*, 393 F. Supp. 2d 80, 96–97 (D. Mass. 2005) (concluding that letters to officials are considered grievances under state law).

228. *See* *Camp v. Brennan*, 219 F.3d 279, 280–281 (3d Cir. 2000) (holding that use of force allegation reportedly investigated and rejected by Secretary of Correction’s office needed no further exhaustion). If you are in the position where you must argue that another kind of complaint meets the exhaustion requirement, be sure to remind the court that it is not as if Congress allowed every prisoner to go straight to court without pursuing other grievance processes first. The Supreme Court even expressed this sentiment, noting that “Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.” *Porter v. Nussle*, 534 U.S. 516, 525, 122 S. Ct. 983, 988, L. Ed. 2d. 12, 22 (2002). You can then argue that if prison officials actually reviewed your complaint, they had the opportunity to address the complaint internally, and exhaustion was therefore satisfied. The likelihood of success with this argument is not good and you should not bypass normal exhaustion procedures. *See, e.g.,* *Macias v. Zenk*, 495 F.3d 37, 43–44 (2d Cir. 2007) (holding “after *Woodford*, notice alone is insufficient”; the PLRA requires both “substantive exhaustion” (notice to officials) and “procedural exhaustion” (following the rules)).

229. *See* *Minter v. Bartruff*, 939 F.3d 925, 927–928 (8th Cir. 2019) (holding state postconviction judicial remedies are not administrative remedies to be exhausted under § 1997e(a)); *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002); *Jenkins v. Morton*, 148 F.3d 257, 259–260 (3d Cir. 1998) (finding that an incarcerated person was not required to exhaust his state judicial remedies prior to bringing an action covered by PLRA). New York does not have that kind of judicial review procedure. Instead, New York permits review of administrative decisions by Article 78 proceedings. For more information on Article 78 proceedings, see *JLM* Chapter 22, “How to Challenge

had in mind when it passed the PLRA are internal prison grievance procedures.²³⁰ An incarcerated person is not required to exhaust state or federal tort claim procedures, unless he wishes to make a tort claim under state law or the Federal Tort Claims Act.²³¹

The United States Department of Justice (“DOJ”) maintains complaint procedures for incarcerated people alleging disability discrimination in violation of the Americans with Disabilities Act or the Rehabilitation Act. There are separate procedures for incarcerated people complaining about state and local facilities and those complaining about the Federal Bureau of Prisons.²³² Some courts have held that resort to the DOJ procedures is not a substitute for exhaustion of prison grievance remedies, but a number of courts have held that the DOJ procedures must be exhausted in addition to the prison grievance process.²³³ As to people incarcerated in federal custody, most recent decisions hold that exhausting the DOJ process is required, and federal regulations now specify that incarcerated people must complete the federal Administrative Remedy Procedure (the grievance system) before using the DOJ disability complaint procedures.²³⁴ The DOJ procedures have been amended in recent years to provide a more elaborate process which may lead to a judicial-like hearing and where participation of counsel is allowed, though the agency does not provide counsel.²³⁵ The procedures for people

Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules.”

230. *Rumbles v. Hill*, 182 F.3d 1064, 1069 (9th Cir. 1999). *See Jones v. Bock*, 549 U.S. 199, 218, 127 S. Ct. 910, 922–923, 166 L. Ed. 2d 798, 815 (2007) (“Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to ‘properly exhaust.’”); *Porter v. Nussle*, 534 U.S. 516, 524–525, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (stating that the exhaustion requirement was intended to give corrections officials the opportunity to solve problems before suit was filed).

231. *See, e.g., Rumbles v. Hill*, 182 F.3d 1064, 1069–1070 (9th Cir. 1999) (stating that under the PLRA, “there is no indication that [Congress] intended prisoners also to exhaust state tort claim procedures”), *overruled on other grounds* by *Booth v. Churner*, 532 U.S. 731, 741 (2001). For information on tort claims generally, review Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions.”

232. 28 C.F.R. § 35.170 (2019).

233. *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1062–1063 (9th Cir. 2007) (relying on the Supreme Court’s characterization of the exhaustion requirement as addressing internal prison remedies); *Lavista v. Beeler*, 195 F.3d 254, 257 (6th Cir. 1999) (holding that resort to the ADA procedures did not suffice to exhaust, stating: “Congress intended the exhaustion requirement to apply to the *prison’s* grievance procedures, regardless of what other administrative remedies might also be available.”).

234. *Brown v. Cooper*, No. 18-219 (DSD/BRT), 2018 U.S. Dist. LEXIS 218544 (D. Minn. Dec. 11, 2018) (*unpublished*) *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 2159 (D. Minn. Jan. 7, 2019) (*unpublished*), *aff’d*, 787 F. App’x 366 (8th Cir. 2019) (per curiam) (*unpublished*); *Elliott v. Wilson*, No. 15-CV-1908, 2017 U.S. Dist. LEXIS 48348 (D. Minn. Jan. 17, 2017) (*unpublished*), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 47952 (D. Minn. Mar. 29, 2017) (*unpublished*); *Cardenas-Urriarte v. USA*, No. 14-cv-00747-JPG-PMF, 2015 U.S. Dist. LEXIS 116193 (S.D. Ill. Sept. 1, 2015) (*unpublished*); *Zoukis v. Wilson*, No. 1:14cv1041 (LMB/IDD), 2015 U.S. Dist. LEXIS 86788 (E.D.Va. July 2, 2015) (*unpublished*); *Brown v. Cantrell*, Civil Action No. 11-cv-00200-PAB-MEH, 2012 U.S. Dist. LEXIS 131188 (D. Colo. Sept. 14, 2012) (*unpublished*) (“Although certain courts have looked to the purpose of the PLRA and to the requirements imposed on non-prisoners asserting ADA claims in determining that the § 39.170 remedy need not be exhausted, . . . the Court finds that the PLRA’s clear textual mandate should control this issue.” (footnote omitted)); *Haley v. Haynes*, No. CV210-122, 2012 U.S. Dist. LEXIS 3754 (S.D. Ga. Jan. 12, 2012) (*unpublished*), *appeal dismissed*, No. 12-11339 (11th Cir. Apr. 22, 2013) (*unpublished*); *Bryant v. U.S. Bureau of Prisons*, No. CV11-254 CAS (DTBx), 2011 U.S. Dist. LEXIS 86374 (C.D. Cal. July 11, 2011) (*unpublished*) (holding plaintiff required by 28 C.F.R. § 39.170 to exhaust that procedure, in addition to the federal Administrative Remedy Procedure, before proceeding with his Rehabilitation Act claim). *See Gambino v. Hershberger*, Civil Action No. TDC-17-1701, 2019 U.S. Dist. LEXIS 47521 (D. Md. Mar. 20, 2019) (*unpublished*) (citing 28 C.F.R. § 39.170(d) (2019)).

235. The procedures have been conveniently summarized by one district court:

To exhaust the additional two step grievance process for disability discrimination issues, the prisoner must file a complaint within 180 days of the BOP general counsel’s final administrative decision. 28 C.F.R. § 39.170(d)(3) (2019). The complaints are processed by the Director of Equal Employment Opportunity at the Department of Justice (“DOJ”). 28 C.F.R. § 39.170(d)(4) (2019). The Director of Equal Employment Opportunity will attempt informal resolution of the issue and if informal resolution is

incarcerated in state or local custody remain basic. DOJ is generally required to investigate disability complaints, but they are not required to investigate *each* complaint. The regulations provide that “designated agencies may exercise discretion in selecting title II complaints for resolution,” reflecting DOJ’s experience that “the Department has received many more complaints alleging violations of title II than its resources permit it to resolve.”²³⁶ If the complaint is not resolved, DOJ is required to issue findings only “[w]here appropriate.” whatever that means. Though at least one recent decision has held that state and local incarcerated people are required to exhaust this process, we are not sure why a remedy that does not even guarantee an investigation or a meaningful decision to the incarcerated person can be considered an available remedy under the PLRA, and we have not seen cases addressing that question.²³⁷

Some courts have held that exhaustion of the DOJ process was not required where there was no evidence that the procedure had been made known to the incarcerated people.²³⁸

In New York, the prison system has agreed not to argue that the DOJ procedures must be exhausted in litigation against it.²³⁹

2. What Are “Prison Conditions”?

The exhaustion requirement applies only to cases filed by incarcerated people about “prison conditions.” The Supreme Court has said that phrase applies “to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive

unsuccessful, the Director will issue a letter of findings within 180 days of receipt of the complaint. 28 C.F.R. §§ 39.170(f)–(h) (2019). The prisoner may then request a hearing and appeal the letter of findings. 28 C.F.R. § 39.170(i) (2019). The administrative remedies process will then be finished after the Complaint Adjudication Officer issues a ruling on the appeal. 28 C.F.R. §§ 39.170(i)–(l).

Cardenas-Uriarte v. United States, No. 14-cv-00747-JPG-PMF, 2015 U.S. Dist. LEXIS 116194, at *9 (S.D. Ill. July 27, 2015) (*unpublished*).

236. 28 C.F.R. Pt. 35, App. A, Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, comment on § 35.172 (2011).

237. 28 C.F.R. § 35.172(c) (2019). Trevino v. Woodbury Cty. Jail, No. C14-4051-MWB, 2015 U.S. Dist. LEXIS 7423 (N.D. Iowa Jan. 22, 2015) (*unpublished*) (holding plaintiff was required to exhaust the DOJ procedures under 28 C.F.R. § 35.170; noting statutory language did not restrict exhaustion requirement to in-prison remedies), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 62609 (N.D. Iowa May 13, 2015), *aff’d*, 623 F. App’x 824 (8th Cir. 2015) (per curiam) (*unpublished*). Some older decisions held similarly under the prior regulations. *See* William G. v. Pataki, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716, at *16 (S.D.N.Y. Aug. 11, 2005) (*unpublished*); Scott v. Goord, No. 01 Civ. 0847 (LTS) (AJP), 2004 U.S. Dist. LEXIS 21663 (S.D.N.Y. Oct. 25, 2004) (*unpublished*); Burgess v. Garvin, No. 01 Civ. 10994 (GEL), 2003 U.S. Dist. LEXIS 14419 (S.D.N.Y. Aug. 18, 2003), *on reconsideration*, 2004 U.S. Dist. LEXIS 4122 (S.D.N.Y. March 16, 2004) (*unpublished*); Rosario v. N.Y. State Dept. of Corr. Servs., No. 03 Civ. 859, 2003 U.S. Dist. LEXIS 18032 (S.D.N.Y. Sept. 24, 2003) (*unpublished*), *vacated and remanded*, 400 F.3d 108 (2d Cir. 2005) (per curiam).

238. Woody v. U.S. Bureau of Prisons, No. 16-862 (DWF/BRT), 2016 U.S. Dist. Lexis 182036 (D. Minn. Nov. 22, 2016) (*unpublished*) (holding DOJ procedures unavailable to people incarcerated in federal prison where they were not mentioned in the inmate handbook or in the Bureau of Prisons’ grievance policy and incarcerated people were not otherwise informed of them), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 5636 (D. Minn. Jan. 13, 2017) (*unpublished*); Burgess v. Garvin, No. 01 Civ. 10994 (GEL), 2004 U.S. Dist. LEXIS 4122 (S.D.N.Y. March 16, 2004) (*unpublished*) (discussing procedural requirements for people incarcerated in state prison); *see also* Payne v. United States Marshals Serv., No. 15 C 5970, 2018 U.S. Dist. LEXIS 122015 (N.D. Ill. July 20, 2018) (*unpublished*) (declining to dismiss for non-exhaustion where a quadriplegic incarcerated person’s disability was not accommodated in a federal courthouse, and no information about administrative remedies was provided in response to his inquiries; stating the plaintiff had exercised “reasonable diligence” and “did not need to scour the Code of Federal Regulations.” Payne v. United States Marshals Serv., No. 15 C 5970, 1028 U.S. Dist. LEXIS 122015 (N.D. Ill. July 20, 2018) (*unpublished*).

239. Rosario v. Goord, 400 F.3d 108 (2d Cir. 2005) (per curiam). *But see* William G. v. Pataki, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716 (S.D.N.Y. Aug. 11, 2005) (*unpublished*) (holding DOJ process must be exhausted in action against by state Division of Parole and Office of Mental Health).

force or some other wrong.”²⁴⁰ In other words, if something happened to you in prison, it is probably covered by the exhaustion requirement.²⁴¹

What anyone does outside the prison system generally will not be considered as relating to “prison conditions.”²⁴² What happened while you were in police custody generally will also not be considered as relating to “prison conditions,” though in many cases concerning events immediately after arrest, it is difficult to tell from court decisions whose custody the incarcerated person was in or where the line was drawn between being an arrestee and being an incarcerated person.²⁴³ The same *might* be true of medical facilities outside the prison.²⁴⁴ Disputes over whether you should be in prison at all are not about “prison conditions.”²⁴⁵ Whether parole release or revocation relate to “prison conditions” is

240. *Porter v. Nussle*, 534 U.S. 516, 532, 122 S. Ct. 983, 992, 152 L. Ed. 2d 12, 26 (2002).

241. *See* *Krilich v. Fed. Bureau of Prisons*, 346 F.3d 157, 159 (6th Cir. 2003) (holding that intrusions on attorney-client correspondence and telephone conversations are prison conditions, notwithstanding argument that attorney-client relationship “transcends the conditions of time and place”); *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (holding that statutorily required DNA collection is a prison condition); *Castano v. Neb. Dept. of Corr.*, 201 F.3d 1023, 1024 (8th Cir. 2000) (failure to provide interpreters for Spanish-speaking prisoners is a prison condition). *But see* *United States v. Hashmi*, 621 F. Supp. 2d 76, 79, 84–85 (S.D.N.Y. 2008) (holding that security clearances for prisoners’ attorneys put in place by the Attorney General were not “conditions” as the PLRA contemplated).

242. For example, one court held that the Department of Homeland Security’s placement of a prisoner on a “watch list” was not a prison condition requiring exhaustion; however, the prison’s actions in placing him in segregation or depriving him of telephone privileges based on that placement required exhaustion. *Almahdi v. Ridge*, 201 F. App’x 865, 868 (3d Cir. 2006) (*unpublished*). *See also* *Singh v. U.S. Dept. of Homeland Sec.*, No. 1:12-cv-00498-AWI-SKO, 2013 U.S. Dist. LEXIS 56664 (E.D. Cal. Apr. 18, 2013) (*unpublished*) (holding Privacy Act suit about Department of Homeland Security misinformation concerning an immigration detainer was not about prison conditions and need not be exhausted within Bureau of Prisons), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 80599 (E.D. Cal. June 6, 2013) (*unpublished*); *Johnson v. O’Malley*, No. 96 C 6598, 1998 U.S. Dist. LEXIS 7955, at *10–11 (N.D. Ill. May 15, 1998) (*unpublished*) (holding that incarcerated person who alleged that prosecutors and investigators were conspiring to harm him in jail because he had information about official corruption did not have to exhaust because claim was not about prison conditions).

243. *See* *Bowers v. City of Philadelphia*, No. 06-CV-3229, 2007 U.S. Dist. LEXIS 5804, at *116 n.40 (E.D. Pa. Jan. 25, 2007) (*unpublished*) (holding police holding cells were not prisons for purpose of prisoner release provisions of PLRA). *See* *Carbajal v. McCann*, 808 F. App’x 620, 639 (10th Cir. 2020) (*unpublished*) (holding § 1997e(a) applied to use of force in a court holding cell because “the PLRA applies to all claims of excessive force pressed by prisoners”; not addressing the statutory term “prison conditions”); *Voss v. Kauer*, No. 18-cv-848-jdp, 2019 U.S. Dist. LEXIS 136215 (W.D. Wis. Aug. 13, 2019) (*unpublished*) (holding denial of medical care while plaintiff was in a holding cell in jail was about prison conditions, regardless of whether he had been booked); *Jackson v. Dart*, No. 13-CV-7713, 2016 U.S. Dist. LEXIS 132582 (N.D. Ill. Sept. 26, 2016) (*unpublished*) (stating it is unclear “whether, during the booking and bond-setting process, he was “confined in any jail, prison, or other correctional facility”); *Vasquez v. Williams*, No. 13 Civ. 9127 (LGS), 2015 U.S. Dist. LEXIS 105913 (S.D.N.Y. Aug. 11, 2015) (*unpublished*) (noting it is “unclear” whether court holding facilities outside the prison are covered by the exhaustion requirement); *see also* *Khatib v. County of Orange*, 639 F.3d 898, 902–905 (9th Cir. 2011) (holding court holding cells were “jails” and “detention facilities” under 42 U.S.C. § 1997(1), which is not a part of the PLRA).

244. In *Borges v. Adm’r for Strong Mem. Hosp.*, No. 99-CV-6351Fe, 2002 U.S. Dist. LEXIS 18596, at *11 (W.D.N.Y. Sept. 30, 2002) (*unpublished*), the court expressed doubt that a claim made by incarcerated people injured by dentists at an outside hospital involved prison conditions, since the grievance system probably could not take any action against defendants. However, the same court reached the opposite conclusion in *Abdur-Raqiyb v. Erie County Med. Ctr.*, 536 F. Supp. 2d 299, 304 (W.D.N.Y. 2008), reasoning that the statute is supposed to be read broadly and that the plaintiff was still an incarcerated person while being treated at an outside medical facility.

245. *See* *Cantu v. Bexar Cty.*, No. SA-17-CA-306-XR, 2018 U.S. Dist. LEXIS 47095 (W.D. Tex. Mar. 22, 2018) (*unpublished*) (noting challenges to fact or duration of confinement are not about “prison conditions”); *Hampton v. Johnson*, No. 12-CV-1103, 2014 U.S. Dist. LEXIS 43357 (W.D. Ark. Mar. 31, 2014) (*unpublished*) (holding unlawful arrest claim “would not be covered under Section 1997e(a)” and need not be exhausted); *Regelman v. Weber*, Civil Action No. 10 - 675, 2011 U.S. Dist. LEXIS 29117 (W.D. Pa. Mar. 21, 2011) (*unpublished*) (holding false arrest plaintiff “is complaining about the very fact of confinement, not the conditions of confinement, and the PLRA does not apply to such claims”); *Fuller v. Kansas*, No. 04-2457-CM, 2005 U.S. Dist. LEXIS 18977, at *5 (D. Kan. Aug. 8, 2005) (*unpublished*) (holding claims of false arrest and imprisonment are not

not clear.²⁴⁶ Complaints from halfway houses or residential treatment programs are likely to be considered “prison conditions” as long as (1) you are there because of a criminal conviction or charge and (2) you are not free to leave.²⁴⁷ However, placement in or removal from these programs might not be about “prison conditions.”²⁴⁸ Incarcerated people complaining about not receiving psychiatric medication and referrals for their mental illness before being released are complaining about prison conditions.²⁴⁹

3. What Are “Available” Remedies?

The PLRA says you must exhaust all “available” administrative remedies before you can file a suit in federal court. The Supreme Court has said that the only exception to the exhaustion requirement is that incarcerated people need not exhaust remedies that are not “available.”²⁵⁰

An administrative remedy is “available” if it can “provide any relief” or “take any action whatsoever in response to a complaint,” even if it cannot provide the relief you prefer, such a money damages.²⁵¹

prison conditions claims under the statute), *aff’d*, 175 F. App’x 234 (10th Cir. 2006) (*unpublished*); *Wishom v. Hill*, No. 02-2291-KHV, 2004 U.S. Dist. LEXIS 2172, at *34 (D. Kan. Feb. 13, 2004) (*unpublished*) (holding detention without probable cause not a prison condition); *Monahan v. Winn*, 276 F. Supp. 2d 196, 204 (D. Mass. 2003) (holding a Bureau of Prisons rule revision abolishing its discretion to designate some offenders to community confinement facilities did not involve prison conditions).

246. *Compare Smalls v. State Bd. of Pardons and Paroles*, No. CV414-031, 2014 U.S. Dist. LEXIS 67133 (S.D. Ga. May 14, 2014) (*unpublished*) (holding challenge to parole condition is not about prison conditions even if it was imposed, and the incarcerated person filed suit, before release); *Coleman v. Dumeng*, No. 10 Civ. 8766 (JGK), 2012 U.S. Dist. LEXIS 18449 (S.D.N.Y. Feb. 13, 2012) (*unpublished*) (holding challenge to parole condition is not about prison conditions), *appeal dismissed*, No. 12-1168 (2d Cir. Aug. 20, 2012); *Hernandez-Vazquez v. Ortiz-Martinez*, No. CIVIL 09-01743 (JA), 2010 U.S. Dist. LEXIS 1621 (D.P.R. Jan. 8, 2010) (*unpublished*) (holding delayed parole hearing is not a prison condition); *L.H. v. Schwarzenegger*, 519 F. Supp. 2d 1072, 1081 n.9 (E.D. Cal. 2007) (holding parole violation procedures are not prison conditions), *with Martin v. Iowa*, 752 F.3d 725, 727 (8th Cir. 2014) (holding challenge to lack of in-person parole interviews must be exhausted since it was a “civil action with respect to prison conditions,” citing the definition from 18 U.S.C. § 3626(g), governing another part of the PLRA); *Castano v. Neb. Dept of Corr.*, 201 F.3d 1023, 1024–1025 (8th Cir. 2000) (holding a § 1983 action alleging defendants’ failure to provide qualified interpreters at disciplinary hearings and institutional programs bearing on eligibility of parole concerned prison conditions); *Ondek v. Ranatza*, No. 16-725-JWD-RLB, 2018 U.S. Dist. LEXIS 43116 (M.D. La. Mar. 16, 2018) (*unpublished*) (holding claims alleging defendants inadequately supervised and trained Parole Board with respect to the Board’s consideration of plaintiff’s pardon application concerned prison conditions); *Morgan v. Messenger*, No. 02-319-M, 2003 U.S. Dist. LEXIS 14892, at *8–9 (D.N.H. Aug. 27, 2003) (*unpublished*) (holding sex offender treatment director’s disclosure of private information from plaintiff’s treatment file to parole authorities and prosecutor involved prison conditions, since the director was a prison employee and the action affected the duration of plaintiff’s prison confinement).

247. *See Ruggiero v. County of Orange*, 467 F.3d 170, 174–175 (2d Cir. 2006) (holding that a “drug treatment campus” was a “jail, prison, or other correctional facility” and that term “includes within its ambit all facilities in which prisoners are held involuntarily as a result of violating the criminal law”); *William G. v. Pataki*, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716, at *11–14 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (holding that the question of whether persons incarcerated pending parole revocation proceedings were entitled to be placed in less restrictive residential treatment programs for mental illness and drug addiction involved prison conditions).

248. *See Monahan v. Winn*, 276 F. Supp. 2d 196, 204 (holding that a Bureau of Prisons rule revision that abolished its discretion to designate certain offenders to community confinement facilities did not involve prison conditions); *Bost v. Adams*, No. 1:04-0446, 2006 U.S. Dist. LEXIS 38919, at *5 (S.D. W. Va. June 12, 2006) (*unpublished*) (explaining that BOP’s decision about placement in a halfway house, affecting duration of the sentence, does not go to the “conditions of her confinement as the term “conditions” is commonly understood.”).

249. *See Bolden v. Stroger*, No. 03 C 5617, 2005 U.S. Dist. LEXIS 7473, at *5 (N.D. Ill. Feb. 1, 2005) (*unpublished*) (holding that a claim of exclusion of persons with mental illness from pre-release programs was about conditions).

250. *Ross v. Blake*, 136 S. Ct. 1850, 1862, 195 L. Ed. 2d 117, 126–127 (2016).

251. *Booth v. Churner*, 532 U.S. 731, 736, 740–741, 121 S. Ct. 1819, 1823, 149 L. Ed. 2d 958, 963 (2001).

You may believe that the complaint system in your prison is unfair or a waste of time, but you must use it and go through all of the steps and give the prison a chance to fix the problem first.²⁵²

Step one in finding out if there is an available remedy for your problem is to read the prison grievance procedure to see if addresses your problem. Often there are certain issues that are “non-grievable” in a particular grievance system, and you are not required to pursue a grievance about those issues that the grievance system does not address.²⁵³ If you have any doubt about whether your issue is grievable, you should try to pursue a grievance about it. In reviewing the prison grievance policy, you should see whether an issue that is non-grievable is directed to another administrative procedure, such as a disciplinary appeal, a special medical complaint procedure, a classification review system, or a separate system for reviewing denial of correspondence of publications.²⁵⁴ If there is a specialized procedure that addresses your problem, you must use it in order to exhaust the procedures available to you.²⁵⁵ If it is not clear which one is right, it is worth it to try all relevant procedures.

For example, the New York State grievance rule says:

- (1) An individual decision or disposition of any current or subsequent program or procedure having a written appeal mechanism which extends review to outside the facility shall be considered non-grievable.
- (2) An individual decision or disposition of the temporary release committee, time allowance committee, family reunion program or media review committee is not grievable. Likewise, an individual decision or disposition resulting from a disciplinary proceeding, inmate property claim (of any amount), central monitoring case review or records review (freedom of information request, expunction) is not grievable. In addition, an individual decision or disposition of the Commissioner, or his designee, on a foreign national prisoner application for international transfer is not grievable.
- (3) The policies, rules, and procedures of any program or procedure, including those above, are grievable.²⁵⁶

This means when some committees make their decisions, the decisions themselves cannot be challenged through the complaint system. However, the rules and procedures that these committees followed when they made that decision can be challenged. So, for example, you cannot use the grievance system to challenge the denial of temporary release (under article 2), but your complaint

252. *Booth v. Churner*, 532 U.S. 731, 741 n.6, 1825 n.6, 966 n.6 (2001) (“[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.”). This means, for example, that if another prisoner has just grieved the same issue and lost, you still need to grieve it yourself, even though you are certain that you will get the same ruling. *See Hattie v. Hallock*, 16 F. Supp. 2d 834, 836 (N.D. Ohio 1998) (dismissing incarcerated person’s action because he had not exhausted his remedies before filing).

253. *Owens v. Keeling*, 461 F.3d 763, 769–770 (6th Cir. 2006) (noting exclusion of classification disputes from grievance system); *Taylor v. Swift*, 21 F. Supp. 3d 237, 241–242 (E.D.N.Y. May 21, 2014) (holding exclusion of “inmate allegations of assault or harassment” means prisoners may rely on that language and refrain from exhausting such allegations, notwithstanding defendants’ construction of the phrase to mean something else), *appeal dismissed*, No. 14-3382 (2d Cir., Mar 10, 2015) (*unpublished*).

254. The relationship between disciplinary appeals and grievance procedures has been a particular source of confusion. Please see discussion between footnotes 291 and 294 of Part E(3) of this Chapter for more information regarding the relationship between disciplinary appeals and grievance procedures.

255. *See, e.g., Owens v. Keeling*, 461 F.3d 763, 769–772 (6th Cir. 2006) (holding prisoner who filed classification appeal exhausted his claim, despite his failure to complete an inapplicable grievance procedure); *Timley v. Nelson*, No. 99-3038-JWL, 2001 U.S. Dist. LEXIS 10117, at *4–5 (D. Kan. Feb. 16, 2001) (*unpublished*) (holding incarcerated person’s failure to pursue “religious accommodation” exception procedure meant that administrative remedies were not exhausted).

256. State of New York, Dept. of Corr. Servs., Directive No. 4040 § 701.3(e), Inmate Grievance Program (2016), available at <http://www.doccs.ny.gov/Directives/4040.pdf> (last visited Nov. 3, 2019). The state regulations say the same thing. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3 (2020). This directive notes, “if an inmate is unsure whether an issue is grievable, he or she should file a grievance and the question will be decided through the grievance process...”

that the Temporary Release Committee followed unfair procedures can be pursued through the grievance system (under article 3).

Sometimes issues that are grievable on paper are not actually grievable, either because of informal practice²⁵⁷ or just because grievance personnel decline to process a particular grievance.²⁵⁸ In those situations you should appeal the rejection all the way to the end of the process so officials cannot claim after you bring suit that the remedy was really available but you just didn't complete the process.

The Supreme Court has acknowledged that sometimes an administrative procedure “though officially on the books, is not capable of use to obtain relief” and is therefore not an available remedy.²⁵⁹ It described, “[a]s relevant here,” three kinds of situations where that may be the case.²⁶⁰ One of these is “when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. . . . When the facts on the ground demonstrate that no such potential [for relief] exists, the inmate has no obligation to exhaust the remedy.”²⁶¹ The situation described above, where there is an informal policy not to process certain kinds of grievances, fits this “dead end” category because you cannot get relief. In several cases lower courts have found a grievance procedure to be such a “dead end” or have otherwise found that there is no potential for relief, usually because of some identifiable breakdown in the system.²⁶² Courts will require a lot of persuasion and factual support, and not just your say-so, to find that a grievance system is a “dead end” or that no relief is available.

257. See, e.g., *Marr v. Fields*, No. 1:07-cv-494, 2008 U.S. Dist. LEXIS 24993 (W.D. Mich. Mar. 27, 2008) (*unpublished*) (holding evidence that hearing officers interpreted grievance policy exclusion broadly to exclude all grievances with any relationship to a disciplinary charge could excuse failure to exhaust); *Casanova v. Dubois*, Civil Action No. 98-11277-RGS, 2002 U.S. Dist. LEXIS 13264 (D. Mass. July 22, 2002) (*unpublished*) (finding that, contrary to written policy, practice was “to treat complaints of alleged civil rights abuses by staff as ‘not grievable’”), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002).

258. See, e.g., *Williams v. Strout*, No. 1:17-cv-03520-WTL-TAB, 2018 U.S. Dist. LEXIS 154435 (S.D. Ind. Sept. 11, 2018) (*unpublished*) (holding the remedy unavailable where plaintiff's grievance was rejected because “a tort claim is not a grievable issue,” which is not supported by the grievance policy); *Mooney v. Beard*, No. 2:13-cv-2290 KJN P, 2014 U.S. Dist. LEXIS 82535 (E.D. Cal. June 17, 2014) (*unpublished*) (holding incarcerated person whose grievance was cancelled because it was “outside the scope of the Inmate Appeals process” was not required to exhaust); *Jackson v. Phelps*, No. 10-919-SLR, 2013 U.S. Dist. LEXIS 169490 (D. Del. Nov. 19, 2013) (*unpublished*) (holding plaintiff had exhausted because he filed a grievance but it was returned as non-grievable), *aff'd*, 575 F. App'x 79 (3d Cir. 2014) (*unpublished*).

259. *Ross v. Blake*, 139 S. Ct. at 1859.

260. *Ross v. Blake*, 136 S. Ct. at 1859. The phrase “as relevant here” means that the Court was not claiming to describe all the possible situations in which a remedy could be unavailable, just those that seemed relevant to the facts in the *Ross* case. See *Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam); *Williams v. Corr. Officer Priatno*, 829 F.3d 118, 123 n. 2 (2d Cir. 2016) (all holding that the three categories do not exclude the possibility that a remedy might be unavailable for other reasons).

261. *Ross v. Blake*, 136 S. Ct. 1850, 1859, 195 L. Ed. 2d 117, 126–127 (2016).

262. See, e.g., *Brant v. Reddish*, No. 3:13-cv-412-J-34MCR, 2019 U.S. Dist. LEXIS 161899 (M.D. Fla. Sept. 23, 2019) (*unpublished*) (finding “systemic dead end” where four different incarcerated people challenging state execution protocols had received “identical, boilerplate responses” showing a “general practice of denying these types of requests for administrative relief,” and that the agency “does not intend to consider any challenge to its lethal injection protocol based on Plaintiffs’ grievances”); *McArdle v. Ponte*, No. 17cv2806, 2018 U.S. Dist. LEXIS 178661 (S.D.N.Y. Oct. 17, 2018) (*unpublished*) (holding incarcerated person who alleged he “never received any response to his grievances and that he ‘observed hundreds of inmates’ grievances in the grievance box . . . for days without being processed by the . . . committee” sufficiently alleged defendants were “consistently unwilling” to provide relief, supporting a “dead-end” argument); *Battle v. S.C. Dept. of Corr.*, No. 2:18-cv-00719-TMC-MGB, 2018 U.S. Dist. LEXIS 224921 (D.S.C. Oct. 2, 2018) (*unpublished*) (rejecting argument that plaintiff's grievance was limited to a complaint about doorknobs where he complained of violent assault made possible by the absence of doorknobs; describing system as a “dead end” in failing to address the assault), *report and recommendation adopted in part, rejected in part on other grounds*, No. 2:18-cv-719-TMC, 2019 U.S. Dist. LEXIS 29997 (D.S.C. Feb. 26, 2019) (*unpublished*); *V.W. by and through Williams v. Conway*, 236 F. Supp. 3d 554, 585 (N.D.N.Y. Feb. 22, 2017) (finding officials “consistently unwilling to provide any relief” where defendants did not contest allegations that “administrative remedies were unavailable to the plaintiff class, with Justice Center staff

A second “on the books, but not capable of use” situation is a grievance system that incarcerated people cannot understand, or as *Ross* put it, is “so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it. . . . [W]hen a remedy is . . . essentially ‘unknowable’—so that no ordinary prisoner can make sense of what it demands—then it is also unavailable.”²⁶³ Courts have found a number of grievance systems too opaque or unknowable to be considered available, and there have been a number of cases where the prison authorities did not even seem to understand how their systems worked.²⁶⁴

Part of making a remedy available, and not opaque, is telling the incarcerated people about it.²⁶⁵ Prison officials must take “reasonable steps to inform the inmates about the required procedures. . .

consistently refusing to provide grievance forms, ignoring grievances, and in some cases throwing grievances in the trash”); *Dunn v. Dunn*, 219 F. Supp. 3d 1100, 1116 (M.D. Ala. 2016) (finding mental health grievance system “so full of blind alleys and dead ends that even those who run it cannot manage to accurately and consistently describe how it works”; prisoners received no instructions in how to file and pursue a grievance, and what instructions did exist were incomprehensible and contradictory); *Apodaca v. Raemisch*, Civil Action No. 15-cv-00845-REB-MJW, 2015 U.S. Dist. LEXIS 148308 (D. Colo. Sept. 8, 2015) (*unpublished*) (holding evidence that defendants “prevented [plaintiff] from timely filing his grievances by creating an institution-wide hostile environment of retaliation and of routinely thwarting grievances,” and supported his claim with 33 non-hearsay affidavits from other incarcerated people, “each alleging frustration or fear arising from the grievance process,” was cognizable on summary judgment and created a factual dispute barring summary judgment as to whether the prison agency actively thwarted the administrative-grievance process), *report and recommendation adopted*, 2015 Dist. LEXIS 148307 (D. Colo. Oct. 30, 2015) (*unpublished*, *rev’d and remanded on other grounds*, 864 F.3d 1071 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5 (2019); *Maxwell v. Wilcher*, No. CV419-018, 2019 U.S. Dist. LEXIS 35032 (S.D. Ga. Mar. 5, 2019) (*unpublished*) (holding allegation that his “grievance slot on the facilities [sic] kiosk machine has been full and unable to accept any grievance . . . since 2016” sufficiently alleged that the remedy was unavailable), *report and recommendation adopted in part, rejected in part on other grounds*, 2019 U.S. Dist. LEXIS 49492 (S.D. Ga. Mar. 25, 2019) (*unpublished*); *see also* *Smith v. Lagana*, 574 F. App’x 130, 132–133 (3d Cir. 2014) (*unpublished*) (per curiam) (pre-*Ross* case holding allegations of a “culture of not processing, nor responding to . . . complaints against correctional guards” combined with evidence of the plaintiff’s fruitless attempts to exhaust raised a factual question of unavailability barring summary judgment); *Scott v. Clarke*, 64 F. Supp. 3d 813, 829 n. 9 (W.D. Va. 2014) (pre-*Ross* case holding evidence that the grievance coordinator was on leave and grievances were not answered, and upon her return plaintiff’s grievance could not be found, supported plaintiff’s claim of non-exhaustion); *Meador v. Hammer*, No. 2:11-cv-3342 LKK AC P, 2013 U.S. Dist. Lexis 27203 (E.D. Cal. Feb. 26, 2013) (*unpublished*) (pre-*Ross* case holding the remedy unavailable to the plaintiff because the prison’s internal mail system “was effectively broken at the time he was attempting to exhaust his remedies, *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 50495 (E.D. Cal. Apr. 8, 2013) (*unpublished*).

263. *See* *Ross v. Blake*, 136 S. Ct. 1850, 1860, 195 L. Ed. 2d 117, 127 (2016).

264. *See* *Does 8-10 v. Snyder*, 945 F.3d 951, 963–965 (6th Cir. 2019) (describing administration of sexual abuse complaint system as too opaque and dysfunctional to be enforceable under *Ross*); *Moore v. Lamas*, No. 3:12-CV-233, 2017 U.S. Dist. LEXIS 153964 (M.D. Pa. Sept. 21, 2017) (*unpublished*) (noting prison system’s witnesses were “not able to provide answers to key questions and [one] could not clarify the interaction between” two separate remedies, “did not elucidate certain areas of confusion,” and gave testimony that was “at best, difficult to decipher” on a fundamental point that was not clarified in written policy either”); *Springer v. Unknown Rekoff*, No. 3:14-CV-300, 2017 U.S. Dist. LEXIS 73005 (S.D. Tex. May 12, 2017) (*unpublished*) (“At best, there is a loose collection of amorphous ad hoc policies that are not memorialized anywhere (not even in the employees’ handbook) and the origin of which is uncertain.”); *Dunn v. Dunn*, 219 F. Supp. 3d 1100, 1116 (M.D. Ala. 2016) (describing system as “so full of blind alleys and dead ends that even those who run it cannot manage to accurately and consistently describe how it works”).

265. *Hernandez v. Dart*, 814 F.3d 836, 842 (7th Cir. 2016) (“It is not incumbent on the prisoner ‘to divine the availability’ of grievance procedures. . . . Rather, prison officials must inform the prisoner about the grievance process. . . . The prison cannot shroud the prisoner in a veil of ignorance and then hide behind a failure to exhaust defense to avoid liability.” The incarcerated person had never been provided with the grievance policy or had an opportunity to learn about it.); *Goebert v. Lee County*, 510 F.3d 1312, 1322–1323 (11th Cir. 2007) (holding an appeal procedure not described in the inmate handbook, but only in the operating procedures the inmates did not have access to, was not an available remedy); *Brown v. Valoff*, 422 F.3d 926, 936–937 (9th Cir. 2005) (stating “information provided [to] the prisoner is pertinent because it informs our determination of whether relief was, as a practical matter, ‘available.’”).

.²⁶⁶ This obligation can generally be satisfied by providing the prisoners with the grievance policy, describing it accurately in a handbook that is given to incarcerated people, or similar measures.²⁶⁷ The remedy may be unavailable to incarcerated people who do not get the benefit of these measures.²⁶⁸ Courts have held that prisons must inform incarcerated people of the procedures in a language that they can understand.²⁶⁹ Some courts have made statements that seemingly reject any obligation to inform incarcerated people of grievance procedures. For example, “A plaintiff’s failure to exhaust cannot be excused by his ignorance of the law or the grievance policy.”²⁷⁰ We do not think those statements accurately state the law. A more accurate statement is: “The PLRA does not excuse a failure to exhaust based on a prisoner’s ignorance of administrative remedies, *so long as the prison has taken reasonable steps to inform the inmates about the required procedures.*”²⁷¹ Once a policy is made known, courts will hold prison officials to it, and “will not condition exhaustion on unwritten or ‘implied’ requirements.”²⁷² Such requirements unfortunately appear rather frequently in prison

266. Ramirez v. Young, 906 F.3d 530, 538 (7th Cir. 2018); *accord*, Small v. Camden County, 728 F.3d 265, 271 (3d Cir. 2013) (“Remedies that are not reasonably communicated to inmates may be considered unavailable for exhaustion purposes.”).

267. See Davis v. Fernandez, 798 F.3d 290, 295 (5th Cir. 2015) (stating “courts may not deem grievance procedures unavailable merely because an inmate was ignorant of them, so long as the inmate had a fair, reasonable opportunity to apprise himself of the procedures”; holding that standard satisfied where “the jail’s grievance procedures are published in an inmate handbook, which is in the record, and explained on jail television, and Davis does not contend that any circumstances precluded him from accessing either source”); Gibson v. Weber, 431 F.3d 339, 341 (8th Cir. 2005) (holding that incarcerated people who admitted receiving guidance that explained the grievance procedure were not excused from using it to prove their allegations even when prison personnel had “made it clear” that they should instead voice complaints informally to medical personnel); Valerio v. Wrenn, Civil No. 15-cv-248-LM, 2019 U.S. Dist. LEXIS 48847 (D.N.H. Mar. 25, 2019) (*unpublished*) (holding policy sufficiently communicated where it was explained in an Inmate Manual and the manual referred incarcerated people to the policy, available in prison libraries); Kelly v. Peterson, No. 13-cv-651-bbc, 2014 U.S. Dist. LEXIS 94291 (W.D. Wis. July 11, 2014) (*unpublished*) (barring summary judgment for non-exhaustion where the plaintiff said that he never received the inmate handbook containing instructions for grievance appeals); Smith v. City of New York, No. 12 Civ. 3303, 2013 U.S. Dist. LEXIS 144122 (S.D.N.Y. Sept. 26, 2013) (*unpublished*) (holding provision of an Inmate Handbook describing the grievance process satisfied defendants’ obligation); Minor v. Brown, No. CV 111-070, 2012 U.S. Dist. LEXIS 162920 (S.D. Ga. Oct. 16, 2012) (rejecting argument that prisoner did not know retaliatory transfers were grievable where it was clear in the policy to which incarcerated people had access; distinguishing *Goebert v. Lee*); *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 162780 (S.D. Ga. Nov. 13, 2012); see also Watson v. Fisher, 558 F. App’x 141, 144 (3d Cir. 2014) (*per curiam*) (*unpublished*) (holding the failure to provide a handbook did not make appeal procedure unavailable where grievance appeal rejection contained instructions for how to file properly).

268. Presley v. Scott, 679 F. App’x 910, 912 (11th Cir. 2017) (*per curiam*) (*unpublished*) (holding remedy unavailable where the grievance policy was omitted from the list of regulations available on the law library computer, and defendants provided no evidence that anyone informed the plaintiff of it); Hernandez v. Dart, 814 F.3d 836, 842 (7th Cir. 2016) (holding remedy unavailable to injured incarcerated person who was first hospitalized, then brought to the jail but hospitalized again in another facility, shackled all the while, and who did not receive the jail handbook or information about the grievance procedure during the 15-day period for filing a grievance); Albino v. Baca, 747 F.3d 1162, 1175–1176 (9th Cir. 2014) (*en banc*) (granting summary judgment to plaintiff who declared without contradiction that he was never given any orientation; had never seen the jail’s personnel manual, a complaint box, or a complaint form; and that when he repeatedly sought and was denied help from prison staff he was not provided complaint forms or told how to file a grievance, but was just referred to his criminal defense attorney; manual detailing procedures was not provided to incarcerated people).

269. Ramirez v. Young, 906 F.3d 530, 533 (7th Cir. 2018); Martinez v. Fields, 627 F. App’x 573, 574 (8th Cir. 2015) (*per curiam*) (*unpublished*) (noting that the grievance rules and forms were not shown to be available in Spanish).

270. Napier v. Laurel Cty., Ky., 636 F.3d 218, 222 n.2 (6th Cir. 2011) (citing cases). In that case, the court acknowledged after its sweeping statement that the grievance policy was distributed to all incarcerated people in the institution in the inmate orientation manual, 636 F.3d at 222 n.2, which generally satisfies officials’ obligation to make the procedures known.

271. Ramirez v. Young, 906 F.3d 530, 538 (7th Cir. 2018) (emphasis supplied).

272. Jackson v. Ivens, 244 F. App’x 508, 514 (3d Cir. 2007) (*per curiam*) (*unpublished*) (citing Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004)); *accord*, West v. Emig, 787 F. App’x 812, 816 (3d Cir. 2019) (*unpublished*).

exhaustion litigation.²⁷³ Since *Ross v. Blake* was decided, courts determining whether incarcerated people were adequately informed of the procedures have focused on the materials provided to the incarcerated people, and have often declined to hold incarcerated people to requirements that appeared in some other place.²⁷⁴

A remedy is also unavailable “when prison administrators thwart incarcerated people from taking advantage of a grievance process through machination, misrepresentation, or intimidation. . . . [W]e [have] recognized that officials might devise procedural systems (including the blind alleys and quagmires just discussed) in order to ‘trip[] up all but the most skillful prisoners.’ And appellate courts have addressed a variety of instances in which officials misled or threatened individual incarcerated people so as to prevent their use of otherwise proper procedures. As all those courts have recognized, such interference with an incarcerated person’s pursuit of relief renders the administrative process unavailable.”²⁷⁵

The Court in *Ross* did not explain what it meant by “machinations,” but it probably includes failing to treat incarcerated people’s grievances consistently with the prison’s own grievance rules.²⁷⁶ One

(stating “regardless of whether West could have availed himself of an unofficial verbal grievance policy, his obligation to exhaust extended only to the then-existing on-the-books administrative remedies”).

273. *Banks v. Patton*, 743 F. App’x 690, 695–696 (7th Cir. 2018) (*unpublished*) (holding plaintiff could not be held to a rule that incarcerated people must cite in their grievances any prior grievances on the same subject because it did not appear in the inmate handbook); *Hill v. Snyder*, 817 F.3d 1037, 1040 (7th Cir. 2016) (noting that under the grievance policy, an error in time or date of the events at issue did not justify declining to decide a grievance; “Because the prison refused to process Hill’s grievance based on his deviation from an unannounced rule, no further administrative remedies were available to Hill.”); *Williams v. Wilkinson*, 659 F. App’x 512, 520–521 (10th Cir. 2016) (*unpublished*) (declining to credit claim that under “facility practice” the incarcerated person must have obtained a receipt for his Request to Staff; “the prison’s regulations, not ‘facility practice,’ define proper exhaustion” (citing *Jones v. Bock*, 549 U.S. 199, 218 (2007))); holding that rule requiring submission of Request to Staff was too vague to dismiss for non-exhaustion for submitting it to the warden, notwithstanding defendants’ argument that as a “knowledgeable inmate” the plaintiff surely knew better); *Conley v. Anglin*, 513 F. App’x 598, 601–602 (7th Cir. 2013) (*unpublished*) (declining to enforce regulation requiring name or description of persons involved where the grievance form still called only for “Brief Summary of Grievance”; refusing to credit claim that adding additional facts to grievance appeal violated rules absent some evidence that such a rule existed); *Hurst v. Hantke*, 634 F.3d 409, 411 (7th Cir. 2011) (refusing to find non-exhaustion where incarcerated person violated apparent “secret supplement to the state’s administrative code, requiring that claims of good cause for an untimely filing be accompanied by evidence”); *Glick v. Walker*, 385 F. App’x 579, 583 (7th Cir. 2010) (*unpublished*) (declining to hold incarcerated person to a supposed grievance rule not found in the Administrative Code); *Miller v. Tanner*, 196 F.3d 1190, 1194 (11th Cir. 1999) (holding that failing to sign and date a grievance was not a failure to exhaust since no rule required it); *Apodaca v. Franco*, No. CIV 15-61 JP/LF, 2017 U.S. Dist. LEXIS 213433 (D.N.M. Dec. 29, 2017) (*unpublished*) (holding incarcerated person could rely on policy statement that a grievance not timely disposed of could be deemed exhausted, and rejecting claim that an appeal of a non-decision was available in the absence of support in the grievance policy), *aff’d*, 737 F. App’x 428 (10th Cir. 2018) (*unpublished*); *Lewis v. Carswell*, No. 5:15-CV-254-DPM-BD, 2016 U.S. Dist. LEXIS 201705 (E.D. Ark. May 26, 2016) (*unpublished*) (rejecting officials’ claim that plaintiff was obliged to send the original grievance, and not a photocopy, with his appeal, where no such rule appeared in the grievance policy), *report and recommendation adopted*, 2016 U.S. Dist. LEXIS 112839 (E.D. Ark. Aug. 24, 2016).

274. *See, e.g., Lanaghan v. Koch*, 902 F.3d 683, 689–690 (7th Cir. 2018) (declining to hold an incarcerated person to a procedure for late grievances that was in the state Administrative Code but not in the handbook provided to prisoners); *West v. Rakers*, No. 3:16-cv-984-NJR-DGW, 2018 U.S. Dist. LEXIS 37386 (S.D. Ill. Feb. 9, 2018) (*unpublished*) (holding state regulation requiring grievances to be filed where the incarcerated person is “assigned,” which defendants claimed means the incarcerated person’s “parent institution,” could not be enforced where the grievance form asked for the prisoner’s “present facility” and the one where the grievance arose, and did not use the word “assigned”); *Daniel v. Harper*, No. 5:17-CV-19-TBR, 2017 U.S. Dist. LEXIS 208235 (W.D. Ky. Dec. 19, 2017) (declining to hold incarcerated person to an appeal procedure described in a Policy and Procedure Manual but not mentioned in the handbook provided to inmates).

275. *Ross v. Blake*, 136 S. Ct. 1850, 1860, 195 L. Ed. 2d 117, 127 (2016) (internal citations and footnote omitted).

276. *See, e.g., Mills v. Mitchell*, 792 F. App’x 511, 512 (9th Cir. 2020) (“CDCR’s repeated failure to meet the statutorily required deadlines and failure to provide proper notice made remedies effectively unavailable”); *Carr v. Higgins*, 700 F. App’x 598, 600–601 (9th Cir. 2017) (holding defendants not entitled to summary judgment for

variety of this conduct is to treat a grievance as some other kind of request so it is not processed correctly and the plaintiff is unable to appeal and complete exhaustion.²⁷⁷ Others include making impossible demands on the person filing the grievance, such as requiring them to produce documents that the incarcerated person has no access to,²⁷⁸ placing incarcerated people in procedural impasses that prevent exhaustion,²⁷⁹ and refusing to provide necessary forms in those grievance systems that require use of a specified form.²⁸⁰ Courts are sometimes suspicious of incarcerated people's claims that they couldn't get forms, holding that they should have tried harder or should have asked more staff members.²⁸¹

As to misrepresentation, *Ross* was more explicit, citing with approval cases holding that “[g]rievance procedures are unavailable . . . if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process,” and “if prison officials misled [a prisoner] into thinking that . . . he had done all he needed to initiate the grievance process,” then “[a]n administrative remedy is not ‘available.’ ”²⁸² There are many other lower court cases finding staff misrepresentations made remedies unavailable.²⁸³ However, statements

non-exhaustion where plaintiff “timely submitted a ‘concern form’ . . . but IDOC officials did not respond, and subsequently refused to collect his grievance forms”); *Michel v. Fed. Bureau of Prisons FCI*, No. 7:16-cv-00863-RDP-HNJ, 2018 U.S. Dist. LEXIS 23004, *4–5 (N.D. Ala. Feb. 13, 2018) (noting apparent random assignment of plaintiff's grievances to initial and appellate levels, causing erroneous rejections for procedural defects).

277. See, e.g., *Coleman v. Dart*, No. 17 C 2460, 2019 U.S. Dist. LEXIS 25817, at *7–8 (N.D. Ill., Feb. 19, 2019) (noting grievance was treated as a “request for services” that could not be exhausted); *Thompson v. Clarke*, No. 7:17cv00010, 2018 U.S. Dist. LEXIS 70508, at *21 (W.D. Va. Apr. 25, 2018) (similar to *Coleman*); *Lewis v. Garcia*, No. CV 15-9736-FMO (PLA), 2016 WL 6603997, at *8–10 (C.D. Cal. Sept. 26, 2016) (noting incarcerated person's grievance about conduct of a disciplinary proceeding was repeatedly rejected with instructions to pursue a disciplinary appeal, even though he had already prevailed on appeal and was now grieving misconduct during the proceedings), *report and recommendation adopted*, 2016 WL 6602554 (C.D. Cal. Nov. 7, 2016).

278. See *DeBrew v. Atwood*, 792 F.3d 118, 126–129 (D.C. Cir. 2015) (noting repeated rejection of incarcerated person's appeal for failure to attach a prior decision despite his showing he did not have it and could not get it).

279. See, e.g., *Jamison v. Varano*, No. 1:12-CV-1500, 2015 U.S. Dist. LEXIS 103325, at *4 (M.D. Pa. Aug. 6, 2015) (holding the remedy unavailable where prison officials provided illegible photocopies of required documents and the plaintiff's grievance was then dismissed because of the documents' illegibility); *Lee v. Sorrels*, No. CIV-12-1061-C, 2013 U.S. Dist. LEXIS 166847, at *9 (W.D. Okla. Nov. 25, 2013) (noting grievance official's direction to resubmit complaint about deprivation of wheelchair to the medical office and medical officer's direction that it should be treated as a property grievance).

280. *Almy v. Davis*, 726 F. App'x. 553, 556–557 (9th Cir. 2018) (*unpublished*) (vacating summary judgment for non-exhaustion where plaintiff declared under penalty of perjury that defendants provided too few grievance forms to exhaust all of his claims); *Stine v. U.S. Fed. Bureau of Prisons*, 508 F. App'x. 727, 729–730 (10th Cir. 2013) (*unpublished*) (holding affidavits confirming plaintiff's claim he had been denied forms raised an issue of material fact).

281. See, e.g., *Watson v. Hughes*, 439 F. App'x 300, 302 (5th Cir. 2011) (*per curiam*) (*unpublished*) (holding allegation plaintiff was told grievance forms were unavailable did not excuse his non-exhaustion since he did not make the same allegation about the remaining 14 days of the period for submitting a grievance); *Lowery v. Strode*, No. 1:11CV-P171-M, 2012 U.S. Dist. LEXIS 137184, at *4 (W.D. Ky. Sept. 25, 2012) (granting summary judgment against incarcerated person who said he was refused grievance forms but “fails . . . to describe the attempts, if any, he made to obtain a grievance form from Defendants or other officers within 48 hours of the incident and the circumstances surrounding their alleged denial/refusal”). The Seventh Circuit made an appropriate response to this sort of argument, rejecting the claim that incarcerated person must pursue *all* alternatives to obtain a form and holding “[u]nder defendants' proposed rule, there would be no way for a prisoner to know when he had truly tried all available alternatives at the very first step—just obtaining the right form. The exhaustion requirement would invite prison staff to require prisoners to go on scavenger hunts just to take the first step toward filing a grievance. The PLRA does not impose such a requirement.” *Hill v. Snyder*, 817 F.3d 1037, 1041 (7th Cir. 2016).

282. *Ross v. Blake*, 136 S. Ct. 1850, 1860 n.3, 195 L. Ed. 2d 117, 127 (2016) (quoting *Davis v. Hernandez*, 798 F.3d 290, 295 (5th Cir. 2015) and *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011)).

283. See, e.g., *Hardy v. Shaikh*, 959 F.3d 578, 587–588 (3d Cir. 2020) (holding misleading or deceptive instructions from officials can make the remedy unavailable; “clear misrepresentation” is not needed; incarcerated people must show that they were actually misled); *Townsend v. Murphy*, 898 F.3d 780, 783–784 (8th Cir. 2018)

that are merely ambiguous (unclear in their meaning) and do not directly mislead a prisoner about using the grievance system may not be held to make the remedy unavailable.²⁸⁴ Your best course of action is to pursue the grievance process or other available administrative remedy, and do it according to the written rules, regardless of what anybody tells you.

With respect to intimidation, there is a large amount of case law, some of it cited in *Ross v. Blake*.²⁸⁵ Most circuits agree that threats or assaults directed at preventing prisoners from complaining may make available remedies unavailable in fact if “a similarly situated individual of ordinary firmness’ [would] have deemed [the remedy] available.”²⁸⁶ Some circuits hold that the incarcerated person must also show that the threat or intimidation actually did deter the plaintiff from pursuing administrative remedies.²⁸⁷ Intimidation from exhaustion cannot be shown by “general and unsubstantiated fears about possible retaliation” but instead requires “factual statements supporting an actual and objectively reasonable fear of retaliation for filing grievances.”²⁸⁸ However, threats of retaliation need not be graphically explicit in order to support a claim of unavailability of the remedy.²⁸⁹ Threats short of physical violence may make the remedy unavailable.²⁹⁰

There are a number of situations that frequently raise questions whether a remedy is available or what the proper available remedy is.

(reversing summary judgment for non-exhaustion where the plaintiff declared that his formal grievance was late because a sergeant wrongly advised him not to file it until he had received a response to his informal grievance—misinformation whose effect was “magnified” by lack of access to the library, which held the only available copy of the grievance directive); *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (holding “a prisoner need not press on to exhaust further levels of review once he has . . . been reliably informed by an administrator that no remedies are available”).

284. See, e.g., *Lyon v. Vande Krol*, 305 F.3d 806, 809 (8th Cir. 2002) (holding that warden’s statement that a decision about religious matters rested in the hands of “Jewish experts” did not excuse non-exhaustion, but was at most a prediction that the plaintiff would lose; courts will not consider incarcerated people’s subjective beliefs in determining whether procedures are “available”); *Gibson v. Weber*, 431 F.3d 339, 341 (8th Cir. 2005) (holding that incarcerated people who admitted receiving a guidebook that explained a grievance procedure were not excused from following the procedure even if prison personnel had “made it clear” that they should instead voice complaints informally to medical personnel); *Jackson v. District of Columbia*, 254 F.3d 262, 269–270 (D.C. Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to “file it in the court” had not exhausted); *Yousef v. Reno*, 254 F.3d 1214, 1221–1222 (10th Cir. 2001) (holding that plaintiff who was confused by prison officials’ erroneous representations that the grievance system could not address “legality and fairness” of restrictive Special Administrative Measures failed to exhaust, since in fact it could address their fairness if not their legality).

285. *Ross v. Blake*, 136 S. Ct. 1850, 1860 n.3, 195 L. Ed. 2d 117, 127 (2016) (citing *Schultz v. Pugh*, 728 F.3d 619, 620 (7th Cir. 2013); *Tuckel v. Grover*, 660 F.3d 1249, 1252–1253 (10th Cir. 2011)).

286. *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004) (citation omitted); *accord*, *Rinaldi v. United States*, 904 F.3d 257, 269 (3d Cir. 2018); *McBride v. Lopez*, 807 F.3d 982, 987–988 (9th Cir. 2015); *Himmelreich v. Federal Bureau of Prisons*, 766 F.3d 576, 578 (6th Cir. 2014), *aff’d and remanded on other grounds sub nom.* *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016); *Tuckel v. Grover*, 660 F.3d 1249, 1252–54 (10th Cir. 2011); *Verbanik v. Harlow*, 441 F. App’x 931, 933 (3d Cir. 2011) (per curiam) (*unpublished*); *Turner v. Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008); *Kaba v. Stepp*, 458 F.3d 678, 684–686 (7th Cir. 2006).

287. *Rinaldi v. United States*, 904 F.3d 257, 268–269 (3d Cir. 2018); *McBride v. Lopez*, 807 F.3d 982, 987–988 (9th Cir. 2015); *Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008).

288. *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 794 (9th Cir. 2018).

289. *Kincaid v. Sangamon County*, 435 F. App’x 533, 536–537 (7th Cir. 2011) (holding “[a] threat from the superintendent that [plaintiff] and his family needed to ‘shut the fuck up’ may have intimidated [plaintiff] and rendered the grievance process unavailable to him”).

290. *Handy v. Varner*, Civil Action No. 12-1091, 2013 U.S. Dist. LEXIS 53121, at *1, 6 (W.D. Pa. Apr. 12, 2013) (finding threat to issue disciplinary charges and a negative recommendation to prevent plaintiff’s release on parole if he didn’t stop seeking a transfer deterred plaintiff from grieving and would have deterred a person of ordinary firmness); *Ward v. Rabideau*, 732 F. Supp. 2d 162, 165, 171–172 (W.D.N.Y. 2010) (holding plaintiffs’ fears of retaliatory conduct such as “unnecessary and harassing frisk searches, urine testing, misbehavior tickets and reports,” some of which they alleged had already occurred, raised a factual issue barring summary judgment for non-exhaustion).

For example, it can be confusing to determine how to satisfy exhaustion for discipline-related claims. There is usually a procedure for disciplinary appeals that is separate from the grievance procedure, and exhausting it will usually exhaust your discipline-related claim.²⁹¹ However, it is not always clear which procedure to use for which claim. The prison's rules should govern this question, but sometimes they do not address it, and sometimes officials do not apply their rules consistently.²⁹² The best rule of thumb is that if the rules don't spell things out, a claim that attacks the disciplinary proceeding itself requires a disciplinary appeal for exhaustion, while claims about other issues related to the proceeding—such as challenges to prison policies underlying the proceeding or claims about the conduct that led to the disciplinary proceeding—must be exhausted by grievance. This second category includes disputes about who assaulted whom in a use of force case that resulted in disciplinary charges, claims of falsification of evidence or improper motives such as retaliation for the charges, or claims that conditions of punitive confinement are unlawful.²⁹³ If you wish to challenge both the disciplinary proceeding itself as well as one of these other issues, both remedies may be required under the rules, and if there is any doubt about what the rules require, you should probably pursue both routes to be safe.²⁹⁴

291. *Jenkins v. Haubert*, 179 F.3d 19, 23 n.1 (2d Cir. 1999) (holding that plaintiff's exhaustion of administrative remedies meant plaintiff was not barred by the PLRA exhaustion requirement); *Murray v. Palmer*, No. 9:03-CV-1010, 2010 U.S. Dist. LEXIS 32014, at *42 (N.D.N.Y. Mar. 31, 2010) (dismissing a complaint for failure to exhaust administrative remedies, including a disciplinary appeal).

292. For example, New York's rules did not say whether a claim that evidence for a disciplinary charge was fabricated should be raised by disciplinary appeal or a separate grievance, and courts have made contradictory arguments on the point. *Compare* *Giano v. Goord*, 380 F.3d 670, 679 (2d Cir. 2004) (noting defendants' argument that the plaintiff, who pursued a disciplinary appeal, should have filed a grievance to exhaust) with *Larkins v. Selsky*, No. 04 Civ. 5900 (RMB) (DF), 2006 U.S. Dist. LEXIS 89057, at *9 (S.D.N.Y. Dec. 6, 2006) (noting defendants' contrary argument that a prisoner who filed a grievance should have pursued a disciplinary appeal) and *Washington v. Chaboty*, No. 09 Civ. 9199 (PGG), 2015 U.S. Dist. LEXIS 40245, at *8 (S.D.N.Y., Mar. 30, 2015) (noting defendants' argument that plaintiff should have raised his First Amendment claim arising from a grievance in the grievance appeal, where he had filed a grievance about it and the grievance body declined to hear it because it said the plaintiff's disciplinary appeal had exhausted his claim). New York has never clarified its rule. *See also* *Siggers v. Campbell*, No. 07-12495, 2008 U.S. Dist. LEXIS 107407, at *4 (E.D. Mich. Dec. 10, 2008) (*unpublished*) (noting officials' argument that an incarcerated person who had tried to seek review within the disciplinary process should have pursued a grievance, even though he *had* pursued a grievance and it was rejected), *aff'd*, 652 F.3d 681 (6th Cir. 2011); *Woods v. Lozer*, No. 3:05-1080, 2007 U.S. Dist. LEXIS 4923, at *3 (M.D. Tenn. Jan. 18, 2007) (*unpublished*) (holding that an incarcerated person exhausted his administrative remedies when he appealed a decision that his use of force claim was not grievable because it was mistakenly said to seek review of disciplinary procedures and punishments); *Livingston v. Piskor*, 215 F.R.D. 84, 86–87 (W.D.N.Y. 2003) (holding that evidence of grievance personnel refusal to process grievances where a disciplinary report had been filed covering the same events created a factual issue preventing summary judgment).

293. *Mayo v. Lavis*, 689 F. App'x 23, 25 (2d Cir. 2017) (*unpublished*) (holding a disciplinary appeal did not exhaust a claim of excessive force arising from the same incident); *Howard v. Chatcavage*, 570 F. App'x 117, 118–119 (3d Cir. 2014) (*per curiam*) (*unpublished*) (holding disciplinary appeal of fighting charge did not exhaust Eighth Amendment claim of failure to protect from assault); *Farid v. Ellen*, 593 F.3d 233, 248 (2d Cir. 2010) (holding disciplinary appeal of contraband and smuggling charges did not exhaust claim of confiscation of papers and personal effects where confiscation was not a “constituent element of the disciplinary hearing”); *Ortiz v. McBride*, 380 F.3d 649, 654 (2d Cir. 2004) (holding challenge to conditions of segregation required grievance exhaustion and not a disciplinary appeal); *Hamilton v. Edwards*, No. 14-CV-6308 CJS, 2019 U.S. Dist. LEXIS 69931, at *4 (W.D.N.Y., Apr. 25, 2019) (holding disciplinary appeal exhausted plaintiff's due process claim but not his retaliation claim); *Singh v. Goord*, 520 F.Supp.2d 487, 497–498 (S.D.N.Y. 2007) (holding successful disciplinary appeal challenging discipline for refusing work contrary to religious beliefs did not exhaust plaintiff's challenge to the underlying disciplinary rule; a separate grievance was required); *Hattie v. Hallock*, 8 F. Supp. 2d 685, 689 (N.D. Ohio 1998) (holding that in order to challenge a prison rule, the incarcerated person must not only appeal from the disciplinary conviction for breaking it, but must also grieve the validity of the rule), *judgment amended*, 16 F. Supp. 2d 834 (N.D. Ohio 1998).

294. *See, e.g., Singh v. Goord*, 520 F. Supp. 2d 487, 497–498 (S.D.N.Y. 2007) (holding successful disciplinary appeal challenging discipline for refusing work contrary to religious beliefs did not exhaust plaintiff's challenge to the underlying disciplinary rule; a separate grievance was required).

If you are transferred out of your prison or jail before you can file a grievance, or while your grievance is pending, that does not automatically end your exhaustion obligation or make the remedy unavailable.²⁹⁵ There may be a way to file and pursue a grievance even after you are transferred. If there is, you must try to use it to satisfy the exhaustion requirement. There is more likely to be a way to exhaust after transfer if you are transferred within the same jail or prison system. Read the grievance policy for instructions, and if there are none, ask the grievance personnel at your new institution how to proceed.²⁹⁶

If you are transferred to another jail or prison system (for example, from a county jail to a state prison after sentencing), you should also read the grievance policy from the facility where your problem arose, if you have access to it. There may be instructions you should follow for how to pursue a grievance from outside the facility, which you should follow. There may also be a statement about who may pursue grievances. If the policy says that the system is for people *in* the institution, or has no instruction for how people no longer in the institution can use it, then you have a good argument that the system is not available to you once you are transferred.²⁹⁷ If you can't get any information about what to do or whether you are even allowed to exhaust after transfer, it's a good idea to write to the grievance program at the previous prison and ask them to send you information about how to pursue a grievance and any necessary forms.

The point is that, unless the system is unavailable to transferred prisoners, you should do as much as you can to exhaust after transfer, because if you don't, you are bound to get an argument that your case should be dismissed for non-exhaustion. You need to be able to describe the things you did or tried to do in order to exhaust. You should also be prepared to describe any obstacles you encountered that prevented you from exhausting. For example, if you are transferred from one prison or jail system to another, you may not have access to the grievance policy of the system you were transferred from or the forms that are required by that system; you may not get your property immediately after transfer and therefore lack access to documents you need; you may not receive a decision timely, or at all, if you filed a grievance just before your transfer, so you may not be able to take a timely appeal.²⁹⁸ If you

295. *Napier v. Laurel Cty., Ky.*, 636 F.3d 218, 223 (6th Cir. 2011) ("Generally, the transfer of a prisoner from one facility to another does not render the grievance procedures at the transferor facility 'unavailable' for purposes of exhaustion." (citation and internal quotation marks and brackets omitted); *accord*, *Medina-Claudio v. Rodriguez-Mateo*, 292 F.3d 31, 35 (1st Cir. 2002); *Mills v. United States*, No. CV-02-5597 (SJF)(LB), 2006 U.S. Dist. LEXIS 82903, at *7 (E.D.N.Y. Nov. 14, 2006) (holding transfer "does not relieve [prisoner] of the obligation to pursue the grievance procedures available in the facility where the conduct occurred").

296. *Ammouri v. ADAPPT House, Inc.*, No. 05-3867, 2008 U.S. Dist. LEXIS 47129, at *10–13 (E.D. Pa. June 13, 2008) (noting that plaintiff was repeatedly told he could not file a grievance about matters from his previous institution).

297. *See Gonzales v. Lnu*, No. 14-484 WJ/KK, 2015 U.S. Dist. LEXIS 196527, at *5 (D.N.M. Sept. 8, 2015) (holding remedy unavailable to an incarcerated person transferred out of the jail four days before his time to file a grievance had expired, where the grievance policy stated it was for use by persons "in the custody" of the jail), *report and recommendation adopted*, 2015 WL 13651117 (D.N.M. Sept. 28, 2015); *Huspon v. Rains*, No. 1:11-cv-109-TWP-DML, 2013 U.S. Dist. LEXIS 13732, at *4 (S.D. Ind. Feb. 1, 2013) (finding remedy unavailable to incarcerated person removed from prison immediately after injury because policy allowed formerly incarcerated people to grieve only if they had commenced the process before transfer); *Rivera v. Mgmt. & Training Corp.*, No. CV 07-8043-PCT-SMM (MHB), 2008 U.S. Dist. LEXIS 45452, at *3 (D. Ariz. June 10, 2008) (noting grievance policy made no provision for exhaustion by incarcerated person during temporary transfer out of the prison system to a county jail).

298. For cases acknowledging some of these obstacles, *see Miller v. Norris*, 247 F.3d 736, 738, 740 (8th Cir. 2001) (holding allegation that transferred incarcerated person could not get grievance forms for transferring prison system sufficiently alleged exhaustion of available remedies); *Carter v. Supnick*, No. 2:18-cv-00003, 2019 U.S. Dist. LEXIS 25063, at *4 (W.D. Mich. Jan. 7, 2019) (denying summary judgment for non-exhaustion where plaintiff's untimely appeals were caused by his transfer and delayed delivery of grievance decisions), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 23244 (W.D. Mich. Feb. 13, 2019); *Lawson v. Youngblood*, No. 1:09-cv-00992-LJO-MJS (PC), 2014 U.S. Dist. LEXIS 8577, at *3–4 (E.D. Cal. Jan. 23, 2014) (holding remedy unavailable where incarcerated person made a verbal complaint but was immediately transferred, had received no guidance as to post-transfer grievance filing and was out of contact with officers responsible for the process), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 22203 (E.D. Cal. Feb. 20, 2014); *Wright v. Smith*, No.

could not exhaust after transfer, you should be prepared to explain why that was, and what you did to try to exhaust.²⁹⁹

If you did not realistically have time to file a grievance before transfer, and there is no provision for doing so after transfer, the remedy is unavailable.³⁰⁰ But if you did have time to file a grievance before being transferred but did not, the court is likely to decide that you failed to exhaust an available remedy.³⁰¹ In that situation, you should point out to the court that the statute doesn't require prisoners to file a grievance; it requires them to *exhaust*. So, if you had time enough to file a grievance, but not time to complete the process, and if the policy doesn't provide a way to complete the process after transfer, you may convince the court that the remedy was not available. One thing that courts seldom consider, but should, is that as a practical matter, in most cases the remedy is not really available after you are transferred, because the grievance process can no longer give you any relief after you're gone.³⁰²

People's individual characteristics and circumstances may make a remedy unavailable in some cases. For example, the grievance system was held unavailable to an incarcerated person with a broken hand who couldn't write, couldn't get assistance writing a grievance, and was not allowed to file a late

1:10-cv-00011-AWI-GSA-PC, 2013 U.S. Dist. LEXIS 1008158, at *7–8 (E.D. Cal. July 18, 2013) (declining to dismiss for non-exhaustion where person incarcerated in federal prison was transferred to state prison, did not receive federal grievance decision, had no access to federal forms or process, and could not get a response by writing to federal officials; court notes defendants' burden of proof), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 137871 (E.D. Cal. Sept. 25, 2013); *Dubois v. Washoe Cty. Jail*, No. 3:12-cv-00415-MMD-VPC, 2013 U.S. Dist. LEXIS 2793, *2 (D. Nev. Jan. 7, 2013) (declining to dismiss for non-exhaustion where plaintiff was extradited the day after his complaint arose, but defendants failed to show he could have exhausted in a day or could have started the process from his new location); *Rodriguez v. Mount Vernon Hosp.*, No. 09 Civ. 5691 (GBD) (JLC), 2010 U.S. Dist. LEXIS 103494, at *12–13 (S.D.N.Y. Sept. 7, 2010) (finding factual dispute with respect to incarcerated person's ability to appeal a grievance during a temporary transfer from state prison to local jail), *report and recommendation adopted*, 2010 U.S. Dist. LEXIS 103539 (S.D.N.Y. Sept. 30, 2010), *order aff'd*, 2010 U.S. Dist. LEXIS 112325 (S.D.N.Y., Oct. 5, 2010); *Key v. Toussaint*, 660 F. Supp. 2d 518, 524–525 (S.D.N.Y. 2009) (denying summary judgment for non-exhaustion where grievance policy prescribed submitting grievances to the grievance clerk, which a transferred incarcerated person could not do, and using a particular appeal form, which a transferred person had no access to); *Green v. Roberts*, No. 2:06-CV-667-WKW, 2008 U.S. Dist. LEXIS 87969, at *4 (M.D. Ala. Oct. 29, 2008) (holding incarcerated person who was transferred from jail, wrote to the jail seeking to exhaust, and received no response for almost three months and then filed suit, satisfied the exhaustion requirement); *Basham v. Corr. Med. Servs.*, No. 5:06-cv-00604, 2007 U.S. Dist. LEXIS 66423, at *5 (S.D.W. Va. Aug. 29, 2007) (holding defendants failed to show a grievance appeal was available to a hospitalized prisoner separated from his grievance documents); *see King v. Coleman*, No. CIV S-04-1158 MCE KJM P, 2007 U.S. Dist. LEXIS 58991, at *1–3 (E.D. Cal. Aug. 13, 2007) (holding incarcerated person injured in a jail van who was not incarcerated in that jail was not shown to have access to the jail's orientation handbook, the grievance form, or the grievance process), *report and recommendation adopted*, 2007 U.S. Dist. LEXIS 72641 (E.D. Cal. Sept. 28, 2007).

299. *See Mellender v. Dane County*, No. 06-C-298-C, 2006 U.S. Dist. LEXIS 80103, at *7–12 (W.D. Wis. Oct. 27, 2006) (finding that an incarcerated person's attempts to mail a grievance from prison after his transfer and to use the prison's grievance system to complain about an incident that occurred at another facility, combined with the prison's refusal to cooperate were good reasons for him being unable to exhaust remedies).

300. *See, e.g., Berry v. Kerik*, 366 F.3d 85, 88 (2d Cir. 2004) (holding dismissal proper where March and October complaints could have been exhausted before release the following January; also citing, dubiously, subsequent returns to the jail system); *Mitchell v. Hammons*, No. 5:11-cv-00029, 2013 U.S. Dist. LEXIS 167687, at *3 (S.D.W. Va., Nov. 26, 2013) (dismissing for non-exhaustion where plaintiff remained at sending facility for almost two months before transfer because he had "more than adequate time to begin and potentially complete the administrative remedy process;" process was supposed to be completed within 60 days, and plaintiff remained in the jail for about 50 days).

301. *James v. Williams*, No. 1:04CV69-1-MU, 2005 U.S. Dist. LEXIS 10076, at *6 (W.D.N.C. May 24, 2005) (noting incarcerated person had 11 days to file a new grievance after his first grievance was rejected and that under the grievance policy he could have filed it at the new prison too).

302. *See White v. Bukowski*, 800 F.3d 392, 397 (7th Cir. 2015) (noting that the grievance system at issue did not entertain grievances from persons no longer in the jail, "presumably because the jail could do nothing for such a person unless it awards damages to successful grievants, which the jail in this case does not").

grievance when his hand had recovered.³⁰³ Courts have agreed that other medical conditions can make remedies unavailable, though they look closely at such claims and reject many as unconvincing, and others on the ground that the system made provisions for injured incarcerated people.³⁰⁴ Decisions are similarly mixed in cases involving other characteristics, including:

- a) Physical disability. Courts have acknowledged that some incarcerated people are unable to use grievance systems by reason of disability,³⁰⁵ though they have rejected such claims in cases where the individual had previously used the system, or where assistance in grieving was available.³⁰⁶
- b) Illiteracy or lack of education. Some courts have held remedies unavailable to persons unable to use them because of lack of education or literacy, though usually in conjunction

303. *Days v. Johnson*, 322 F.3d 863, 867 (5th Cir. 2003) (noting that “one’s personal inability to access the grievance system could render the system unavailable”).

304. *See, e.g., Hurst v. Hantke*, 634 F.3d 409, 411–412 (7th Cir. 2011) (holding remedy would be unavailable if incarcerated person were incapacitated by stroke during time when he was required to file grievance, and he was not allowed to file a late grievance); *Pavey v. Conley*, 170 F. Appx 4, 9 (7th Cir. 2006) (*unpublished*) (holding grievance procedure might be unavailable to a prisoner who couldn’t write because of injury and was isolated from anyone who could help him); *Franklin v. Fewell*, No. 3:13-CV-673 JD, 2014 U.S. Dist. LEXIS 15322, at *4 (N.D. Ind. Feb. 7, 2014) (rejecting defendants’ argument that plaintiff was capable of filing a grievance upon his return from an outside hospital after emergency surgery, and noting plaintiff spent nine days in the prison infirmary and was taking prescription pain medication. An evidentiary hearing was required to resolve the question); *Childers v. Bates*, No. C-08-338, 2010 U.S. Dist. LEXIS 71170, *6–7 (S.D. Tex. Jan. 14, 2010) (holding remedy that required identification of defendants was not “personally available” to prisoner who could not do so because of a head injury and memory loss), *report and recommendation rejected on other grounds*, U.S. Dist. LEXIS 29186 (S.D. Tex. Mar. 26, 2010). *See, e.g., Wilborn v. Ealey*, 881 F.3d 998, 1005–1006 (7th Cir. 2018) (rejecting claim of incapacity from incarcerated person held in the infirmary who failed to show a basis for inability to grieve because “[h]e ha[d] not shown, for example, that he lacked access to the grievance forms or that his injuries prevented him from researching or writing,” and he filed a different grievance immediately upon release); *Ferrington v. Louisiana Dept. of Corr.*, 315 F.3d 529, 532 (5th Cir. 2002) (holding plaintiff’s near blindness did not exempt him from exhausting because he managed to file suit, as well as other grievances and appeals). *Also see, e.g., McCormick v. Corizon Health, Inc.*, No. 13-11098, 2014 U.S. Dist. LEXIS 28645, *4 (E.D. Mich. Mar. 6, 2014) (holding temporary loss of vision did not excuse non-exhaustion where grievance policy provided for staff assistance filing grievances); *Lopez v. Goodman*, No. 10-CV-6413, 2013 U.S. Dist. LEXIS 85565, at *3 (W.D.N.Y. June 18, 2013) (holding incarcerated person was not excused from exhaustion by his hospitalization where the grievance system provided for extensions of time for mitigating circumstances), *reconsideration denied*, 2013 U.S. Dist. LEXIS 135046 (W.D.N.Y. Sept. 20, 2013).

305. *See, e.g., Lanaghan v. Koch*, 902 F.3d 683, 686, 688–689 (7th Cir. 2018) (holding remedy was not available to a incarcerated person with limited use of his hands who was not shown to have been able to complete the grievance form under the circumstances); *Johnson-Ester v. Elyea*, No. 07-CV-4190, 2009 U.S. Dist. LEXIS 18049, at *6–8 (N.D. Ill. Mar. 9, 2009) (holding incarcerated person who could not write, ambulate, or make himself understood, and may have been irrational or delusional at times, was not capable of pursuing a grievance; letters from his mother and lawyer about his condition put officials on sufficient notice they should have assisted him in filing a grievance; grievance system made no provision for outside persons to use it on a incarcerated person’s behalf); *Williams v. Hayman*, 657 F. Supp. 2d 488, 495–497 (D.N.J. 2008) (holding evidence of the deaf plaintiff’s inability to communicate in writing or with his counselor raised a factual issue concerning availability to him of the grievance remedy).

306. *Thomas v. Holder*, No. PJM-10-246, 2010 U.S. Dist. LEXIS 84764, at *3 (D. Md. Aug. 18, 2010) (dismissing claim of blind incarcerated person for non-exhaustion where he had filed 15 grievances in the preceding several years); *Oliver v. Va. Dept of Corr.*, No. 3:09-CV-00056, 2010 U.S. Dist. LEXIS 33931, at *6 (W.D. Va. Apr. 6, 2010) (dismissing claim of legally blind incarcerated person who had filed numerous complaints and grievances, without inquiry into her access to the system for this grievance); *Elliott v. Monroe Corr. Complex*, No. C06-0474RSL, 2007 U.S. Dist. LEXIS 5242, at *3 (W.D. Wash. Jan. 23, 2007) (dismissing for non-exhaustion where plaintiff with cerebral palsy was provided with assistance and had filed numerous grievances, though he hadn’t actually exhausted any).

- with other barriers.³⁰⁷ Others have rejected such claims, often based on the availability of assistance.³⁰⁸
- c) Lack of proficiency in English. A number of cases have held that when incarcerated people who do not have access to grievance procedures, or to assistance in filing grievances, in a language that they can understand, the remedy may be unavailable.³⁰⁹ Others have rejected such claims, either generally³¹⁰ or based on the individuals' having used the system previously,³¹¹ or the availability of assistance.³¹²
 - d) Age. Courts have generally rejected claims that being young makes remedies unavailable.³¹³ However, one court declined to find remedies unavailable without evidence

307. See, e.g., *Womack v. Smith*, No. 1:06-CV-2348, 2011 U.S. Dist. LEXIS 20750, at *9 (M.D. Pa. Mar. 2, 2011) (holding plaintiff's illiteracy in combination with other factors made the remedy unavailable; illiteracy by itself would not excuse non-exhaustion where prisoner did not ask for assistance as provided in grievance policy); *Robertson v. Dart*, No. 07 C 4398, 2009 U.S. Dist. LEXIS 66794, at *3 (N.D. Ill. Aug. 3, 2009) (denying summary judgment on exhaustion where the illiterate plaintiff alleged that a staff member gave him wrong information about how to mark a form to appeal his grievance decision); *Langford v. Ifediora*, No. 5:05CV00216WRW/HLJ, 2007 U.S. Dist. LEXIS 34915, at *3–4 (E.D. Ark. May 11, 2007) (holding plaintiff's age, deteriorating health, and lack of general education, combined with the prison's failure to provide him assistance in preparing grievances, raised a factual issue concerning the availability of the remedy to him); *Kuhajda v. Illinois Dept. of Corr.*, No. 05-cv-3236, 2006 WL 1662941, at *1 (C.D. Ill. June 8, 2006) (holding that an incarcerated who is hearing-impaired and has limited ability to read and write, and who did not have the assistance of a sign language interpreter, raised a factual issue concerning availability of remedies).

308. See, e.g., *Ramos v. Smith*, 187 F. App'x 152, 154 (3d Cir. 2006) (per curiam) (*unpublished*) (rejecting claim of illiteracy as a defense to non-exhaustion, since federal regulations require assistance to illiterate prisoners, and plaintiff did not allege that he asked for such assistance); *Levan v. Thomas*, No. CV 10-2278-PHX-GMS (LOA), 2011 U.S. Dist. LEXIS 73532, at *2 (D. Ariz. July 7, 2011) (rejecting claim of illiteracy, since grievance policy provided for assistance to illiterate persons, and defendants said grievance staff would help individuals as needed).

309. See, e.g., *Ramirez v. Young*, 906 F.3d 530, 533 (7th Cir. 2018); *Martinez v. Fields*, 627 F. App'x. 573, 574 (8th Cir. 2015) (per curiam) (*unpublished*) (reversing summary judgment for non-exhaustion by Spanish-speaking incarcerated person who did not understand English where grievance rules and forms were only in English); *Salcedo-Vazquez v. Nwaobasi*, No. 3:13-CV-00606-NJR-DGW, 2014 U.S. Dist. LEXIS 78123, at *4 (S.D. Ill. June 9, 2014) (finding that plaintiff "never was given an Orientation Manual in Spanish and that no person in the jail, especially not his Counselor, made any effort to inform him of the grievance process in a language that he readily understood. Assistance from other inmates cannot be a substitute for assistance from actual jail personnel."); *Beltran-Ojeda v. Doe*, No. CV 12-1287-PHX-DGC (MEA), 2013 U.S. Dist. LEXIS 163803, at *3 (D. Ariz. Nov. 18, 2013) (holding allegations of failure to provide an interpreter, to accept Spanish grievances, or to reply in a language other than English may support a claim of unavailability), *reconsideration denied*, 2014 U.S. Dist. LEXIS 35076 (D. Ariz. Mar. 18, 2014).

310. *Linares-Alcantara v. Longley*, No. 3:13-cv-1085-DCB-MTP, 2014 U.S. Dist. LEXIS 124163, at *5 (S.D. Miss. Sept. 5, 2014) ("Inability to fully understand the language does not create a special circumstance justifying departure from the exhaustion requirement.").

311. *Figueroa v. Bass*, 522 F. App'x. 643, 644 (11th Cir. 2013) (per curiam) (*unpublished*) (rejecting claim of limited English proficiency because the plaintiff had filed other grievances later and didn't explain why he couldn't have done so at this point); *Zarate v. S.C. Dept. of Corr.*, No. 0:13-cv-3079 DCN, 2014 U.S. Dist. LEXIS 150935, at *4 (D.S.C. Oct. 24, 2014) (noting that plaintiff was able to file pleadings in English and has submitted letters to defendants in English).

312. *Mendez v. Sullivan*, 488 F. App'x. 566, 568 (3rd Cir. 2012) (per curiam) (*unpublished*) (affirming summary judgment for non-exhaustion based on evidence of bilingual handbook, availability of interpreters and of counselors to assist Spanish-speaking prisoners); *Zarate v. S.C. Dept. of Corr.*, No. 0:13-cv-3079 DCN, 2014 U.S. Dist. LEXIS 150935, at *4 (D.S.C. Oct. 24, 2014) (citing plaintiff's failure "to allege that he requested, or was denied, any assistance from prison officials in relation to filing a prison grievance" in granting summary judgment for non-exhaustion).

313. See, e.g., *Brock v. Kenyon County, KY*, 93 F. App'x 793, 797–798 (6th Cir. 2004) (*unpublished*); *Doe v. Michigan Dept. of Corr.*, No. 13-14356, 2016 U.S. Dist. LEXIS 14823, at *16–17 (E.D. Mich. Feb. 8, 2016) (*unpublished*) (declining to "relax or create an exception to the PLRA's exhaustion requirement based on a prisoner's status as a youth"), *reconsideration denied*, 2016 U.S. Dist. LEXIS 59683 (E.D. Mich., May 5, 2016) (*unpublished*). But see *Moore v. Louisiana Dept. of Pub. Safety and Corr.*, No. CIV.A. 99-1108, 2002 WL

that “the relevant administrative procedures were explained in terms intelligible to [average] persons, particularly taking into consideration plaintiff’s age (14 years old).”³¹⁴ Others have interpreted grievance rules especially leniently in cases involving juvenile incarcerated people.³¹⁵

- e) Mental illness. Many courts have acknowledged that mental illness or cognitive disabilities may make remedies unavailable.³¹⁶ Others have rejected such claims, sometimes because they believed the plaintiff’s prior use of the grievance system or the courts disproved the claim of unavailability, others because the plaintiff did not sufficiently plead or provide evidentiary support for the claim.³¹⁷

1791996, at *4 (E.D. La. Aug. 5, 2002) (*unpublished*) (declining to enforce 30-day grievance time limit; declaring 30-day delay in filing complaint “not unreasonable” given that the plaintiff was a juvenile in state custody).

314. *Bailey v. Wienandt*, No. 17-CV-943-BBC, 2018 U.S. Dist. LEXIS 185808, at *8 (W.D. Wis. Oct. 30, 2018) (*unpublished*) (citing *Ramirez v. Young*, 906 F.3d 530, 535 (7th Cir. 2018)).

315. *See, e.g., Q.F. v. Daniel*, 768 F. App’x 935, 942–943 (11th Cir. 2019) (*unpublished*); *Troy D. v. Mickens*, 806 F. Supp. 2d 758, 768–769 (D.N.J. 2011) (holding administrative procedure was exhausted by an attorney’s letter to juvenile institution superintendent, since it created an opportunity for investigation and resolution at the facility level); *Lewis v. Gagne*, 281 F. Supp. 2d 429, 433–435 (N.D.N.Y. 2003). *See also* *Apkarian v. McAllister*, No. 17-CV-309-JDP, 2019 U.S. Dist. LEXIS 12959, at *8–13 (W.D. Wis. Jan. 28, 2019) (*unpublished*) (denying summary judgment for non-exhaustion in youth facility where plaintiffs had to submit their grievances to the staff members they complained about, since the option for submitting directly to the superintendent was omitted from the inmate handbook, and there was no evidence that the underlying regulations permitting that option were made available to the incarcerated people despite a policy requirement to do so).

316. *See, e.g., Lynch v. Corizon, Inc.*, 764 F. App’x 552, 554 (7th Cir. 2019) (*unpublished*) (holding plaintiff’s affidavit stating “that the defendants altered his medication, that doing so left him too confused to complete the grievance process, and that they did this for the non-medical reason of creating that disabling confusion” raised factual issues barring summary judgment and requiring an evidentiary hearing); *Weiss v. Barribeau*, 853 F.3d 873, 875 (7th Cir. 2017) (denying summary judgment for non-exhaustion where defendants failed to show that their procedures could be used by incarcerated person suffering from mental breakdown requiring hospitalization); *Beaton v. Tennis*, 460 F. App’x 111, 113–114 (3d Cir. 2012) (*unpublished*) (evidence that prison staff took advantage of plaintiff’s confused mental state arising from a skull fracture and post-concussion syndrome to make him withdraw his grievance raised a factual issue barring summary judgment for non-exhaustion); *Braswell v. Corr. Corp. of America*, 419 F. App’x 622, 625–626 (6th Cir. 2011) (*unpublished*) (noting defendants failed to explain how the plaintiff could have exhausted “while suffering a mental breakdown requiring hospitalization”); *Adams v. Wexford Health Sources, Inc.*, No. 15-CV-604-NJR-DGW, 2018 U.S. Dist. LEXIS 168030, at *19 (S.D. Ill. Sept. 28, 2018) (*unpublished*) (concluding on summary judgment that plaintiff “was not mentally or physically capable of filing a grievance regarding the medical treatment he received at Menard while he was incarcerated there, and therefore administrative remedies were not available to him”); *Carter v. Paramo*, No. 3:17-CV-1833-JAH-AGS, 2018 U.S. Dist. LEXIS 164606, at *17–18 (S.D. Cal. Sept. 25, 2018) (*unpublished*) (holding allegation of head and facial injuries including multiple fractures resulting in cognitive impairment raised a factual issue barring summary judgment as to plaintiff’s ability to exhaust properly); *Smith v. Singh*, No. 3:17-CV-170-NJR-DGW, 2018 U.S. Dist. LEXIS 141811, at *10–11, 4 (S.D. Ill. July 27, 2018) (*unpublished*) (holding incarcerated person with schizoaffective disorder who was hospitalized for lithium toxicity “was incapable of filing a grievance for much of the time ... after his release from the hospital. While the record contains instances of lucidity, Plaintiff continued to suffer periods of mental insufficiency, confusion, and lack of memory such that he was incapable of filing a grievance.”).

317. *Geter v. Baldwin State Prison*, 974 F.3d 1348, 1354–1357 (11th Cir. 2020) (affirming rejection of claim that mental disability barred exhaustion based on plaintiff’s performance in filing and pursuing the lawsuit); *Washington v. Fresno Cty. Sheriff*, No. 1:14-CV-00129-SAB, 2018 U.S. Dist. LEXIS 27997, at *27–29 (E.D. Cal. Feb. 21, 2018) (*unpublished*) (holding evidence of lack of competency was stale and there was no current evidence of inability to exhaust for mental health reasons); *Wakeley v. Giroux*, No. 1:12-CV-2610, 2014 U.S. Dist. LEXIS 52121 (M.D. Pa. Apr. 15, 2014) (*unpublished*) (rejecting claim of inability to file a grievance where mental health records and cooperation with investigators showed plaintiff was capable of filing); *Marella v. Terhune*, No. 03CV660-BEN MDD, 2011 U.S. Dist. LEXIS 105282, at *21–24 (S.D. Cal. Aug. 16, 2011) (*unpublished*) (rejecting claim that plaintiff was unable to grieve because of medication, shock, and pain, relying on expert opinion based on review of his medical records, and his ability to perform other tasks during the same time period). *Jones v. Nelson*, 729 F. App’x 467, 469 (7th Cir. 2018) (*unpublished*) (rejecting claim that “mental limitations” prevented plaintiff from grieving where he had filed 23 grievances); *Lopez v. Swift*, No. 12-CV-4099-TOR, 2014 U.S. Dist. LEXIS 130469, at *9–10 (E.D. Wash. Sept. 16, 2014) (*unpublished*) (rejecting claim that depression prevented

Some courts in mental health cases have gone further than saying the plaintiff's claim was not convincing enough. They have said that under *Ross v. Blake*, claims that a remedy was unavailable because of a characteristic of the incarcerated person are no longer allowed.³¹⁸ So far, appellate courts reviewing these decisions have not adopted that view, but have said that the incarcerated people in those cases failed to show that they were mentally disabled enough to make the remedy unavailable.³¹⁹ There is no basis for claiming that *Ross* eliminated claims of unavailable remedies based on medical or mental health condition, disability, language barriers, etc.

Prison rules and practices may also make remedies unavailable. Examples include refusing to provide postage and other supplies for indigent (poor) incarcerated people where incarcerated people must use the mail to exhaust, requiring incarcerated people to supply copies of documents but not providing a means to obtain them, or refusing to allow writing materials or documents to incarcerated

plaintiff from exhausting where he had filed another grievance within the same month); *Williams v. Crosby*, No. 5:12-CT-3056-F, 2013 U.S. Dist. LEXIS 32769, at *15–19 (E.D.N.C. Mar. 4, 2013) (*unpublished*) (rejecting mental-health related claim as “self-serving and conclusory” since the plaintiff had previously used the grievance system, despite evidence of “paranoid ideation and hallucinatory delusions of conversations with God and sexual threats from inmates and staff” immediately preceding the incident). *Brinson v. Kirby Forensic Psychiatric Ctr.*, No. 16-CV-1625 (VSB), 2018 U.S. Dist. LEXIS 168163, at *19 (S.D.N.Y. Sept. 28, 2018) (*unpublished*) (holding plaintiff in psychiatric facility “failed to provide competent evidence that he was so impaired as to be unable to pursue any of the administrative remedies available to him”); *Harvey v. Corr. Officers 1–6*, No. 9:09-CV-0517 LEK/TWD, 2014 U.S. Dist. LEXIS 83466, at *7 (N.D.N.Y. June 19, 2014) (*unpublished*) (stating “although Plaintiff’s medical records do show a history of mental illness, Plaintiff has not shown that his failure to follow the grievance procedure resulted from this condition”; finding confusion from mental illness or other sources was not the cause of non-exhaustion), *vacated and remanded on other grounds*, 612 F. App’x 35 (2d Cir. 2015) (*unpublished*).

318. The *Ross* case is discussed at the beginning of Part E(3) of this Chapter, “What Are Available Remedies?” For more information on *Ross*, please see the discussion about *Ross*, and subsequent cases, from footnotes 250 through footnote 285. *Osborn v. Williams*, No. 3:14-CV-1386 (VAB), 2017 U.S. Dist. LEXIS 212954, at *21 (D. Conn. Dec. 29, 2017) (*unpublished*) (holding *Ross*’s elimination of the “special circumstances” exception to exhaustion means that the only question before the court is whether the regulations provide “a procedural route to obtain administrative relief”); *Griggs v. Holt*, No. CV 117-089, 2018 U.S. Dist. LEXIS, at *16–19 (S.D. Ga. Oct. 24, 2018) (*unpublished*); *Geter v. Baldwin State Prison*, No. 516CV00444TESCHW, 2018 U.S. Dist. LEXIS 138409, at *17 (M.D. Ga. Aug. 16, 2018) (*unpublished*) (stating “subjective considerations of a prisoner’s assumed particular mental deficiencies effectively creates a ‘fourth avenue’ to show a prison’s grievance procedure was unavailable under the PLRA. To do so would effectively carve out a ‘special circumstance’ for a particular plaintiff that the United States Supreme Court unequivocally rejected in *Ross*.”); *Galberth v. Washington*, No. 14 CIV. 691 (KPF), 2017 U.S. Dist. LEXIS 120595, at *29 (S.D.N.Y. July 31, 2017) (*unpublished*) (stating in connection with a claim of mental disability that in *Ross* “the Court seems to have affirmed the outward-looking inquiry focused on what is made available by a prison, and rejected the inward-looking inquiry concerned with [what] is perceived to be available by a prisoner”).

319. *Geter v. Baldwin State Prison*, 974 F.3d 1348, 1354–1357 (11th Cir. 2020); *Osborn v. Williams*, 792 F. App’x 88, 90–91 (2d Cir. 2019) (*unpublished*); *Galberth v. Washington*, 743 F. App’x. 479, 480 (2d Cir. 2018) (*unpublished*).

people in restrictive housing units.³²⁰ In some cases, particular categories of incarcerated people are simply excluded from using the grievance system.³²¹

Some prisons and jails have rules that are explicitly designed to limit incarcerated people's use of the grievance system, and, depending on their severity, those rules may have the effect of making the remedy unavailable.³²² In a system of "modified access status," which requires some incarcerated

320. *Williams v. Pollard*, No. 07-C-1157, 2009 U.S. Dist. LEXIS 86332, at *26–27 (E.D. Wis. Sept. 21, 2009) (*unpublished*) (holding remedies were unavailable to an incarcerated person who could not obtain envelope for an appeal that had to be mailed); *Bey v. Caruso*, No. 06-14909, U.S. Dist. LEXIS 72462, at *2 (E.D. Mich. Sept. 28, 2007) (*unpublished*) (noting that denial of "postal loan" was based on plaintiff's using his religious name suffix on the relevant form, contrary to the policy he was trying to challenge; "the procedural question of exhaustion is inextricably intertwined with the merits of this case"); *Cordova v. Frank*, No. 07-C-172-C, 2007 U.S. Dist. LEXIS 54789, at *16 (W.D. Wis. July 26, 2007) (*unpublished*) (noting that "insofar as defendants have devised a grievance system that prevents [poor] prisoners from filing appeals of their inmate grievances, they have made the grievance process unavailable to those inmates and may not use failure to file timely appeals as a ground for dismissing subsequent lawsuits."); *Almy v. Davis*, 726 F. App'x. 553, 557 (9th Cir. 2018) (*unpublished*) (vacating dismissal for non-exhaustion where grievance was rejected because plaintiff failed to attach a copy of the challenged disciplinary decision because he did not have the funds to pay for it, and prison officials already had the charges anyway); *DeMartino v. Zenk*, No. 04-CV-3880(SLT)(LB), 2009 U.S. Dist. LEXIS 75600, (E.D.N.Y. Aug. 21, 2009) (*unpublished*) (holding factual question whether plaintiff had access to a copier in order to comply with the grievance procedure barred summary judgment for non-exhaustion); *Iseley v. Beard*, No. CIV. 1:CV-02-2006, 2009 U.S. Dist. LEXIS 52014, *19 (M.D. Pa. June 15, 2009) (*unpublished*) (holding remedy unavailable where copies of documents were required to appeal but there was no copier access in Restricted Housing Unit). *West v. Emig*, 787 F. App'x. 812, 815–816 (3d Cir. 2019) (*unpublished*) (holding plaintiff's assertion that he was denied a pen in "Psychological Close Observation" barred summary judgment for non-exhaustion); *Pierce v. Cook County*, No. 12 C 5725, 2014 U.S. Dist. LEXIS 122889, at *6–16 (N.D. Ill. Sept. 4, 2014) (*unpublished*) (denying summary judgment for non-exhaustion where the plaintiff averred that he had no access to writing materials while in the hospital during the period for filing a timely grievance); *Saenz v. Nickel*, No. 13-CV-697-BBC, 2014 U.S. Dist. 93007, at *3–11 (W.D. Wis. July 9, 2014) (*unpublished*) (denying summary judgment where the defendants failed to show the plaintiff had access to necessary grievance forms system in observation unit); *Woods v. Carey*, No. CIV S-04-1225 LKK GGH P, 2007 U.S. Dist. LEXIS 69832, at *1–2, 4–5 (E.D. Cal. Sept. 13, 2007) (*unpublished*) (vacating recommendation for dismissal because of failure to exhaust and demanding an inquiry into plaintiff's access to his legal property, which he claims he did not have, thereby preventing his timely appeal).

321. *Hurtado-Gomez v. McCleary*, No. 1:12-CV-00606-BLW, 2014 U.S. Dist. LEXIS 32825, *14–18 (D. Idaho Mar. 12, 2014) (*unpublished*) (declining to dismiss for non-exhaustion in light of plaintiff's allegations that he was told upon conviction that he was no longer a jail inmate and was refused jail grievance forms); *Zuege v. Geffers*, No. 08-C-1124, 2010 U.S. Dist. LEXIS 102406, at *8–11 (E.D. Wis. Sept. 28, 2010) (*unpublished*) (declining to dismiss where incarcerated person was in program in which right to use the grievance system was suspended); *Daker v. Ferrero*, No. 1:03-CV-2526-RWS, 2004 U.S. Dist. LEXIS 30591, at *6–8 (N.D. Ga. Nov. 24, 2004) (*unpublished*) (holding that an incarcerated person placed in "sleeper" status, meaning he remained officially assigned to another prison and was not allowed to file grievances where he was actually located, lacked an available remedy); *see also* *Sease v. Phillips*, No. 06 Civ. 3663 (PKC), 2008 U.S. Dist. LEXIS 60994, at *15–16 (S.D.N.Y. July 25, 2008) (*unpublished*) (denying summary judgment where incarcerated person in "transient" status was told his grievance could not be processed, and when he filed one it was never processed);

322. *Pleasant-Bey v. Luttrell*, No. 2:11CV-0218-TLP-TMP, 2018 U.S. Dist. LEXIS 152864, *8 (W.D. Tenn. Sept. 7, 2018) (*unpublished*) (holding plaintiff exhausted where he filed grievances that were rejected for exceeding a limit of five grievances within a 30-day period followed by a restriction to two more grievances within the following six months; he "took advantage of each step that the Jail offered for resolving the claims that he had"), *aff'd in part, rev'd in part, and remanded*, No. 18-6063, Order (6th Cir. Nov. 7, 2019) (*unpublished*); *Peck v. Nevada*, No. 2:18-CV-00237-APG-VCF, 2018 U.S. Dist. LEXIS 112079, at *15 (D. Nev. July 5, 2018) (*unpublished*) (holding incarcerated person stated a "colorable claim of denial of access to the courts" where his allegations showed "he is unable to grieve all the issues he wishes to pursue in civil rights and habeas litigation due to the restrictions in AR 740 to one grievance per week and one issue per grievance"; allegation that staff are being trained to "fraudulently defeat" exhaustion attempts also states a claim); *Lerajjareanra-O-Kel-Ly v. Zmuda*, No. 1:10-CV-263-MHW, 2012 U.S. Dist. LEXIS 127806, at *8 (D. Idaho Sept. 7, 2012) (*unpublished*) ("Should a prisoner have four legitimate grievances at roughly the same time, he will be able to pursue only three, and whether he can file the fourth in time is wholly dependent upon whether prison officials process the other three before the time for the filing of the fourth grievance expires. Here, the prison has chosen to make the grievance system unavailable to any prisoner who already has three pending grievances."); *Stine v. Fed. Bureau of Prisons*, No. 11-CV-00109-WJM-CBS, 2012 U.S. Dist. LEXIS 34836, at *7 (D. Colo. Mar. 15, 2012) (*unpublished*) ("If a

people to obtain prior permission to file a grievance, if permission is not granted for a non-frivolous claim, the remedy is not available.³²³ However, some courts have held that rules that limit the number of grievances that will be processed do not make the remedy unavailable, but merely make the incarcerated person “prioritize his grievances.”³²⁴ We think that a rule that requires incarcerated people to abandon some valid grievances violates the “unconstitutional conditions” doctrine, which “vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.”³²⁵

Courts may be skeptical of a claim that you have exhausted your remedies, or a claim that you were not informed or were misinformed about the grievance process, without further evidence.³²⁶ You should therefore do everything you can to exhaust even if you know the effort is going to fail, and also keep records so you can prove you tried. In other words, file a grievance no matter what. For example, if prison staff refuse to provide you with grievance forms, write your grievance on a sheet of paper, explain that you cannot get the forms, and appeal if they reject the grievance for not being on the right form.³²⁷ If prison staff tell you that you do not need to file a grievance, file a grievance anyway; if they

prisoner is pursuing a case that involves multiple claims, the Court could see how the BOP policy of only issuing one Informal Resolution form at a time could hinder the prisoner's ability to exhaust his administrative remedies. This is especially true given the short time constraints typically associated with the prison grievance system.”), *motion to amend denied*, 2012 U.S. Dist. LEXIS 108720 (D. Colo. Aug. 3, 2012) (*unpublished*), *affirmed in part, reversed in part*, 508 F. App'x 727 (10th Cir. 2013) (*unpublished*);

323. Walker v. Mich. Dept of Corr., 128 F. App'x 441, 446 (6th Cir. 2005) (*unpublished*); Reeves v. Corr. Med. Servs., No. 08-13776, 2009 U.S. Dist. LEXIS 107122, at *1–7 (E.D. Mich. Nov. 17, 2009) (*unpublished*) (holding plaintiff exhausted by asking for a form and being denied); Marr v. Jones, No. 1:07-CV1201, 2009 U.S. Dist. LEXIS 4065, at *5–8 (W.D. Mich. Jan. 22, 2009) (*unpublished*) (holding defendants failed to identify any available remedy where incarcerated person on modified grievance status was denied grievance forms) Marr v. Jones, No. 1:08-CV-1201, 2010 U.S. Dist. LEXIS 50130 (W.D. Mich. Jan. 22, 2009) (*unpublished*); Dawson v. Norwood, No. 1:06-CV-914, 2007 U.S. Dist. LEXIS 82205, at *9 (W.D. Mich. Nov. 6, 2007) (*unpublished*) (“If a prisoner has been placed on modified access to the grievance procedure and attempts to file a grievance which is deemed to be non-meritorious, he has exhausted his ‘available’ administrative remedies as required by § 1997e(a).” (citation omitted)) Dawson v. Norwood, No. 1:06-CV-914, 2008 U.S. Dist. LEXIS 115088 (W.D. Mich. Sept. 16, 2008) (*unpublished*).

324. Pearson v. Taylor, 665 F. App'x 858, 867–868 (11th Cir. 2016) (*unpublished*) (holding a rule that an incarcerated person could only have two grievances pending at a time did not make the remedy unavailable; stating that incarcerated people must comply with grievance rules, and the two-grievance limit was a grievance rule); Wilson v. Epps, 776 F.3d 296, 300–301 (5th Cir. 2015) (holding “backlogging” system under which only one grievance would be processed at a time is not unconstitutional and does not abrogate the exhaustion requirement); Wilson v. Boise, 252 F.3d 1356, 2001 WL 422621, at *4 (5th Cir. 2001) (*unpublished*) (Table, text in Westlaw) (upholding “backlogging” system under which only one grievance would be processed at a time) Wilson v. Boise, No. 00-30803, 2001 U.S. App. LEXIS 31249 (5th Cir. Mar. 30, 2001); Williams v. Owens, No. 5:13-CV-254 MTT, 2014 U.S. Dist. LEXIS 128476, * (M.D. Ga. Sept. 15, 2014) (*unpublished*) (rejecting claim that plaintiff could not exhaust because of rule that no incarcerated person could have more than two grievances pending; “... Plaintiff must adhere to the procedural rules in the grievance procedure when exhausting his administrative remedies. His inability to file a grievance because he already had two grievances pending is consequently immaterial to whether he exhausted.”), *appeal dismissed*, No. 14-14287 (11th Cir. Oct 30, 2014) (*unpublished*) Williams v. Owens, No. 5:13-CV-0254-MTT-MSH, 2014 U.S. Dist. LEXIS 129509 (M.D. Ga. Aug 20, 2014) (*unpublished*). Pearson v. Taylor, 665 F. App'x 858, 868 (11th Cir. 2016) (*unpublished*).

325. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013).

326. See, e.g., Gaughan v. U.S. Bureau of Prisons, No. 02-C-0740, 2003 U.S. Dist. LEXIS 23297, at *3–5 (N.D. Ill. Dec 30, 2003) (*unpublished*) (rejecting claim that incarcerated person had exhausted where defendants had not made a record of it); Thomas v. N.Y. State Dept. of Corr. Servs., No. 00 Civ. 7163 (NRB), 2003 U.S. Dist. LEXIS 20286, at *13–14 (S.D.N.Y. Nov. 10, 2003) (*unpublished*) (dismissing case for failure to exhaust remedies where prison staff told the incarcerated person a grievance was unnecessary, but did not tell him he could not file a grievance).

327. Kendall v. Kittles, No. 03 Civ. 628 (GEL), 2003 U.S. Dist. LEXIS 16129, at *10–13 (S.D.N.Y. Sept. 15, 2003) (*unpublished*) (declining to dismiss where incarcerated person in New York City jails said he could not get grievance forms; the fact that he filed grievances at other times showed only that forms were available on the dates those grievances were filed, and not that such forms were always available). This is not an issue in the New York State grievance system. The directive states that under New York's administrative grievance procedure, if

tell you that the issue is not “grievable”—that is, if the grievance system is not available to you for that issue—file the grievance anyway so that you will get a decision in writing telling you that it isn’t grievable.³²⁸ If they refuse to accept your grievance, write to the Warden or Superintendent and tell him that you were not allowed to file your grievance. Ask him to either investigate it as a non-grievance complaint or treat it as a grievance in case you were misinformed by the lower-level staff. You should also file a grievance about a refusal to accept your grievance. It is extremely important to keep copies of everything that you file so that you can later prove that you did in fact file those documents.

4. What Must You Put in Your Grievance or Administrative Appeal?

Exhausting means you must raise all of the issues that you intend to raise in your lawsuit in your grievance or appeal. Issues you do not include in your grievance or appeal cannot be brought up later in a lawsuit.³²⁹ You may have to file more than one grievance about a complicated situation if the grievance policy prohibits “multiple issues” in a grievance.³³⁰ Sometimes, most often in connection with disciplinary proceedings, you have to use more than one remedy to exhaust all your issues.³³¹

How specific and detailed must you be in a grievance or appeal to satisfy the exhaustion requirement? Read the grievance policy to find out. The best way to determine how specific and detailed you must be in a grievance or appeal to satisfy an exhaustion requirement is by reading the grievance policy of your institution. The Supreme Court has held “[t]he level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”³³² Therefore, it said, courts could not require incarcerated people to have named all their litigation defendants in their earlier grievances if the grievance system itself did not have such a requirement.³³³ If the prison grievance system *does* require you to name the responsible employees in

forms are not available, your grievance can be submitted on plain paper. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(1) (2020). New York state grievance procedures are available in the state regulations. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5 (2020). New York City has now changed its policy as well: the current policy provides that grievances that are not on the prescribed form will be accepted and grievance staff will provide the form and will assist the prisoner in transferring the information to the form. City of New York Department of Correction, Directive 3376R-A, Inmate Grievance Procedures § (V)(F) (2012) (*as revised* Dec. 10, 2018), *available at* https://www1.nyc.gov/assets/doc/downloads/directives/Directive_3376R-A.pdf (last visited Dec. 2, 2020).

328. Some courts have refused to accept incarcerated people’s statements that an unidentified person told them that their issues were not grievable. *See, e.g.,* *Perez v. Arpaio*, No. CV 06-0038-PHX-SMM (ECV), 2006 U.S. Dist. LEXIS 86559, at *5–6 (D. Ariz. Nov. 21, 2006) (*unpublished*) (dismissing claim for failure to exhaust, even though an unnamed official told plaintiff he did not have to file).

329. *See Jones v. Bock*, 549 U.S. 199, 211, 127 S. Ct. 910, 919, 166 L. Ed. 2d 798, 810 (2007) (noting that “unexhausted claims cannot be brought in court”); *Tucker v. Collier*, 906 F.3d 295, 306 (5th Cir. 2018) (holding a grievance challenging a ban on assembly by Nations of Gods and Earths members did not exhaust claims concerning wearing of Nation headgear, displaying its flag, assistance in finding a cultural representative, and ability to carry lessons to services); *Mattox v. Edelman*, 851 F.3d 583, 596 (6th Cir. 2017) (holding that grievances requesting cardiac catheterization did not exhaust a claim about failure to provide a particular medication); *Johnson v. Johnson*, 385 F.3d 503, 517–523 (5th Cir. 2004) (holding an incarcerated person who complained of sexual assault and referred to his sexual orientation in his grievance, but said nothing about his race, did not exhaust his racial discrimination claim).

330. Such prohibitions have caused much confusion and some courts have rejected the way prison officials have applied them. *See Lafountain v. Martin*, 334 F. App’x 738, 741 & n.2 (6th Cir. 2009) (*unpublished*) (holding the grievance body was wrong to characterize a claim of multiple retaliatory incidents as involving multiple issues); *Moore v. Bennette*, 517 F.3d 717, 722, 730 (4th Cir. 2008) (holding plaintiff had properly exhausted despite application of a “no multiple issues” rule to prevent him from pursuing his grievance about repeated instances of punishment without notice or charge).

331. For more information regarding disciplinary hearings and exhaustion, please see discussion in Part E(3) of this Chapter, which begins at the paragraph containing footnote 291 and ends at footnote 294.

332. *Jones v. Bock*, 549 U.S. 199, 218, 127 S. Ct. 910, 923, 166 L. Ed. 2d 798, 815 (2007).

333. *Jones v. Bock*, 549 U.S. 199, 218, 127 S. Ct. 910, 922, 166 L. Ed. 2d 798, 814–815 (2007).

your grievance, and you have that information, if you don't name them in your grievance, you can't name them as defendants in a lawsuit.³³⁴

Grievance policies often say little or nothing about how much detail is required in a grievance.³³⁵ One often-cited decision has said that if the prison grievance policy does not have more specific requirements, then a grievance counts as exhausting "if it alerts the prison to the nature of the wrong for which redress is sought ... [T]he grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming."³³⁶ This makes sense because the purpose of the PLRA exhaustion requirement is to give prison officials time and opportunity to resolve problems before they turn into lawsuits.³³⁷ An example of a grievance that satisfied the "object intelligibly" standard (though just barely) is found in a sexual assault case where the incarcerated person said only: "[T]he administration don't . . . do there . . . job. [A sexual assault] should've never . . . happen again," and requested that the assailant be criminally prosecuted.³³⁸

Even courts that do not use the *Strong v. David* standard generally do not require grievances to be very specific or detailed where the grievance policy does not have a requirement of greater detail.³³⁹ They generally hold grievances inadequate when they are so vague that prison officials could not reasonably have been expected to understand what the incarcerated person was complaining about.³⁴⁰

334. *Garrison v. Dutcher*, 1:07-CV-642, 2008 U.S. Dist. LEXIS 90504, at *4 (W.D. Mich. Sept. 30, 2008) (*unpublished*) (holding that "[the Michigan Department of Corrections] requires prisoners to include the 'names of all those involved'. . . . Plaintiff's failure to name [a prison supervisor] as a responsible party in his grievances thus constitutes failure to exhaust").

335. For example, the New York State grievance system requires only that incarcerated people include a "concise, specific description of the problem and the action requested and indicate what actions the grievant has taken to resolve the complaint, [that is], specific persons/areas contacted and responses received." N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(2) (2020).

336. *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002); *Wilcox v. Brown*, 877 F.3d 161, 167 n.4 (4th Cir. 2017) (stating "grievances generally need only be sufficient to 'alert[] the prison to the nature of the wrong for which redress is sought.'" (quoting *Strong v. David*, 297 F.3d 646 (7th Cir. 2002))); *Fennell v. Cambria Cty. Prison*, 607 F. App'x 145, 149 (3d Cir. 2015) (*unpublished*) (citing *Strong v. David* and "object intelligibly" language with approval); *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) ("*Strong* held that, when a prison's grievance procedures are silent or incomplete as to factual specificity, 'a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.' . . . We adopt *Strong* as the appropriate standard." (citation omitted)). *Kikumura v. Osagie*, 461 F.3d 1269, 1283 (10th Cir. 2006); *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004), overruled on other grounds. *Woodford v. Ngo*, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2386, 165 L. Ed. 2d 368, 378 (2006); *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003) (quoting "object intelligibly" language with approval).

337. *Porter v. Nussle*, 534 U.S. 516, 525, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12 (2002).

338. *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004); *see also Westefer v. Snyder*, 422 F.3d 570, 580–581 (7th Cir. 2005) (holding that plaintiffs sufficiently exhausted complaints about transfers to a high-security prison by listing "Transfer from Tamms" as a requested remedy, or by expressing concern about not being given a reason for the transfer, in grievances about the conditions at that prison).

339. *See, e.g., McAlphin v. Toney*, 375 F.3d 753, 755 (8th Cir. 2004) (treating two claims that: (1) two defendants failed to treat plaintiff's dental grievances as emergency matters, and (2) others refused to escort him to the infirmary for emergency treatment, as just a single exhausted claim of denial of emergency dental treatment for exhaustion purposes); *Kikumura v. Hurley*, 242 F.3d 950, 956 (10th Cir. 2001) (holding complaint sufficient to meet the exhaustion requirement where the plaintiff complained that he was denied Christian pastoral visits, though the defendants said his claim should be dismissed because he had not stated in the grievance process that his religious beliefs included elements of both the Buddhist and Christian religions); *Carter v. Symmes*, No. 06-10273-PBS, 2008 U.S. Dist. LEXIS 7680, at *9 (D. Mass. Feb. 4, 2008) (*unpublished*) (adopting administrative law rule that "claims not enumerated in an initial grievance are allowed notwithstanding the exhaustion requirement if they 'are like or reasonably related to the substance of charges timely brought before [the agency]'").

340. *See Beltran v. O'Mara*, 405 F. Supp. 2d 140, 152 (D.N.H. 2005) (holding that allegations the plaintiff was "being punished for no reason" and isolated from other incarcerated people were "too vague" to allow officials to make any response); *Aguirre v. Feinerman*, No. 3:02 cv 60 JPG, 2005 U.S. Dist. LEXIS 45520, at *20 (S.D. Ill. May 10, 2005) (*unpublished*) (holding that a grievance that specifically mentioned physical therapy, but mentioned other medical care only generally, did not exhaust a claim concerning failure to diagnose the plaintiff's

They generally do not require grieving of legal theories.³⁴¹ But you should be careful about this last point. There are some issues that some courts say are legal theories, but that other courts require to be exhausted, notably the existence of retaliatory motive,³⁴² conspiracy,³⁴³ and discriminatory intent,³⁴⁴ and occasionally other matters.³⁴⁵ You should probably err on the side of being explicit in such cases.

If the prison grievance system actually investigates and addresses your complaint, and does not throw it out for lack of detail, a court will generally consider it to be exhausted. This will be the case even if the defendants' lawyers later claim that you should have said more in the grievance.³⁴⁶

You can expect prison officials to attack your claim for failure to exhaust. There are some things you can do to protect yourself. If the prison grievance system requires you to name all the individuals involved, you may not necessarily know who they all are. Make it clear in your grievance that you do not know their names. For example, if you were beaten by several officers while others looked on, you might write in your grievance: "Officers Smith and Jones beat me, along with the other officers present

congestive heart failure). *Compare* Westefer v. Snyder, 422 F.3d 570, 580–581 (7th Cir. 2005) (holding that incarcerated people who mentioned concern with their transfers to a high-security prison in the course of grievances complaining about the conditions there exhausted their claims about transfer) *with* Shoucair v. Warren, No. 07-12964, 2008 U.S. Dist. LEXIS 37961, at *7–8 (E.D. Mich. May 9, 2008) (*unpublished*) (rejecting grievance body's finding of undue vagueness where incarcerated person provided enough information to investigate his complaint and grievance policy required investigation).

341. Reyes v. Smith, 810 F.3d 654, 659 (9th Cir. 2016) ("A grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grieved." (citing Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009)); Johnson v. Johnson, 385 F.3d 503, 517–518 (5th Cir. 2004) (agreeing legal theories need not be presented in grievances); Burton v. Jones, 321 F.3d 569, 575 (6th Cir. 2003) (holding grievances need not "allege (state) a specific legal theory or facts that correspond to all the required elements of a particular legal theory").

342. Petzold v. Rostollan, 946 F.3d 242, 254–255 (5th Cir. 2019) (holding retaliation claim was not "sufficiently specific" in grievance to exhaust); Shifflett v. Korszniak, 934 F.3d 356, 366 (3d Cir. 2019) ("Retaliation is a separate claim, . . . and therefore must be separately grieved."). *But see*, Maldonado v. Unnamed Defendant, 648 F. App'x 939, 953 (11th Cir. 2016) (*unpublished*) (holding plaintiff was not required to allege retaliatory motive in a grievance since there is no requirement to exhaust legal theories).

343. Cleveland v. Harvanek, 607 F. App'x 770, 773 (10th Cir. 2015) (*unpublished*); Siggers v. Campbell, 652 F.3d 681, 694–695 (6th Cir. 2011) (holding failure to mention alleged conspiracy in grievance meant claim was not exhausted). *But see*, Espinal v. Goord, 558 F.3d 119, 127–128 (2d Cir. 2009) (holding that conspiracy is a legal theory which incarcerated people need not grieve; it is sufficient to describe the alleged misconduct adequately).

344. Johnson v. Johnson, 385 F.3d 503, 518 (5th Cir. 2004) (holding that an incarcerated person who complained of sexual assault, made repeated reference to his sexual orientation, but said nothing about his race had exhausted his sexual orientation discrimination claim, but not his racial discrimination claim); Waddy v. Sandstrom, No. 7:11CV00320, 2012 U.S. Dist. LEXIS 77937, at *10 (W.D. Va. June 5, 2012) (*unpublished*) (holding racial discrimination claim unexhausted where plaintiff grieved a use of force but did not mention the racial comments on which the claim was based). *But see*, Gonzalez v. Morris, No. 9:14-cv-1438 (GLS/DEP), 2018 U.S. Dist. LEXIS 42534, at *6–7 (N.D.N.Y. Mar. 15, 2018) (*unpublished*) (holding Santeria follower who complained of denial of privileges accorded to Native American incarcerated people exhausted his discrimination claim, even though he did not mention discrimination until the final stage, since "equal protection is a legal theory" that need not be articulated in grievances).

345. *See* Dye v. Kingston, 130 F. App'x 52, 56 (7th Cir. 2005) (*unpublished*) (holding that an incarcerated person who complained in his grievance of missing property items, including his Bibles, failed to exhaust his 1st Amendment claim by failing to state that the Bibles' loss was "infringing on his religious practice").

346. Reyes v. Smith, 810 F.3d 654, 659 (9th Cir. 2016) (holding incarcerated person who grieved doctors' failure to provide pain medication exhausted claim about Pain Management Committee's involvement where grievance responses themselves cited the Committee's decision); Patterson v. Stanley, 547 F. App'x 510, 512 (5th Cir. 2013) (*unpublished*) (holding claim exhausted where appeal decision acknowledged it and said it had been referred to Office of Professional Standards and plaintiff was scheduled for an ophthalmology exam); Espinal v. Goord, 558 F.3d 119, 128 (2d Cir. 2009) (holding medical care complaint not raised explicitly in grievance was exhausted where grievance decision addressed it; medical care complaint stated in very general terms was exhausted where grievance decision addressed plaintiff's care with specificity).

who beat me or who stood by and did not intervene to stop the beating, and whose names I do not know.” If you think there is a practice of beating prisoners that higher-ups in the prison are responsible for, you might add something like: “Sergeant Black, Lieutenant White, Deputy Superintendent Green and Superintendent Red, and any other supervisors unknown to me who fail to train and supervise the security staff and keep them from using excessive and unnecessary force.” Or, if the mail room officer denies you a book you have ordered by telling you only “it’s not allowed,” you might say your grievance was against “Officer Jones in the mail room, and any other person unknown to me who made the policy resulting in this book being denied to me, or if there is no such policy, the supervisor of the mail room operation, unknown to me, who allows mail room staff to deny books to prisoners in the absence of a policy permitting such denial.”

Even if your prison’s grievance policy does not require the naming of all individuals involved, you should still think about the different people, events, and policies that might be involved in the problem you are filing a grievance about, and mention them. That is because some courts require that if you raise claims about policy, training, or supervision in your grievance, you must have explicitly exhausted those claims in addition to describing what happened to you.³⁴⁷ For instance, in a use of force case, if the grievance policy requires only a “concise, specific statement of the problem,” you might say: “I was beaten without justification by Officers Smith and Jones and others, while other officers stood by and did not intervene. I am also complaining about the lack of training and supervision that allows security staff to use excessive and unnecessary force and get away with it.” If you were denied a book, you might say: “I was denied the book A Time to Die about the 1971 Attica disturbance. I am also complaining about the policies and practices that allow the denial of books to incarcerated people without good reason and without clear written criteria and procedures.” (Or, if there are clear criteria and procedures, but you wish to challenge them as unlawful, mention those in the grievance, too.)

Similarly, if you get more information about a problem after you have filed a grievance about it (or more information about the people responsible), you should consider filing a separate grievance including the new information.³⁴⁸ If you discover new information after the grievance deadline has passed that might be important for what you plan to file suit about after exhaustion, file a grievance anyway and explain that you couldn’t file it within the deadline because you didn’t have the information. For example, if you file a grievance stating that you have been denied certain medical care by the prison’s medical director, and then later on learn that your care was denied by the prison system’s central office through a “utilization review,” you might wish to file and exhaust a new grievance about the utilization review decision. Courts have disagreed about whether these sorts of grievances are enough to exhaust, but it is the best way to protect yourself when you learn new information after filing an initial grievance.³⁴⁹

347. See *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (8th Cir. 2003) (holding that a grievance complaining of excessive force by line staff did not exhaust plaintiff’s claim that a supervisor failed to supervise and take action against them), *overruled on other grounds by* *Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

348. If the grievance system contains a “name all responsible persons” rule, courts might require you to file a new grievance including newly identified defendants or other new information. In *Brownell v. Krom*, 446 F.3d 305, 312–313 (2d Cir. 2006), the court rejected the argument that the plaintiff should have filed a new grievance reflecting new information, but only because the system did not seem to provide for supplementing or re-filing existing grievances to reflect new information.

349. Compare *Sullivan v. Caruso*, No. 1:07cv367, 2008 U.S. Dist. LEXIS 9090 (W.D. Mich. Feb. 7, 2008) (*unpublished*) (holding defendants improperly rejected a grievance as duplicative where it named a defendant not named in a previous grievance) with *Laster v. Pramstaller*, No. 06-13508, 2008 U.S. Dist. LEXIS 11435, at *3 (E.D. Mich. Feb. 15, 2008) (*unpublished*) (holding that a grievance naming a defendant that is dismissed because it duplicates an earlier grievance that did not name that defendant fails to exhaust). In *Dunbar v. Jones*, No. 1:05-CV-1594, 2007 U.S. Dist. LEXIS 49278, at *21–22 (M.D. Pa. July 9, 2007) (*unpublished*), the court rejected the argument that the plaintiff should have amended his grievance to name a defendant whose identity he did not initially know since the rules did not provide for such amended grievances. The court nonetheless dismissed the claim against that particular defendant because the plaintiff didn’t add her name in his grievance appeals. The court did not, however, cite anything in the grievance policy that permits adding new material in grievance appeals.

Prison officials and their lawyers want to try to get your case thrown out for non-exhaustion so they can avoid facing facts and arguments of your lawsuit. You should do your best to make your grievance reflect all aspects of the problem, so the judge will see that you did your best to bring everything to prison officials' attention before suing.

5. What If You Make a Mistake Trying to Exhaust?

Incarcerated people not only must exhaust, they must do it correctly. The Supreme Court has held that the PLRA exhaustion requirement requires you to obey an agency's deadlines and other important procedural rules because no decision-making system can work well without having an orderly structure.³⁵⁰ If your grievance or other complaint is rejected because you did not follow the required procedures, the court will find that you failed to exhaust and will not allow your lawsuit to go forward.³⁵¹

This does *not* mean that you should just give up if you fail to follow the proper procedure. You should pursue your grievance and all available appeals, and if the grievance is rejected for a procedural mistake, request that your error be excused or that you be permitted to re-file your grievance and start over, and explain any circumstances that might have caused you to make a mistake. Sometimes grievance systems allow incarcerated people to correct mistakes and re-file (in fact, sometimes they instruct incarcerated people to do so).³⁵² If prison officials *don't* reject your grievance for procedural mistakes, but decide the merits anyway, they have waived their right to claim your mistakes mean you didn't exhaust.³⁵³ That is because the purpose of the "proper exhaustion" rule is to allow the

350. See *Woodford v. Ngo*, 548 U.S. 81, 90–91, 93, 126 S. Ct. 2378, 2386–2387, 165 L. Ed. 2d 368, 378, 380 (2006) (describing the Court's "proper exhaustion" requirement); see also *Jones v. Bock*, 549 U.S. 199, 218, 127 S. Ct. 910, 922–923, 166 L. Ed. 2d 798, 815 (2007) (holding that "[c]ompliance with prison grievance procedures ... is all that is required by the PLRA to properly exhaust").

351. See *Woodford v. Ngo*, 548 U.S. 81, 83–84, 126 S. Ct. 2378, 2382, 165 L. Ed. 2d 368, 374 (2006).

352. If they do allow you to re-file your grievance, and give you instructions, you should follow the directions even if you disagree with them.

353. See *Does 8-10 v. Snyder*, 945 F.3d 951, 962 (6th Cir. 2019); *Rinaldi v. United States*, 904 F.3d 257, 271 (3d Cir. 2018) ("We simply reaffirm . . . that when an inmate's allegations 'have been fully examined on the merits' and 'at the highest level,' they are, in fact, exhausted." (quoting *Camp v. Brennan*, 219 F.3d 279, 281 (3d Cir. 2000))); *Whatley v. Smith*, 898 F.3d 1072, 1083 (11th Cir. 2018) ("[A] prisoner has exhausted his administrative remedies when prison officials decide a procedurally flawed grievance on the merits. . . . [D]istrict courts may not enforce a prison's procedural rule to find a lack of exhaustion after the prison itself declined to enforce the rule." (citation and internal quotation marks omitted)); *Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016); *Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1213–14 (11th Cir. 2015) ("We join our sister Circuits in holding that district courts may not find a lack of exhaustion by enforcing procedural bars that the prison declined to enforce."); *Spada v. Martinez*, 579 F. App'x 82, 85 (3d Cir. 2014) (per curiam) (*unpublished*) (dicta: quoting *Hill v. Curcione*); *Hammett v. Cofield*, 681 F.3d 945, 947 (8th Cir. 2012) (per curiam) (stating "all circuits that have addressed it have concluded that the PLRA's exhaustion requirement is satisfied if prison officials decide a procedurally flawed grievance on the merits"); *Hill v. Curcione*, 657 F.3d 116, 125 (2d Cir. 2011) (holding "the exhaustion requirement of the PLRA is satisfied by an untimely filing of a grievance if it is accepted and decided on the merits by the appropriate prison authority."); *Maddox v. Love*, 655 F.3d 709, 722 (7th Cir. 2011) ("Where prison officials address an inmate's grievance on the merits without rejecting it on procedural grounds, the grievance has served its function of alerting the state and inviting corrective action, and defendants cannot rely on the failure to exhaust defense."); *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324–26 (6th Cir. 2010) (declining to dismiss claims against defendants not named in grievance where officials reached the merits despite noncompliance with "name the defendant" grievance rule; "When the State . . . decides to reject the claim on the merits, who are we to second guess its decision to overlook or forgive its own procedural bar?"); *Gates v. Cook*, 376 F.3d 323, 331–332 (5th Cir. 2004) (noting that the plaintiff sent a form to the Commissioner rather than the Legal Adjudicator, but that defendants did not reject it for noncompliance; in addition, the grievance was submitted by the prisoner's lawyer and not by the prisoner, as the rules specify); *Spruill v. Gillis*, 372 F.3d 218, 234 (3d Cir. 2004) (holding that the prison grievance officer's recognition that a particular defendant was involved in the events the prisoner complained of, even though the prisoner had not named the defendant in his grievance, excused the procedural mistake and the case could continue).

grievance system to “function effectively,”³⁵⁴ and if it decided the merits, obviously it *did* function effectively. Courts have disagreed over whether a grievance is exhausted if it is rejected both on the merits and for procedural reasons.³⁵⁵ In any event, the harder you have tried to exhaust correctly, the more likely the court is to rule in your favor in a close case. Also, if there is some reason you cannot comply with all the procedural rules of the grievance system, pursue your grievance anyway and explain why you couldn't comply. If your grievance is rejected or denied because you failed to do something you couldn't do, the remedy was unavailable and your suit should go forward.³⁵⁶ Courts will look very closely at this kind of claim, and you should make every effort to exhaust properly so you will have a convincing explanation of why you were not able to do so.

Courts have generally held that to exhaust properly, incarcerated people must follow instructions given by grievance staff, in addition to the grievance rules.³⁵⁷ However, a number of courts have refused to find non-exhaustion where incarcerated people have failed to follow staff instructions that were not supported by the grievance policy.³⁵⁸ The best practice is probably to follow staff instructions if you can unless they are contrary to the written policy.

Suppose you follow the grievance rules, but get a grievance decision rejecting your grievance and claiming wrongly that you didn't follow the rules. Courts have generally been willing to examine

354. See *Woodford v. Ngo*, 548 U.S. 81, 90, 126 S. Ct. 2378, 2386, 165 L. Ed. 2d 368, 378 (2006).

355. Compare *Cobb v. Berghuis*, No. 1:06-CV-773, 2007 U.S. Dist. LEXIS 93890, at *3–4 (W.D. Mich. Dec. 21, 2007) (*unpublished*) (holding that a grievance rejected for both reasons does not exhaust), with *McCarroll v. Sigman*, No. 1:07-cv-513, 2008 U.S. Dist. LEXIS 17254, at *10–11, (W.D. Mich. Mar. 6, 2008) (*unpublished*) (finding exhaustion on those facts), *reconsideration granted on other grounds*, No. 1:07-CV-513, 2008 U.S. Dist. LEXIS 38710 (W.D. Mich. May 13, 2008) (*unpublished*).

356. See, e.g., *DeBrew v. Atwood*, 792 F.3d 118, 126–29 (D.C. Cir. 2015) (holding remedy was unavailable where the grievance was denied for failure to attach a document that the incarcerated person could not obtain); *Risher v. Lappin*, 639 F.3d 236, 240 (6th Cir. 2011) (same as *DeBrew*); *Jamison v. Varano*, No. 1:12-C-1500, 2015 U.S. Dist. LEXIS 103325, at *4 (M.D. Pa. Aug. 6, 2015) (*unpublished*) (holding the remedy unavailable where prison officials provided illegible photocopies of required documents and the plaintiff's grievance was then dismissed because of the documents' illegibility); *Lee v. Gulick*, No. 2:17-CV-42-PK, 2018 U.S. Dist. LEXIS 106294, at *8 (D. Or. June 26, 2018) (*unpublished*) (holding plaintiff exhausted available remedies where a staff member ordered him to stop placing grievances in the grievance box, he had no other way of filing them, and when he filed his accumulated grievances later when he was able they were rejected as untimely). Please see footnotes 280 and 281 of this Chapter for more information regarding denials of forms and/or grievances.

357. See *Thomas v. Parker*, 609 F.3d 1114, 1118–19 (10th Cir. 2010); *Cannon v. Washington*, 418 F.3d 714, 718 (7th Cir. 2005); *Ford v. Johnson*, 362 F.3d 395, 397 (7th Cir. 2004) (“Just as courts may dismiss suits for failure to cooperate, so administrative bodies may dismiss grievances for lack of cooperation; in either case this procedural default blocks later attempts to litigate the merits.”); *Jernigan v. Stuchell*, 304 F.3d 1030, 1032–33 (10th Cir. 2002) (holding that an incarcerated person who received no response to a grievance and refused the appeals body's direction to try to get one had failed to exhaust); *Kelley Bey v. Keen*, No. 3:13-CV-01942, 2014 U.S. Dist. LEXIS 97649, at *37 (M.D. Pa. May 29, 2014) (*unpublished*) (holding incarcerated person who failed to explain when asked why the Halal diets on offer were unacceptable did not exhaust).

358. See, e.g., *Fisher v. Figueroa*, No. CIV-12-231-F, 2013 U.S. Dist. LEXIS 26099, *3–4 (W.D. Okla. Jan. 7, 2013) (*unpublished*) (holding remedies unavailable where the incarcerated person followed correct procedure, was erroneously told to re-file his grievance after grievance staff misrouted it; since he had followed the rules, his appeal of the initial grievance should have been processed), *report and recommendation adopted*, *Fisher v. Figueroa*, No. CIV-12-231-F, 2013 U.S. Dist. LEXIS 24931 (W.D. Okla. Feb. 22, 2013); *Chavez v. Granadoz*, No. 2:11-cv-1015 WBS CKD P, 2013 U.S. Dist. LEXIS 58282, *2–4 (E.D. Cal. Apr. 23, 2013) (*unpublished*) (declining to dismiss for non-exhaustion where grievance personnel demanded the names of involved staff, which were not required by the rules, and denied plaintiff's request for documentation that would include that information); *Andrews v. Cervantes*, No. CIV S-03-1218 EFB P, 2009 U.S. Dist. LEXIS 28530, at *6 (E.D. Cal. Mar. 25, 2009) (*unpublished*) (holding incarcerated person exhausted though his grievance was rejected because he refused to resubmit it without the word “moron,” since the grievance policy did not support this basis for rejection). *Contra*, *Starks v. Lewis*, No. CIV-06-512-M, 2008 U.S. Dist. LEXIS 48444, at *5 (W.D. Okla. June 24, 2008) (*unpublished*) (“Even when prison authorities are incorrect about the existence of the perceived deficiency, the inmate must follow the prescribed steps to cure it....An inmate's disagreement with prison officials as to the appropriateness of a particular procedure under the circumstances, or his belief that he should not have to correct a procedural deficiency does not excuse his obligation to comply with the available process...”).

incarcerated people's compliance with the rules independently rather than being bound by what grievance officials say about it.³⁵⁹

6. What If You Miss a Time Limit?

The Supreme Court's ruling requiring "proper exhaustion" means that you must follow time limits in the grievance system.³⁶⁰ That means you should learn the time limits and meet the deadlines. But if you miss a grievance deadline, do not give up. Continue with your grievance as quickly as possible. If there is a provision allowing late grievances under certain circumstances,³⁶¹ request permission to file late if the provision fits your situation. (The fact that late grievances are sometimes allowed won't help you if you don't use the procedure for getting one approved.³⁶²) Take all available appeals if the grievance officials reject your grievance for lateness. If the appeals body decides the merits of your grievance, then you will have exhausted; the lateness of your grievance will be deemed waived by the grievance body.³⁶³ If they do not decide the merits, you can still argue in court that the remedy was unavailable if something prevented you from filing on time.³⁶⁴ Most courts have held that if the

359. See, e.g., *Pyles v. Nwaobasi*, 829 F.3d 860, 865 (7th Cir. 2016) (holding incarcerated person had "good cause" for a late grievance even though grievance officials had said otherwise); *Dimanche v. Brown*, 783 F.3d 1204, 1211–1214 (11th Cir. 2015) (holding plaintiff's grievance qualified as a "grievance of reprisal" under the state's grievance rules, even though it had been procedurally rejected by grievance authorities); *Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010) (holding remedies are unavailable if officials "screened [the plaintiff's] grievance or grievances for reasons inconsistent with or unsupported by applicable regulations"); *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010) (holding dismissal was wrong under a "plain reading" of the grievance rules, and made the remedy unavailable to the plaintiff); *Lafountain v. Martin*, 334 F. App'x 738, 741, 741 n.2 (6th Cir. 2009) (per curiam) (*unpublished*) (holding officials improperly applied their rule against multiple issues in grievances); *Price v. Kozak*, 569 F. Supp. 2d 398, 406–407 (D. Del. 2008) (holding the prisoner's grievances timely despite the defendant, a prison employee, rejecting them as late); *Moton v. Cowart*, No. 8:06-CV-2163-T-30EAJ, 2008 U.S. Dist. LEXIS 40419, at *15–18 (M.D. Fla. May 19, 2008) (*unpublished*) (rejecting the prison's decision that the incarcerated person's complaint was not grievable and rejecting an appeal decision that it must be re-filed at the facility, as contrary to the prison system's own policy).

360. See *Woodford v. Ngo*, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2389, 165 L. Ed. 2d 368, 381–382 (finding that enforcing strict time limits was necessary to promote an effective adjudicatory system) (2006).

361. For example, the New York State grievance system allows late grievances if there are "mitigating circumstances," which include "attempts to resolve informally by the inmate." N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(g)(1)(i)(a) (2020); State of New York, Department of Correctional Services, Directive No. 4040 § 701.6(g)(1)(i)(a), Inmate Grievance Program (2016), available at <http://www.doccs.ny.gov/Directives/4040.pdf> (last visited Nov. 4, 2019). It provides: "An exception to the time limit may not be granted if the request was made more than 45 days after an alleged occurrence."

362. See *Patel v. Fleming*, 415 F.3d 1105, 1110–1111 (10th Cir. 2005) (holding that the existence of provisions for time extensions did not save the untimely grievance of an incarcerated person who never officially sought an extension); *Harper v. Jenkin*, 179 F.3d 1311, 1312 (11th Cir. 1999) (holding that an incarcerated person whose grievance was dismissed as untimely had to appeal that decision before turning to a court, whether or not the incarcerated person believed his appeal would be heard, since the system allowed for waiver of time limits for "good cause"); *Soto v. Belcher*, 339 F. Supp. 2d 592, 596 (S.D.N.Y. 2004) (holding that an incarcerated person who learned of his problem after the deadline passed should have tried to file a late grievance).

363. See *Spada v. Martinez*, 579 F. App'x 82, 85 (3d Cir. 2014) (per curiam) (*unpublished*) (dicta; quoting *Hill v. Curcione*); *Hill v. Curcione*, 657 F.3d 116, 125 (2d Cir. 2011); *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Cordero v. FNU Ricknauer*, Civ. No. 13-2023 (RBK) (AMD), 2014 U.S. Dist. LEXIS 129822, *6 (D.N.J. Sept. 17, 2014) (*unpublished*); *Miller v. Coning*, 2014 U.S. Dist. LEXIS 25843, *6 (D.Del., Feb. 28, 2014) (*unpublished*), report and recommendation adopted, 2014 U.S. Dist. LEXIS 108858, (D.Del., Aug. 7, 2014) (*unpublished*).

364. See *Green v. Burkhart*, 767 F. App'x 342, 346 (3d Cir. 2019) (per curiam) (*unpublished*) (holding grievance appeal unavailable where plaintiff could not appeal without a document he had no access to, and did not obtain until after he had filed suit); *Jackson v. Griffin*, 762 F. App'x 744, 746 (11th Cir. 2019) (per curiam) (*unpublished*) (holding untimeliness caused by defendants' failure to pick up submitted grievances on their own announced schedule would make the remedy unavailable); *Pyles v. Nwaobasi*, 829 F.3d 860, 865–869 (7th Cir. 2016) (holding plaintiff had exhausted "such remedies as were available to him" when his grievance was dismissed as untimely after the prison failed to make copies of it timely); *Nunez v. Duncan*, 591 F.3d 1217, 1225–1226 (9th Cir. 2010) (holding remedy was unavailable and incarcerated person's lack of timely exhaustion excused where

grievance body determines a grievance was late, the court makes its own independent determination if that is correct.³⁶⁵ If you miss a deadline for some reason outside your control, don't bypass the grievance process and just argue in court that the remedy is unavailable. A number of courts have said that if you are prevented from filing your grievance on time, you must file a grievance as soon as you can,³⁶⁶ even though the Supreme Court said in the *Woodford* case that an untimely grievance does not exhaust. Some courts have rejected this idea where there is no instruction to that effect in the grievance policy.³⁶⁷ Your best strategy is to pursue the grievance regardless.

If a grievance system has no time limit, delay in filing cannot bar an incarcerated person's claim for

non-exhaustion.³⁶⁸ In that scenario, an unexhausted claim should be dismissed without prejudice, and the incarcerated person will then have the opportunity to try to exhaust.³⁶⁹

Warden led plaintiff to believe he had to have a particular document to appeal, and he spent months trying to get it); *Days v. Johnson*, 322 F.3d 863, 867–868 (5th Cir. 2003) (holding remedy unavailable where incarcerated person was injured and unable to write during the prescribed time period for filing).

365. *Pyles v. Nwaobasi*, 829 F.3d 860, 865 (7th Cir. 2016) (holding incarcerated person had shown “good cause” for filing an untimely grievance, despite the grievance authorities’ contrary decision); *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (holding district court should have determined whether plaintiff’s grievance fell into an exception to the time limits, even though state officials had rejected it as untimely); *Williams v. Franklin*, 302 F. App’x 830, 832 (10th Cir. 2008) (*unpublished*) (rejecting determination of untimeliness that was obviously wrong); *Miller v. Coning*, 2014 U.S. Dist. LEXIS 25843, *6 (D. Del. Feb. 28, 2014) (*unpublished*) (holding officials measured timeliness from the wrong date under their own rule); *Jaros v. Illinois Department of Corrections*, No. 11–cv–168–JPG, 2013 WL 5546189, at *3 (S.D. Ill. Oct. 8, 2013) (*unpublished*) (holding prison officials were “demanding the prisoner do more than the administrative rules require” when they measured timeliness of an appeal by when it was received, and not when it was sent, under a rule that said appeal must be “submitted” within 30 days);

366. *Jones v. Nelson*, 729 F. App’x 467, 469 (7th Cir. 2018) (*unpublished*) (holding incarcerated person who was physically incapacitated during filing period was obliged to file as soon as reasonably possible thereafter, and appeal if denied); *Burnett v. Miller*, 738 F. App’x 951, 953 (10th Cir. 2018) (*unpublished*) (holding incarcerated person who was in the hospital and under the influence of incapacitating medications during the grievance-filing period should have pursued an out of time grievance under prison procedure); *Lamont-Goldsby v. Kaschmitter*, 712 F. App’x 701, 702 (9th Cir. 2018) (*unpublished*) (holding incarcerated person who showed remedy was unavailable during three months in segregation should have pursued an untimely grievance after release from segregation); *Bryant v. Rich*, 530 F.3d 1368, 1373 (11th Cir. 2008) (holding an incarcerated person who said he could not submit a grievance for fear of assault at his place of detention should have exhausted that ability after transfer to another facility); *Green v. McBride*, No. 5:04-cv-01181, 2007 U.S. Dist. LEXIS 71189, at *8–9 (S.D. W.Va. Sept. 25, 2007) (*unpublished*) (holding an incarcerated person who was kept on suicide watch without necessary materials until past the grievance deadline should have grieved as soon as he was released from suicide watch and his failure to do so without justification means he failed to properly exhaust his administrative remedies).

367. *See Lanaghan v. Koch*, 902 F.3d 683, 689–690 (7th Cir. 2018) (holding incarcerated person unable to file a timely grievance was not obliged to file an untimely one where the provision allowing late grievances did not appear in the handbook provided to incarcerated people); *Forde v. Miami Fed. Dept. of Corr.*, 730 F. App’x 794, 799–800 (11th Cir. 2018) (per curiam) (*unpublished*); *Spada v. Martinez*, 579 F. App’x 82, 86 (3d Cir. 2014) (per curiam) (*unpublished*) (holding incarcerated person who was denied grievance forms during the period a grievance was timely was not required to file an untimely grievance where the grievance policy did not provide for untimely grievances under the circumstances); *Cotton-Schrichte v. Peate*, No. 07-4052-CV-C-NKL, 2008 U.S. Dist. LEXIS 59452, at *4 (W.D. Mo. Aug. 5, 2008) (*unpublished*) (holding that an incarcerated person who was raped by a staff member exercising a position of authority over the incarcerated person and who had been threatened into silence was not required to file a grievance after the threats were removed because she did not have administrative procedures available to her at the appropriate time).

368. *See Schonarth v. Robinson*, No. 06-CV-151-JM, 2008 U.S. Dist. LEXIS 13596, at *10–12 (D.N.H. Feb. 22, 2008) (*unpublished*) (finding that a grievance that was filed two years after the jail was demolished, but otherwise in compliance with grievance rules, was exhausted).

369. *See Alexander v. Dickerson*, No. 6:07-CV-423, 2008 U.S. Dist. LEXIS 32866, at *17 (E.D. Tex. Apr. 22, 2008) (*unpublished*) (indicating that when no deadline for filing grievances exists in the jail’s policy, the lawsuit does not have to be dismissed with prejudice and the plaintiff can re-file the suit once he exhausts his administrative remedies).

7. Dealing with Exhaustion in Your Lawsuit

Exhaustion is an “affirmative defense,” so you do not have to put it in a complaint—the defendants must raise it in order to claim you didn’t exhaust.³⁷⁰ However, if a grievance is properly exhausted, it may be helpful to put that information (and nothing else) in the complaint anyway. Then, if the defendants make a motion to dismiss, you can simply refer to that part of the complaint in response, since the court must assume that the facts alleged in a complaint are true for purposes of a motion to dismiss.³⁷¹ If you did *not* properly exhaust but you have a good argument that administrative remedies were not available, you should *not* put that in the complaint.³⁷² In that case, you should leave exhaustion out of the complaint and let the defendants raise it, probably by motion for summary judgment. If the defendants do raise the defense, you will then have the opportunity to provide a fuller explanation. Here is the rule of thumb: If you can truthfully write in your complaint, “Plaintiff has exhausted all available administrative remedies for his claims,” you should do it; if it is more complicated than that, you should leave it out.

Since exhaustion is not a pleading requirement, it cannot be addressed at initial screening or by motion under Federal Rules of Civil Procedure Rule 12(b)(6) to dismiss for failure to state a claim, except in cases where non-exhaustion is clear on the face of the complaint. Motions under Federal Rules of Civil Procedure Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction are equally inappropriate, since failure to exhaust is not jurisdictional.³⁷³

In most courts, defendants who claim an incarcerated person did not exhaust will generally have to raise that claim in a motion for summary judgment, which requires the defendant to submit factual evidence showing that an incarcerated person did not exhaust.³⁷⁴ Sometimes defendants say they are moving to dismiss the complaint under Rule 12(b)(6), but then also include factual materials like documents or affidavits. These should not be considered on such a motion to dismiss. The court may decide to convert the Rule 12(b)(6) motion to a summary judgment motion.³⁷⁵ Courts are not required to convert such motions to summary judgment, and many have declined to do so.³⁷⁶

If you are faced with a summary judgment motion claiming you didn’t exhaust, you will have to respond to the defendant’s facts with your own admissible evidence. This evidence can include your declaration or sworn affidavit³⁷⁷ (not just a statement in a brief or a letter) establishing that you

370. See *Jones v. Bock*, 549 U.S. 199, 211–217, 127 S. Ct. 910, 919–922, 166 L. Ed. 2d 798, 811–813 (2007).

371. See *Wright v. Dee*, 54 F. Supp. 2d 199, 206 (S.D.N.Y. 1999) (holding claim of exhaustion made in response to the defendants’ motion to dismiss was sufficient to survive the motion).

372. See *Jones v. Bock*, 549 U.S. 199, 213–215, 127 S. Ct. 910, 920–921, 166 L. Ed. 2d 798, 812–813 (2007)

373. See *Woodford v. Ngo*, 548 U.S. 81, 101, 126 S. Ct. 2378, 2392, 165 L. Ed. 2d 368, 384 (2006) (“[T]he PLRA exhaustion requirement is not jurisdictional.”).

374. See FED. R. CIV. P. 56. See, e.g., *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006); *Brown v. Croak*, 312 F.3d 109, 111–112 (3d Cir. 2002); *Fields v. Oklahoma State Penitentiary*, 511 F.3d 1109, 1111–1112 (10th Cir. 2007) (upholding the decision to grant summary judgment for the defendant and dismiss the case because Mr. Fields failed to exhaust his remedies, as required under the PLRA before bringing suit).

375. FED. R. CIV. P. 12(d). See *McCoy v. Goord*, 255 F. Supp. 2d 233, 251 (S.D.N.Y. 2003) (discussing why such a conversion may not fit the goals of exhaustion).

376. See, e.g., *Escalera v. Harry*, NO: 1:15-CV-02132, 2016 U.S. Dist. LEXIS 136010, at *7 (M.D.Pa. Sept. 28, 2016), *report and recommendation adopted*, *Escalera v. Harry*, NO: 1:15-CV-02132, 2016 U.S. Dist. LEXIS 153924, (M.D.Pa. Nov. 7, 2016) (*unpublished*); *Endicott v. Allen*, No. 2:17-CV-29-DDN 2019, U.S. Dist. LEXIS 19890, *3 (E.D. Mo. Feb. 7, 2019) (*unpublished*) (citing deficiencies of parties’ presentations, plaintiff’s incarceration and pro se status, and lack of any discovery); *Vaillette v. Lindsay*, 11-CV-3610 (NGG) (RLM), 2014 U.S. Dist. LEXIS 114701, at *8 (E.D.N.Y. Aug. 18, 2014) (*unpublished*) (citing lack of opportunity for discovery by plaintiff); *McNair v. Rivera*, 12 Civ. 06212 (ALC) (SN); 12 Civ. 8325 (ALC)(SN); 13 Civ. 0352 (ALC)(SN), 2013 U.S. Dist. LEXIS 127642, at *6–7 (S.D.N.Y. Sept. 6, 2013) (*unpublished*) (declining to convert where defendants had not provided or alluded to any documents that would be dispositive; noting bifurcating discovery between exhaustion and the merits risked complication and delay); *Taylor v. Hillis*, No. 1:10-cv-94 2011 U.S. Dist. LEXIS 145694, at *4 (W.D. Mich. Nov. 28, 2011), *report and recommendation adopted*, *Taylor v. Hillis*, No. 1:10-cv-94, 2011 U.S. Dist. LEXIS 145429 (W.D. Mich. Dec. 19, 2011) (*unpublished*).

377. See Chapter 6, “An Introduction to Legal Documents,” for more information on affidavits.

exhausted, or that you were unable to exhaust for some legitimate reason, along with documentary evidence, such as a final grievance decision showing exhaustion, or a statement in the grievance policy or a memo to you from the grievance body telling you your complaint is not grievable. You should also look closely at the defendant's evidence and, if it does not really show that you failed to exhaust, explain why to the court.³⁷⁸ If the defendant cannot show that it is *undisputed* that you have failed to exhaust, and you do not have an adequate excuse or explanation, summary judgment will be denied.

If the court finds disputed issues of fact bearing on whether you exhausted, or on whether the remedy was unavailable so you couldn't exhaust, the court will have to decide the issue before trial. Courts are now agreed that exhaustion is not an issue for the jury at trial.³⁷⁹ Most but not all have held that disputed facts must be decided at an evidentiary hearing.³⁸⁰

Exhaustion is an affirmative defense. This means that the defendant will have the burden of proof that the plaintiff did not exhaust his prison remedies.³⁸¹ One often-cited decision has stated that once defendants have produced evidence that there was an available administrative remedy and the plaintiff did not exhaust it, "the prisoner has the burden of *production* . . . to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. . . . However, as required by *Jones [v. Bock]*, the ultimate burden of *proof* remains with the defendant."³⁸²

To prove you didn't exhaust, then, the defendant will have to show three things:

- 1) That there actually was an available administrative solution that would address your problem.³⁸³ Defendants must also show the court exactly what prisoners were required to

378. See cases cited in notes in footnotes 375–382, below, for examples of reasons courts have found that defendants' evidence did not really show you didn't exhaust.

379. See *Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015); *Small v. Camden County*, 728 F.3d 265, 271 (3d Cir. 2013) (holding "judges may resolve factual disputes relevant to the exhaustion issue without the participation of a jury"); *Messa v. Goord*, 652 F.3d 305, 309–310 (2d Cir. 2011) (holding jury trial right does not extend to "the 'threshold issue[s]' that courts must address to determine whether litigation is being conducted in the right forum at the right time."); *Dillon v. Rogers*, 596 F.3d 260, 272 (5th Cir. 2010); *Pavey v. Conley*, 544 F.3d 739, 741–742 (7th Cir. 2008); *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008).

380. Compare *Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015) (stating "disputed issues of fact regarding exhaustion under the PLRA presented a matter of judicial administration that could be decided in a bench trial"); *Roberts v. Neal*, 745 F.3d 232, 234 (7th Cir. 2014) (holding a "swearing contest" cannot be resolved without hearing testimony); *Dillon v. Rogers*, 596 F.3d 260, 273 (5th Cir. 2010) (stating "the judge may resolve disputed facts concerning exhaustion, holding an evidentiary hearing if necessary") with *Paladino v. Newsome*, 885 F.3d 203, 211 (3d Cir. 2018) (leaving necessity for a hearing to discretion of district courts); *Bryant v. Rich*, 530 F.3d 1368, 1377 & n.16 (11th Cir. 2008) (holding the court may decide exhaustion disputes without a hearing if no one asks for a hearing).

381. *Roberts v. Barreras*, 484 F.3d 1236, 1240–1241 (10th Cir. 2007) (citing established rules that the burden of proving affirmative defenses is on the defendant and that burden of proof follows burden of pleading).

382. *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc) (emphasis supplied); *accord*, *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010) (stating defendants "must establish beyond peradventure all of the essential elements of the defense of exhaustion to warrant summary judgment in their favor"); *Surles v. Anderson*, 678 F.3d 452, 456 (6th Cir. 2012) (rejecting argument that once defendants come forward on summary judgment with some evidence of non-exhaustion, burden shifts to plaintiff to show exhaustion; defendants must show the absence of factual disputes); *Grant v. Kopp*, No. 9:17-cv-1224 (GLS/DEP), 2019 U.S. Dist. LEXIS 1758, at *4 (N.D.N.Y. Jan. 3, 2019) (*unpublished*) (same as *Albino*), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 14368 (N.D.N.Y. Jan. 30, 2019); *Sarvey v. Wetzels*, C.A.No. 16-157ERIE, 2018 U.S. Dist. LEXIS 51487, at *2 (W.D. Pa. Mar. 28, 2018) (*unpublished*) (citing *Njos v. Argueta*, No. 2:13-cv-01038, 2017 U.S. Dist. LEXIS 26222, at *2 (M.D. Pa. Feb. 23, 2017)), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 52906 (M.D. Pa. Apr. 6, 2017); *Widener v. City of Bristol, Va.*, No. 1:13CV00053, 2014 U.S. Dist. LEXIS 90121, at *2 (W.D. Va. July 2, 2014) (*unpublished*) (stating to obtain summary judgment, "the defendant must adduce evidence which supports the existence of each element of its affirmative defense, and the evidence must be so powerful that no reasonable jury would be free to disbelieve it" (citation omitted)).

383. See, e.g., *Hubbs v. Suffolk Cty. Sheriff's Dept.*, 788 F.3d 54, 59 (2d Cir. 2015) (holding that defendants failed to establish that their grievance procedure provided a remedy for abuses in a court holding pen); *Cantwell v. Sterling*, 788 F.3d 507, 509 (5th Cir. 2015) (reversing summary judgment for non-exhaustion; stating that "the defendants have not put before the district court or this court the applicable grievance procedures (and we stress

- do to exhaust, and failed to do.³⁸⁴ The Second Circuit has held that complaints by incarcerated people should not be dismissed for non-exhaustion without the court having “establish[ed] the availability of an administrative remedy from a legally sufficient source.”³⁸⁵ This generally means submitting the actual grievance policy that was in effect at the time of the problem you have brought suit about. To establish availability, defendants must also show that the remedy was made known to the incarcerated people.³⁸⁶
- 2) That you were incarcerated when you filed your complaint, so you were required to exhaust.³⁸⁷
 - 3) That you did not exhaust. Many courts have found that prison officials’ evidence of non-exhaustion was insufficient, because the evidence did not respond to plaintiffs’ specific

applicable—the ones in force at the relevant time, in the relevant place.”); *Brown v. Valoff*, 422 F.3d 926, 940 (9th Cir. 2005) (“Establishing, as an affirmative defense, the existence of further ‘available’ administrative remedies requires evidence, not imagination.”); *Chamblis v. Bland*, No. 5:17-CV-000254, 2018 U.S. Dist. LEXIS 158103, at *4–5 (E.D. Ark. Mar. 19, 2018) (*unpublished*) (declining to dismiss for non-exhaustion where defendants provided no information explaining their grievance policy), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 157565 (E.D. Ark. Sept. 17, 2018) (*unpublished*); *Fernandez v. Morris*, No. 08-CV-0601 H (PCL), 2008 U.S. Dist. LEXIS 54298, at *8–9 (S.D. Cal. Jul. 16, 2008) (*unpublished*) (holding defendants who failed to show availability of remedies in segregation were not entitled to dismissal for non-exhaustion); *Ayala v. C.M.S.*, No. 05-5184 (RMB), 2008 U.S. Dist. LEXIS 50692, at *7 (D.N.J. Jul. 2, 2008) (*unpublished*) (holding defendants who failed to specify what the administrative grievance procedure required were not entitled to dismissal for non-exhaustion).

384. *English v. Payne*, 720 F. App’x 810, 810–811 (8th Cir. 2018) (per curiam) (*unpublished*) (holding defendants failed to establish non-exhaustion where plaintiff’s grievances were “Not Processed” (a designation for grievances that include insufficient information, are incomplete, or which the filer did not attempt informal resolution) when defendants did not submit the grievances or other evidence showing a deficiency in any of those respects); *Breeland v. Baker*, 439 F. App’x 93, 96 (3d Cir. 2011) (per curiam) (*unpublished*) (“Without any showing concerning the specific policy that Breeland allegedly violated,” summary judgment for non-exhaustion was inappropriate); *Ayala v. C.M.S.*, No. 05-5184 (RMB), 2008 U.S. Dist. LEXIS 50692, at *7 (D.N.J. July 2, 2008) (*unpublished*) (finding that, where plaintiff said he was unable to pursue administrative remedies, defendants’ failure to establish their policy’s requirements made it impossible for the court to assess plaintiff’s claim).

385. *Mojias v. Johnson*, 351 F.3d 606, 609 (2d Cir. 2003) (quoting *Snider v. Melindez*, 199 F.3d 108, 114 (2d Cir. 1999) (noting that a party’s admission is not a “legally sufficient source”)); see *Hubbs v. Suffolk Cty. Sheriff’s Dept.*, 788 F.3d 54, 59 (2d Cir. 2015) (holding “defendants bear the initial burden of establishing, by pointing to ‘legally sufficient source[s]’ such as statutes, regulations, or grievance procedures, that a grievance process exists and applies to the underlying dispute”). In *Mojias*, the court criticized the lower court for relying on check marks and questionnaire answers on a form complaint to determine exhaustion. *Mojias v. Johnson*, 351 F.3d 606, 609–610 (2d Cir. 2003); *accord*, *Robinson v. Cty. of Riverside*, No. ED CV 17-323-DSF (SP), 2018 U.S. Dist. LEXIS 143029, at *11 (C.D. Cal. July 3, 2018) (*unpublished*) (noting difficulty of interpreting checks in boxes, declining to infer non-exhaustion from them, especially in light of allegations suggesting unavailability), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 143023 (C.D. Cal. Aug. 21, 2018) (*unpublished*); *Cole v. Stepp*, No. 09-22492-CIV-SEITZ, 2010 U.S. Dist. LEXIS 140285, at *7–8 (S.D. Fla. Nov. 1, 2010) (*unpublished*) (“It cannot be assumed . . . that because the plaintiff checked no for availing himself of grievance procedures, that he did not actually file grievances, nor is it clear what grievances were available to him if he was transferred to another facility. It is apparent that any determination as to whether the operative complaint may be subject to dismissal under § 1997e(a), will require further development of the record.”), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 6261 (S.D. Fla. Jan. 24, 2011) (*unpublished*). That harmful practice is still alive in some jurisdictions. See *Winfield v. Soloman*, No. CIV S-08-0875 WBS DAD P, 2008 U.S. Dist. LEXIS 46880, at *3 (E.D. Cal. May 23, 2008) (*unpublished*) (finding for the defendant and that the plaintiff did not exhaust where he conceded to non-exhaustion in a questionnaire).

386. Please see footnotes 265 through 268 of this Chapter, above, for examples of cases in which defendants were required to prove that they made a remedy known to individuals who were incarcerated.

387. *Brown v. Burnett*, Civil Action No. 15-284, 2016 U.S. Dist. LEXIS 1671, *10 (W.D. Pa. Jan. 7, 2016) (*unpublished*) (holding plaintiff was not an incarcerated person where her amended complaint stated that she had been released and defendants merely provided evidence of bench warrants and criminal dockets); *Abner v. County of Saginaw County*, 496 F. Supp. 2d 810, 823 (E.D. Mich. 2007) (“There is no clear evidence that this plaintiff was subject to the requirements of the PLRA, and the defendants are not entitled to summary judgment on that ground”).

allegations concerning exhaustion efforts,³⁸⁸ or defendants relied on their grievance records but the way they searched their records was inadequate or unexplained,³⁸⁹ or the records themselves were unreliable,³⁹⁰ or the records rested on hearsay,³⁹¹ or they simply did not establish the incarcerated person's failure to exhaust.³⁹² In numerous cases,

388. To better understand non-responsiveness to plaintiff's specific allegations concerning exhaustion see *Surles v. Anderson*, 678 F.3d 452, 457 & n.10 (6th Cir. 2012) (holding defendants must negate allegations that defendants interfered with plaintiff's efforts to exhaust); *Burns v. Apollo*, No. 2:12-CV-158, 2014 U.S. Dist. LEXIS 25038, at *6–7 (N.D. Ind. Feb. 27, 2014) (*unpublished*) (noting defendants did not respond to plaintiff's assertion that he did not file special appeal forms because the forms in use were designed to be used for grievances and appeals, and the appeal form proffered by the defendants was no longer used); *Laws v. Walsh*, No. 02-CV-6016, 2003 U.S. Dist. LEXIS 12600, at *10 n.3 (W.D.N.Y. Jun. 27, 2003) (*unpublished*) (holding conclusory affidavit about records search and lack of appeals inadmissible).

389. To better understand inadequate or unexplained searches of records see *Boykin v. Sandholm*, 801 F. App'x 417, 420–421 (7th Cir. 2020) (*unpublished*) (remanding based on defendants' concession that the grievance log they produced would not have reflected the emergency grievance the plaintiff alleged he filed); *Roberts v. Neal*, 745 F.3d 232, 236 (7th Cir. 2014) (noting it was unclear whether defendants' records search would have uncovered the emergency grievance the plaintiff said he had submitted); *Stout v. North-Williams*, 476 F. App'x 763, 765–766 (5th Cir. 2012) (per curiam) (*unpublished*) (noting absence of verified statement that defendants had reviewed plaintiff's grievance history for the relevant time period); *Howard v. Gambino*, 457 F. App'x 642, 643 (9th Cir. 2011) (*unpublished*) (holding defendants' presentation inadequate where they “relied on a declaration by their attorney stating that she reviewed documents contained in her office file, rather than conducting a complete search of the jail's tracking system for inmate grievances and their dispositions”); *White v. Whorton*, 430 F. App'x 621 (9th Cir. 2011) (*unpublished*) (holding defendants' submission of unverified grievance report “unaccompanied by a declaration describing its import or completeness, is insufficient to meet the defendants' burden to show nonexhaustion”); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (noting that defendants' affidavit does not state whether the plaintiff exhausted his appeals; their “Appeal Record” lacks a foundation and is not shown to be complete); *Livingston v. Piskor*, 215 F.R.D. 84, 85–86 (W.D.N.Y. 2003) (holding defendants' affidavits stating that they had no record of grievances and appeals by the plaintiff were inadequate where they did not respond to his allegations that his grievances were not processed as policy required and gave no detail as to “the nature of the searches . . . their offices' record retention policies, or other facts indicating just how reliable or conclusive the results of those searches are”).

390. To better understand unreliable records, see *Paladino v. Newsome*, 885 F.3d 203, 211 (3d Cir. 2018) (noting “the record is bereft of evidence that the Prison's recordkeeping system is reliable,” and holding such evidence is necessary to determine whether the plaintiff exhausted); *Banks v. Patton*, 743 F. App'x 690, 694 (7th Cir. 2018) (*unpublished*) (noting finding below that the jail's “informal and disorganized filing system” made it difficult to “track which complaints the [jail] staff responded to, which they ignored, and which, if any, the plaintiff appealed”); *Turley v. Cowan*, No. 09-CV-829-SCW, 2012 U.S. Dist. LEXIS 39825, at *21–22 (S.D. Ill. Mar. 23, 2012) (*unpublished*) (finding defendants' records sufficiently inaccurate, based on documentation in the record, that the court declines to infer lack of exhaustion from them).

391. To better understand non-responsiveness when defendant's argument rests on hearsay see *Britt v. Rahana*, No. 1:13-CV-01795-WTL-DML, 2014 U.S. Dist. LEXIS 63423, at *6–7 (S.D. Ind. May 8, 2014) (*unpublished*) (holding defendant's affidavit that mailroom clerk delivered grievance response to plaintiff, with no indication of personal knowledge by affiant, was inadmissible to support non-exhaustion finding); *Hicks v. Irvin*, No. 06-CV-645, 2010 U.S. Dist. LEXIS 68262, at *20–21 (N.D. Ill. July 8, 2010) (*unpublished*) (refusing to consider defendants' “Sentry” records system where they failed to establish its status as business records); *Bey v. Williams*, No. L-09-2181, 2010 U.S. Dist. LEXIS 42145, at *5–6 (D. Md. Apr. 29, 2010) (*unpublished*) (declining to dismiss for non-exhaustion where defendants cited documents, but did not produce them because they were archived); *Donahue v. Bennett*, No. 02-CV-6430, 2003 U.S. Dist. LEXIS 12601, at *10 (W.D.N.Y. Jun. 23, 2003) (*unpublished*) (holding counsel's hearsay affirmation about a telephone call with grievance officials did not properly support their motion).

392. To better understand when cited records fail to establish non-exhaustion simply because they do not stand for that proposition see *Ray v. Kertes*, 130 F. App'x 541, 543 (3d Cir. 2005) (*unpublished*) (holding “conclusory statement” that “does not constitute a factual report describing the steps Ray did or did not take to exhaust his grievances” did not meet defendants' burden); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (noting that defendants did not show that the administrative remedies had been exhausted because “[t]he affidavit, although describing the inmate appeals process, does not state whether or not [the plaintiff] has exhausted his appeals”); *Thixton v. Berge*, No. 05-C-620-C, 2006 U.S. Dist. LEXIS 92193, at *7 (W.D. Wis. Dec. 19, 2006) (*unpublished*) (noting that the absence of an appeal about lack of a working toilet and sink did not

incarcerated people have produced evidence of grievances that prison officials claimed did not exist.³⁹³ Courts have repeatedly held that they must review plaintiffs' actual grievances to assess exhaustion; prison officials' summaries or characterizations of them are not adequate for that purpose.³⁹⁴

Since exhaustion is an affirmative defense, the defendants should raise it in their answer, or in a motion to dismiss filed in lieu of an answer, or in theory it is waived.³⁹⁵ However, courts are very lenient in allowing defendants to raise the defense at a "pragmatically sufficient time," such as in a summary judgment motion.³⁹⁶ If you file an amended complaint, defendants can assert exhaustion in the answer to it even if they omitted it from their initial answer.³⁹⁷ Courts enforce waiver of the

establish non-exhaustion, since if the plaintiff prevailed at the first stage he would not have needed to appeal, and he might have filed an appeal about conditions in general including the sink and toilet issue).

393. See, e.g., *Whitmore v. Jones*, 456 F.App'x 747, 749–750 (10th Cir. 2012) (*unpublished*) (noting plaintiff's production of the grievance defendants denied was filed); *Spires v. Harbaugh*, 438 F. App'x 185, 187 n.2 (4th Cir. 2011) (per curiam) (*unpublished*) (noting "the State alleged to the district court that Spires availed himself of none of the avenues of administrative relief. This highly material fact is clearly disputed by Spires' submission of copies of dismissals of his administrative remedy requests."); *Frazier v. Kelley*, No. 4:20-CV-00434-KGB, 2020 U.S. Dist. LEXIS 90821, at *70 (E.D. Ark. May 19, 2020) (*unpublished*) ("Defendants claim to have no record of Mr. Frazier's grievance, yet there is record evidence of a grievance submitted by Mr. Frazier signed for by an ADC staff member."); *Williams v. Hesse*, No. 9:16-CV-1343 (GTS/TWD), 2020 U.S. Dist. LEXIS 29551, at *10–12 (N.D.N.Y. Feb. 19, 2020) (*unpublished*) (noting plaintiff produced documentation of an exhausted grievance defendants had denied existed, leading to withdrawal of the exhaustion defense), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 29551 (N.D.N.Y. Mar. 26, 2020) (*unpublished*); *Dorlette v. Wu*, No. 3:16-CV-318 (VAB), 2019 U.S. Dist. LEXIS 45737, at *18 (D. Conn. Mar. 20 2019) (*unpublished*) (noting defendants claimed they had submitted all of plaintiff's requests seeking administrative relief, but the plaintiff produced a Health Services Review form defendants omitted), *appeal dismissed*, No. 19-1292, 2020 U.S. App. LEXIS 14595 (2d Cir. Jan. 24, 2020) (*unpublished*); see also *Banks v. Patton*, 743 F. App'x 690, 695 (7th Cir. 2018) (*unpublished*) (noting that court found evidence in the record of two grievances defendants had denied existed).

394. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (noting that "Appeal Record" did not sufficiently establish subject matter of plaintiff's appeal); *Almy v. Dzurenda*, No. 3:17-CV-00045-MMD-WGC, 2019 U.S. Dist. LEXIS 27654, at *12 (D. Nev. Jan. 18, 2019) (*unpublished*) (admonishing defendants to produce actual grievance documentation rather than summaries in the future), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 26713 (D. Nev. Feb. 20, 2019) (*unpublished*), *appeal dismissed*, No. 19-15422, 2019 U.S. App. LEXIS 18433 (9th Cir. June 19, 2019) (*unpublished*); *Ned v. Rardin*, No. 3:16-CV-251-KRG-KAP, 2019 U.S. Dist. LEXIS 16767, at *8 (W.D. Pa. Jan. 31, 2019) (*unpublished*) (noting unreliability of Bureau of Prisons' "foundationless summary of the contents of grievances" where the grievances themselves are not retained), *report and recommendation adopted as modified*, 2019 U.S. Dist. LEXIS 46779 (W.D. Pa. Mar. 21, 2019) (*unpublished*), *aff'd sub nom. Ned v. Kardin*, No. 19-1825, 779 F. App'x 75 (3d Cir. 2019) (per curiam) (*unpublished*); *Yahtues v. Dionne*, No. 16-cv-174-SM, 2018 U.S. Dist. LEXIS 161751, at *18 (D.N.H. Sept. 21, 2018) (*unpublished*) (noting inaccuracy of defendants' summary list of grievances and their subject matter).

395. FED. R. CIV. P. 12(b).

396. See, e.g., *Nottingham v. Finsterwald*, No. 13-10398, 582 F. App'x 297, 298 (5th Cir. 2014) (per curiam) (*unpublished*) (holding defense not waived because it was "raised it at a pragmatically sufficient time and Nottingham was not prejudiced in his ability to respond"); *Campfield v. Tanner*, No. 10-1151 section "S" (5), 2011 U.S. Dist. LEXIS 105584, at *14 (E.D. La. Aug. 16, 2011) (*unpublished*) (allowing exhaustion defense raised for the first time in response to plaintiff's summary judgment motion, since it was raised at a "pragmatically sufficient time" and plaintiff was not prejudiced), *report and recommendation adopted as modified*, 2011 U.S. Dist. LEXIS 105577 (E.D. La. Sept. 19, 2011) (*unpublished*); see also *Johnson v. Johnson*, 385 F.3d 503, 516 n.7 (5th Cir. 2004) (holding unpleaded non-exhaustion defense raised by motion for judgment on the pleadings was raised at a "pragmatically sufficient time" and was not waived). *Contra*, *Louis-Charles v. Courtwright*, No. 9:11-CV-147 (GLS/TWD), 2014 U.S. Dist. LEXIS 14215, at *12 (N.D.N.Y. Jan. 7, 2014) (*unpublished*) (holding defendants who failed to preserve non-exhaustion defense by pleading it "are not entitled to summary judgment on exhaustion grounds"), *report and recommendation adopted as modified by*, 2014 U.S. Dist. LEXIS 13448 (N.D.N.Y. Feb. 4, 2014) (*unpublished*); *Santos v. Delaney*, No. 09-3437, 2014 U.S. Dist. LEXIS 6144, at *16–17 (E.D. Pa. Jan. 17, 2014) (*unpublished*) (holding failure to plead non-exhaustion bars defendant from "belatedly" raising it by summary judgment motion).

397. *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999); *Castillo v. Rodas*, No. 09 Civ. 9919 (AJN), 2014 U.S. Dist. LEXIS 41282, at *48–49 (S.D.N.Y. Mar. 25, 2014) (*unpublished*) (holding filing of amended complaints after an initial summary judgment motion meant that the defendants, who pled non-exhaustion in their amended

exhaustion defense only in extreme cases and in those cases where you can show your case was harmed by the delay in raising it.³⁹⁸

Ordinarily, if a court refuses to dismiss your case for non-exhaustion, prison officials cannot appeal right away. They have to wait until the end of the case.³⁹⁹ However, a district court may grant permission for an interlocutory appeal if it thinks resolving the exhaustion issue is urgent enough.⁴⁰⁰

8. Exhaustion and Statutes of Limitations

Most courts have held that the statute of limitations (the amount of time you have to file your case) is tolled (paused) while you are exhausting administrative remedies.⁴⁰¹ Tolling during exhaustion means that the limitations period does not run while you are exhausting. Some decisions apply state law tolling rules to reach that conclusion.⁴⁰² Other decisions in a few jurisdictions say that state law

answer, could pursue a second summary judgment motion claiming non-exhaustion); *Jackson v. Gandy*, 877 F. Supp. 2d 159, 176 (D.N.J. 2012). *But see Carr v. Hazelwood*, No. 7:07cv00001, 2008 U.S. Dist. LEXIS 81753, at *4 (W.D. Va. Oct. 8, 2008) (*unpublished*) (holding defendant cannot as a matter of right add a new affirmative defense of exhaustion in response to an amended complaint that does not change the theory of plaintiff's case), *report and recommendation adopted*, 2008 U.S. Dist. LEXIS 88672 (W.D. Va. Nov. 3, 2008) (*unpublished*).

398. *Keup v. Hopkins*, 596 F.3d 899, 903, 904-05 (8th Cir. 2010) (holding exhaustion defense was waived by failure to raise it at trial after earlier denial of summary judgment); *Handberry v. Thompson*, 446 F.3d 335, 343 (2d Cir. 2006) (noting that plaintiffs could have exhausted and returned to court had the defense been timely raised); *Sutton v. Ghosh*, No. 10-C-08137, 2015 U.S. Dist. LEXIS 123352, at *25 n.12 (N.D. Ill. Sept. 16, 2015) (*unpublished*) (holding non-exhaustion defense forfeited by failure to assert it until after fact discovery was completed, in light of circuit precedent directing that exhaustion should be resolved before merits discovery and ruling; *Norington v. Poland*, No. 1:05-cv-0063-SEB-JMS, 2009 U.S. Dist. LEXIS 117397, at *2-5 (S.D. Ind. Dec. 15, 2009) (*unpublished*) (holding exhaustion defense that was pled, but not pursued for four years until the time of trial, was waived); *Abdullah v. Washington*, 530 F. Supp. 2d 112, 115 (D.D.C. 2008) (denying amendment to answer asserting exhaustion defense five years after filing; plaintiff would be prejudiced because discovery was closed and plaintiff might have formulated discovery differently if exhaustion had been asserted); *Hightower v. Nassau County Sheriff's Dept.*, 325 F. Supp. 2d 199, 205 (E.D.N.Y. 2004) (holding defense waived where raised only after trial, after 23 months delay, and plaintiff lost opportunity to take discovery), *vacated in part on other grounds*, 343 F. Supp. 2d 191 (E.D.N.Y. 2004). *Compare Curtis v. Timberlake*, 436 F.3d 709, 711 (7th Cir. 2005) (holding that the plaintiff did not suffer any harm from the defendant's delay in asserting the exhaustion defense); *Panaro v. City of North Las Vegas*, 432 F.3d 949, 952 (9th Cir. 2005) (holding that the exhaustion defense could be waived because the plaintiff suffered no harm from the delay). *Norington v. Poland*, No. 1:05-cv-0063-SEB-JMS, 2009 U.S. Dist. LEXIS 117397, at *2-5 (S.D. Ind. Dec. 15, 2009) (*unpublished*) (holding exhaustion defense that was pled, but not pursued for four years until the time of trial, was waived).

399. *Abu-Jamal v. Kerestes*, 779 F. App'x 893, 899 (3d Cir. 2019) (*unpublished*); *Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 752 (6th Cir. 2015); *Langford v. Norris*, 614 F.3d 445, 456-457 (8th Cir. 2010); *Davis v. Streekstra*, 227 F.3d 759, 762-763 (7th Cir. 2000) (holding that the defendant had to wait until the case was decided before appealing on an exhaustion issue).

400. See 28 U.S.C. § 1292(b) (allowing certification for appeal of "controlling question of law" under specified circumstances, subject to court of appeals' discretion); *Pavey v. Conley*, No. 3:03-CV-662 RM, 2006 U.S. Dist. LEXIS 90523, at *4 (N.D. Ind. Dec. 14, 2006) (*unpublished*) (certifying question of proper procedural handling of exhaustion for interlocutory appeal), *rev'd*, 544 F.3d 739 (7th Cir. 2008). *But see Estrada v. White*, No. 2:14-CV-149, 2015 U.S. Dist. LEXIS 106172, *6-7 (S.D. Tex. Aug. 12, 2015) (declining to certify for interlocutory appeal the question whether the remedy was available, since it was ultimately factual and not a question of law).

401. *Gonzalez v. Hasty*, 651 F.3d 318, 322 (2d Cir. 2011) (quoting decisions explaining that equitable tolling is meant to avoid unfairness to persons not at fault for a late filing, and citing earlier decisions holding limitations is tolled for PLRA exhaustion, without clarifying whether it relied on state law or federal common law principles); *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005) (stating "we agree with the uniform holdings of the circuits that have considered the question that the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process;" citing cases relying on state law, but not referring directly to state law); *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000).

402. *Johnson v. Rivera*, 272 F.3d 519, 521 (7th Cir. 2001) (following state law that the statute of limitations is tolled); *Roberts v. Barreras*, 484 F.3d 1236, 1240-1243 (10th Cir. 2007) (holding claim was not tolled by state equitable tolling law but appeared to be tolled under statute providing tolling where filing is delayed for "any . . . lawful proceeding"); *See, e.g., Harris v. Hegmann*, 198 F.3d 153, 157 (5th Cir. 1999) (holding that state

prescribes that the limitations period is *not* tolled for exhaustion.⁴⁰³ You should be sure you know what rule is applicable in your federal circuit, and if you can't figure it out for sure (since it is not settled in some jurisdictions), it is safest to plan to file early enough that you don't need tolling. That means you should file your case within the limitations period calculated from the date of the occurrence you are suing about. For more information about statutes of limitations, please see Part C(5) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law."

If your case is dismissed for non-exhaustion and you want to try to exhaust and re-file it, or if you completed exhaustion while the now-dismissed case was pending, the limitations period will probably have expired.⁴⁰⁴ However, some states have tolling provisions that may apply to such situations, and that will be applied in federal courts, which usually adopt state tolling rules in cases under 42 U.S.C. § 1983.⁴⁰⁵ For example, a New York law says that in an action that started on time but was dismissed for any reason *except* for those named in the statute, the plaintiff has six months to file a new lawsuit about the subject matter of the dismissed lawsuit.⁴⁰⁶ That six-month period is available in cases dismissed for non-exhaustion.⁴⁰⁷

administrative proceeding tolled statute of limitations); *Leal v. Ga. Dept. of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001) (remanding a case back to the district court to determine if tolling should apply). Two appellate decisions have held that if state law tolls the limitations period for exhaustion, it is tolled under the PLRA, but if state law doesn't toll limitations, then federal law does. *Battle v. Ledford*, 912 F.3d 708, 713 (4th Cir. 2019); *accord*, *Johnson v. Garrison*, 805 F. App'x 589, 593 (10th Cir. 2020) (*unpublished*).

403. *Pemberton v. Patton*, 673 F. App'x 860, 866 (10th Cir. 2016) (*unpublished*) (holding neither § 1997e(a) nor Oklahoma law supports tolling for administrative exhaustion; holding claim time-barred where exhaustion took 21 months and suit was filed after the two-year statute of limitations had expired); *Braxton v. Zavaras*, 614 F.3d 1156, 1160 (10th Cir. 2010) (holding there is no tolling for exhaustion under Colorado law, and equitable tolling did not apply where plaintiffs were insufficiently diligent in pursuing their claim without tolling); *Jackson v. Crawford*, No. 12-4018, 2015 U.S. Dist. LEXIS 14222, 2015 WL 506233, *10–11 (W.D. Mo. Feb. 6, 2015) (*unpublished*) (holding limitations was not tolled under Missouri law, which limits tolling to categories specified by the legislature and to instances where a plaintiff was "actively misled" or was "in some extraordinary way prevented [] from asserting his rights"); *Adams v. Wiley*, No. 09-cv-00612-MSK-KMT, 2010 U.S. Dist. LEXIS 14229, *4–5 (D. Colo. Feb. 10, 2010) (*unpublished*) (similar to *Braxton*), *aff'd*, 398 F. App'x 372 (10th Cir. 2010); *Smith v. Wilson*, No. 3:09-CV-133, 2009 U.S. Dist. LEXIS 98594, *6–7 (N.D. Ind. Oct. 22, 2009) (*unpublished*) (denying tolling where state law limited statutory tolling to persons less than eighteen years of age, mentally incompetent, or out of the United States, and plaintiff was not entitled to equitable tolling).

404. You may not be allowed to exhaust after your case is dismissed for non-exhaustion because your grievance, too, may be time-barred, unless you persuade prison officials there is a reason to hear your late grievance. See Part E(6) of this Chapter for more information. If you have been released in the interim, your release means that a *new* case will not be "brought by a prisoner," so you will no longer be subject to the PLRA and won't have to worry about this problem.

405. *Hardin v. Straub*, 490 U.S. 536, 538–539 (1989); *Board of Regents v. Tomanio*, 446 U.S. 478, 483–486 (1980) (holding that state tolling rules are applicable in § 1983 actions).

406. N.Y. C.P.L.R. § 205(a) (1999). The statute provides that an action that "is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits" is entitled to this six-month refiling period. It also requires that service of process be completed within the six-month period. However, courts have held that this service requirement is not binding in federal court, since state law governing the method or timing of service of process is not borrowed along with the statute of limitations for federal claims. *Allaway v. McGinnis*, 362 F. Supp. 2d 390, 395 (W.D.N.Y. 2005) (applying state law to tolling, but not to service of process); *Gashi v. County of Westchester*, 02 Civ. 6934 (GBD), 2005 U.S. Dist. LEXIS 1215, at *27–30 (S.D.N.Y. Jan. 27, 2005) (*unpublished*) (borrowing state tolling laws in a federal case). Tolling statutes vary from state to state and may not always be helpful. For example, the Indiana statute applies only if the case is dismissed for reasons other than negligence in prosecuting it. One court has held that failure to exhaust constitutes negligence under the Indiana statute. The statute was not tolled and the claim was time-barred in that case. *Thomas v. Timko*, 428 F. Supp. 2d 855, 857 (N.D. Ind. 2006).

407. *See Villante v. Vandyke*, 93 F. App'x 307, 309–310 (2d Cir. 2004) (*unpublished*) (noting Attorney General's office's concession that claims dismissed for non-exhaustion can be reinstated under this statute); *Rivera v. Pataki*, 01 Civ. 5179 (MBM), 2003 U.S. Dist. LEXIS 11266, at *31, 32 n.13 (S.D.N.Y. July 1, 2003) (*unpublished*) (reading the statute the same way).

In some cases, courts have applied the doctrine of equitable tolling to toll the limitations period for exhaustion, and sometimes for actions brought and then dismissed for non-exhaustion, under circumstances where it would be unfair to dismiss the plaintiff's case based on the statute of limitations.⁴⁰⁸

Claims may be validly exhausted even if the exhaustion occurred outside the limitations period.⁴⁰⁹

F. Physical Injury Requirement: Section 1997e(e) of the PLRA

Section 1997e(e) of the PLRA states:

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).⁴¹⁰

A similar requirement was added by the PLRA to the Federal Tort Claims Act ("FTCA"):

No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).⁴¹¹

Note that this FTCA section applies only to people convicted of felonies; it does not apply to detainees or those convicted of misdemeanors. However, section 1997e(e) applies to all people who are incarcerated. As of the publication of this Manual, courts have not addressed whether § 1997e(e) restricts FTCA cases that are not within the scope of the FTCA provision, though several courts have applied § 1997e(e) in FTCA cases where the differences between the provisions do not make any practical difference. When they conflict—that is, when a federal pre-trial detainee or misdemeanant brings a case under the FTCA—the well-known statutory construction principle that “the specific governs the general” suggests that § 1997e(e), the more general provision, would not apply, and the more specific FTCA provision limiting the physical injury requirement to persons serving time or awaiting sentencing for a felony would apply instead.⁴¹²

Courts have held the physical injury requirement is constitutional since it only applies to damage claims (damages are the money awarded by a court to a person who has suffered injury or harm).⁴¹³

408. *Clifford v. Gibbs*, 298 F.3d 328, 333 (5th Cir. 2002) (applying equitable tolling because otherwise the plaintiff would be unable to bring his claim); *McCoy v. Goord*, 255 F. Supp. 2d 233, 253 (S.D.N.Y. 2003) (extending the statute of limitations as a matter of fairness). Courts are more likely to apply equitable tolling if there is some reason it would be unfair to dismiss your case as time-barred, like if you made a technical mistake the first time you tried to exhaust. *But see* *Crump v. Darling*, No. 1:06-cv-20, 2007 U.S. Dist LEXIS 20000, at *45–47 (W.D. Mich. Mar. 21, 2007) (*unpublished*) (denying equitable tolling to prisoner whose case was dismissed for non-exhaustion).

409. *Beckett v. Dept. of Corr.*, No. 1:CV-10-0050, 2014 U.S. Dist. LEXIS 100890, at *54 n.9 (M.D. Pa. July 24, 2014) (*unpublished*) (holding claim exhausted where grievance was decided outside the limitations period (action was timely because limitations was tolled during exhaustion)), *aff'd*, 597 F. App'x 665 (3d Cir. 2015) (per curiam) (*unpublished*); *Harrison v. Stalder*, No. 06-2825, 2006 U.S. Dist. LEXIS 88277, at *2 (E.D. La. Dec. 5, 2006) (*unpublished*) (granting defendants' motion to dismiss for failure to exhaust administrative remedies).

410. 42 U.S.C. § 1997e(e).

411. 28 U.S.C. § 1346(b)(2).

412. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012) (holding that a more specific provision that seems to contradict a more general one should be regarded as an exception to the general provision).

413. *See Davis v. District of Columbia*, 158 F.3d 1342, 1346–1347 (D.C. Cir. 1998), a case in which an

Section 1997e(e) refers to actions “brought by a prisoner,” so the rule does not apply to people who sue after they are released from prison.⁴¹⁴ It does apply to people who file their lawsuits in prison and are later released.⁴¹⁵ If a case is dismissed under this statute, dismissal should be without prejudice. When dismissal is without prejudice, you may refile your case once you are no longer in jail or prison as long as the statute of limitations (the law that says how long you have to bring your case) has not expired.⁴¹⁶

The physical injury requirement applies to “injury suffered while in custody,” which is broader than “prison conditions,” the phrase used in the administrative exhaustion requirement.⁴¹⁷ “Injury suffered while in custody” includes injury sustained on arrest,⁴¹⁸ and as one court has said, “any situation in which a reasonable person would feel a restraint on his movement such that he would not feel free to leave.”⁴¹⁹ The same court has held that § 1997e(e) applies to injury suffered in custody, even if the custody had nothing to do with the plaintiff’s current incarceration.⁴²⁰

incarcerated person argued that 1997e(e) violated his right to equal protection and heavily burdened his Fifth Amendment right of access to the courts. The court determined that 1997e(e) did not restrict claims for declaratory or injunctive relief; it only limited the availability of damages. After conducting a rational basis review, the court concluded that 1997e(e) did not violate the plaintiff’s right to equal protection or his right of access to the courts. *See also* *Zehner v. Trigg*, 133 F.3d 459, 461–463 (7th Cir. 1997) (explaining that immunity doctrines, like restrictions on damage remedies, are constitutional because a remedy of damages does not need to be available for every constitutional violation).

414. *Harris v. Garner*, 216 F.3d 970, 976–980 (11th Cir. 2000) (*en banc*) (holding that 1997e(e) applies to a complaint filed while the plaintiff was detained in a jail, prison, or another correctional facility); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (holding that 1997e(e) did not apply to a formerly incarcerated person who filed a complaint after he was released from prison). A conflicting decision, *Cox v. Malone*, 199 F. Supp. 2d 135, 140 (S.D.N.Y. 2002), *aff’d*, *Cox v. Malone*, 56 F. App’x. 43, 44 (2d Cir. 2003) (*unpublished*), contradicts the statutory language and has been rejected by subsequent decisions. *See* *Hayes v. City of New York*, No. 4370 (LAK), 2014 U.S. Dist. LEXIS 133919, at *1–2 (S.D.N.Y. Sept. 15, 2014) (*unpublished*); *In re Nassau County Strip Search Cases*, No. 99-CV-2844 (DRH), 2010 U.S. Dist. LEXIS 99783, at *19–20 (E.D.N.Y. Sept. 22, 2010) (*unpublished*) (holding that § 1997e(e) only applies when a plaintiff is incarcerated at the beginning of the lawsuit, and stating that *Cox v. Malone* is unpersuasive); *Mills v. Grant Cnty. Detention Ctr.*, No. 07-74-DLB, 2009 WL 10675152, at *2 (E.D. Ky. Mar. 17, 2009) (*unpublished*) (stating the court is unpersuaded by *Cox v. Malone*, and noting that several other courts have also rejected the case’s reasoning); *Sutton v. Hopkins County*, No. 4:03CV-003-M, 2005 U.S. Dist. LEXIS 34698, at *12–13 (W.D. Ky. Dec. 19, 2005) (*unpublished*) (rejecting *Cox v. Malone* and holding that § 1997e(e) does not apply to formerly incarcerated people); *Rose v. Saginaw County*, 232 F.R.D. 267, 277 (E.D. Mich. 2005) (rejecting the reasoning in *Cox v. Malone* because “it ignores the plain language of the statute.”).

415. *Harris v. Garner*, 216 F.3d 970, 985 (11th Cir. 2000) (*en banc*) (holding that released plaintiffs remain “prisoners” for purposes of § 1997e(e) as long as they brought the lawsuit at the time they were still imprisoned, but dismissing their claims for monetary relief without prejudice so that they may re-file when they are no longer confined).

416. *Douglas v. Yates*, 535 F.3d 1316, 1320 (11th Cir. 2008) (“We have interpreted this statute to require the dismissal of several prisoners’ complaints for emotional injury ‘without prejudice to their being re-filed at a time when the plaintiffs are not confined.’”) (citing *Harris v. Garner*, 216 F.3d 970, 985 (11th Cir. 2000) (*en banc*)). As explained in the next section, dismissal of the entire action may not be appropriate, since some courts hold that the statute restricts only compensatory (money) damages.

417. *See* 42 U.S.C. § 1997e(a) (exhaustion requirement).

418. *Napier v. Preslicka*, 314 F.3d 528, 533 (11th Cir. 2002) (holding § 1997e(e) applies to “injuries suffered during custodial episodes, even if such custody occurred outside prison walls,” and noting arrest “is considered the archetype of a situation that results in *Miranda* custody” (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966)), *rehearing denied*, *Napier v. Preslicka*, 331 F.3d 1189 (11th Cir. 2003).

419. *See* *Quinlan v. Personal Transport Servs. Co.*, 329 F. App’x 246, 249 (11th Cir. 2009) (*per curiam*) (*unpublished*) (addressing a plaintiff who was restrained and caged during extradition).

420. *Napier v. Preslicka*, 314 F.3d 528, 532–534 (11th Cir. 2002) (holding that 42 U.S.C. § 1997e(e) of the Prison Litigation Reform Act applied to claims regarding the arrest of an imprisoned plaintiff and claims unrelated to the current incarceration of that plaintiff), *rehearing denied*, 331 F.3d 1189 (11th Cir. 2003), *cert denied*, 540 U.S. 1112, 124 S. Ct. 1038, 157 L. Ed. 2d 901 (2004). This interpretation sharply divided both the panel and the court as a whole and produced strong dissents.

The Eleventh Circuit has held that in a case removed to federal court from state court (in other words, when a case begins in state court and later is moved to federal court by the defendants), § 1997e(e) does not apply to claims based only on state law.⁴²¹ This holding is questionable. A number of lower courts have disagreed, holding the term “Federal civil action” means all “claims brought in federal court, not merely . . . claims founded on federal law.”⁴²² It is also questionable whether § 1997e(e) applies at all to actions originally filed in state court. The statute says that “no Federal civil action *may be brought*” for mental or emotional injury without physical injury.⁴²³ The phrase “no Federal civil action may be brought” suggests that whether § 1997e(e) applies depends on whether the case is a “Federal Civil Action” at the time the case is filed. If a “federal civil action” is a case in federal court, a lawsuit filed in state court is not a “[f]ederal civil action” when it is filed. That reasoning would mean section 1997e(e) of the PLRA should not apply to any part of a case filed in state court under any circumstances, even after the case was removed to federal court. Yet, there are no decisions interpreting § 1997e(e) in this way (and there is one case that interprets §1997e(e) in the opposite way).⁴²⁴

1. What Does Section 1997e(e) Do?

Section 1997e(e) prohibits “action[s] . . . for mental or emotional injury.”⁴²⁵ However, courts have interpreted it as prohibiting damages for mental or emotional injury, not prohibiting actions as a whole.⁴²⁶ Most courts have held that section 1997e(e) prohibits compensatory (money) damages for mental or emotional injury, while allowing punitive damages (damages to punish the defendant when his behavior was very harmful) and nominal damages (very small amounts of money).⁴²⁷ One circuit

421. *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1315 (11th Cir. 2002) (finding that section 1997e(e) did not apply because the action was filed in state court on “solely alleged state-law claims unrelated to prison conditions.”)

422. *Hood v. Balido*, No. 3:02-CV-0669-P, 2002 U.S. Dist. LEXIS 10137, at *1 (N.D. Tex. June 4, 2002) (*unpublished*); *accord*, *Wagner v. Texas Dept. of Criminal Justice*, No. 1:15-CV-177-BL, 2018 U.S. Dist. LEXIS 75278, at *20 (N.D. Tex. May 3, 2018) (*unpublished*); *Jacobs v. Penn. Dept. of Corr.*, No. 04-1366, 2011 U.S. Dist. LEXIS 60869, at *23 (W.D.Pa. June 7, 2011) (*unpublished*) (holding federal civil action means “an action in which civil claims over which the federal court has jurisdiction are brought, i.e., all claims over which the court has original jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction under 28 U.S.C. § 1367”); *Schonarth v. Robinson*, No. 06-cv-151-JM, 2008 U.S. Dist. LEXIS 13596, at *14 (D.N.H. Feb. 22, 2008) (*unpublished*) (“I agree with the line of cases which conclude that § 1997e(e) applies to all actions that are brought in federal court which seek damages for mental or emotional injury, regardless of whether the underlying cause of action is based on federal or state law.”); *Hines v. Oklahoma*, No. CIV-07-197-R, 2007 U.S. Dist. LEXIS 77291, at *6 (W.D. Okla. Oct. 17, 2007) (*unpublished*). *Contra* *Vanvalkenburg v. Oregon Dept. of Corr.*, No. 3:14-cv-00916-BR, 2016 U.S. Dist. LEXIS 58438, at *36–37 (D. Or. May 2, 2016) (*unpublished*) (concluding that the plaintiff’s claim which began in state court and moved to federal court was a “federal civil action”).

423. 42 U.S.C. § 1997e(e) (emphasis added).

424. *Vanvalkenburg v. Oregon Dept. of Corr.*, No. 3:14-cv-00916-BR, 2016 U.S. Dist. LEXIS 58438, at *35–36 (D.Or. May 2, 2016) (*unpublished*) (holding that where a plaintiff’s claim moved from state to federal court, § 1997e(e) applied and required a showing of physical injury).

425. 42 U.S.C. § 1997e(e).

426. *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (holding the statute is a limitation on damages for mental or emotional injury, not “a filing prerequisite for the federal action itself”); *accord* *Rasho v. Elyea*, 856 F.3d 469, 477 (7th Cir. 2017); *Munn v. Toney*, 433 F.3d 1087, 1089 (8th Cir. 2006).

427. *Smith v. Peters*, 631 F.3d 418, 421 (7th Cir. 2011) (“Prison officials who recklessly expose a prisoner to a substantial risk of a serious physical injury . . . are subject to those remedies that are not barred by section 1997e(e),” which include nominal and punitive damages); *Hutchins v. McDaniels*, 512 F.3d 193, 196–198 (5th Cir. 2007) (“We hold today that Hutchins may recover nominal or punitive damages, despite § 1997e(e), if he can successfully prove that McDaniels violated his Fourth Amendment rights.”); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (holding that nominal and punitive damages were available to plaintiff); *Calhoun v. DeTella*, 319 F.3d 936, 943 (7th Cir. 2003) (holding that nominal damages are included in the forms of a relief that a plaintiff is entitled to under § 1997e(e)); *Oliver v. Keller*, 289 F.3d 623, 629–630 (9th Cir. 2002) (holding that where plaintiff alleged his constitutional rights were violated, his claims for nominal and punitive damages were allowed under § 1997e(e)); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (“both parties and three of our sister circuits

has held that section 1997e(e) prohibits punitive as well as compensatory damages for mental or emotional injury without physical injury,⁴²⁸ though it along with all other circuits to date holds that nominal damages are not restricted.⁴²⁹ Declaratory relief (when a court declares the plaintiff's rights) and injunctive relief (when the court orders a person to start or stop doing something) are not affected by section 1997e(e).⁴³⁰

If you have one claim for mental or emotional injury and some other claim, such as loss or damage to property, the second claim can go forward for all forms of damages.⁴³¹

Most courts assume that section 1997e(e) creates a pleading requirement, even though the statute does not say physical injury must be pled. Many claims for damages are dismissed at initial screening⁴³² or on a motion to dismiss⁴³³ because the plaintiff does not allege physical injury.⁴³⁴ One

agree that Section 1997e(e) does not limit the availability of nominal damages for the violation of a constitutional right or of punitive damages.”); *Searles v. Van Bebber*, 251 F.3d 869, 878–881 (10th Cir. 2001) (“the rule seems to be that an award of nominal damages is mandatory upon a finding of a constitutional violation, as the jury found here.”); *Allah v. Al-Hafeez*, 226 F.3d 247, 251–252 (3d Cir. 2000); *see Aref v. Lynch*, 833 F.3d 242, 266 (D.C. Cir. 2016) (holding plaintiffs who allege “actual harms,” including intangible (nonphysical) harms that violate the Constitution, may seek punitive as well as nominal damages).

428. *Al-Amin v. Smith*, 637 F.3d 1192, 1196–1199 (11th Cir. 2011) (holding the question was decided previously in *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007) and in *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000)).

429. *Brooks v. Warden*, 800 F.3d 1295, 1308–1309 (11th Cir. 2015) (stating “both the text and purpose of the PLRA support the conclusion that § 1997e(e) does not bar a prisoner from recovering nominal damages without a showing of physical injury”).

430. *Hutchins v. McDaniels*, 512 F.3d 193, 197 (5th Cir. 2007) (noting that § 1997e(e) does not prohibit declaratory or injunctive relief when an incarcerated person's constitutional rights are violated); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (stating that Congress did not intend for § 1997e(e) to prohibit all relief); *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (citing *Zehner v. Trigg*, 133 F.3d 459, 462 (7th Cir. 1997)); *Mitchell v. Horn*, 318 F.3d 523, 533 (3d Cir. 2003) (“We also agree with several other courts of appeals that § 1997e(e) does not apply to claims seeking injunctive or declaratory relief.”); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2004) (“First, we agree with all the circuits to have addressed the issue . . . that Section 1997e(e) does not prevent a prisoner from obtaining injunctive or declaratory relief.”); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) (“Section 1997e(e) prohibits only recovery of the damages Harper seeks absent a physical injury. He also seeks a declaration that his rights have been violated, and he requests injunctive relief to end the allegedly unconstitutional conditions of his confinement; these remedies survive § 1997e(e).”) (footnote omitted); *Perkins v. Kansas Dept. of Corr.*, 165 F.3d 803, 808 (10th Cir. 1999) (holding that even if the plaintiff could not receive money damages, he could still receive injunctive relief for restrictions placed on him); *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (rejecting the plaintiff's argument that § 1997e(e) prohibits declaratory and injunctive relief); *see Mann v. Wilkinson*, No. C2-00-706, 2009 U.S. Dist. LEXIS 47089, at *1–2 (S.D. Ohio, May 20, 2009) (*unpublished*) (granting injunctive relief while holding damages were prohibited by § 1997e(e)).

431. *Robinson v. Page*, 170 F.3d 747, 749 (7th Cir. 1999) (“If the suit contains separate claims, neither involving physical injury, and in one the prisoner claims damages for mental or emotional suffering and in the other damages for some other type of injury, the first claim is barred by the statute but the second is unaffected.”); *see Jones v. Bock*, 549 U.S. 199, 222, 127 S. Ct. 910, 925, 166 L. Ed. 2d 798, 814 (2007) (“Section 1997e(e) contains similar language, ‘[n]o . . . action may be brought . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury,’ yet respondents cite no case interpreting this provision to require dismissal of the entire lawsuit if only one claim does not comply, and again we see little reason for such an approach.”).

432. Please see Part D of this Chapter for more information on the initial screening.

433. Please see Part D of this Chapter for more information on Motions to Dismiss.

434. *See, e.g., Brooks v. Warden*, 800 F.3d 1295, 1298 (11th Cir. 2015) (“Because Brooks has not alleged any physical injury resulting from his hospital stay, under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), he cannot recover compensatory or punitive damages.”); *DeMoss v. Crain*, 636 F.3d 145, 151 (5th Cir. 2011) (stating compensatory damages for religious deprivation claim are “barred by 42 U.S.C. § 1997e(e) because [plaintiff] has not alleged any physical injury stemming from the cell restriction policy”); *Brazil v. Rice*, 308 F. App'x 186, 187 (9th Cir. 2009) (*unpublished*) (“The district court properly dismissed the Eighth Amendment claim because the amended complaint does not allege that Brazil suffered any physical injury.”); *Harden-Bey v. Rutter*, 524 F.3d 789, 795–796 (6th Cir. 2008) (“Even if we read his complaint to allege emotional or mental injuries, Harden-Bey cannot bring an Eighth Amendment claim for such injuries because he did not allege a physical

federal circuit has held that § 1997e(e) creates an affirmative defense (a defense the defendant offers to justify his action, so that even if he committed the act, he should still be found not guilty),⁴³⁵ like the administrative exhaustion requirement.⁴³⁶ That would mean the defendants have to raise the physical injury requirement in their answer. A few courts have held that it does not create either a pleading requirement or an affirmative defense, but just a rule about what damages are recoverable.⁴³⁷ That seems to us the correct approach, but since most courts have held physical injury is a pleading requirement, you should probably describe in your complaint whatever physical injury, if any, that you are claiming.

If your case gets past screening and a motion to dismiss, it may be the subject of a motion for summary judgment, where you will need to provide evidence of any physical injury you claim you suffered (which can include your own affidavit or declaration describing your injury as well as documentary evidence).⁴³⁸

2. What Is “Mental or Emotional Injury”?

There is a strong conflict among federal courts about the meaning of “mental or emotional injury.” Some courts have interpreted the phrase narrowly. One court said, for example, “[t]he term ‘mental or emotional injury’ has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts.”⁴³⁹ A court taking this view will hold that deprivations of intangible constitutional rights—which are rights like freedom of speech and religion or the due process of law—are not “mental or emotional injury” and incarcerated people can receive damages for constitutional violations regardless of whether they sustained any physical injury. Several federal appeals courts have taken this view.⁴⁴⁰

injury. See 42 U.S.C. § 1997e(e). . . .”); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (“Under § 1997e(e), however, in order to bring a claim for mental or emotional injury suffered while in custody, a prisoner must allege physical injury. . . .”); *Robinson v. Page*, 170 F.3d 747, 748–749 (7th Cir. 1999) (holding that actions or claims asserting mental or emotional injury should be dismissed if physical injury is not pled).

435. *Douglas v. Yates*, 535 F.3d 1316, 1320 (11th Cir. 2008) (“we conclude that the limitation of complaints by prisoners for emotional injury, 42 U.S.C. § 1997e(e), provides an affirmative defense.”).

436. Please see Part E(1) and Part E(3) of this Chapter for more information on the administrative exhaustion requirement.

437. *Malik v. City of New York*, No. 11 Civ. 6062 (PAC) (FM), 2012 U.S. Dist. LEXIS 118358, at *47 (S.D.N.Y. Aug. 15, 2012) (*unpublished*) (“Furthermore, a plaintiff need not plead physical injury in a complaint covered by the PLRA.”), *report and recommendation adopted*, No. 11 Civ. 6062 (PAC) (FM), 2012 U.S. Dist. LEXIS 141305 (S.D.N.Y. Sept. 28, 2012) (*unpublished*); *In re Nassau County Strip Search Cases*, No. 99-CV-2844 (DRH), 2010 U.S. Dist. LEXIS 99783, at *2 (E.D.N.Y. Sept. 22, 2010) (*unpublished*) (“As § 1997e(e) is a limitation on recovery and not an affirmative defense to liability, it need not be pled [by defendants].”).

438. Please see Part E(7) of this Chapter for more information on summary judgment and exhaustion.

439. *Amaker v. Haponik*, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *22–23 (S.D.N.Y. Feb. 17, 1999) (*unpublished*) (noting that requiring physical injury in all cases would make the term “mental or emotional injury” superfluous); *see also Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) (restricting the domain of the statute to suits in which mental or emotional injury is claimed).

440. *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016) (holding “not every non-physical injury is by default a mental or emotional injury”); *King v. Zamiara*, 788 F.3d 207, 212–213 (6th Cir. 2015) (holding “the plain language of the statute does not bar claims for constitutional injury that do not also involve physical injury”); *Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017) (stating court is “squarely in the . . . camp” of circuits holding that First Amendment violations are compensable independently of physical, mental, or emotional injury (citing *Piver v. Pender Cty. Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987) (holding that an “injury to a protected first amendment interest can itself constitute compensable injury wholly apart from any emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish suffered by plaintiffs” (internal quotation marks omitted))); *Mitchell v. Horn*, 318 F.3d 523, 534 n.10 (3d Cir. 2003) (stating that requests for damages for loss of “status, custody level and any chance at commutation” resulting from a disciplinary hearing were “unrelated to mental injury” and “not affected by § 1997e(e)’s requirements.”); *Cassidy v. Ind. Dept. of Corr.*, 199 F.3d 374, 375–377 (7th Cir. 2000) (dismissing claims for mental and emotional harm stemming from an underlying constitutional violation but allowing plaintiff to pursue “all of his other claims for damages”—which included “(2) the loss of the opportunity to enjoy an early discharge from prison or the chance

Other courts have taken a much broader view of mental or emotional injury. In effect, they say any injury that is not physical is either mental or emotional—which means that constitutional violations, like being deprived of your right to due process and religious freedom, are merely mental or emotional and you cannot recover compensatory (money) damages for them unless they somehow caused physical injury.⁴⁴¹ So, for example, an incarcerated person who was held in solitary confinement for a year based on retaliation for exercise of his First Amendment rights was held entitled only to \$1.00 in nominal damages because the court thought his injury—a year’s loss of the limited liberty of ordinary prison confinement—was only mental or emotional.⁴⁴² There are many similar decisions in “broader view” cases holding prisoners cannot recover compensatory damages for injuries such as unlawful arrest and confinement,⁴⁴³ racial discrimination,⁴⁴⁴ abusive conditions of confinement,⁴⁴⁵ and many others.⁴⁴⁶ However, you should argue that these types of constitutional violations are really injuries to your liberty, and not just a matter of mental or emotional injury. Property deprivations are of course not mental or emotional injury,⁴⁴⁷ though they may also cause mental or emotional injury for which prisoners cannot recover under the broader interpretation.⁴⁴⁸

of a pardon or clemency based on efforts to rehabilitate himself; (3) the loss of participation in and advantages of activities to which the non-disabled had access while in prison, and the loss of the freedom of movement and social contact; (4) a diminished quality of life; and (5) the loss of access to programs, services and activities guaranteed by federal law”); *Rowe v. Shake*, 196 F.3d 778, 781–782 (7th Cir. 1999) (“A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.”); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (“[T]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment [c]laims regardless of the form of relief sought.”).

441. *Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam) (holding claim that plaintiff was deprived of magazines in violation of the First Amendment involved only mental or emotional injury); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (holding in a religious freedom case “the only actual injury that *could* form the basis for the award he seeks would be mental and/or emotional injury” (emphasis added)).

442. *Pearson v. Welborn*, 471 F.3d 732, 744–745 (7th Cir. 2006).

443. *Brown v. Sudduth*, 255 F. App’x 803, 808 (5th Cir. 2007) (applying § 1997e(e) to claim of false arrest; plaintiff “sought compensatory damages for the sole alleged injury of liberty deprivation. Having not alleged a physical injury, the district court correctly concluded that Brown’s claim for compensatory damages must fail.”); *Brumett v. Santa Rosa County*, No. 3:07cv448/LAC/EMT, 2007 U.S. Dist. LEXIS 89061, at *4–6 (N.D. Fla. Dec. 4, 2007) (*unpublished*) (holding that claim of six months’ illegal detention was not sufficient for relief because it failed to demonstrate a physical injury); *Campbell v. Johnson*, No. 3:06cv365/RV/EMT, 2006 U.S. Dist. LEXIS 72146, at *2 (N.D. Fla. Oct. 3, 2006) (*unpublished*) (refusing to accept paperwork and collateral for release on bond).

444. *Jones v. Pancake*, No. 3:06CV-P188-H, 2007 U.S. Dist. LEXIS 84309, at *6–8 (W.D. Ky. Nov. 9, 2007) (*unpublished*) (allowing plaintiff to amend a racial discrimination claim to include relief for nominal and punitive damages).

445. *Merchant v. Hawk-Sawyer*, 37 F. App’x 143, 145–146 (6th Cir. 2002) (*unpublished*) (barring damages because plaintiff did not allege that conditions in a segregated housing unit caused him physical injury); *Harper v. Showers*, 174 F.3d 716, 719–720 (5th Cir. 1999) (barring damages claims for placement in filthy cells formerly occupied by psychiatric patients and for exposure to deranged behavior of those patients).

446. *Robinson v. Dept. of Corr.*, No. 3:07cv5/MCR/EMT, 2007 U.S. Dist. LEXIS 50817, at *10 (N.D. Fla. July 13, 2007) (*unpublished*) (stopping mail and delaying filing of lawsuits as well as deprivation of religious materials), *report and recommendation adopted*, 2007 U.S. Dist. LEXIS 75961 (N.D. Fla. Oct. 12, 2007); *Ivy v. New Albany City Police Dept.*, No. 3:06CV112-P-A, 2006 U.S. Dist. LEXIS 79882, at *1–3 (N.D. Miss. Oct. 30, 2006) (*unpublished*) (being held naked in an isolation cell); *Caudell v. Rose*, Nos. 7:04CV00557, 7:04CV00558, 2005 U.S. Dist. LEXIS 10251, at *8 (W.D. Va. May 27, 2005) (*unpublished*) (seizure of legal papers), *report and recommendation adopted*, 378 F. Supp. 2d 725 (W.D. Va. 2005); *Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559, 565–566 (W.D. Va. 2000) (holding that a complaint that an incarcerated person was routinely viewed in the nude by opposite-sex staff stated a constitutional claim sufficiently established to defeat qualified immunity, but was not actionable because of the mental/emotional injury provision).

447. *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002).

448. *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999).

Based on the rulings discussed above that adopt the narrow view of what mental or emotional injury means, you could make a legitimate argument that mental or emotional injury means just what it sounds like,⁴⁴⁹ and deprivations of constitutional or statutory rights are separate injuries from mental or emotional injuries, regardless of whether they cause mental or emotional injury as well. If “mental or emotional injury” really meant any injury that is not physical, then there would be no need for the phrase “mental or emotional injury” in the statute; it could just say that no prisoner action can be brought without showing physical injury. That is contrary to one of the basic principles of interpreting statutes: they should not be interpreted in a way that makes any part of them superfluous, *i.e.*, useless.⁴⁵⁰ Some courts adopting the narrow interpretation of “mental or emotional injury” have relied on that principle in reaching their conclusions.⁴⁵¹

That argument will probably not help you if you are in a circuit where the court of appeals has committed itself to the broad approach. However, at least one of those courts has expressed some doubt about the correctness of its position.⁴⁵² Note, if you make the argument in the district court, then you will be able to argue the point on appeal.

Some circuits have not yet decided whether to adopt the broader or narrower interpretation of § 1997e(e) as of late 2020. These include:

The First Circuit, where there is no relevant appellate decision. Several district courts there have held that intangible violations of constitutional or other rights are distinct from mental or emotional injury (the narrow interpretation).⁴⁵³

449. *See* *Amaker v. Haponik*, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *22–23 (S.D.N.Y. Feb. 17, 1999) (*unpublished*) (noting that requiring physical injury in all cases would make the term “mental or emotional injury” superfluous); *see also* *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) (restricting the domain of the statute to suits in which mental or emotional injury is claimed).

450. *See* *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339, 350 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks and citations omitted)).

451. *Aref v. Lynch*, 833 F.3d 242, 263 (D.C. Cir. 2016); *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015) (citing *Amaker v. Haponik*, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *7 (S.D.N.Y., Feb. 17, 1999) (*unpublished*)).

452. *See* *Carter v. Allen*, 940 F.3d 1233, 1237 (11th Cir. 2019) (Martin, J., dissenting from the denial of rehearing en banc) (stating court’s broad interpretation of § 1997e(e) is wrong); *Carter v. Allen*, 940 F.3d 1233, 1235–1236 (11th Cir. 2019) (W. Pryor, J., respecting the denial of rehearing en banc) (acknowledging that circuit precedent may require reexamination on the interpretation of § 1997e(e)).

453. *Cox v. Massachusetts Dept. of Corr.*, No. 13-10379-FDS, 2018 U.S. Dist. LEXIS 55482, *18 (D. Mass. Mar. 31, 2018) (*unpublished*) (holding in an ADA case, “in accordance with the reasoning of *Aref* [*v. Lynch*], that a prisoner’s inability to access prison programs and services is itself an injury, separate and distinct from a mental and emotional injury, for which the prisoner can recover compensatory damages absent any showing of physical injury or sexual assault”), *appeal dismissed*, No. 18-1399 U.S. App. LEXIS 31923 (1st Cir. July 11, 2018) (*unpublished*); *Shaheed–Muhammad v. Dipaolo*, 393 F.Supp.2d 80, 107 (D.Mass. 2005) (holding “the violation of a constitutional right is an independent injury that is immediately cognizable and outside the purview of [Section] 1997e(e)”; *Shaheed–Muhammad v. Dipaolo* 138 F.Supp.2d 99, 107 (D. Mass. 2001); *see also* *Ford v. Bender*, No. 07-11457-JGD, 2012 U.S. Dist. LEXIS 10090, at *13–14 (D.Mass. Jan. 27, 2012) (*unpublished*) (concluding that § 1997e(e) had to be raised as an affirmative defense, and, in any event, that compensatory damages were available for suits alleging deprivation of constitutional rights (citing *Gordon v. Pepe*, No. 00-10453-RWZ, 2004 U.S. Dist. LEXIS 16707, at *2 (D.Mass. Aug. 24, 2004) (*unpublished*))), *motion to amend denied*, No. 07-11457-JGD, U.S. Dist. LEXIS 54890 (D.Mass. Apr. 19, 2012) (*unpublished*) (citations omitted).

In the Second Circuit, there is an unpublished decision that adopts the narrow view (but unfortunately there has yet to be a published decision that adopts this view).⁴⁵⁴ District court decisions are mixed but tend towards the narrow view as well.⁴⁵⁵

The Seventh Circuit has at times taken the stance that the narrower interpretation of § 1997e(e) is correct, but has also taken opposite stance in other decision.⁴⁵⁶ Not surprisingly, so have district court decisions.⁴⁵⁷

454. *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013) (*unpublished*) (stating “even if [the plaintiff] is unable to establish that any of the injuries complained of in this action stemmed from an incident in which he suffered physical injuries, [he] may still recover damages for injuries to his First Amendment rights.”). A published decision stated that “Section 1997e(e) *applies* to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury,” *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002) (emphasis added), but that statement does not establish *how* § 1997e(e) applies—that is, it doesn't say whether First Amendment and other intangible violations are merely “mental or emotional injur[ies].”

455. *See, e.g., Jones v. Annucci*, No. 16-CV-3516 (KMK), 2018 U.S. LEXIS 24359, at *8 (S.D.N.Y. Feb. 14, 2018) (*unpublished*) (stating §1997e(e) does not bar compensatory damages for First Amendment violations, which “allege intangible violations of liberty and personal rights” (citations and internal quotation marks omitted)); *Russell v. Pallito*, No. 5:15-cv-126, 2017 U.S. Dist. LEXIS 42009, at *6 (D.Vt. Mar. 23, 2017) (*unpublished*) (relying on *King v. Zamiara*, 788 F.3d 207 (6th Cir. 2015) and *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016), cited earlier); *Valdez v. City of New York*, 11 Civ. 05194 (PAC) (DF), 2013 U.S. Dist. LEXIS 188044, at *21–22 (S.D.N.Y. Sept. 3, 2013) (*unpublished*) (holding in First Amendment religious rights case that “deprivations of liberty and personal rights can give rise to damages separate and apart from those recoverable for any physical injury or emotional suffering”), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 82508 (S.D.N.Y. June 16, 2014) (*unpublished*); *Rosado v. Herard*, 12 Civ. 8943 (PGG) (FM), 2014 U.S. Dist. LEXIS 40172, at *13 (S.D.N.Y. Mar 25, 2014) (*unpublished*) (stating “courts in this Circuit have concluded that a physical injury is not required for a prisoner to recover compensatory damages for the loss of a constitutional liberty interest.”); *Mendez v. Amato*, 9:12-CV-560(TJM/CFH), 2013 U.S. Dist. LEXIS 132346, at *20 (N.D.N.Y. Sept. 17, 2013) (*unpublished*) (holding claims based on confinement in Involuntary Protective Custody “involve the loss of such intangibles as liberty through a lack of due process and equal protection” and thus “fall outside of the physical harm requirement of the PLRA”; distinguishing between loss of liberty and emotional suffering); *Lipton v. County of Orange*, 315 F. Supp. 2d 434, 457 (S.D.N.Y. 2004) (“Although § 1997e(e) applies to plaintiff's First Amendment retaliation claim, a First Amendment deprivation presents a cognizable injury standing alone and the PLRA ‘does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself.’” (citation omitted))). *Contra, e.g., Kimbrough v. Fischer*, 9:13-CV-100 (FJS/TWD), 2017 U.S. Dist. LEXIS 58412, at *4 (N.D.N.Y. Apr. 11, 2017) (*unpublished*) (holding in case involving segregated confinement that deprivations such as loss of recreation, inability to attend religious services, loss of contact visitations, and loss of certain privileges were not sufficiently distinguished from mental or emotional injury); *Amaker v. Goord*, 06-CV-490A(Sr), 2015 U.S. Dist. LEXIS 73133, at *1 (W.D.N.Y. June 5, 2015) (*unpublished*) (holding § 1997e(e) bars compensatory damages for religious rights violation and confinement in special housing).

456. *Taking the broad view:* *Pearson v. Welborn*, 471 F.3d 732, 744–745 (7th Cir. 2006) (holding § 1997e(e) bars damages for a year in solitary confinement); *Reed v. Kemper*, 673 F. App'x 533, 536–537 (7th Cir. 2016) (*unpublished*) (assuming deprivation of right to marry inflicted only emotional injury). *Taking the narrow view:* *Cassidy v. Ind. Dept. of Corr.*, 199 F.3d 374, 375–378 (7th Cir. 2000) (allowing damages claims in a disability case based on “the loss of participation in and advantages of activities to which the non-disabled had access while in prison, and the loss of the freedom of movement and social contact; . . . a diminished quality of life; and . . . the loss of access to programs, services and activities guaranteed by federal law” to go forward); *Rowe v. Shake*, 196 F.3d 778, 781–782 (7th Cir. 1999) (“A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.”).

457. *Narrow view:* *Baldwin v. Clarke*, No. 14-CV-856, 2017 U.S. Dist. LEXIS 20666, at *6 (E.D. Wis. Feb. 14, 2017) (*unpublished*) (in case involving denial of visit with plaintiff's minor child, holding Seventh Circuit “has recognized compensatory damages for non-mental and non-emotional damages in the PLRA context” (citing *Aref v. Lynch*, 833 F.3d 242, 264 (D.C. Cir. 2016), and its citation to *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999)); *Pippin v. Frank*, 04-C-582-C, 2005 U.S. Dist. LEXIS 5576, at *1 (W.D. Wis. Mar. 30, 2005) (*unpublished*) (stating that § 1997e(e) precludes claims for mental or emotional injury but not a claim that plaintiff was “falsely confined” in segregation as a result of constitutional violations). *Broad view:* *Shaw v. Wall*, 12-cv-497-wmc, 2015 U.S. Dist. LEXIS 55259, at *1–3 (W.D. Wis. Apr. 28, 2015) (*unpublished*) (holding absence of non-*de minimis* (none minor) physical injury bars compensatory damages for disability discrimination in access to prison canteen; citing *Cassidy v. Ind. Dept. of Corr.*, 199 F.3d 374, (7th Cir. 2000) but ignoring its holding about damages for program

The narrow approach to § 1997e(e) is consistent with tort law, which is supposed to be the basis of the law of damages under 42 U.S.C. § 1983.⁴⁵⁸ Historically, tort law divided damages into six categories: injury to property, physical injuries, mental injuries, injuries to family relations, injuries to personal liberty, and injuries to reputation.⁴⁵⁹ Under that approach, deprivation of your religious freedom or placement in segregation without due process would injure your personal liberty. Those deprivations might inflict mental or emotional injury too, but that injury would be separate and in addition to the injury to your liberty.

A good example of the proper difference between mental or emotional injury and deprivation of personal liberty is the Second Circuit decision in *Kerman v. City of New York*.⁴⁶⁰ In that case, the plaintiff had been placed in a mental hospital against his will, and he claimed both that he had been seized in violation of the Fourth Amendment and that he had been subjected to the tort of false imprisonment. The court treated the plaintiff's mental and emotional injury as a different type of injury from his loss of liberty, stating: "[t]he damages recoverable for loss of liberty for the period spent in a wrongful confinement are severable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours' loss of liberty."⁴⁶¹ A number of courts have relied on the *Kerman* decision in adopting the narrower view of the interpretation of § 1997e(e).⁴⁶²

If you are bringing a case about something that did not cause you physical injury, you should make it very clear that you are seeking damages for something other than mental or emotional injury. For

access).

458. *Smith v. Wade*, 461 U.S. 30, 34, 103 S. Ct. 1625, 1628, 75 L. Ed. 2d 632, 637 (1983) ("It was intended to create a 'species of tort liability' in favor of persons deprived of federally secured rights"); *Carey v. Piphus*, 435 U.S. 247, 253, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252, 258 (1978) ("[Section 1983] was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution.").

459. ARTHUR G. SEDGWICK, JOSEPH H. BEALE & THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, 50–51 (8th ed. 1891).

460. *Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004).

461. *Kerman v. City of New York*, 374 F.3d 93, 125–126 (2d Cir. 2004).

462. *Jones v. Annucci*, No. 16-CV-3516 (KMK), 2018 U.S. Dist. LEXIS 24359, at *8 (S.D.N.Y. Feb. 14, 2018) (*unpublished*) (stating §1997e(e) does not bar compensatory damages for First Amendment violations, which "allege intangible violations of liberty and personal rights" (citations and internal quotation marks omitted)); *Valdez v. City of New York*, 11 Civ. 05194 (PAC) (DF), 2013 U.S. Dist. LEXIS 188044, at *21–22 (S.D.N.Y. Sept. 3, 2013) (*unpublished*) (holding in First Amendment religious rights case that "deprivations of liberty and personal rights can give rise to damages separate and apart from those recoverable for any physical injury or emotional suffering"), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 82508 (S.D.N.Y., June 16, 2014) (*unpublished*); *Rosado v. Herard*, 12 Civ. 8943 (PGG) (FM), 2014 U.S. Dist. LEXIS 40172, at *10 (S.D.N.Y. Nov. 25, 2013) (*unpublished*) ("Herard's motion mistakenly assumes that, where no physical injury is alleged, the only injury that a plaintiff may suffer as a result of retaliation is mental or emotional harm. The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma." (citing *Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004))); claim was for violation of privacy rights by disclosure of HIV status), *report and recommendation adopted as modified*, 2014 U.S. Dist. LEXIS 40172, at *13 (S.D.N.Y. Mar. 25, 2014) (*unpublished*) ("Applying *Kerman*, courts in this Circuit have concluded that a physical injury is not required for a prisoner to recover compensatory damages for the loss of a constitutional liberty interest."); *Mendez v. Amato*, 9:12-CV-560(TJM/CFH), 2013 U.S. Dist. LEXIS 132346, at *20 (N.D.N.Y. Sept. 17, 2013) (*unpublished*) (holding claims based on confinement in Involuntary Protective Custody "involve the loss of such intangibles as liberty through a lack of due process and equal protection" and thus "fall outside of the physical harm requirement of the PLRA"; citing *Kerman's* distinction between loss of liberty and emotional suffering); *Malik v. City of New York*, No. 11 Civ. 6062 (PAC) (FM), 2012 U.S. Dist. LEXIS 118358, at *16–17 (S.D.N.Y. Aug. 15, 2012) (*unpublished*) ("The Defendants' motion mistakenly assumes that the only injury that a plaintiff may suffer without a physical injury is mental or emotional harm. The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma. See *Kerman* Malik's religion and retaliation claims allege deprivations of personal rights under the First Amendment which do not fall under the PLRA's physical injury requirement for compensatory damages."), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 141305 (S.D.N.Y. Sept. 28, 2012) (*unpublished*).

example, if you are suing for being placed in segregation for a long period without due process, and you were not physically injured as a result, do not write in your complaint that “plaintiff seeks damages for mental anguish and psychological torture.” You are better off with something like this:

Plaintiff seeks compensatory damages for the loss of privileges and quality of life in his prison living conditions, and loss of the limited liberty enjoyed by prisoners, resulting from his segregated confinement, in that he was confined for 23 hours a day in a cell roughly 60 feet square, and deprived of most of his personal property as well as the ability to work, attend educational and vocational programs, watch television, associate with other prisoners, attend outdoor recreation in a congregate setting with the ability to engage in sports and other congregate recreational activities, attend meals with other prisoners, attend religious services [and whatever other privileges you may have lost].

Plaintiff does not seek compensatory damages for mental or emotional distress.

Plaintiff seeks punitive damages against defendant(s) [names] for their willful and malicious conduct in confining the plaintiff to segregation after a hearing in which he was denied basic rights to due process of law.

You would take a similar approach in demanding damages for any other kind of constitutional violation that didn’t cause you physical injury, like loss of religious freedom, freedom of speech, placement in filthy and disgusting physical conditions, etc.

If you did suffer some physical injury from being segregated, you should still protect yourself (in case the court does not find your physical injury serious enough to satisfy the statute) with a damages demand similar to the one above, making clear that you are seeking damages for the constitutional deprivation separately from any claim of mental or emotional injury. If you *did* suffer a physical injury, you can recover not only for damages resulting from that physical injury, but also for the mental or emotional damages you suffered. In such a case you should say in your complaint “Plaintiff also seeks compensatory damages for the mental or emotional distress resulting from his prolonged confinement in segregation without due process of law” instead of the second paragraph in the above example.

There is no guarantee of success if you follow the suggestions above, since as previously explained some courts are committed to the broad approach to § 1997e(e). Also, even if you win on this point, constitutional rights are very hard to value or give dollar amounts to (meaning that courts will often just award “nominal damages,” which are damages in a very low amount).⁴⁶³ The Supreme Court has warned that non-compensatory damage awards cannot be based on the “abstract ‘importance’ of a constitutional right.”⁴⁶⁴ However, courts have made compensatory damage awards for violations of First Amendment and other intangible rights based on the particular circumstances of the violation and not on a claim of mental or emotional injury.⁴⁶⁵ You should bring this up to the court if prison officials argue that you can only recover nominal damages.

463. *Williams v. Kaufman Cnty.*, 352 F.3d 994, 1014–1015 (5th Cir. 2003) (noting the possibility of nominal awards under § 1983); *see also* *Carlo v. City of Chino*, 105 F.3d 493, 495 (9th Cir. 1997) (noting nominal award for denial of phone access to overnight detainee); *Sockwell v. Phelps*, 20 F.3d 187, 189 (5th Cir. 1994) (noting nominal award for racial segregation).

464. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309–310, 106 S. Ct. 2537, 2544, 91 L. Ed. 2d 249, 260 (1986).

465. *See, e.g., Sallier v. Brooks*, 343 F.3d 868, 880 (6th Cir. 2003) (affirming jury award of \$750 in

3. What is “Physical Injury”?

Incarcerated people must show physical injury in order to recover damages for mental or emotional injury under 1997e(e)⁴⁶⁶, but courts have not fully explained what it takes to show physical injury. The injury “must be more than *de minimis*, but need not be significant.”⁴⁶⁷ A “*de minimis*” injury is one where the harm is very small. However, courts disagree over what kinds of injuries go past the *de minimis* threshold. One appeals court has said that injury does not need to be observable or diagnosable, or require treatment by a medical care professional, to meet the Section 1997e(e) standard.⁴⁶⁸ But a much-cited district court decision says that, under Section 1997e(e):

A physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional. It is not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks. . . . [It is] more than the types and kinds of bruises and abrasions about which the Plaintiff complains. Injuries treatable at home and with over-the-counter drugs, heating pads, rest, etc., do not fall within the parameters of 1997e(e).⁴⁶⁹

compensatory damages for each instance of unlawful opening of legal mail); *Goff v. Burton*, 91 F.3d 1188, 1192 (8th Cir. 1996), *cert. denied*, 512 U.S. 1209, 114 S. Ct. 2684, 129 L. Ed. 2d 817 (2004) (affirming \$2250 award at \$10 a day for lost privileges because of a vengeful retaliatory transfer to a higher security prison); *Vanscoy v. Hicks*, 691 F. Supp. 1336, 1338 (M.D. Ala. 1988) (awarding \$50 for unwarranted exclusion from religious service, without evidence of mental anguish or suffering).

466. 42 U.S.C. § 1997e(e).

467. *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997); *accord*, *Mitchell v. Horn*, 318 F.3d 523, 535–536 (3d Cir. 2003); *Oliver v. Keller*, 289 F.3d 623, 626–627 (9th Cir. 2002); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999), *vacated in part and reinstated in part on reh’g*, *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc).

468. *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002); *accord*, *Mengesha v. Stokes*, No. 3:16-cv-446-MCR-GRJ, 2017 U.S. Dist. LEXIS 193411, at *7 (N.D. Fla., Nov. 22, 2017) (*unpublished*) (holding that a dislocated shoulder causing severe pain was more than *de minimis* even though it “popped back into the socket” before plaintiff received medical care and no injury was visible at that time), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 107160 (N.D. Fla., June 27, 2018) (*unpublished*); *Lamb v. Hazel*, No. 5:12-CV-00070-TBR, 2013 U.S. Dist. LEXIS 50238, at *9 (W.D. Ky., Apr. 8, 2013) (*unpublished*) (holding injury “can be more than *de minimis* even though it did not result in a need for medical treatment”). Courts have rejected efforts to read “long-term” into the physical injury requirement. *Payne v. Parnell*, 246 F. App’x 884, 888 (5th Cir. 2007) (per curiam) (*unpublished*); *Glenn v. Copeland*, No. 5:02CV158-RS/WCS, 2006 U.S. Dist. LEXIS 38466, at *11 (N.D. Fla. June 9, 2006) (*unpublished*) (“Presumably . . . any physical injury, even if short-term, is sufficient” to meet the statutory threshold.).

469. *Luong v. Hatt*, 979 F. Supp. 481, 486 (N.D. Tex. 1997); *see Jarriett v. Wilson*, 162 F. App’x 394, 401 (6th Cir. 2005) (*unpublished*) (citing *Luong*, holding pain and swelling of previously injured leg while required to stand for hours in “strip cage” were *de minimis*); *Johnson v. Correction Corp. of Am.*, No. 15-cv-2320, 2015 U.S. Dist. LEXIS 165099, at *1 (W.D. La. Nov. 17, 2015) (*unpublished*) (holding plaintiff who alleged an officer stepped on his hand, causing “pain and suffering, swelling, and the loss of use of his hand for some period of time . . . has not alleged an injury that is more than *de minimis*” (citing *Luong*, 979 F. Supp. at 486)), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 165103 (W.D. La. Dec. 8, 2015) (*unpublished*). *But see Pierce v. County of Orange*, 526 F.3d 1190, 1224 (9th Cir. 2008) (noting that the circuit court had rejected the “overly restrictive” *Luong* standard, and further finding that bedsores and bladder infections resulting from inadequate accommodation of a paraplegic’s disabilities qualified as physical injuries even under the restrictive *Luong* standard).

Not surprisingly, several courts have dismissed painful traumatic injuries as *de minimis*.⁴⁷⁰ But others have found somewhat minor injuries to be actionable under section 1997e(e).⁴⁷¹

Several courts have held that the physical results of emotional distress do not qualify as physical injuries under this statute.⁴⁷² That view is not supported by the statute's language, and other courts

470. See, e.g., *Dixon v. Toole*, 225 F. App'x 797, 799 (11th Cir. 2007) (per curiam) (*unpublished*) (holding "mere bruising" from 17.5 hours in restraints was *de minimis*; incarcerated person actually complained of "welts"); *Springer v. Caple*, No. 6:15-cv-06026-PKH-BAB, 2017 U.S. Dist. LEXIS 36189, at *5 (W.D. Ark. Jan. 25, 2017) (*unpublished*) (holding sprained ankle treated with over-the-counter pain medication, an ice pack, and an ace bandage was *de minimis*); *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 35874 (W.D. Ark. Mar. 14, 2017) (*unpublished*); *judgment entered*, 2017 WL 988121 (W.D. Ark., Mar. 14, 2017), *aff'd as modified*, 717 F. App'x 650 (8th Cir. 2018) (per curiam) (*unpublished*); *cert. denied*, 139 S. Ct. 416, (2018); *Jeter v. Sample*, No. 4:13CV00896, 2015 U.S. Dist. LEXIS 25048, at *14 (N.D. Ohio Feb. 27, 2015) (holding "cut [and] bleeding also slightly swollen" lip to be *de minimis*); *Harvard v. Beaudry*, No. 3:12cv289/LC/CJK, 2014 U.S. Dist. LEXIS 129402, at *10 (N.D. Fla. Sept. 12, 2014) (holding sore right shoulder and forearm, knot on index finger knuckle, swollen fingers on right hand, scratch on back of right arm were *de minimis* injury); *Hollingsworth v. Thomas*, No. 13-00480-WS-B, 2014 U.S. Dist. LEXIS 116890, at *4 (S.D. Ala. Aug. 22, 2014) (*unpublished*) (holding plaintiff failed to allege a non-*de minimis* injury where plaintiff alleged that his hand and fingers were struck with a baton, causing him to scream in severe pain, and resulting in dispensing of pain medication and wrapping of his wrist; "There are no allegations of a broken bone, bruising, swelling, or an abrasion; of the type of medication that he received or the type of wrapping applied; or of the length of time he took pain medication or wore the wrapping."); *Griggs v. Horton*, No. 7:05-CV-220-R, 2008 U.S. Dist. LEXIS 24888, at *2-3 (N.D. Tex. Mar. 28, 2008) (*unpublished*) (holding that wrist abrasion and tenderness to rib cage were *de minimis* injuries); *Diggs v. Emfinger*, No. 07-1807 SECTION P, 2008 U.S. Dist. LEXIS 19140, at *9 (W.D. La. Jan. 10, 2008) (*unpublished*) (holding that allegation of "an 'open wound' causing 'severe pain' was a *de minimis* injury).

471. See, e.g., *Moneyham v. United States*, No. EDCV 17-329-VBF (KK), 2018 U.S. Dist. LEXIS 133886, at *6 (C.D. Cal., May 31, 2018) (*unpublished*) (holding allegation that plaintiff "suffered bruises and cuts after being slammed into the concrete block and pulled in opposing directions by his restraints satisfies the physical injury requirement"); *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 133887 (C.D. Cal. Aug. 6, 2018) (*unpublished*); *Curry v. Johnson*, No. 3:16cv483/MCR/EMT, 2017 U.S. Dist. LEXIS 211341, at *5 (N.D. Fla. Nov. 22, 2017) (*unpublished*) ("Curry's allegation of pain and swelling which required pain relievers and diagnostic testing, coupled with his allegations of continuing pain which has persisted during the year between the use of force and the submission of his affidavit and affects use of his hand, appear to allege more than the vague injury or periodic episodes of pain found by the Eleventh Circuit to be *de minimis* as a matter of law for purposes of § 1997e(e)."); *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 210923 (N.D. Fla. Dec. 22, 2017) (*unpublished*); *Young v. Dep't of Corr.*, No. 1:16-cv-00407-JCN, 2017 U.S. Dist. LEXIS 110178, at *2 (D. Me. July 17, 2017) (*unpublished*) (declining to hold a fractured finger is *de minimis*); *McFadden v. Nicholson*, No. 1:14CV664, 2017 U.S. Dist. LEXIS 36044, at *4 (M.D.N.C. Mar. 13, 2017) (*unpublished*) (holding in inmate-inmate assault case that a blow to the head causing bleeding and bad headaches satisfied § 1997e(e)); *Sanders v. Day*, No. 5:06-CV-280 (HL), 2008 U.S. Dist. LEXIS 21713, at *4 (M.D. Ga. Mar. 19, 2008) (*unpublished*) (holding that the allegation of kicking and using pepper spray on a handcuffed suspect demonstrate more than *de minimis* injury); *Edwards v. Miller*, No. 06-CV-00933-MSK-MEH, 2007 U.S. Dist. LEXIS 22639, at *4 (D. Colo. Mar. 28, 2007) (*unpublished*) (holding that plaintiff's allegation that she was punched in the face and bitten on the arm over a 10-minute period, causing damage to her forehead, facial injuries, and subsequent severe headaches, demonstrates more than *de minimis* injury); *Cotney v. Bowers*, No. 2:03-cv-1181-WKW (WO), 2006 U.S. Dist. LEXIS 69523, at *25 (M.D. Ala. Sept. 26, 2006) (*unpublished*) (holding bruised ribs that took weeks to heal could be more than *de minimis*, and thus that such allegations could withstand a motion for summary judgment).

472. *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (holding that weight loss, appetite loss, and insomnia that occurred *after* and *because* of the emotional harm could not qualify as "physical injuries" under § 1997e(e) because the statute explicitly requires that the physical injuries predate the emotional harm); *Williams v. Roper*, No. 4:13-CV-2440 CAS, 2018 U.S. Dist. LEXIS 47147, at *8 (E.D. Mo. Mar. 22, 2018) (*unpublished*) ("Headaches caused by stress, . . . are not a physical injury within the meaning of the PLRA."); *Session v. Clements*, No. 14-cv-02406-PAB-KLM, 2018 U.S. Dist. LEXIS 15702, at *9 (D. Colo. Jan. 31, 2018) (*unpublished*) (holding that physical injuries among "hearing voices, hallucination, cognitive dysfunction, uncontrollable jumping, severe depression, anxiety, appetite loss, sleep disruption, muscle tightening, panic, traumatic re-enactment of being shot at point blank range, PTSD, continued fear and paranoia, large very painful lump on lower left side rib-cage area" were not distinct from mental/emotional injuries claimed to result from confinement in segregation); *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 53171 (D. Colo. Mar. 29, 2018) (*unpublished*); *Clark v. Raemisch*, No. 14-cv-01594-RBJ-MJW, 2016 U.S. Dist. LEXIS 47159, at *9 (D. Colo. Feb. 26, 2016) (*unpublished*) ("Plaintiff's only alleged physical harm is weight loss caused by stress and

have rejected it.⁴⁷³ Courts are also split on the question of whether the risk of future injury meets the standard.⁴⁷⁴

There must be some relationship between the physical injury and the legal claims in the case.⁴⁷⁵ The injury does not need to have been caused by the legal violation alleged.⁴⁷⁶ There are contrary

anxiety. This is insufficient.”), *report and recommendation adopted*, 2016 U.S. Dist. LEXIS 47166 (D. Colo. Apr. 7, 2016) (*unpublished*); Darvie v. Countryman, No. 9:08-CV-0715 (GLS/GHL), 2008 U.S. Dist. LEXIS 52797, at *23 (N.D.N.Y. July 10, 2008) (*unpublished*) (characterizing “anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, weight loss, etc.” as “essentially emotional in nature”); Minifield v. Butikofer, 298 F. Supp. 2d 900, 905 (N.D. Cal. 2004) (“Physical symptoms that are not sufficiently distinct from a plaintiff’s allegations of emotional distress do not qualify as a prior showing of physical injury.”); Todd v. Graves, 217 F. Supp. 2d 958, 960 (S.D. Iowa 2002) (holding that allegations of stress-related aggravation of hypertension, dizziness, insomnia and loss of appetite were not actionable).

473. *Wilkinson v. Kenneth*, No. 12-CIV-80404-RYSKAMP, 2015 U.S. Dist. LEXIS 188974, at *9 (S.D. Fla. Nov. 10, 2015) (*unpublished*) (holding complaint of persistent headaches over a period of two and one-half years, insomnia, dizziness and fainting, weight loss, and vomiting resulting from mental and emotional distress over plaintiff’s inability to practice his religion, supported by a variety of medical records, were more than *de minimis* at least at the pleading stage), *report and recommendation adopted sub nom. Wilkinson v. GEO Grp., Inc.*, 2015 U.S. Dist. LEXIS 188973 (S.D. Fla. Dec. 11, 2015) (*unpublished*); *Peterson v. Burris*, No. 14-cv-13000, 2015 U.S. Dist. LEXIS 78229, at *3 (E.D. Mich. June 17, 2015) (*unpublished*) (holding high blood pressure resulting from stress satisfied § 1997e(e) at least at the pleading stage); *Montemayor v. Fed. Bureau of Prisons*, No. 02-1283 (GK), 2005 U.S. Dist. LEXIS 18039, at *17 (D.D.C. Aug. 25, 2005) (*unpublished*) (holding that a heart attack resulting from physical and emotional stress caused by treatment in prison would meet the physical injury requirement).

474. *Compare Rahman v. Schriro*, 22 F. Supp. 3d 305, 318 (S.D.N.Y. 2014) (holding claim for “a serious risk of future physical harm” caused by radiation exposure was not barred by § 1997e(e)); *West v. Walker*, No. 06 C 4350, 2007 U.S. Dist. LEXIS 65905, at *6 (N.D. Ill. Sept. 4, 2007) (*unpublished*) (holding incarcerated person may pursue claim of “documentably increased likelihood of future harm” from second-hand smoke); *Crawford v. Artuz*, 98 Civ. 0425 (DC), 1999 U.S. Dist. LEXIS 9552, at *6 (S.D.N.Y. June 24, 1999) (*unpublished*) (holding § 1997e(e) inapplicable to claim for damages for future injury from asbestos exposure) *with Brown v. Crews*, No. 3:13-cv-36-J-34PDB, 2015 U.S. Dist. LEXIS 20518, at *5 (M.D. Fla. Feb. 20, 2015) (*unpublished*) (stating “the unknown future effects of [plaintiff’s] exposure to asbestos” are “insufficient to support a claim for compensatory or punitive damages under the PLRA. Although Brown is correct that he need not prove his injuries at this stage of the proceedings, he must allege facts showing that he suffered an injury.”); *Smith v. U.S.*, No. 06-3061-JTM, 2007 U.S. Dist. LEXIS 54488, at *4 (D. Kan. July 26, 2007) (*unpublished*) (holding claim for “future physical health, safety and well being” and “future medical expenses” did not satisfy physical injury requirement), reconsideration denied, 2007 U.S. Dist. LEXIS 94707 (D. Kan. Dec. 27, 2007), motion to amend denied, 2008 U.S. Dist. LEXIS 30210 (D. Kan. Apr. 10, 2008), *aff’d in part and rev’d in part on other grounds*, 561 F.3d 1090 (10th Cir. 2009); *Pack v. Artuz*, 348 F. Supp. 2d 63, 74 n.12 (S.D.N.Y. 2004) (holding proof of asbestos exposure posing a serious risk of harm would establish an Eighth Amendment violation entitling the plaintiff to nominal damages regardless of present non-physical injury); *Zehner v. Trigg*, 133 F.3d 459, 462–463 (7th Cir. 1997) (holding that exposure to asbestos without claim of damages for physical injury is not actionable). *See also Helling v. McKinney*, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 33 (1993) (recognizing the possibility of an Eighth Amendment claim based on future serious health problems because of a prison smoking policy). *See Smith v. Carpenter*, 316 F.3d 178, 188 (2d Cir. 2003) (“[Plaintiff] correctly argues that an Eighth Amendment claim may be based on a defendant’s conduct in exposing an inmate to an unreasonable risk of future harm and that actual physical injury is not necessary in order to demonstrate an Eighth Amendment violation.”); *Davis v. New York*, 316 F.3d 93, 101 (2d Cir. 2002) (allowing *Helling* claim to proceed, after passage of PLRA).

475. *See, e.g., Antrobus v. City of New York*, 2014 U.S. Dist. LEXIS 42468, at *6 (S.D.N.Y. Mar. 27, 2014) (*unpublished*) (holding § 1997e(e) limited damages where plaintiff alleged kidney disease and other injuries, but claim was for interference with mail).

476. *McAdoo v. Martin*, 899 F.3d 521, 526 (8th Cir. 2018) (upholding claim against medical personnel for denial of pain medication for injuries inflicted by correction officers; use of force itself was not challenged); *accord, Sealock v. Colorado*, 218 F.3d 1205, 1210 n.6 (10th Cir. 2000) (holding that a heart attack satisfied the § 1997e(e) requirement of “prior showing of physical injury” allowing plaintiff to recover for the associated pain even if pain were deemed to constitute mental or emotional injury); *Karsten v. Davis*, No. 12-cv-02107-MSK-KLM, 2013 U.S. Dist. LEXIS 69054, at *10 n.2 (D. Colo. Apr. 26, 2013) (*unpublished*) (holding year’s delay in repairing a hernia was compensable since the hernia was a physical injury), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 69048 (D. Colo. May 15, 2013) (*unpublished*); *Al-Turki v. Ballard*, No. 10-cv-02404-WJM-CBS, 2013 U.S. Dist. LEXIS 20000, at *15 (D. Colo. Feb. 14, 2013) (*unpublished*) (holding pain caused by failure to treat kidney

decisions,⁴⁷⁷ but these are not supported by the language of § 1997e(e). Courts have disagreed over whether mental or emotional injury can be compensated when it is caused by a claim separate from the claim involving physical injury.⁴⁷⁸

Courts initially differed over whether sexual assault, which does not always result in damage to the body, amounted to physical injury under § 1997e(e).⁴⁷⁹ However, Congress amended § 1997e(e) to add the phrase “showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).” The definition in 18 U.S.C. § is quite specific, defining sexual act as:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration,

stones was actionable even though defendants did not cause the stones), *aff'd*, Turki v. Ballard, 762 F.3d 1188 (10th Cir. 2014);

477. See, e.g. Banks v. Katzenmeyer, No. 13-cv-02599-KLM, 2015 U.S. Dist. LEXIS 26256, at *13 (D. Colo. Mar. 4, 2015) (*unpublished*) (“Plaintiff fails to include any factual allegations that would demonstrate or even infer that he suffered physical injury caused by conduct attributable to Defendants. This omission is fatal to Plaintiff’s claim for compensatory damages.”), *aff’d in part, rev’d in part on other grounds*, Banks v. Katzenmeyer, 645 F. App’x 770 (10th Cir. 2016) (*unpublished*).

478. Compare Phillips v. Steinbeck, No. 06-cv-02569-WDM-KLM, 2008 U.S. Dist. LEXIS 24537, at *21 (D. Colo. Mar. 26, 2008) (*unpublished*) (plaintiff who alleged he was labelled an informant by staff and assaulted by inmates in retaliation for complaints about staff could seek damages for both Eighth Amendment and access to courts claims (which the court said were “intertwined”) based on injuries from assault); Root v. Watkins, No. 04-cv-00977-ZLW-MEH, 2007 U.S. Dist. LEXIS 102238, at *8 (D. Colo. Aug. 28, 2007) (*unpublished*) (plaintiff alleged that one defendant refused to do anything about loud incarcerated persons’ conduct, and when he complained to another defendant, he was labelled a snitch and then attacked by other incarcerated people; he could seek damages against both defendants), *objections overruled*, 2008 U.S. Dist. LEXIS 22130 (D. Colo. Mar. 19, 2008) (*unpublished*); Fogle v. Pierson, No. 05-cv-01211-MSK-CBS, 2008 U.S. Dist. LEXIS 24543, at *9 (D. Colo. Mar. 26, 2008) (*unpublished*) (incarcerated person complaining of injury from protracted segregation could seek damages both for due process claim for segregation placement and claim of denial of access to courts which arguably prolonged the confinement); Noguera v. Hasty, 99 Civ. 8786 (KMW)(AJP), 2001 U.S. Dist. LEXIS 2458, at *5 (S.D.N.Y. Mar. 12, 2001) (*unpublished*) (holding that allegations of retaliation for reporting a rape by an officer were closely enough related to the rape that a separate physical injury need not be shown) *with* Purvis v. Johnson, 78 F. App’x 377, 379–380 (5th Cir. 2003) (*per curiam*) (*unpublished*) (holding that an incarcerated person alleging assault by a staff member could not also pursue a claim for damages for obstruction of the post-assault investigation without a showing of physical injury related to that claim); Wallin v. Dycus, No. 03-cv-00174-CMA-MJW, 2009 U.S. Dist. LEXIS 29099, at *13 (D. Colo. Feb. 25, 2009) (*unpublished*) (holding claim for damages for disclosure of confidential information was barred by § 1997e(e) despite the presence of an excessive force claim; stating physical injury requirement is “claim specific”), *report and recommendation adopted*, Wallin v. Dycus, 2009 U.S. Dist. LEXIS 71834 (D. Colo. Aug. 13, 2009) (*unpublished*), *aff’d*, Wallin v. Dycus, 381 F. App’x 819 (10th Cir. 2010) (*unpublished*).

479. Compare Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding alleged sexual assaults “qualify as physical injuries as a matter of common sense,” without much explanation); Doe v. United States, No. 12-00640 ACK-RLP, 2014 U.S. Dist. LEXIS 174413, at *8 (D. Haw. Dec. 17, 2014) (holding that “common sense and public policy dictates that Doe should be able to pursue mental and emotional injury claims arising out of [a] sexual assault” despite the absence of physical force or physical injury); Kornagay v. Given, No. 3:11cv428/LAC/EMT, 2014 U.S. Dist. LEXIS 38377, at *19 (N.D. Fla. Mar. 24, 2014) (*unpublished*) (holding injuries from alleged rape—“rectal bleeding, rectal pain, head bruise, etc.”—were *de minimis* (very small), but prison staff’s disregarding a known risk of rape was actionable under § 1997e(e) for mental or emotional injury because “repugnant to the conscience of mankind . . .”); Marrie v. Nickels, 70 F. Supp. 2d 1252, 1264 (D. Kan. 1999) (“sexual assaults would qualify as physical injuries under § 1997e(e)”); citing “common sense” holding of *Liner v. Goord*, above) *with* Ashley v. Perry, No. 13-00354-BAJ-RLB, 2015 U.S. Dist. LEXIS 167863, at *1, *5–6 & n.12 (M.D. La. Dec. 15, 2015) (holding an incarcerated person who alleged that a staff member performed oral sex on him until he ejaculated did not satisfy § 1997e(e); rejecting argument that “a sexual assault is a per se physical injury because of its very nature, even when such an assault does not result in any physical pain, temporary or otherwise”); McGregor v. Jarvis, No. 9:08-CV-770 (GLS/RFT), 2010 U.S. Dist. LEXIS 97408, at *1, *4 (N.D.N.Y., Aug. 20, 2010) (*unpublished*) (holding allegations of non-forcible oral and vaginal sex did not establish physical injury), *report and recommendation adopted*, 2010 U.S. Dist. LEXIS 97403 (N.D.N.Y., Sept. 16, 2010); Hancock v. Payne, No. 1:03cv671-JMR-JMR, 2006 U.S. Dist. LEXIS 1648, *1, 3 (S.D. Miss. Jan. 4, 2006) (*unpublished*) (holding incarcerated people who alleged they were “sexually battered . . . by sodomy” did not allege a physical injury for § 1997e(e) purposes).

however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; . . . ⁴⁸⁰

Thus, under the amendment, anal, vaginal and oral sex—including anal or genital penetration by hand, finger, or object with the necessary intent⁴⁸¹—are actionable for compensatory damages, regardless of the presence of physical injury. Manual and other non-penetrative sexual touching of another person, compelled or otherwise, are not actionable nor are acts involving the touching of breasts. However, intentional, unclothed touching of persons under 16 years old is actionable.⁴⁸² The amendment does not include cases in which incarcerated persons are compelled or persuaded to perform sexual acts or displays for the arousal of others.⁴⁸³ Nor does the amendment include cases where incarcerated persons are subjected to sexual displays by staff,⁴⁸⁴ or to certain other kinds of shockingly intrusive but non-injurious actions.⁴⁸⁵

480. 18 U.S.C. § 2246(2).

481. See *Bucano v. Austin*, No. 15-67ERIE, 2016 U.S. Dist. LEXIS 33144, at *5 (W.D. Pa. Feb. 12, 2016) (*unpublished*) (holding allegation that officer penetrated plaintiff's vagina with his fingers, and that he made sexual comments and demands during a course of such conduct, established sexual acts under § 1997e(e)), *report and recommendation adopted in part, rejected in part on other grounds*, 2016 U.S. Dist. LEXIS 32332 (W.D. Pa. Mar. 14, 2016) (*unpublished*).

482. See, e.g., *Graham v. Elliott*, No. 1:17-cv-68-MW-GRJ, 2018 U.S. Dist. LEXIS 126886,*1, 3 (N.D. Fla. June 27, 2018) (*unpublished*) (holding grabbing and twisting plaintiff's penis was *de minimis* under § 1997e(e)), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 126565 (N.D. Fla., July 28, 2018) (*unpublished*); *Mengsha v. Stokes*, No. 3:16-cv-446-MCR-GRJ, 2017 U.S. Dist. LEXIS 193411, at *9 (N.D. Fla. Nov. 22, 2017) (*unpublished*) (holding evidence that “a hand touched Plaintiff's buttocks, a finger touched—but did not penetrate—Plaintiff's anus, and a hand grabbed his testicles [did not] meet the definition of a ‘sexual act’ under § 2246. Instead, these actions constitute, at most, ‘sexual contact’ under § 2246.”), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 107160 (N.D. Fla., June 27, 2018) (*unpublished*); *Jamison v. United States*, No. 1:15-CV-01678, 2016 U.S. Dist. LEXIS 181549, at *5–6 (W.D. La., Sept. 26, 2016) (holding touching of genitals through clothing during pat search not compensable under 28 U.S.C. § 1346(b)(2)), *report and recommendation adopted*, *Jamison v. United States*, 2017 U.S. Dist. LEXIS 3046 (W.D. La. Jan. 9, 2017); *Holley v. Bossert*, No. 3:15cv389/LAC/EMT, 2016 U.S. Dist. LEXIS 19668, at *5 (N.D. Fla. Jan. 19, 2016) (holding allegation of defendant's “kissing [plaintiff], grabbing his buttocks, and touching his chest” was not a “sexual act” or a physical injury under § 1997e(e)), *report and recommendation adopted*, *Holley v. Bossert*, 2016 U.S. Dist. LEXIS 19667 (N.D. Fla. Feb. 18, 2016); see also *Jackson v. Schaff*, No. 2:17-cv-10492, 2017 U.S. Dist. LEXIS 52653, at *3 (E.D. Mich. Apr. 6, 2017) (*unpublished*) (holding “mere bruises” from a use of force also involving unwanted touching of breast and buttock was *de minimis*; no discussion of incident as sexual abuse).

The decision in *Snow v. List*, No. 11-3411, 2013 U.S. Dist. LEXIS 96078, at *2 (C.D. Ill. July 10, 2013) (*unpublished*), erroneously states that the definition appears to include the “intentional touching . . . of the breast, . . . with an intent to abuse humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” That language appears in the statutory definition of sexual *contact*, 18 U.S.C.A. § 2246(3), rather than the definition of sexual *act*, found in 18 U.S.C.A. § 2246(2). The latter definition is what the VAWA amendment incorporates into § 1997e(e).

483. *Johnson v. Perry*, No. 2:16-cv-0367 AC P, 2018 U.S. Dist. LEXIS 142041, at *4 (E.D. Cal. Aug. 21, 2018) (*unpublished*) (holding sexually intrusive visual search was not a “sexual act” under VAWA amendment), *report and recommendation adopted*, *Johnson v. Perry*, 2018 U.S. Dist. LEXIS 157442 (E.D. Cal. Sept. 14, 2018) (*unpublished*).

484. *Martin v. Byars*, No. 4:12-cv-02100-DCN, 2014 U.S. Dist. LEXIS 10153, at *3 (D.S.C. Jan. 28, 2014) (*unpublished*) (holding allegations that staff members masturbated outside plaintiff's cell did not satisfy § 1997e(e) since they amounted neither to a “sexual act” under the statute nor to physical injury).

485. See *Lagarde v. Metz*, No. 13-805-RLB, 2017 U.S. Dist. LEXIS 14596, at *5–6 (M.D. La. Feb. 2, 2017) (*unpublished*) (holding compensatory damages barred where an officer shoved a broomstick between plaintiff's

A number of injuries short of visible damage to body parts have been held to satisfy Section 1997e(e), though not by all courts. These include:

- a) physical disturbances resulting from medication withdrawal, overdose, or error;⁴⁸⁶
- b) loss of consciousness;⁴⁸⁷
- c) concussion;⁴⁸⁸

buttocks but did not penetrate his anus or inflict injury; awarding \$1,000 in punitive damages after a bench trial).

486. *Hinton v. Mark*, 544 F. App'x 75, 76 n.2 (3d Cir. 2013) (per curiam) (*unpublished*) (holding plaintiff who attempted suicide by overdose of pills and was hospitalized for two days satisfied § 1997e(e)); *Munn v. Toney*, 433 F.3d 1087, 1089 (8th Cir. 2006) (holding claim of headaches, cramps, nosebleeds, and dizziness resulting from deprivation of blood pressure medication “does not fail . . . for lack of physical injury”); *Cook v. Illinois Dept. of Corr.*, No. 3:15-cv-83-NJR-DGW, 2018 U.S. Dist. LEXIS 1631, at *4 (S.D. Ill. Jan. 4, 2018) (*unpublished*) (holding claim of physical injury from not being transferred to drug treatment, resulting in being “sick,” pain and nightmares, was for a jury); *Lynch v. Lewis*, U.S. Dist. LEXIS 35561, at *1, 13–14 (M.D. Ga. Mar. 23, 2015) (*unpublished*) (holding “nausea, dizziness, reflux, headaches, vomiting, and leg pain” resulting from hormone withdrawal, as well as self-mutilation injuries, satisfied § 1997e(e) at the pleading stage, subject to further factual development); *Campbell v. Gause*, No. 10-11371, 2011 U.S. Dist. LEXIS 21870, at *7 (E.D. Mich. Feb. 1, 2011) (*unpublished*) (holding allegations of chest pains, spiked blood pressure, bronchospasms, migraine headaches, and dizziness resulting from defendants' confiscation of his prescription medications satisfied § 1997e(e)), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 21865 (E.D. Mich. Mar. 4, 2011) (*unpublished*); *May v. Jones*, No. 1:07-CV-1787, 2009 U.S. Dist. LEXIS 113485, at *1, *4–5 (M.D. Pa. Dec. 7, 2009) (citing deprivation of medication for migraine headaches resulting in “pain, vomiting, loss of appetite, light sensitivity and an inability to sleep”); *Scarver v. Litscher*, 371 F. Supp. 2d 986, 997 (W.D. Wis. 2005) (suggesting that self-inflicted overdose of Thorazine, as well as self-inflicted razor cuts by a mentally ill incarcerated person being held in isolation may have been physical injury for the purposes of 1997e(e)), *aff'd*, *Scarver v. Litscher*, 434 F.3d 972 (7th Cir. 2006); *Ziembra v. Armstrong*, No. 3:02CV2185(DJS), 2004 U.S. Dist. LEXIS 432, at *7 (D. Conn. Jan. 14, 2004) (*unpublished*) (holding that allegations of withdrawal, panic attacks, pain similar to a heart attack, difficulty breathing and profuse sweating, resulting from withdrawal of psychiatric medication, may have been physical injuries for the purposes of 1997e(e)). *But see* *Chatham v. Adcock*, 334 F. App'x 281, 285 (11th Cir. 2009) (per curiam) (*unpublished*) (holding hallucinations, anxiety, and nightmares resulting from denial of Xanax did not meet physical injury requirement); *McGathey v. Osinga*, No. 2:17-cv-56-FtM-29MRM, 2017 U.S. Dist. LEXIS 86232, at *2–3 (M.D. Fla. June 6, 2017) (*unpublished*) (holding that damages for “horrendous” drug withdrawal in which “[t]he demonic spirits overtook me again. I was truly fearful for my life” were barred by § 1997e(e) absent an allegation of physical injury other than pain); *Sparks v. Ingle*, No. 5:14-cv-00013-MHH-JHE, 2017 U.S. Dist. LEXIS 36067, at *8 (N.D. Ala. Mar. 14, 2017) (*unpublished*) (holding epileptic seizures occurring when defendants failed to provide his medication and resulting in the plaintiff's “body banging on the walls and door” were de minimis absent other evidence of injury), *aff'd*, 724 F. App'x 692 (11th Cir. 2018) (per curiam) (*unpublished*).

487. *Waggoner v. Comanche Cnty. Det. Ctr.*, No. CIV-06-700-C, 2007 WL 2068661, at *4 (D. Okla. July 17, 2007). (*unpublished*) (holding plaintiff rendered unconscious by a shock shield after being pepper-sprayed, shaken, and punched sufficiently supported a claim of physical injury). *But see* *Owens v. U.S.*, No. 5:09-CT-3167-FL, 2012 U.S. Dist. LEXIS 173093, at *2, 6 (E.D.N.C. Dec. 6, 2012) (*unpublished*) (holding transitory episode of dizziness and general weakness, including loss of consciousness, following deprivation of blood pressure medication, was de minimis where plaintiff resumed normal activities including exercise the next day).

488. *Norfleet v. Taylor*, No. 3:16cv413/MCR/EMT, 2017 U.S. Dist. LEXIS 216194, at *17 (N.D. Fla. Nov. 27, 2017) (*unpublished*) (“A concussion and migraine headaches may be considered more than de minimis injuries.”), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 12182 (N.D. Fla. Jan. 25, 2018) (*unpublished*); *Flanning v. Baker*, No. 5:12cv337-MW-CJK, 2016 U.S. Dist. LEXIS 121010, at *6 (N.D. Fla. Aug. 16, 2016) (*unpublished*) (“A concussion and migraine headaches may be considered more than de minimis injuries.”), *report and recommendation adopted*, *Flanning v. Baker*, 2016 U.S. Dist. LEXIS 121007 (N.D. Fla., Sept. 7, 2016). *But see* *Buie v. Myers*, No. 4:06-81 DCN TER, 2007 U.S. Dist. LEXIS 10929, at *9 (D.S.C. Feb. 13, 2007) (*unpublished*) (stating “other than a report submitted by the defendant which shows plaintiff complained of dizziness and blurred vision as a result of the alleged fall, plaintiff has not shown more than de minimis injury or that any injury was a result of the conditions of his confinement”).

- d) the consequences of failing to treat an illness or injury, both the immediate consequences⁴⁸⁹ and longer-term or future issues;⁴⁹⁰
- e) denial of enough food;⁴⁹¹

467. See *Perez v. U.S.*, 330 F. App'x 388, 389–390 (3d Cir. 2009) (*per curiam*) (*unpublished*) (holding claim of untreated asthma attack resulting in “dizziness, headaches, weakness, back pain, and nausea,” which required steroids, prescription medication, and other medical treatment to recover, presented a material issue of fact under the *de minimis* standard); *Tatum v. Helder*, No. 5:15-cv-05254, 2017 U.S. Dist. LEXIS 25448, at *21 (W.D. Ark. Feb. 1, 2017) (*unpublished*) (holding plaintiff's evidence that he “suffered from sores caused by porphyria [and] was in extreme pain and had pressure sores” established “adverse health effects . . . sufficient to constitute more than a *de minimis* injury” under § 1997e(e)), *report and recommendation adopted*, *Tatum v. Helder*, No. 5:15-cv-05254, 2017 U.S. Dist. LEXIS 24470 (W.D. Ark. Feb. 22, 2017) (*unpublished*); *Johnson v. Thomas*, No. 4:12-cv-1899-KOB-JEO, 2015 U.S. Dist. LEXIS 41058, at *4, *7 (N.D. Ala. Mar. 31, 2015). (*unpublished*) (holding allegation of “continual skin disorder” that caused plaintiff's “skin to peel, bleed, and ooze pus from simply wearing cloth[els] or showering” sufficiently alleged more than *de minimis* injury); *DeRoche v. Funkhouse*, No. CV 06-1428-PHX-MHM (MEA), 2008 U.S. Dist LEXIS 31166, at *18–19 (D. Ariz. Mar. 27, 2008) (*unpublished*) (further liver damage and daily pain, swelling, nausea and hypertension from lack of treatment for Hepatitis C satisfied the physical injury requirement); *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1248 (D. Colo. 2006) (addressing “prolonged” pain attendant upon labor and stillbirth). *But see* *Green v. U.S.*, No. 6: 13–142–DCR, 2014 U.S. Dist. LEXIS 51816, at *10 (E.D. Ky. Apr. 15, 2014) (*unpublished*) (holding inadequately treated eczema constituted no more than *de minimis* injury); *Owens v. U.S.*, No. 5:09-CT-3167-FL, 2012 U.S. Dist. LEXIS 173093, at *4–6, *16–18 (E.D.N.C., Dec. 6, 2012) (*unpublished*) (holding dizziness, weakness, and loss of consciousness following deprivation of blood pressure medication *de minimis*; emphasizing transitoriness of symptoms); *Broadnax v. Escambia Cnty. Main Jail*, No. 3:11cv354/LC/CJK, 2012 U.S. Dist. LEXIS 160160, at *2 (N.D. Fla. Oct. 9, 2012). (*unpublished*) (holding allegation of staph infection “without more” does not show more than *de minimis* injury), *report and recommendation adopted*, *Broadnax v. Escambia Cnty. Main Jail*, No. 3:11cv354/LAC/CJK, 2012 U.S. Dist. LEXIS 160159 (N.D. Fla. Nov. 8, 2012). (*unpublished*); *Tuft v. Chaney*, No. H-06-2529, 2007 U.S. Dist. LEXIS 83817, at *7–8 (S.D. Tex. Nov. 9, 2007) (*unpublished*) (holding complaints of “generalized ‘fatigue’ and ‘stress’” resulting from MRSA and Hepatitis C were not physical injuries); *Jones v. Sheahan*, No. 99 C 3669, 2000 U.S. Dist. LEXIS 14130, at *22–23 (N.D. Ill. Sept. 22, 2000) (*unpublished*) (finding no physical injury when plaintiff alleged that delay of surgery for removing tumors resulted in “anguish and worry” that the tumors might be malignant, even though there were no physical effects). *But see* *Leon v. Johnson*, 96 F. Supp. 2d 244, 248 (W.D.N.Y. 2000) (finding delayed receipt of HIV/AIDS medication did not constitute physical injury when no adverse health effects from delay were shown).

468. *Young v. Beard*, Civil Action No. 06-160, 2007 WL 1549453, at *4 (W.D. Pa. May 18, 2007) (*unpublished*) (holding claim for damages for “the physical injury he has already sustained or will sustain to his internal organs” from denial of cholesterol medication, and of testing of blood pressure, diabetes, and cholesterol more often than every six months, satisfied § 1997e(e) at the pleading stage), *vacated on other grounds*, *Young v. Beard*, Civil Action No. 06-160, 2007 U.S. Dist. LEXIS 48283 (W.D. Pa. July 3, 2007) (*unpublished*), *report and recommendation adopted*, *Young v. Beard*, Civil Action No. 06-160, 2008 U.S. Dist. LEXIS 26767 (W.D. Pa. Apr. 2, 2008); *Mejia v. Goord*, No. 9:03-CV-124, 2005 U.S. Dist. LEXIS 32394, at *16–17 (N.D.N.Y. Aug. 16, 2005) (*unpublished*) (denying summary judgment for the state where incarcerated person was denied a low-fat diet for coronary condition). *But see* *Cotter v. Dall. Cnty. Sheriff*, No. 3:05-CV-2225-H, 2006 WL 1652714, at *4 (N.D. Tex. June 15, 2006) (*unpublished*) (holding that plaintiff's allegations that he had been exposed to staphylococcus bacteria and that the bacteria still lay dormant in his blood was not a physical injury).

469. *Avery v. Helder*, No. 5:16-CV-5169, 2017 U.S. Dist. LEXIS 28230, at *2, (W.D. Ark. Feb. 28, 2017). (*unpublished*) (allegation that plaintiff was “losing weight and muscle mass” from inadequate food satisfied § 1997e(e) at the pleading stage); *Hall v. Klemm*, Civil Action No. 15-20 E, 2017 U.S. Dist. LEXIS 14767, at *15, (W.D. Pa. Feb. 1, 2017). (*unpublished*) (holding evidence that lack of a nutritionally adequate religious diet resulted in weight loss, dizziness, fatigue, and headaches was “consistent with the types of physical injuries that other federal courts have recognized to be sufficient under § 1997e(e)”), *report and recommendation adopted*, *Hall v. Klemm*, Civil Action No. 15-20 E, 2017 U.S. Dist. LEXIS 31654 (W.D. Pa. Mar. 7, 2017) (*unpublished*); *Mozden v. Helder*, No. 5:13-CV-05160, 2014 U.S. Dist. LEXIS 91295, at *3, (W.D. Ark. July 2, 2014). (*unpublished*) (holding plaintiff's allegation “that as a result of an inadequate diet, he lost substantial weight and felt weak and lacked energy” satisfied § 1997e(e) at the pleading stage); *Williams v. Humphreys*, No. CV504-053, 2005 U.S. Dist. LEXIS 44027, at *19–21 (S.D. Ga. July 27, 2005) (*unpublished*), *adopted by* *Williams v. Humphreys*, No. CV504-053, 2005 U.S. Dist. LEXIS 44029 (S.D. Ga. Sept. 13, 2005) (*unpublished*) (holding that an allegation of 12-pound weight loss, abdominal pain, and nausea resulting from denial of pork substitute at meals sufficiently alleged a physical injury). *But see* *Clark v. Raemisch*, No. 14-CV-01594-RBJ-MJW, 2016 U.S. Dist. LEXIS 47159, at *9, (D. Colo. Feb. 26, 2016). (*unpublished*) (“Plaintiff's only alleged physical harm is weight loss caused by stress and

- f) food contamination or poisoning;⁴⁹²
- g) denial of exercise;⁴⁹³

anxiety. This is insufficient.”), report and recommendation adopted, *Clark v. Raemisch*, No. 14-CV-01594-RBJ, 2016 U.S. Dist. LEXIS 47166 (D. Colo. Apr. 7, 2016) (*unpublished*); *Pittman-Bey v. Clay*, No. V-10-086, 2012 U.S. Dist. LEXIS 146994, at *8, (S.D. Tex. Sep. 19, 2012) (*unpublished*) (holding allegation of being “weak, tired, and dizzy” and unable to sleep from missing evening meals during Ramadan was *de minimis*), *report and recommendation adopted in part, rejected in part on other grounds*, *Pittman-Bey v. Clay*, No. 6:10-CV-86, 2013 U.S. Dist. LEXIS 29668 (S.D. Tex. Mar. 4, 2013). (*unpublished*), *aff’d*, *Pittman-Bey v. Clay*, 557 F. App’x. 310 (5th Cir. 2014) (*per curiam*) (*unpublished*); *Linehan v. Crosby*, No. 4:06-CV-00225-MP-WCS, 2008 U.S. Dist. LEXIS 63738, at *13, (N.D. Fla. Aug. 20, 2008). (*unpublished*) (holding that weight loss from denial of a kosher diet did not meet physical injury requirement).

470. *Carter v. United States*, No. 3:11-CV-1669, 2012 U.S. Dist. LEXIS 80849, at *2, (M.D. Pa. June 11, 2012) (*unpublished*) (holding allegations of becoming violently ill and bed-ridden for three days after eating contaminated food sufficient to withstand a motion to dismiss his FTCA claims). *But see* *Mayes v. Travis State Jail*, No. A-06-CA-709-SS, 2007 U.S. Dist. LEXIS 47317, at *14 (W.D. Tex. June 29, 2007) (*unpublished*) (holding diarrhea allegedly caused by spoiled food was *de minimis*).

471. *Doolittle v. Holmes*, 306 F. App’x. 133, 134 (5th Cir. 2009) (*per curiam*) (*unpublished*) (holding allegation of muscle atrophy from lack of exercise sufficiently pled physical injury); *Anderson v. Colorado*, 848, 1298 F. Supp. 2d 1291 (D. Colo. 2012). (holding allegation of muscle weakness from lack of exercise sufficed at summary judgment stage); *Williams v. Goord*, 111 F. Supp. 2d. 280, 291 (S.D.N.Y. 2000) (holding that allegation of a 28-day denial of exercise by a pro se plaintiff might satisfy 1997e(e) standard for physical injury). *But see* *Kuhbander v. Blue*, No. 4:15CV-P123-JHM, 2016 U.S. Dist. LEXIS 12027, at *2, (W.D. Ky. Feb. 2, 2016) (*unpublished*) (holding allegation of complete deprivation of exercise was *de minimis* absent an allegation of physical injury and a statement of how long the deprivation existed); *Sarno v. Reilly*, Civil Action No. 12-cv-00280-REB-KLM, 2013 U.S. Dist. LEXIS 38546, at *11, (D. Colo. Jan. 17, 2013) (*unpublished*) (holding alleged deprivation of exercise resulting in headaches, chest pains, and other physical pain was *de minimis*), *report and recommendation adopted*, *Sarno v. Reilly*, No. 12-CV-00280-REB-KLM, 2013 U.S. Dist. LEXIS 38544 (D. Colo. Mar. 20, 2013) (*unpublished*).

- h) physical disturbances resulting from exposure to harmful materials,⁴⁹⁴ including pepper spray and other chemical agents in cases of unusually serious consequences,⁴⁹⁵ and in a few cases including exposure to human waste;⁴⁹⁶

472. *Gray v. Hardy*, 826 F.3d 1000, 1007 (7th Cir. 2016) (holding allegations of worsened asthma and skin rash caused by exposure to excessive dust and insect dander in unsanitary prison satisfied physical injury requirement at summary judgment stage); *Smith v. Leonard*, 244 F. App'x 583, 584 (5th Cir. 2007) (*unpublished*) (stating headaches, sinus problems, trouble breathing, blurred vision, irritated eyes, and fatigue, allegedly from exposure to toxic mold, might satisfy § 1997e(e) standard); *Cary v. Hickenlooper*, No. 14-CV-00411-PAB-NYW, 2015 U.S. Dist. LEXIS 122134, at *8, (D. Colo. Aug. 3, 2015). (*unpublished*) (holding allegation of physical maladies allegedly connected to exposure to uranium in drinking water, some confirmed in medical records, satisfied § 1997e(e)), *report and recommendation adopted in part, rejected in part on other grounds*, *Cary v. Hickenlooper*, No. 14-CV-00411-PAB-NYW, 2015 WL 5353847 (D. Colo. Sept. 15, 2015), *aff'd*, *Cary v. Hickenlooper*, 673 F. App'x. 870 (10th Cir. 2016) (*unpublished*); *Rahman v. Schriro*, 22 F.Supp.3d 305, 317–318 (S.D.N.Y. 2014) (holding allegations of excessive radiation exposure and associated health risks adequately alleged physical injury at the pleading stage); *Enigwe v. Zenk*, No. 03-CV-854 (CBA), 2006 U.S. Dist. LEXIS 66022, at *19 (E.D.N.Y. Sept. 15, 2006) (*unpublished*) (finding that allegation of exposure to environmental tobacco smoke resulting in dizziness, uncontrollable coughing, lack of appetite, runny eyes and high blood pressure may meet physical injury requirement). *But see* *Glover v. Haynes*, No.: CV211-114, 2012 U.S. Dist. LEXIS 50406, *23–24 (S.D. Ga. Mar. 21, 2012) (*unpublished*) (dismissing claim based on respiratory illnesses resulting from mold exposure on the ground that it was “of temporary duration and treatable”), *report and recommendation adopted*, *Glover v. Haynes*, No.: CV211-114, 2012 U.S. Dist. LEXIS 50407 (S.D. Ga. Apr. 10, 2012); *Smith v. Leonard*, Civil Action No. G-06-0288, 2008 U.S. Dist. LEXIS 34587, *21 n.7 (S.D.Tex., Apr. 28, 2008) (*unpublished*) (holding headaches, sinus problems, trouble breathing, blurred vision, irritated eyes, and fatigue resulting from exposure to toxic mold were *de minimis*); *Thompson v. Joyner*, No. 5:06-CT-3013-FL, 2007 U.S. Dist. LEXIS 96515, at *15 (E.D.N.C. May 29, 2007) (*unpublished*) (holding that pepper spraying was *de minimis*), *aff'd*, 251 F. App'x 826 (4th Cir. 2007); *Hogg v. Johnson*, No. 2:04-CV-0024, 2005 U.S. Dist. LEXIS 851, at *3, *7 (N.D. Tex. Jan. 21, 2005)) (*unpublished*) (dismissing allegation that plaintiff was “gassed three times for asking for a mattress and standing up for his rights” for lack of physical injury).

473. *Santais v. Corr. Corp. of Am.*, Civil Action No.: 5:16-cv-80 2017 U.S. Dist. LEXIS 42368, *4 (S.D. Ga. Mar. 23, 2017) (*unpublished*) (holding allegations that plaintiff “developed an abnormality on his left side, and that he has coughed up blood two to three times per week,” and these conditions persisted for months, were more than *de minimis*); *Taylor v. Wawrzyniak*, No. 1:15-CV-104, 2016 U.S. Dist. LEXIS 181359, *14*–15 (W.D. Mich. Dec. 13, 2016) (*unpublished*) (denying summary judgment to defendant under § 1997e(e) where plaintiff alleged he was “unable to breathe” after use of chemical agent, unlike minor “typical” effects), *report and recommendation approved*, *Taylor v. Wawrzyniak*, No. 1:15-CV-104, 2017 U.S. Dist. LEXIS 2466 (W.D. Mich., Jan. 6, 2017) (*unpublished*); *Watson v. Edelen*, 76 F. Supp. 3d 1332, 1379 (N.D. Fla. 2015) (holding “intense pain, vomiting, loss of consciousness, a burning sensation for at least one week, and chemicals burns to the skin on his genitals, buttocks, arms, face, back, legs, and stomach, which caused blisters and peeling skin” caused by use of chemical agents were more than *de minimis*). *But see* *Kirkland v. Everglades Corr. Inst.*, NO. 12-22302-CIV-ALTONAGA/White, 2014 U.S. Dist. LEXIS 43681, *19 (S.D. Fla., Mar. 31, 2014) (*unpublished*) (“If [plaintiff] experienced temporary chemical burns and minor respiratory problems from exposure to a chemical agent, he then sustained only minor, physical injuries from the chemical spray.”); *Magwood v. Tucker*, No. 3:12cv140/RV/CJK, 2012 U.S. Dist. LEXIS 168822, *13–16 (N.D. Fla. Nov. 14, 2012) (*unpublished*) (holding incarcerated person failed to show more than a *de minimis* physical injury resulting from officer’s use of chemical agent where he alleged he suffered bloody nose and bloody phlegm), *report and recommendation adopted*, *Magwood v. Tucker*, No. 3:12cv140/RV/CJK, 2012 U.S. Dist. LEXIS 168819 (N.D.Fla., Nov. 28, 2012) (*unpublished*), *appeal dismissed*, *Magwood v. Tucker*, No. 12-16262 (11th Cir. Feb. 19, 2013) (*unpublished*).

474. *Allen v. Stanislaus Cnty.*, No.: 1:13-cv-00012-DAD-SAB (PC), 2017 U.S. Dist. LEXIS 15843, *52 (E.D. Cal. Feb. 3, 2017) (*unpublished*) (holding § 1997e(e) permits damages for direct exposure to urine and feces, which “in and of itself, constitutes more than *de minimis* injury”), *report and recommendation adopted in part, rejected in part on other grounds*, *Allen v. Stanislaus Cnty.*, No. 1:13-cv-00012-DAD-SAB (PC), 2017 U.S. Dist. LEXIS 43607 (E.D.Cal., Mar. 24, 2017)(*unpublished*); *Havens v. Clements*, No. 13-cv-00452-MSK-MEH, 2014 U.S. Dist. LEXIS 38417, *26–28 (D.Colo., Mar. 24, 2014) (*unpublished*) (holding lying in one’s own wastes might constitute physical injury if as alleged it caused a bladder infection); *Hawthorne v. Cain*, Civil Action No. 10-0528-BAJ-DLD, 2011 U.S. Dist. LEXIS 79681, *17–20 (M.D.La., June 8, 2011) (*unpublished*) (holding allegation of foot ailment, vomiting, and breathing problems resulting from exposure to human waste from overrunning toilet satisfied § 1997e(e)), *report and recommendation adopted*, *Hawthorne v. Cain*, Civil Action No. 10-0528-BAJ-DLD, 2011 U.S. Dist. LEXIS 79674 (M.D.La., July 21, 2011) (*unpublished*). *But see* *Moody v. Shoultes*, No. 5:15-cv-325-MTT-CHW, 2018 U.S. Dist. LEXIS 25767, *1, *13–15 (M.D.Ga., Jan. 11, 2018) (*unpublished*) (holding §

- i) infliction of pain or illness through extreme conditions of confinement;⁴⁹⁷
- j) physical abuse short of blows;⁴⁹⁸
- k) stillbirth or miscarriage.⁴⁹⁹

1997e(e) barred damages where officer allegedly sprayed plaintiff with a mixture including human wastes and only other injury was a cut forehead, though court acknowledged a jury could find an Eighth Amendment violation), *report and recommendation adopted*, *Moody v. Shoultes*, No. 5:15-cv-325-MTT-CHW, 2018 U.S. Dist. LEXIS 25382 (M.D.Ga., Feb. 16, 2018) (*unpublished*); *Allen v. Louisville Metro Dept. of Corrections*, No. 3:07CV-P296-S, 2007 U.S. Dist. LEXIS 78948, *23–24 (W.D.Ky., Oct. 24, 2007) (*unpublished*) (holding plaintiff who had urine and feces thrown on him by others failed to allege a physical injury under § 1997e(e)).

475. *Love v. Godinez*, No. 15 C 11549, 2018 U.S. Dist. LEXIS 76438, *13 (N.D. Ill., May 7, 2018) (*unpublished*) (holding allegation of sleep deprivation resulting from cold conditions and cockroaches walking over plaintiff raised a triable issue as to physical injury); *Camps v. Nutter*, Civil Action NO. 14-01498, 2017 U.S. Dist. LEXIS 98932, *7 n.1 (E.D. Pa., June 27, 2017) (*unpublished*) (holding allegations that overcrowded conditions caused “physical and mental suffering, sickness, loss of sleep, anxiety and emotional distress” and prevented plaintiff from receiving adequate medical care for “high blood pressure, headaches, fatigue, muscle pain, chills and problems with his heart, lung and liver” were consistent with allegations other courts had recognized as sufficient under § 1997e(e)); *Ellis v. LeBlanc*, 09-222-BAJ-DLD, 2012 U.S. Dist. LEXIS 140192, *8 (M.D.La., Sept. 10, 2012) (*unpublished*) (holding allegation that plaintiff was sent for retaliatory reasons to work in agricultural fields and collapsed, suffering from chest pain, nausea, dizziness and profuse sweating, and was later treated for dehydration, high blood pressure and high blood sugar, satisfied § 1997e(e)), *report and recommendation approved*, *Ellis v. LeBlanc*, 09-222-BAJ-DLD, 2012 U.S. Dist. LEXIS 140194 (M.D.La., Sept. 28, 2012) (*unpublished*); *Rinehart v. Alford*, No. 3:02-CV-1565-R, 2003 U.S. Dist. LEXIS 1789, at *4 (N.D. Tex. Mar. 3, 2003) (*unpublished*) (holding that severe headaches and back pain, caused by bright 24-hour light and sleeping on a narrow bench, sufficiently alleged physical injury). *But see Alexander v. Tippah County, Miss.*, 351 F.3d 626, 631 (5th Cir. 2003) (holding incarcerated person who suffered nausea and vomited as a result of exposure to noxious odors in a filthy holding cell full of raw sewage could not pursue damages since he suffered only a de minimis injury, if any); *Vansparrentak v. Hall*, No. 3:14cv399/MCR/EMT, 2015 WL 333075, *5 (N.D.Fla., Jan. 26, 2015) (*unpublished*) (holding allegation of six-day transportation with bathroom breaks only every 12 to 15 hours, leading plaintiff to suffer from “neurogenic bladder,” alleged only de minimis injury); *Beasley v. LeBlanc*, Civil Action No. 1:11CV2047, 2012 U.S. Dist. LEXIS 170615, *4–5 (W.D.La., May 23, 2012) (*unpublished*) (holding allegation of athlete’s foot contracted from unsanitary floor was *de minimis*), *report and recommendation adopted*, *Beasley v. LeBlanc*, Civil Action No. 1:11CV2047, 2012 U.S. Dist. LEXIS 170618 (W.D.La., Nov. 30, 2012).

476. *Payne v. Parnell*, 246 F. App’x 884, 888–889 (5th Cir. 2007) (*unpublished*) (holding that being jabbed with a cattle prod is not *de minimis*); *Lawson v. Hall*, No. 2:07-0334, 2009 U.S. Dist. LEXIS 60924, at *10–11 (S.D. W.Va. July 16, 2009) (*unpublished*) (finding that the use of force may have been impermissible “even in the absence of severe injuries”); *Zamoras v. Karr*, No. 04-73194, 2007 U.S. Dist. LEXIS 11140, at *16 (E.D. Mich. Feb. 16, 2007) (*unpublished*) (holding severe pain resulting from lack of moving during nine months in restraints, along with rashes and scarring on his arms, and inability to raise his arms over his head when released, were not *de minimis*). *But see Dixon v. Toole*, 225 F. App’x 797, 799 (11th Cir. 2007) (*per curiam*) (*unpublished*) (holding “mere bruising” from 17.5 hours in restraints was *de minimis*; incarcerated person actually complained of “welts”).

477. *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1245 (D. Colo. 2006) (holding that the pain of prolonged labor resulting in a stillbirth and the death and stillbirth of a child, without physical injury, due to improper medical care meet the standard to state a claim under the PLRA).

One question that the courts have not resolved is whether the infliction of significant physical pain alone constitutes physical injury under § 1997e(e),⁵⁰⁰ or not.⁵⁰¹ If the answer is “no,” then even outright torture might not be compensable in damages as long as it is done with enough care to leave no marks.⁵⁰²

478. *Burley v. Abdellatif*, No. 16-12256, 2018 U.S. Dist. LEXIS 44187, *6 (E.D. Mich., Mar. 19, 2018) (*unpublished*) (“Plaintiff’s repeated allegations of physical pain suffered as a result of Defendant’s alleged deliberate indifference constitute more than de minimis physical injuries for purposes of § 1997e(e).”; plaintiff complained of pain from heel spur and acid reflux); *Clark v. Price*, No. 2:16-cv-00919-KOB-TMP, 2018 U.S. Dist. LEXIS 1479, *15–16 (N.D. Ala., Jan. 4, 2018) (*unpublished*) (stating “the pain associated with [an] assault itself is more than a de minimis injury”); *Garcia-Feliciano v. U.S.*, Civ. No.: 12-1959(SCC), 2014 U.S. Dist. LEXIS 56688, *2–4 & n.2 (D.P.R., Apr. 23, 2014) (*unpublished*) (holding allegation of substantial pain from fall down stairs in restraints was sufficient to defeat summary judgment under § 1997e(e)); *Andrade v. Christ*, No. 08-cv-01649-WYD-KMT, 2009 WL 3004575, *4 (D.Colo., Sept. 18, 2009) (*unpublished*) (holding failure to treat existing traumatic injury, causing “unwarranted physical pain,” satisfied § 1997e(e)); *Malone v. Runnels*, No. CIV S-06-2046 GEB KJM P, 2009 U.S. Dist. LEXIS 78945, *22 (E.D.Cal., Sept. 2, 2009) (noting that testimony that plaintiff was in pain for three days after a blow to the head “describes an injury that is more than de minimis”), *report and recommendation adopted*, *Malone v. Runnels*, No. CIV S-06-2046 GEB KJM P, 2009 U.S. Dist. LEXIS 90583 (E.D.Cal., Sept. 29, 2009); *Bain v. Cotton*, No. 2:06 CV 217, 2009 WL 1660051, *7 (D.Vt., June 12, 2009) (holding “severe chronic pain” from termination of drug regime for incarcerated person who had serious head and spinal injuries from auto accident satisfied § 1997e(e)); *Lawson v. Hall*, Civil Action No. 2:07-00334, 2008 WL 793635, *5–7 (S.D.W.Va., Mar. 24, 2008) (declining to apply § 1997e(e) to allegation of “severe pain” from being kneed in the genitals); *Mansoori v. Shaw*, No. 99 C 6155, 2002 U.S. Dist. LEXIS 11670, *9–12 (N.D.Ill., June 28, 2002) (holding alleged “tenderness and soreness,” for which plaintiff was taken to a hospital for treatment and received a diagnosis of “chest wall injury,” met the standard).

479. *McAdoo v. Martin*, Civil No. 6:13-cv-06088, 2017 U.S. Dist. LEXIS 40009, *23 (W.D. Ark. Mar. 21, 2017) (*unpublished*) (noting that injury must be “more than de minimis”; “The question is whether suffering pain, only partially relieved by Tylenol and Ibuprofen, from [plaintiff’s] shoulder injury constitutes a physical injury sufficient to enable Plaintiff to recover damages for his mental pain and suffering under § 1997e(e). Reluctantly, the Court finds it does not.”), *affirmed in part, reversed in part and remanded*, *McAdoo v. Martin*, 899 F.3d 521, 525 (8th Cir. 2018) (avoiding the question whether pain standing alone is physical injury under § 1997e(e)); *Jones v. F.C.I. Beckley Medical Staff Employees*, Civil Action No. 5:11-cv-00530, 2014 U.S. Dist. LEXIS 88571, *13 (S.D.W.Va., June 30, 2014) (“Physical pain alone is insufficient to constitute more than a *de minimis* injury.”); *Hollingsworth v. Thomas*, Civil Action No. 13-00480-WS-B, 2014 U.S. Dist. LEXIS 73556, *4, 15–18 (S.D.Ala., May 30, 2014) (holding allegation of baton blows that the plaintiff said inflicted “severe pain” alleged no more than de minimis injury); *Calderon v. Foster*, No. 5:05-cv-00696, 2007 U.S. Dist. LEXIS 24505, at *27 (S.D. W.Va. Mar. 30, 2007) (*unpublished*) (pain, standing alone, is *de minimis*), *aff’d*, 264 F. App’x 286 (4th Cir. 2008) (*unpublished*); *Ladd v. Dietz*, No. 4:06cv3265, 2007 U.S. Dist. LEXIS 3782, at *3 (D. Neb. Jan. 17, 2007) (*unpublished*) (holding pain resulting from placing ear medication in plaintiff’s eye was “not enough” to constitute physical injury); *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1246 (D. Colo. 2006) (“Physical pain, standing alone, is a de minimis injury that may be characterized as a mental or emotional injury and, accordingly, fails to overcome the PLRA’s bar”); *Olivas v. Corr. Corp. of Am.*, 408 F. Supp. 2d 251, 254, 259 n. 4 (N.D. Tex. 2006) (dismissing as *de minimis* extreme pain resulting from delay in treatment of broken teeth with exposed nerve); *see also Al-Turki v. Ballard*, No. 10-cv-02404-WJM-CBS, 2013 U.S. Dist. LEXIS 20000, *7, 41–44 (D.Colo., Feb. 14, 2013) (*unpublished*) (“Pain alone may be considered a mental or emotional injury, but physical pain accompanied by physical effects necessitating medical treatment have been held to satisfy the physical injury requirement under the PLRA”; pain resulting from passing kidney stones satisfied § 1997e(e)), *aff’d sub nom. Al-Turki v. Robinson*, 762 F.3d 1188 (10th Cir. 2014).

480. For example, in *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005), an incarcerated person complained that he was forced to stand in a two-and-a-half-foot square cage for about 13 hours, naked for the first eight to 10 hours, unable to sit for more than 30 or 40 minutes of the total time, in severe pain, with clear, visible swelling in a portion of his leg that had previously been injured in a motorcycle accident, during which time he repeatedly asked to see a doctor. *Jarriett v. Wilson*, 414 F.3d 634, 641 (6th Cir. 2005) (dissenting opinion). The appeals court affirmed the dismissal of his claim as *de minimis* on the ground that the plaintiff did not complain about his leg upon release or shortly thereafter when he saw medical staff. *Jarriett v. Wilson*, 414 F.3d 634, 643 (6th Cir. 2005). *Jarriett* conflicts with *Payne v. Parnell*, 246 F. App’x 884 (5th Cir. 2007) (*unpublished*), in which the court, referring both to § 1997e(e) and the 8th Amendment, held that being jabbed with a cattle prod was not *de minimis*, despite the lack of long-term damage, in part because it was “calculated to produce real physical harm.” *Payne v. Parnell*, 246 F. App’x 884, 888–889 (5th Cir. 2007).

There may be some clarification of the meaning of physical injury under the PLRA in another federal statute, 18 U.S.C. § 242, which makes it a crime for someone acting under color of state law to deprive another person of his or her federal civil rights.⁵⁰³ Section 242 requires a showing of “bodily injury,” but the statute does not define “bodily injury.”⁵⁰⁴ However, several other federal criminal statutes define “bodily injury” as meaning: “(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.”⁵⁰⁵ This definition of “bodily injury,” found in other federal statutes, could also be applied in Section 1997e(e).⁵⁰⁶ As far as we know, no court has yet considered this idea. If you are faced with a claim that your injury isn’t severe enough to satisfy the PLRA, but it falls within the statutory definition (definition provided by law) of bodily injury, you could point out the definition of “bodily injury” in 18 U.S.C. §§ 831(f)(5), 1365(g)(4), 1515(a)(5), and 1864(d)(2), and argue that there is no difference between “bodily injury” and “physical injury” under the PLRA.

G. Attorney’s Fees

The PLRA limits the attorney’s fees incarcerated people can recover. These limitations do not directly affect you if you are proceeding *pro se* (without a lawyer), but they do affect your ability to get a lawyer.

Recovery of attorney’s fees under 42 U.S.C. § 1988⁵⁰⁷ is barred in “any action brought by a prisoner”⁵⁰⁸ except when the fees are “directly and reasonably incurred in proving an actual violation of the plaintiff’s rights” under a statute that allows fees to be awarded.⁵⁰⁹ Fees cannot be awarded in cases that are settled without findings of an actual violation of rights,⁵¹⁰ though it may be that fees can be awarded when a settlement is accompanied by a finding of violation.⁵¹¹ Fees may also be

481. 18 U.S.C. § 242.

482. 18 U.S.C. § 242 (providing “if bodily injury results from the acts committed in violation of this section . . . [the defendant] shall be fined under this title or imprisoned not more than ten years, or both”).

483. 18 U.S.C. § 831(f)(5); *accord* 18 U.S.C. § 1365(g)(4); 18 U.S.C. § 1515(a)(5); 18 U.S.C. § 1864(d)(2).

484. “When Congress uses, but does not define a particular word, it is presumed to have adopted that word’s established meaning.” *United States v. Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992) (citing *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 806, 109 S. Ct. 1500, 1503, 103 L. Ed. 2d 891, 899 (1989)); *See generally* *Leon v. Johnson*, 96 F. Supp. 2d 244, 248 (W.D.N.Y. 2000) (using the word “physical” in § 1997e(e) interchangeably with the word “bodily” harm).

485. 42 U.S.C. § 1988 authorizes attorneys’ fees for actions filed under 42 U.S.C. § 1983.

486. For purposes of these provisions, ex-incarcerated people are not incarcerated people, and a case filed after the plaintiff’s release is not governed by the PLRA fees provisions. *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999) (holding that a formerly incarcerated person does not need to meet the exhaustion requirement of the PLRA because he does not qualify as a “prisoner” under the relevant provision); *Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir. 1998) (PLRA provisions about attorney’s fees do not apply to a plaintiff who was not an incarcerated person at the time of filing his suit). The attorneys’ fees provisions are not limited to cases about prison conditions. *Robbins v. Chronister*, 435 F.3d 1238, 1241–1244 (10th Cir. 2006) (en banc) (applying PLRA attorney’s fees restrictions to a case about events before incarceration); *Jackson v. State Bd. of Pardons & Paroles*, 331 F.3d 790, 794–796 (11th Cir. 2003) (applying a PLRA provision to a case about parole eligibility hearings and length of confinement, and not restricting the provision to lawsuits about prison conditions).

487. 42 U.S.C. § 1997e(d)(1)(A). *See, e.g.*, *Armstrong v. Davis*, 318 F.3d 965, 973–974 (9th Cir. 2003) (holding that fees in Americans with Disabilities Act and Rehabilitation Act suits are not governed by the PLRA fee limitations).

488. *Torres v. Walker*, 356 F.3d 238, 243 (2d Cir. 2004) (holding that where a case was resolved by a stipulation that did not require the court’s approval and disclaimed defendants’ liability, “it cannot be said that [plaintiffs] attorneys’ fees were directly and reasonably incurred in proving an actual violation. . . .”; relying on parties’ stipulation, not the PLRA, in awarding fees); *Duvall v. O’Malley*, No. ELH-94-2541, 2014 U.S. Dist. LEXIS 48093, *34 (D. Md. Apr. 7, 2014) (*unpublished*) (denying fees for obtaining a private settlement agreement that “expressly provides that [i]t does not operate as an adjudication of the merits of the litigation” . . . and that it is not “an admission of liability of or by any party”).

489. *See Laube v. Allen*, 506 F. Supp. 2d 969, 979–980 (M.D. Ala. 2007) (holding that fees may be awarded for injunctive settlements to the extent they first satisfy the PLRA’s “need-narrowness-intrusiveness”

awarded if they are “directly and reasonably incurred in enforcing the relief ordered for the violation.”⁵¹² The statute says that fees must be “proportionately related to the court ordered relief for the violation,”⁵¹³ but this provision has little effect on fee awards in addition to that of the other PLRA restrictions on fees. Defendants may be required to pay fee awards of up to 150 percent of any damages awarded—but no more.⁵¹⁴

Hourly rates for lawyers’ fees are limited to 150 percent of the Criminal Justice Act (“CJA”) rates for criminal defense representation set in 18 U.S.C. § 3006A.⁵¹⁵ Unfortunately, this rate is much lower than the market rates most lawyers usually charge, and the amount usually awarded in non-incarcerated person cases, and it probably discourages many lawyers from taking incarcerated people’s cases.⁵¹⁶

Incarcerated people are more directly affected by the part of the PLRA that says up to twenty-five percent of a monetary judgment can be applied to the fee award. The Supreme Court has held that the phrase “not to exceed 25 percent” means that the court “must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney’s fees,” and has no discretion to apply a smaller percentage.⁵¹⁷

The courts have rejected arguments that attorney’s fee restrictions deny incarcerated people equal protection or otherwise violate the Constitution.⁵¹⁸

requirement that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right).

490. 42 U.S.C. § 1997e(d)(1)(B)(ii); *see* *Ilick v. Miller*, 68 F. Supp. 2d 1169, 1173 n. 1 (D. Nev. 1999), *abrogated by* *Kimbrough v. California*, 609 F.3d 1027, 1032 n.7 (9th Cir. 2010) (noting that *Illick* was the only case in the Ninth Circuit where a person who was incarcerated did not need to affirmatively establish an actual violation in order to recover attorneys’ fees under the PLRA, instead finding that sufficient evidence that the post-PLRA fees were “directly and reasonably” incurred.); *West v. Manson*, 163 F. Supp. 2d 116, 120 (D. Conn. 2001) (holding fees are recoverable for post-judgment monitoring).

491. 42 U.S.C. § 1997e(d)(1)(B)(i).

492. 42 U.S.C. § 1997e(d)(2); *see* *Parker v. Conway*, 581 F.3d 198, 201 (3d Cir. 2009); *Walker v. Bain*, 257 F.3d 660, 666-67 (6th Cir. 2001) (so interpreting the statute). That means when a court or jury awards \$1.00 in nominal damages, *Pearson v. Welborn*, 471 F.3d 732, 742–744 (7th Cir. 2006) (holding fees limited to \$1.50 where the plaintiff recovered only \$1.00 in nominal damages); *Boivin v. Black*, 225 F.3d 36, 40–46 (1st Cir. 2000) (going through an extensive analysis of the constitutional basis for the fee cap and concluding that fees are limited to 150 percent of recovered nominal damages). This 150 percent limit does not apply to cases in which the plaintiff seeks and receives an injunction as well as damages. *See* *Walker v. Bain*, 257 F.3d 660, 667 n.2 (6th Cir. 2001) (noting that § 1997e(d)(2) does not apply if non-monetary relief is granted).

493. 42 U.S.C. § 1997e(d)(3).

494. Although the hourly rate is higher than the Criminal Justice Act rates (up to 150 percent), lawyers defending clients under the CJA get paid for their time whether they win or lose. 18 U.S.C. § 3006A(d).

495. *Murphy v. Smith*, 138 S. Ct. 784, 790, 200 L. Ed. 2d 75 (2018).

496. *See* *Wilkins v. Gaddy*, 734 F.3d 344, 347–348 (4th Cir. 2013); *Parker v. Conway*, 581 F.3d 198, 203-04 (3d Cir. 2009); *Johnson v. Daley*, 339 F.3d 582, 597–598 (7th Cir. 2003) (en banc) (finding no constitutional violation of equal protection); *Jackson v. State Bd. of Pardons & Paroles*, 331 F.3d 790, 796–798 (11th Cir. 2003) (holding that § 1997e(d) passed the rational basis test and was therefore constitutional); *Foulk v. Charrier*, 262 F.3d 687, 704 (8th Cir. 2001); *Walker v. Bain*, 257 F.3d 660, 670 (6th Cir. 2001) (stating “[w]e admit to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual, albeit ‘technical,’ civil rights violations”; upholding statute nonetheless); *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000); *Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999); *Collins v. Montgomery Cnty. Bd. of Prison Inspectors*, 176 F.3d 679, 686 (3d Cir. 1999) (en banc) (affirming by divided vote the 150% cap’s constitutionality); *Carbonell v. Acrish*, 154 F. Supp. 2d 552, 561–566 (S.D.N.Y. 2001) (upholding 150 percent limit as a rational means to achieve Congress’s end).

H. Waiver of Reply

The PLRA states in 42 U.S.C. § 1997e(g):

(g) Waiver of Reply.

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under [42 U.S.C. § 1983] . . . or any other Federal law.

Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.⁵¹⁹

This provision means that with the suits of people who are incarcerated, the defendants do not have to answer the complaint unless the court tells them to answer. Courts can do this if “the plaintiff has a reasonable opportunity to prevail on the merits.”⁵²⁰ In practice, courts generally direct defendants to answer if the case survives the court’s first screening or a motion to dismiss, which means that the complaint states a claim for which relief can be granted.⁵²¹

If you amend the complaint to add parties after the initial screening, the court might not automatically direct the new defendants to answer. When you move to amend or edit a complaint, always ask the court to direct the defendants to answer when it grants your motion to amend. If you amend the complaint as a matter of course (when no motion is required) and the defendants do not answer, then you may need to move to direct them to answer.⁵²²

The provision that “[n]o relief shall be granted to the plaintiff unless a reply has been filed”⁵²³ may limit “default judgments,” which are judgments granted in favor of the plaintiff if a defendant fails to respond to the complaint.⁵²⁴ Clearly no default or default judgment can be entered unless the defendants have been directed to answer the complaint.⁵²⁵ Although it is possible to read this provision to say that courts cannot grant default judgments if defendants refuse to reply,⁵²⁶ this view has been

497. 42 U.S.C. § 1997e(g).

498. 42 U.S.C. § 1997e(g).

499. *See, e.g.*, Cameron v. Rantz, No. CV 08–42–H–DWM–RKS, 2008 WL 5111875, *6 (D. Mont. Dec. 4, 2008) (*unpublished*); Daniel v. Power, No. 04-CV-789-DRH, 2005 U.S. Dist. LEXIS 17235, at *6 (S.D. Ill. July 20, 2005) (*unpublished*) (holding that after an initial screening, “[d]efendants [must] . . . timely file an appropriate responsive pleading to the Amended Complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g)”).

522. Amendment by motion and as a matter of course are discussed in FED. R. CIV. P. 15.

523. 42 U.S.C. § 1997e(g)(1)

524. *See* FED. R. CIV. P. 55(a) (“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.”).

525. Lafountain v. Martin, No. 1:07-cv-76, 2009 U.S. Dist. LEXIS 112349, at *10 (W.D.Mich. Dec 3, 2009) (*unpublished*) (where the court affirmed the magistrate judge’s denial of Plaintiff’s motion for default) ; Olmstead v. Balcarecel, No. 06-CV-14881, 2007 U.S. Dist. LEXIS 53130, at *3 (E.D.Mich., July 24, 2007) (*unpublished*); Cidone v. Chiarelli, No. Civ. 1:CV-07-0746, 2007 U.S. Dist. LEXIS 51581, at *n.1 (M.D.Pa., July 17, 2007) (*unpublished*); Wallin v. Brill, No. Civ.A. 04-cv-00215-WDM-MJW, 2007 U.S. Dist. LEXIS 17674, at *5 (D.Colo., Mar. 13, 2007) (*unpublished*) (setting aside default); 269 F.App’x. 820 (10th Cir. 2008), cert. denied, 555 U.S. 1051 (2008).

526. Johns v. Lockhart, No. 2:11-cv-458, 2013 U.S. DIST. LEXIS 45817, at *1 (W.D.Mich., Feb. 7, 2013) (*unpublished*) (“The only action required of any defendant is the filing of an appearance within the time allowed

rejected by at least one court,⁵²⁷ and courts continue to grant default judgments in prison cases.⁵²⁸ If the defendants in your case do not respond, and the court does not want to enter a default judgment, try moving to hold the defendants in contempt of the court's order for them to reply to your complaint. Also ask the court for contempt damages equal to what you would get if the case went forward.⁵²⁹

I. Hearings by Telecommunication and at Prisons

The PLRA added a new section to the Civil Rights of Institutionalized Persons Act ("CRIPA"):

(f) Hearings.

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States ([42 U.S.C. § 1983] ...), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.⁵³⁰

by the Court's order of service. No default will be entered against any defendant for exercising the right under section 1997(e)(1) not to respond to the complaint."), *affirmed in part, vacated in part, remanded on other grounds*, Johns v. Lockhart, No. 13-1720, 2014 U.S. App. LEXIS 18520 (6th Cir., Feb. 18, 2014) (*unpublished*); Smith v. Heyns, No. 2:12-CV-11373, 2013 U.S. Dist. LEXIS 39534, at *16 (E.D.Mich., Jan. 10, 2013) (*unpublished*), *report and recommendation adopted*, Smith v. Heyns, No. 12-11373, 2013 U.S. Dist. LEXIS 38148 (E.D.Mich., Mar. 20, 2013) (*unpublished*); Bell v. Lesure, No. CIV-08-1255-R, 2009 U.S. Dist. LEXIS 38691, at *3-4 (W.D.Okla., May 6, 2009) (*unpublished*) (holding the PLRA forbids entry of default judgments in prisoner cases); Vinning v. Walls, No. 01-CV-994-WDS, 2009 U.S. Dist. LEXIS 26936, at *1 (S.D.Ill., Mar. 31, 2009) (*unpublished*) (holding default judgment could be entered, but no relief ordered, under the PLRA).

527. *McCurdy v. Johnson*, No. 2:08-cv-01767-MMD-PAL, 2012 U.S. Dist. LEXIS 107171, at *2 (D.Nev., Aug. 1, 2012) (*unpublished*) (holding a default judgment may be entered if the court has entered an order specifically based on 42 U.S.C. § 1997e(g)(2), which authorizes requiring a reply where the court has found a reasonable opportunity to prevail on the merits).

528. *See, e.g., Montez v. Hampton*, No. Civ.A. H-11-1891, 2013 U.S. Dist. LEXIS 172070, at *1-2 (S.D.Tex., Dec. 6, 2013) (*unpublished*) (awarding damages based on earlier default judgment); *Benton v. Rousseau*, 940 F.Supp.2d 1370, 1380-1381 (M.D.Fla. 2013) (entering default judgment against defendant who did not answer third amended complaint); *Johnson v. MDOC*, No. 4:05CV250-P-D, 2009 U.S. Dist. LEXIS 6142, at *3 (N.D.Miss., Jan. 28, 2009) (*unpublished*); *Cameron v. Myers*, 569 F. Supp. 2d 762, 766 (N.D. Ind. 2008) (entering default judgment in favor of a *pro se* prisoner plaintiff).

529. On contempt damages, *see Hutto v. Finney*, 437 U.S. 678, 691, 98 S. Ct. 2565, 2573, 57 L. Ed. 2d 522, 534 (1978) ("If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance."); *Benjamin v. Sielaff*, 752 F. Supp. 140, 148-149 (S.D.N.Y. 1990) (holding a prison accountable for "compensatory damages to be paid to any member of the [prisoner] plaintiff class who, in the future, as a new admission, is held in a non-housing area for more than twenty-four hours"); *Feliciano v. Hernandez Colon*, 704 F. Supp. 16, 20 (D.P.R. 1988) ("Sanctions in civil contempt proceedings may be employed for either or both of two purposes: to coerce defendants into compliance with the Court's order, and to compensate the complainant for losses sustained.").

530. 42 U.S.C. § 1997e(f); *see Moss v. Gomez*, No. 97-56234, 1998 U.S. App. LEXIS 27753, at *4 (9th Cir.

Long before the PLRA, many federal courts were using telephones and videos in court proceedings and holding some proceedings at prisons.⁵³¹ This provision concerning hearings at the prison raises new legal and practical problems. The statute refers to holding “hearings” but not “trials” at the prison, leaving it unclear whether evidentiary proceedings are included.⁵³² Conducting a trial or evidentiary proceeding by video conferencing raises serious questions of fairness, particularly in jury trials. In *United States v. Baker*,⁵³³ a non-PLRA case, the Fourth Circuit Court of Appeals said that it was constitutional to hold incarcerated persons’ psychiatric commitment hearings by video. However, the court was careful to say that these decisions are generally based on expert testimony and don’t depend on the appearance of the witnesses or the “impression” made by the person being committed, and that the proceeding does not involve fact-finding in the usual sense.⁵³⁴ That description does not fit most evidentiary proceedings in the cases of incarcerated people, and courts have traditionally expressed a strong preference for having incarcerated plaintiffs physically present in court for trial.⁵³⁵

If the court does hold a hearing by telephone or video in your case, it is your responsibility to subpoena (call to court) any witnesses you wish to present or cross-examine or take any other action the court directs, just as in a live hearing in the courtroom.⁵³⁶

J. Revocation of Earned Release Credit

The PLRA added a new statutory section concerning earned release credit:

§ 1932. Revocation of earned release credit

In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18, United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that—

- (1) the claim was filed for a malicious purpose;
- (2) the claim was filed solely to harass the party against

which it was filed; or

Oct. 26, 1998) (*unpublished*) (holding district court should have considered teleconferencing as an alternative to producing prisoner witness who was a security risk).

531. See, e.g., *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991) (noting use of telephone evidentiary hearing to assess frivolousness of claim).

532. But see *Williams v. Forcade*, No. Civ.A. 04-15 SECTION “I”(2), 2004 U.S. Dist. LEXIS 14494, at *1–2 (E.D. La. July 28, 2004) (*unpublished*) (directing that plaintiff participate in trial by telephone); *Bickham v. Blair*, No. Civ.A. 98-881, 1999 U.S. Dist. LEXIS 12773, at *3 (E.D. La. Aug. 16, 1999) (*unpublished*) (noting that an evidentiary hearing was held by telephone), *aff’d* 228 F.3d 408 (5th Cir. 2000); *Edwards v. Logan*, 38 F. Supp. 2d 463, 466–468 (W.D. Va. 1999) (authorizing video jury trial for Virginia prisoner held in New Mexico; analogizing to PLRA’s provisions concerning pretrial proceedings).

533. *United States v. Baker*, 45 F.3d 837 (4th Cir. 1995).

534. *United States v. Baker*, 45 F.3d 837, 845 (4th Cir. 1995).

535. See, e.g., *Muhammad v. Warden, Balt. City Jail*, 849 F.2d 107, 113 (4th Cir. 1988) (“[C]onsideration should be given to securing the prisoner’s presence, at his own or government expense, for trial of his action.”); *Poole v. Lambert*, 819 F.2d 1025, 1029 (11th Cir. 1987) (“[A] district court should consider all possibilities for affording a prisoner his day in court before dismissing his case for failure to prosecute.”).

536. See, e.g., *Bickham v. Blair*, No. Civ.A. 98-881, 1999 U.S. Dist. LEXIS 12773, at *3 (E.D. La. Aug. 16, 1999) (*unpublished*) (“[Plaintiffs] proposed witnesses and the defendants did not attend the telephone hearing because he did not provide the court with sufficient information to subpoena the prisoners he listed as witnesses, ...he did not list the defendants as witnesses, ... and the defense apparently chose not to call the defendants as witnesses.... Therefore, the claim that he was denied cross-examination of the defendants is without merit.”), *Bickham v. Blair*, 228 F.3d 408 (5th Cir. 2000).

(3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.⁵³⁷

This seldom-used provision, which applies only to federal incarcerated people, allows a court to take away good time credit based on what a court thinks about an incarcerated person's litigation activities, or activities during the case. Though the statute raises substantial questions about due process of law, it provides no procedural protections. It is not clear what due process requirements would apply. The only reported decisions applying this provision do not discuss due process.⁵³⁸

K. Diversion of Damage Awards

The PLRA includes two provisions about awarding damages in a successful suit brought by an incarcerated person:

Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.

Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of any such compensatory damages.⁵³⁹

These provisions say that any compensatory (money) damages won by an incarcerated person in a lawsuit will be first used to pay any restitution orders or damages that the incarcerated person has not yet paid. There is very little case law about these statutes.⁵⁴⁰ One important question is whether

537. 28 U.S.C. § 1932.

538. See *United States v. Williams*, No. 3:09-548-JFA, 2011 U.S. Dist. LEXIS 110297, at *1 (D.S.C. Sept. 26, 2011) (*unpublished*) (“The court finds that by filing a verified petition containing materially false statements of fact, the defendant presented false information to the court. Therefore, the court hereby revokes his earned release credit (‘good time credits’) pursuant to 28 U.S.C. § 1932.”); *United States v. Belt*, No. PJM 10-2921, 2011 U.S. Dist. LEXIS 81548, at *24–25 (D. Md. July 26, 2011) (*unpublished*) (denying revocation of good time credit because the government instituted the suit); *Armstrong v. Zickefoose*, No. CIV.A. 10-4388 RMB, 2010 U.S. Dist. LEXIS 121571, at *10 (D.N.J. Nov. 17, 2010) (*unpublished*) (stating an order regarding revocation of good time credit will be ordered because plaintiff misrepresented prior litigation); *Townsend v. United States*, No. CV410-005, 2010 U.S. Dist. LEXIS 64625, at *1, n.2 (S.D. Ga. May 19, 2010) (*unpublished*) (noting that, in a previous case, the court had revoked plaintiff's earned good time credit for filing a frivolous and malicious suit); *Rice v. Nat'l Sec. Council*, 244 F. Supp. 2d 594, 597 (D.S.C. 2001) (revoking earned good time credit and dismissing complaint as frivolous and malicious), *Rice v. Nat'l Sec. Council*, 46 F. App'x 212 (4th Cir. 2002) (*per curiam*) (*unpublished*); *Feurtado v. McNair*, No. C/A 3:99-2582-17BC, 2000 WL 34448882, at *1 (D.S.C. July 20, 2000) (*unpublished*) (revoking earned time credit on the grounds “that this action was malicious and intended to harass”), *Feurtado v. McNair*, 3 F. App'x 113 (4th Cir. 2001) (*per curiam*).

539. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 807–808, 110 Stat. 1321-66, 1321-75–1321-76 (1996). This provision is not codified, and appears after 18 U.S.C. § 3626 under the History heading.

540. See *Loucony v. Kupec*, No. 3:98 CV 61 (JGM), 2000 U.S. Dist. LEXIS 6620, at *4–5 (D. Conn. Feb. 17, 2000) (*unpublished*) (holding that a person who, after his release from prison, sued medical staff for their treatment of him while in a correctional facility was not a “prisoner” and the statute did not apply to him). Cf. *Hutchinson v. Watson*, No. 913CV862FJSRFT, 2014 WL 11515849, at *4 (N.D.N.Y. Aug. 13, 2014) (rejecting

the phrase “compensatory damages awarded” includes settlements of damage claims. As a matter of plain English, it would seem not, and that is the holding of the only relevant decision we are aware of.⁵⁴¹

L. Injunctions

The PLRA contains a number of provisions restricting courts’ abilities to enter and to maintain “prospective relief” (mostly injunctions, or court orders) in prison cases.⁵⁴²

1. Entry of Prospective Relief

Under the PLRA, courts may not enter prospective relief in prison cases unless:

[T]he court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.⁵⁴³

This standard is not very different from the law in effect before the PLRA,⁵⁴⁴ though the requirement that the court make these specific findings (“need-narrowness-intrusiveness” findings) is new. The statute also bars injunctive relief that requires state or local officials to exceed their normal local authority, unless 1) federal law requires the relief, 2) the relief is necessary to fix a federal law

plaintiff’s claim that notifying his victim of a settlement he received could form the basis of a retaliation suit, since the PLRA obligated the defendants to give notice), *Hutchinson v. Watson*, 607 F. App’x 116 (2d Cir. 2015).

541. In *Dodd v. Robinson*, Civil Action No. 03-F-571-N, Order, *1 (M.D. Ala. Mar. 26, 2004), in which a district attorney sought to satisfy a restitution order by moving in the court in which a case had been settled, the district court held that the PLRA provision concerning restitution orders “is not applicable in this case because the parties have reached a private settlement agreement.” The court expressed confidence that the District Attorney had ample means in state court to enforce the restitution order. *Cf. Torres v. Walker*, 356 F.3d 238, 243 (2d Cir. 2004) (holding that a “so ordered” stipulation settling a damage claim was not a money judgment). The *Hutchinson* case cited in the previous footnote did treat a settlement as an award, but did not discuss the meaning of “compensatory damages awarded” in doing so.

542. One federal appeals court has held that under the PLRA’s language, punitive damages are “prospective relief” subject to the PLRA’s limitations. *See Johnson v. Breeden*, 280 F.3d 1308, 1325–1326 (11th Cir. 2002) (remanding to district court for determination of whether punitive damages are narrowly drawn). Other courts have mostly ignored this decision. One exception is *Rieara v. Sweat*, No. CV205-174, 2007 U.S. Dist. LEXIS 18644, at *14–16 (S.D. Ga. Mar. 16, 2007) (*unpublished*) (finding that punitive damages are a form of prospective relief under the PLRA, but that the court could first determine whether a punitive damage was warranted and then later determine whether it was excessive). These two cases seem conceptually wrong because the prospective relief provisions are clearly written to deal with injunctions and make very little sense as applied to punitive damages. *See, e.g., Tate v. Dragovich*, No. 96-4495, 2003 U.S. Dist. LEXIS 14353, at *22 (E.D. Pa. Aug. 14, 2003) (*unpublished*) (stating that the court could find no case applying the prospective relief provision to a punitive damage award).

543. 18 U.S.C. § 3626(a)(1)(A); *see Brown v. Plata*, 563 U.S. 493, 531 (2011) (“Narrow tailoring requires a fit between the remedy’s ends and the means chosen to accomplish those ends. . . . [§ 3626(a)(1)(A)] means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010) (stating “the core concern of the intrusiveness inquiry [is] whether the district court has ‘enmeshed [itself] in the minutiae of prison operations,’ beyond what is necessary to vindicate plaintiffs’ federal rights. . . .”); *Benjamin v. Fraser*, 343 F.3d 35, 54 (2d Cir. 2003) (“Although the PLRA’s requirement that relief be ‘narrowly drawn’ and ‘necessary’ to correct the violation might at first glance seem to equate permissible remedies with constitutional minimums, a remedy may require more than the bare minimum the Constitution would permit and yet still be necessary and narrowly drawn to correct the violation.”). .

544. *See Smith v. Ark. Dept. of Corr.*, 103 F.3d 637, 647 (8th Cir. 1996) (observing that the PLRA “merely codifies existing law and does not change the standards for determining whether to grant an injunction.”).

violation, and 3) no other relief will correct the violation.⁵⁴⁵ This provision also appears to be consistent with prior law.⁵⁴⁶ The PLRA limits federal courts to prospective relief (relief that is ordered now against some future event) that corrects violations of “*federal rights*,” which means a court cannot enter an injunction based on a violation of state or local law.⁵⁴⁷

2. Preliminary Injunctions

Preliminary injunctions must meet the same standards that apply to other prospective relief, though the court does not need to make the required need-narrowness-intrusiveness findings immediately. A preliminary injunction automatically expires after ninety days unless the court makes the required findings and makes the order final.⁵⁴⁸ However, a court may grant a new preliminary injunction after the first has expired if the plaintiff shows that the conditions justifying the first injunction still exist.⁵⁴⁹ The PLRA’s requirements for preliminary injunctions are in addition to, not instead of, the usual requirements for such an injunction.⁵⁵⁰

3. Prisoner Release Orders

The PLRA contains special rules for “prisoner release orders,” which it defines as “any order . . . that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison.”⁵⁵¹ An order does not have to specifically direct the release of incarcerated people to be considered a prisoner release order.⁵⁵² Such orders are permitted only if previous, less intrusive relief has failed to fix the federal law violation in a reasonable time.⁵⁵³ In other words, releasing incarcerated people to correct the federal law violation may not be the first type of relief tried. A release order must be supported by clear and convincing evidence that “crowding is the primary cause of the violation of a Federal right” and no other relief will remedy the violation.⁵⁵⁴

545. 18 U.S.C. § 3626(a)(1)(B); *see, e.g.*, *Doe v. Cook County, Illinois*, 798 F.3d 558, 564 (7th Cir. 2015) (stating “under § 3626(a)(1)(B) the parties, like the court, must respect state law unless federal law leaves no other option”); *Coleman v. Brown*, 952 F. Supp. 2d 901, 904, 931–932 (E.D.Cal. 2013) (waiving all state and local laws that would interfere with compliance with a population limit), *stay denied*, *Coleman v. Brown* 960 F.Supp.2d 1057 (E.D. Cal. July 3, 2013), *stay denied sub nom.* *Brown v. Plata*, 563 U.S. 493 (2013); *Perez v. Hickman*, No. C 05-05241 JSW, 2007 U.S. Dist. LEXIS 44432, at *11, *16–17 (N.D. Cal. June 12, 2007) (*unpublished*) (ordering increase in salaries paid to prison dentists, contrary to state law, and finding PLRA standards met).

546. *See, e.g.*, *Stone v. City & Cty. of S.F.*, 968 F.2d 850, 861–865 (9th Cir. 1992) (holding, pre-PLRA, that provisions of consent decree that overrode state law were not the least intrusive option available and were thus prohibited); *LaShawn A. ex rel. Moore v. Barry*, 144 F.3d 847, 854 (D.C. Cir. 1998) (stating, pre-PLRA, that “[d]isregarding local law . . . is a grave step and should not be taken unless absolutely necessary.”).

547. *Handberry v. Thompson*, 446 F.3d 335, 344–346 (2d Cir. 2006) (holding that in prison cases the PLRA overrides federal courts’ “supplemental jurisdiction” to enforce state law).

548. 18 U.S.C. § 3626(a)(2).

549. *See, e.g.*, *Mayweathers v. Newland*, 258 F.3d 930, 935–936 (9th Cir. 2001) (upholding a second injunction when the defendants were then subject to a prior injunction that was being appealed, the injunctions were identical, and the granting of the first injunction raised no new issues unable to be reviewed by the court on appeal); *Coleman v. Brown*, 938 F. Supp. 2d 955, 990 (E.D. Cal. Apr. 5, 2013) (upholding an injunction that was “necessary to correct current and ongoing violations” of prisoners’ federal rights and “extend[ed] no further than necessary to correct those violations.”).

550. *Gates v. Fordice*, No. 4:71CV6-JAD, CONSOLIDATED WITH No. 4:90CV125-JAD, 1999 U.S. Dist. LEXIS 13443, at *2 (N.D. Miss. July 16, 1999).

551. 18 U.S.C. § 3626(g)(4).

552. *Brown v. Plata*, 563 U.S. 493, 511 (2011) (holding that an order that limited prison population to a percentage of the prisons’ design capacity, but did not necessarily require release of any prisoners since the defendants could comply by expanding capacity or transferring prisoners to county jails or out of state, was a prisoner release order because “it nonetheless has the ‘effect of reducing or limiting the prison population’”); *accord*, *Ruiz v. Estelle*, 161 F.3d 814, 825–827 (5th Cir. 1998).

553. 18 U.S.C. § 3626(a)(3)(A).

554. 18 U.S.C. § 3626(a)(3)(E)(i)–(ii).

One court has held that these requirements for prison release orders do not apply when the prison is trying to modify an order that existed before the PLRA was enacted.⁵⁵⁵

The PLRA requires convening a three-judge court before a “prisoner release order” can be issued. Either the party asking for the order, or the district court itself, can request these orders.⁵⁵⁶ In order to obtain a prisoner release order, the plaintiff will have to show a few things. First, the plaintiff must show that there has been a prior, less intrusive order that failed to correct the federal law violation that the plaintiff is seeking a remedy for. Second, the plaintiff must show that the defendants had a reasonable time to comply with the previous order.⁵⁵⁷ Finally, the plaintiff will have to show that “(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right.”⁵⁵⁸ Since the statute is clearly most concerned with crowding, requests to remove incarcerated people from a particular prison for reasons unrelated to crowding are not governed by the prisoner release provisions.⁵⁵⁹ However, in the context of the COVID-19 pandemic, most courts have held that requests to reduce prison populations to protect incarcerated people from the virus would be considered prisoner release orders.⁵⁶⁰

The PLRA permits state and local officials to intervene to oppose prisoner release orders.⁵⁶¹

4. Termination of Judgments

Under the PLRA, court orders in prison litigation, including consent judgments (a judgment the parties agree to), may be terminated after two years unless the court finds that there is a “current and ongoing violation” of federal law that, “extends no further than necessary” to correct a current the violation of federal law, and the “prospective relief” is narrowly drawn and the least intrusive means to correct the violation.⁵⁶² After this two-year period, orders may be challenged every year.⁵⁶³ An order may be challenged at any time if it was entered without the court finding that it “is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”⁵⁶⁴ Orders without these findings may be terminated immediately unless a current and ongoing federal law violation is shown. A “violation of the Federal right” means a violation of the federal Constitution, statutes, or regulations. Violation of the court order itself is not enough.⁵⁶⁵ “Current and ongoing” violation of federal law means one that

555. *Berwanger v. Cottey*, 178 F.3d 834, 836 (7th Cir. 1999) (citing 18 U.S.C. § 3626(a)(3)(A) and finding that the prison official’s request to modify an order could not be based on the PLRA because the order existed before the PLRA; however, the PLRA rules about *terminating* relief could still apply).

556. 18 U.S.C. § 3626(a)(3)(B)–(D).

557. 18 U.S.C. § 3626(a)(3)(C). *See Coleman v. Schwarzenegger*, No. S-90-0520 LKK JFM P, U.S. Dist. LEXIS 56043, at *2–5 (E.D.Cal., July 23, 2007) (*unpublished*) (citing materials supporting the showing required by § 3626(C)).

558. 18 U.S.C. § 3626(a)(3)(E).

559. *Plata v. Brown*, 427 F. Supp. 3d 1211 (N.D. Cal. 2013) (holding an order directing removal of medically vulnerable incarcerated people from a prison where Valley Fever was prevalent did not constitute a prisoner release order).

560. *See, e.g., Wilson v. Ponce*, No. CV 20-4451-MWF (MRWx), 2020 U.S. Dist. LEXIS 160346, at *5 (C.D. Cal. July 14, 2020) (holding that petitioners’ request to exercise social distancing cannot be separated from overcrowding and is therefore a prisoner release order); *Alvarez v. Larose*, 445 F. Supp. 3d 861, 868 (S.D. Cal. 2020); *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1124–26 (N.D. Ill. 2020).

561. 18 U.S.C. § 3626(a)(3)(F); *see Ruiz v. Estelle*, 161 F.3d 814, 818–821 (5th Cir. 1998) (holding that PLRA grants individual legislators the right to intervene in litigation regarding prisoner release orders “where [such legislators’] legislative jurisdiction or function includes appropriation of funds for the construction, operation, or maintenance of prison facilities subject to the challenged prisoner release order”).

562. 18 U.S.C. § 3626(b)(1)–(3).

563. 18 U.S.C. § 3626(b)(1)(A)(ii).

564. 18 U.S.C. § 3626(b)(2); *see Tyler v. Murphy*, 135 F.3d 594, 597 (8th Cir. 1998) (noting that, absent the required findings, the immediate termination provision rather than the two-year provision applies).

565. *Plyler v. Moore*, 100 F.3d 365, 370 (4th Cir. 1996) (holding that a violation of incarcerated peoples’ rights under the consent decree was not a violation of a “federal right” under the PLRA).

is going on at the time the termination motion is litigated, not one that is anticipated to occur if the court order is terminated.⁵⁶⁶

Constitutional challenges asserting that the provision violates the separation of powers, the Equal Protection Clause, and the Due Process Clause have all been unsuccessful in the past.⁵⁶⁷

5. Automatic Stay

The PLRA provides that courts must quickly rule on motions to terminate prospective relief. The PLRA also says that the prospective relief is automatically stayed (suspended) on the thirtieth day after the motion is made. If prospective relief is stayed the court will no longer enforce a rule or ruling requiring prison officials to remedy the violation.⁵⁶⁸ The thirty days can be extended to sixty days if good cause (a good reason) is shown. The “general congestion of the court’s calendar” is not considered a good reason.⁵⁶⁹ Good cause may be established by showing that there is reason to believe there are continuing federal law violations in the prisons at issue.⁵⁷⁰ The Supreme Court has held that the automatic stay provision does not violate the principle of separation of powers in the Constitution.⁵⁷¹

6. Settlements

Under the PLRA, settlements that include prospective relief must meet the same need-narrowness-intrusiveness requirements that the PLRA establishes for other court orders.⁵⁷² In other words, the court must find that these settlements are narrowly drawn, necessary to correct federal law violations, and the least intrusive way of correcting them. In practice, however, parties who settle agree to these findings, and the court usually approves them. Parties can enter into “private settlement agreements” that do not meet the PLRA standards as long as these agreements cannot be enforced in federal court.⁵⁷³ In effect, they must be contracts enforceable in state court. The only federal court recourse for violation of a private settlement agreement is to reinstate the action as it was before the settlement, and litigate the case to conclusion. These agreements are not subject to the judgment

566. Cason v. Seckinger, 231 F.3d at 777, 784 (11th Cir. 2000); Benjamin v. Jacobson, 172 F.3d 144, 166 (2d Cir. 1999); Graves v. Arpaio, No. CV-77-0479-PHX-NVW, 2008 U.S. Dist. LEXIS 85935 (D. Ariz. Oct. 22, 2008), *aff’d*, 623 F.3d 1043 (9th Cir. 2010).

567. Court of appeals decisions and district court decisions upholding the statute include Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001); Gilmore v. California, 220 F.3d 987 (9th Cir. 2000); Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999); Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999); Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999); Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997); Inmates of Suffolk Cty. Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); and Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996).

568. Richard J. Costa, Note, *The Prison Litigation Reform Act of 1995: A Legitimate Attempt to Curtail Frivolous Inmate Lawsuits and End the Alleged Micromanagement of State Prisons or a Violation of Separation of Powers?*, 63 BROOK. L. REV. 319, 324 (1997).

569. 18 U.S.C. § 3626(e)(3).

570. See Plata v. Schwarzenegger, No. C01-1351 TEH, 2009 U.S. Dist. LEXIS 20438, at *1 (N.D. Cal. Feb. 26, 2009) (granting less than a 60-day extension where it was undisputed that serious harm would result from delaying health care reforms but a hearing was scheduled on termination in less than 60 days); Lancaster v. Tilton, No. C 79-01630 WHA, 2007 U.S. Dist. LEXIS 89252, at *1 (N.D. Cal. Nov. 19, 2007) (holding evidence of continuing sanitary deficiencies were good cause to extend the stay). One court has held that good cause was established by “extraordinary complexity of the issues on which the parties must prepare to present evidence and the continuing opacity about what orders or provisions are being challenged.” Braggs v. Dunn, No. 2:14cv601-MHT, 2020 U.S. Dist. LEXIS 186833, at *4 (M.D. Ala. Oct. 1, 2020) (granting plaintiffs’ motion for on-site prison inspections related to mental-health care even during the COVID-19 pandemic because the minimal risk of transmission is outweighed by plaintiff prisoners’ need to gather evidence to respond to the defendant’s motion to terminate the court’s remedial orders.”

571. Miller v. French, 530 U.S. 327, 348, 120 S. Ct. 2246, 2259, 147 L. Ed. 2d 326, 343 (2000).

572. 18 U.S.C. § 3626(c)(1).

573. 18 U.S.C. § 3626(c)(2).

termination provisions.⁵⁷⁴ The PLRA does not restrict settlements that involve money damages in place of other forms of relief.

M. Conclusion

By passing the PLRA, Congress has made it more difficult for you to have your claims heard in federal court. Although you might feel that some of its provisions are unfair, you cannot ignore the PLRA's strict requirements. To give yourself the best possible chance of getting your claim into federal court and winning, you will have to get familiar with all the portions of the PLRA that are relevant for your case.

In going back through this Chapter, you should pay special attention to the “three strikes” provisions of the PLRA (see Part C) and to the administrative procedure exhaustion requirements (see Part E). The three strikes rules should encourage you to consider your decision whether to bring suit very carefully, because if a court decides you have brought a frivolous suit, your ability to bring future suits may be jeopardized. You must also be certain you fully understand the exhaustion requirements, since courts *will not* allow your suit to proceed unless you have made every effort to resolve your grievance through administrative procedures.

574. Shultz v. Wells, 73 F. App'x 794, 795–796 (6th Cir. 2003) (*unpublished*); Davis v. Gunter, 771 F. Supp. 2d 1068, 1071–1072 (D. Neb. 2011); York v. City of El Dorado, 119 F. Supp. 2d 1106, 1109 (E.D. Cal. 2000).

Chapter 15

INMATE GRIEVANCE PROCEDURES*

A. Introduction

If you have a complaint concerning your treatment at a state correctional facility, you must consult the state's formal inmate grievance procedures. According to the Prison Litigation Reform Act ("PLRA"), you must "exhaust" (use up) all of the available grievance procedures before you can take your complaint to court.¹ Before filing any type of lawsuit, you should carefully read *JLM*, Chapter 14, "The Prison Litigation Reform Act." In New York, for example, state law and the New York Inmate Grievance Program ("IGP") require the Commissioner of the Department of Correctional Services and Community Supervision ("DOCCS") to establish a committee in each correctional facility. These committees address inmate grievances (complaints about the way the Department of Corrections applies a policy and how it negatively affects you).² The purpose of the IGP is to "provide[] each inmate an orderly, fair, simple, and expeditious method for resolving grievances," and "to promote mediation and conflict reduction in the resolution of grievances."³ The details of this program appear in DOCCS Directives 4040 and 4041,⁴ and in Title 7 of the Codes, Rules, and Regulations of the State of New York.⁵ Directive 4002 describes the Inmate Liaison Committee ("ILC"), which is concerned with the general welfare of incarcerated people.⁶

This *JLM* Chapter will help you make an informed decision about how to proceed with your grievance, using New York's IGP as an example. Part B discusses the PLRA requirement that you go through the entire complaint process in your prison before taking your claim to federal court. Part C defines the term "grievance," discusses what kinds of claims are "non-grievable" (meaning that you cannot use the IGP), and provides you with an overview on how to write your grievance. Part D describes the basic structure of the New York IGP. Part E looks closely at the relevant New York DOCCS directives, explaining specific steps to follow when filing a grievance through the New York

* This Chapter was revised by Erin LaFarge based in part on previous versions by Sarah Martinez, Samuel J. Levine, Wendy Lang, Patricia A. Sheehan, and Caroline Lim Starbird.

1. 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.")

2. See N.Y. CORRECT. LAW § 139(1) (McKinney 2014) ("The commissioner shall establish, in each correctional institution under his jurisdiction, grievance resolution committees to resolve grievances of persons within such correctional institution."). This law was enacted in response to the 1971 Attica Prison uprising. The McKay Commission looked into the cause of that uprising and recommended procedures to resolve prison issues through an administrative process. See also *Patterson v. Smith*, 53 N.Y.2d 98, 101, 423 N.E.2d 23, 25, 440 N.Y.S.2d 600, 602 (1981).

3. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.1(a)–(b) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.1(a)–(b) (2016). New York Department of Corrections and Community Supervision directives can be found at <http://www.doccs.ny.gov/Directives/directives.html>. (last visited Nov. 19, 2019). Directives related to inmate grievances can be found under "facility management." Directive 4040 reprints the regulations found in § 701, and Directive 4041 reprints the regulations found in § 702. The rest of the footnotes in this document will cite directly to both the regulations and Directive 4040 or Directive 4041.

4. See Chapter 7 of the *JLM*, "Freedom of Information," to learn how to obtain a copy of these directives through the state Freedom of Information Law ("FOIL") and the federal Freedom of Information Act ("FOIA"). In addition, ask the librarian if your prison law library has copies of these directives.

5. N.Y. COMP. CODES R. & REGS. tit. 7, § 701–702 (2012). Ask the librarian if your prison law library has this code.

6. State of New York, Department of Corrections and Community Supervision, Directive No. 4002, Inmate Liaison Committee (ILC) (2019). See *JLM*, Chapter 7 to learn how to obtain a copy of this directive through the state Freedom of Information Law ("FOIL") and the federal Freedom of Information Act ("FOIA"). In addition, ask the librarian if your prison law library has a copy of the directive.

IGP. Part F discusses the publication of rules for other states' inmate grievance procedures and how to find these rules.

If you are a foreign national (not a U.S. citizen) and are having problems with prison conditions, or need to contact someone in your home country, you may want to contact your consulate. Consult the *JLM Immigration and Consular Access Supplement* for more information on how to raise these claims.

B. Exhausting Your Administrative Remedies

The PLRA requires you to go through your prison's entire complaint process before you can bring a federal court claim under 42 U.S.C. § 1983 (a federal law that deals with incarcerated people's complaints).⁷ Therefore, even if you believe that the grievance system in your prison is unfair or pointless, you still have to go through all of the steps of the process to try to resolve your grievance *before* you file a lawsuit.⁸ In New York, for example, the IGP is not considered exhausted until you receive a final decision on your complaint from the highest grievance committee, such as New York's Central Office Review Committee ("CORC"). If you bring a complaint in federal court under 42 U.S.C. § 1983 without first exhausting administrative remedies, your case will be dismissed, and you might be barred from bringing a future case.⁹ Dismissal for non-exhausted claims is supposed to be "without prejudice," which means that you will be able to come back to court after you have fully pursued your prison's grievance procedures. However, some judges might dismiss a case with prejudice. Dismissal "with prejudice" means that you cannot take that particular issue back to court.

In addition to filing your grievance under federal law, some states allow you to file your grievance under state law, too. In New York, for example, you may challenge the CORC's decision under Article 78 of the New York Civil Practice Law and Rules.¹⁰ Just like the federal grievance procedures, you may not bring an Article 78 proceeding until you first pursue all administrative remedies available through the IGP.¹¹ Even if the Inmate Grievance Resolution Committee ("IGRC") denies your

7. 42 U.S.C. § 1997e(a). Note that the PLRA exhaustion requirement applies only to cases filed on or after April 26, 1996 (the effective date of the PLRA), including cases where the actions complained of occurred before the enactment. It does not apply to actions or appeals filed *before* its passage. *See Jones v. Bock*, 549 U.S. 199, 216, 127 S. Ct. 910, 921, 166 L.Ed. 2d 798, 813 (2007) (holding that while incarcerated person's claims can be dismissed because they have not yet been exhausted, there is no requirement that exhaustion be demonstrated in the incarcerated person's pleading); *Ancrum v. St. Barnabas Hosp.*, 301 A.D.2d 474, 475, 755 N.Y.S.2d 28, 31 (1st Dept. 2003) (holding that the PLRA exhaustion requirement applies to all incarcerated people who sue while they are incarcerated—including formerly incarcerated people who are released before a ruling on their suit is issued). *See* Chapter 16 of the *JLM*, "Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law," for more information on 42 U.S.C. § 1983 actions.

8. If you receive a satisfactory remedy from the IGP, then you will not need to go to court. If you are unsatisfied with the result of the IGP, you may then file a lawsuit in federal court.

9. *See Wendell v. Asher*, 162 F.3d 887, 892 (5th Cir. 1998) (finding that while incarcerated person's Section 1983 claim was properly dismissed for failure to exhaust administrative remedies, the incarcerated person can still refile his action in district court once he has exhausted his administrative remedies); *Wright v. Morris*, 111 F.3d 414, 417 n.3 (6th Cir. 1997) (noting that where alleged violations occurred after PLRA's enactment and incarcerated people have both notice that exhaustion is required and a reasonable opportunity to file administrative complaints, the exhaustion requirement is mandatory). However, if the statute of limitations has run on your claim before you return to court, your claim may be permanently barred. *See, e.g., Dorsey v. Pa. Dep't of Corr.*, CIV NO. 1:16-CV-588, 2016 U.S. Dist. LEXIS 166728 (M.D. Pa. Nov. 30, 2016) (*unpublished*) (holding that, where plaintiff "knew or should reasonably have known that she has been injured and that her injury has been caused by another party's conduct" for the duration of the two-year statute of limitations, her PLRA claim was time-barred). In addition, if you are able to bring your claim back to court, you will probably have to pay another filing fee to refile your claim in court.

10. *See* Chapter 22 of the *JLM* on Article 78 proceedings. Article 78 proceedings allow you to challenge decisions made by New York administrative bodies or officers, like the Central Office Review Committee.

11. *See Patterson v. Smith*, 53 N.Y.2d 98, 100–101, 423 N.E.2d 23, 24–25, 440 N.Y.S.2d 600, 601–602 (1981) (dismissing incarcerated person's Article 78 claim because he failed to exhaust prison's grievance procedures); *Roberts v. Coughlin*, 165 A.D.2d 964, 966, 561 N.Y.S.2d 852, 854 (3d Dept. 1990) (finding Article 78 petition should have been dismissed for failure to exhaust all administrative remedies).

grievance, you still may not bring an Article 78 proceeding until you exhaust *all* of your administrative remedies.¹² In New York, this means you first have to appeal the IGRC's denial to your prison's superintendent. If your grievance is again denied, you must appeal to the CORC. If the CORC also denies your grievance, only then are you allowed to bring a lawsuit in state court under Article 78. This is because the CORC is the committee designated to provide final review of your claim under the state administrative grievance procedures.¹³

As you go through the inmate grievance procedures, it is important to bring up, from the very beginning, any issues you think you might want to raise in a later lawsuit. If you fail to state a particular claim in your original grievance, a court may later consider this claim "unexhausted." As a result, the court may dismiss this unexhausted claim and hear only the claims that you brought up in your original grievance. Courts are required to hear your exhausted claims and are no longer allowed to dismiss the entire action if only some of the claims are unexhausted.¹⁴ Keep in mind that in order to exhaust all of your claims, you may have to use more than one administrative procedure. For example, you may have to go through one review process for one of your claims and a different review process for another of your claims.¹⁵

If you have exhausted your administrative remedies and wish to file a complaint in federal court, make sure that your complaint states that you have already exhausted all other remedies. Even though the Supreme Court held that plaintiffs are not required to include this in their complaints, stating that you have exhausted all other remedies will help prevent issues down the line.¹⁶

C. Grievances in New York

1. What Grievances Can Be Raised?

A grievance is defined by the New York State DOCCS as "a complaint ... about the substance or application of any written or unwritten policy, regulation, procedure or rule of the Department of Correctional Services or any of its program units, or the lack of a policy, regulation, procedure or rule."¹⁷ You may raise a grievance only if it relates to a situation that affects or will affect you personally.¹⁸ Examples of grievable issues include: prison official retaliation, inadequate medical care, and assignment of prison jobs.¹⁹

12. See *People ex rel. Chapman v. Sullivan*, 135 A.D.2d 675, 676, 522 N.Y.S.2d 249, 250 (2d Dept. 1987) (holding that petitioners are not entitled to an Article 78 hearing until they have exhausted all administrative remedies); *Joyce v. Mann*, 190 A.D.2d 922, 922, 593 N.Y.S.2d 579, 579 (3d Dept. 1993) (holding petitioner not entitled to Article 78 relief because he failed to exhaust all administrative remedies).

13. See section D(1)(c) of this chapter for more information about CORC.

14. See *Jones v. Bock*, 549 U.S. 199, 202–203, 127 S. Ct. 910, 914, 166 L. Ed. 2d 798 (2007) (holding that judicial screening of incarcerated people's complaints requiring total exhaustion is not permitted under the PLRA).

15. For example, in New York, there is a separate claims review process for inmate personal property claims. You need to exhaust this procedure before bringing a personal property claim in court. See N.Y. COMP. CODES R. & REGS. tit. 7, § 1700 (2012).

16. *Jones v. Bock*, 549 U.S. 199, 202–203, 127 S. Ct. 910, 914, 166 L. Ed. 2d 798 (2007).

17. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(a) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.2(a) (2016) ("a letter addressed to facility or Central Office staff is not a grievance,").

18. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(b) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.3(b) (2016). For example, a proper grievance could be a complaint about how a new prison policy negatively affects your day-to-day life. An improper grievance would be a complaint about something that may make you angry or upset, but does not actually affect your day-to-day life.

19. Examples of grievable issues in cases where the courts have required incarcerated people to exhaust administrative remedies include the following: *Underwood v. Wilson*, 151 F.3d 292, 296 (5th Cir. 1998) (incarcerated person brought Section 1983 suit against prison officials alleging they assigned him to jobs that forced him to perform work beyond his physical capabilities and medical work restrictions); *White v. McGinnis*, 131 F.3d 593, 594–595 (6th Cir. 1997) (incarcerated person alleged that prison officials retaliated against him

2. Non-Grievable Issues²⁰

An issue is “non-grievable” when the grievance system has no remedy (fix) for it. In other words, the grievance system cannot be used to resolve that type of issue. The PLRA requires that you exhaust the IGP if *any* remedy is available to you.²¹ This means that you must still go through the IGP even if it cannot give you the exact remedy you want. If no remedy is available through the IGP, you are not required to exhaust the grievance system.²² However, if there is some other administrative remedy for your claim, you will be required to pursue that remedy. For example, although an appeal of a temporary release ruling may be considered non-grievable by the IGP, you will still be required to pursue your appeal using the procedures for the temporary release program.²³

A grievance committee may dismiss and close your grievance as non-grievable if:²⁴

- (1) you have made no effort to resolve the complaint through procedures and officials at your prison;
- (2) you are not or will not be personally affected by the issue you are complaining about;
- (3) your grievance is about the decision of a program with already established procedures, including temporary release programs,²⁵ family reunion programs,²⁶ or media review²⁷ programs, disciplinary proceedings or time allowance committee proceedings,²⁸ central

after he filed a lawsuit against another prison official); *Barry v. Ratelle*, 985 F. Supp. 1235, 1238 (S.D. Cal. 1997) (incarcerated person brought civil rights action against prison officers claiming deliberate indifference to his serious medical needs in violation of his 8th and 14th Amendment rights).

20. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(e) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.3(e) (2016).

21. *See Booth v. Churner*, 532 U.S. 731, 733–734, 121 S. Ct. 1819, 1821, 149 L. Ed. 2d 958, 962 (2001) (holding that the PLRA requires incarcerated people to exhaust any administrative remedies that are available before suing over prison conditions, even if the available remedy is not what you are seeking); *see also Alexander v. Hawk*, 159 F.3d 1321, 1326–1327 (11th Cir. 1998) (holding that an incarcerated person was required to submit his claims to the available prison grievance program even if the relief offered by that program was not necessarily plain, speedy, and effective in comparison to the federal court system); *Sallee v. Joyner*, 40 F. Supp. 2d 766, 770 (E.D. Va. 1999) (holding that an incarcerated person must bring confinement-related grievances to the Administrative Remedy Program even if he seeks money damages, which are not available through the Administrative Remedy Program).

22. *See Davis v. Frazier*, No. 98 Civ. 2658 (HB), 1999 U.S. Dist. LEXIS 8911, at *9–10 (S.D.N.Y. June 15, 1999) (*unpublished*) (citing State of New York, Department of Correction Services, Directive No. 4040, Directive No. 3375R, which states that complaints about alleged assaults or verbal harassment and matters under investigation by the Inspector General are non-grievable); *Kearsey v. Williams*, No. 99 Civ. 8646, 2004 U.S. Dist. LEXIS 18727, at *9–10 (S.D.N.Y. Sept. 20, 2004) (*unpublished*) (finding that an incarcerated person was informed by a written decision that, under State of New York, Department of Corrections and Community Supervision, Directive No. 3375R, his complaint was non-grievable, which is why the incarcerated person sued in court); *see also Marcello v. Dept. of Corr.*, No. 07 Civ. 9665, 2008 U.S. Dist. LEXIS 60895, at *9 (S.D.N.Y. July 30, 2008) (*unpublished*) (“[Incarcerated people] may overcome the exhaustion requirement only if they are able to show either (1) that administrative remedies were not actually ‘available’ to them; (2) that defendant should be estopped from raising plaintiffs’ failure to exhaust as an affirmative defense; or (3) that special circumstances exist that excuse plaintiffs’ non-compliance with official procedural requirements.”).

23. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6 (2012).

24. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(i) (2016).

25. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i)(a)–(c) (2012).

26. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i)(c)(1) (2012).

27. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i)(c)(1) (2012).

28. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i)(c)(2) (2012).

monitoring,²⁹ inmate claims, or records review procedures,³⁰ or any other program or procedure involving a written appeal which extends review outside of the facility;³¹

(4) your grievance involves issues outside DOCCS' supervision; or

(5) your grievance relates only to an individual no longer in your facility.

If a majority of the committee (three out of four members) votes that your grievance falls into one of these categories, your grievance will be dismissed as non-grievable.³² If there is less than a majority, the committee will hear your grievance.³³ If you believe that your grievance was improperly dismissed as non-grievable, you can apply for review directly to the IGP supervisor. You must do so within seven calendar days after receiving the committee's decision to dismiss the grievance.³⁴

You cannot use the IGP for complaints concerning the decisions of other committees such as those relating to disciplinary proceedings and records review as listed above.³⁵ But you can use the IGP to file a grievance concerning the IGP's general policies, rules, and procedures.³⁶ However, complaints you may have against any policy, regulation, or rule of an outside agency, or action taken by an outside agency, are non-grievable under the New York IGP.³⁷ Outside agencies are those not under the supervision of the DOCCS Commissioner, including the Division of Parole, Citizenship and Immigration Services,³⁸ and the Office of Mental Health.³⁹ Note that New York City DOC Directive 3376, Inmate Grievance Resolution Program, sets out non-grievable issues specific to New York City jails (as opposed to New York prisons).⁴⁰

29. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i)(c)(3) (2012).

30. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i)(c)(3) (2012). Records review includes freedom of information (FOI) requests and expunction (erasing a record). See Chapter 7 of the *JLM*, "Freedom of Information," for information about FOI requests and appeals.

31. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(e)(1) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.3(e)(1) (2016).

32. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(i) (2016).

33. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(iv) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(iv) (2016).

34. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(iii) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(iii) (2016).

35. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(e)(2) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.3(e)(2) (2016); *see, e.g.*, *Harris v. Coughlin*, 143 A.D.2d 1018, 1018, 533 N.Y.S.2d 604, 605 (2d Dept. 1988) (holding that where administrators deny an incarcerated person's temporary release application and also his only chance at administrative appeal, the incarcerated person can then seek judicial review).

36. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(e)(3) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.3(e)(3) (2016). An example of a rule that could be challenged using the IGP is the rule governing membership of the Temporary Release Committee. *See*

Cintron v. Coughlin, 141 A.D.2d 1006, 1007, 531 N.Y.S.2d 46, 47 (3d Dept. 1988) (allowing incarcerated person to challenge his rejection for release by the Temporary Release Committee by arguing that a parole officer should not be allowed on the committee). Note that this decision is pre-PLRA, but it serves as an example of the grievable rules of the committees listed in DOCCS Directive 4040.

37. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i)(d) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(i)(d) (2016).

38. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(f) (2012). The U.S. Citizenship and Immigration Services is a bureau of the Department of Homeland Security and was formerly referred to as Immigration and Naturalization Services.

39. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(f) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.3(f) (2016).

40. New York City Department of Correction, Directive No. 3376, Inmate Grievance and Request Program § IV(B)(2) (2012), *available at* https://www1.nyc.gov/assets/doc/downloads/directives/Directive_3376_Inmate_Grievance_Request_Program.pdf

Finally, if you are filing a claim for loss of or damage to personal property, the New York State Court of Claims requires you to first exhaust the administrative procedures available for paying back incarcerated people, and then file your claim within 120 days of doing so.⁴¹ The IGP cannot be used to do this. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for more information about property claims.

If you are unsure whether an issue is grievable under the IGP, you should file a grievance, and the committee will decide through the grievance process in Section 701.5 of DOCCS Directive 4040.⁴²

3. How to Write an Effective Grievance

When using the IGP, you should follow several guidelines to increase your chances of obtaining relief (help). First, if you file a formal grievance with a grievance resolution committee, write out your grievance in detail and list exactly what attempts you made to resolve the problem.⁴³ If you do not try to resolve the problem on your own, your grievance may be dismissed and closed at the grievance committee hearing.⁴⁴

Second, your complaint must show that you are personally affected by the policy or issue that you are filing a grievance against.⁴⁵ If that is not the case, your complaint must show that you will be affected at some point in the future unless relief is granted and changes are made.⁴⁶ Grievances submitted by third parties will be sent to the Inmate’s Grievance Coordinator and Inmate Grievance Resolution Program Director. The Grievance Coordinator will speak to the corresponding incarcerated person to determine if the incarcerated person wishes to pursue the formal grievance process. If the corresponding incarcerated person declines to pursue this process, the grievance will not be addressed.

Third, you should state the problem accurately and precisely. Using inflammatory, disrespectful, or offensive language (such as curse words) in your complaint will reduce your chances of success.

Fourth, the more specific you are about the relief you are seeking, the more likely you are to receive it. You should list in detail every aspect of relief that you seek because the Inmate Grievance Resolution Committee may not consider types of relief that you do not specifically request. For example, explain the conditions or policies you want changed.

Finally, you should keep copies of all papers filed and received. For a more detailed discussion of what information you must include in your grievance, see Part E(1)(b)(i) of this chapter.

(last visited Nov. 4, 2019). This city jail grievance directive lists the following issues as non-grievable: matters under investigation by the Inspector General; complaints pertaining to an alleged assault or harassment; complaints where the remedy involves the removal of a staff person from an assignment, or the censure, discipline, or termination of a staff person; matters outside the jurisdiction of the Department of Correction; and complaints involving any program or procedure having its own administrative or investigative process, such as requests for accommodation based on disability or claims for discrimination based on disability, or Freedom of Information Law requests.

41. N.Y. CT. CL. ACT § 10(9) (McKinney 2009).

42. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(e) (2012); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.3(e) (2016). The committee has 16 days to decide the issue informally. If the grievant is not satisfied with the informal solution, the committee will schedule a full hearing. The full hearing must be within 16 days of the receipt of the grievance. After the full hearing, the committee will deliberate in private session. The committee must issue its decision in writing to the grievant within two days.

43. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(2); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(a)(2) (2016).

44. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 701.3(a), 701.5(b)(4)(i)(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program §§ 701.3(a), 701.5(b)(4)(i)(a) (2016).

45. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 701.3(b), 701.5(b)(4)(i)(b); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program §§ 701.3(b), 701.5(b)(4)(i)(b) (2016).

46. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 701.3(b), 701.5(b)(4)(i)(b); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program §§ 701.3(b), 701.5(b)(4)(i)(b) (2016).

D. The Basic Structure of the New York IGP

1. Levels of Authority

The IGP has three levels of authority. Higher levels of authority supervise lower levels of authority. The three levels, starting with the lowest, are: the Inmate Grievance Resolution Committee ("IGRC"), the Superintendent, and the Central Office Review Committee ("CORC").⁴⁷

(a) The Inmate Grievance Resolution Committee ("IGRC")

Each correctional institution must have an IGRC.⁴⁸ The IGRC must be a five-person group, made up of two voting incarcerated people, two voting staff members, and a non-voting chairperson.⁴⁹ The incarcerated IGRC representatives are elected by their peers for a term of six months and ordinarily serve full-time.⁵⁰ An incarcerated representative may not be removed from his position without a limited due process hearing.⁵¹

(b) The Role of the Superintendent and Staff

The superintendent selects staff IGRC representatives from a list of personnel who successfully complete a training course designed for individuals who want to serve as IGRC representatives.⁵² The Superintendent must ensure that the IGP staff is trained and available.⁵³ Chairpersons for IGRC hearings are selected by the IGP Supervisor from a list submitted by the IGRC representatives.⁵⁴ The chairperson may be an incarcerated person, staff member, or a volunteer associated with the facility's program. Incarcerated people may communicate with the Superintendent when appealing a decision by the IGRC. Incarcerated people may also communicate with the Superintendent when the Superintendent issues a decision regarding a grievance. Incarcerated people may also interact with the Superintendent when he conducts an investigation.

(c) The Central Office Review Committee ("CORC")

CORC consists of Deputy Commissioners and staff members.⁵⁵ It functions on behalf of and under the authority of the Commissioner of Correctional Services.⁵⁶ An Office of Diversity Management representative attends CORC hearings and may offer input on grievances alleging discrimination, but cannot vote.⁵⁷ Incarcerated people may communicate directly with CORC when appealing a decision of the Superintendent.

47. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.1(c); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.1(c) (2016).

48. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.1(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.1(a) (2016).

49. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.4(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.4(a) (2016).

50. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.4(b)(2),(4); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.4(b)(2),(4) (2016).

51. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.4(c)(1); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.4(c)(1) (2016).

52. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.4(d); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.4(d) (2016).

53. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.4(d); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.4(d) (2016).

54. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.4(f); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.4(f) (2016).

55. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(2)(i); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(i) (2016).

56. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(2)(ii); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(ii) (2016).

57. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(2)(i); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(i) (2016).

CORC decisions have the effect of directives. CORC decisions requiring corrective action are implemented by the appropriate facility and/or departmental office.⁵⁸ Although the Director of the IGP is not a voting member of the CORC, he is responsible for the administrative function of the IGP and for ensuring that the appropriate facility and/or departmental office carry out CORC decisions.⁵⁹

E. The New York IGP Rules

Understanding how the IGP works will help you use the program effectively. The rules are in two DOCCS directives. Directive 4040 contains the rules for the general program, while Directive 4041 contains alternative rules for special facilities. The policies, rules, and procedures contained in Directives 4040 and 4041 are also in Title 7 of the Codes, Rules, and Regulations of the State of New York.⁶⁰ Also, Directive 4002 establishes the Inmate Liaison Committee (“ILC”), which is concerned with the general welfare of incarcerated people.

1. Directive 4040: The Inmate Grievance Program

(a) General Procedures

IGP procedures work along three levels of authority, in order from lowest to highest: the IGRC, the Superintendent, and the CORC. As noted earlier, before filing a complaint with the IGRC, you should try to resolve the complaint on your own through existing formal or informal methods.

(b) The IGRC

(i) Filing the Complaint⁶¹

You must submit your complaint to the Grievance Clerk, using the Inmate Grievance Complaint Form 2131, within twenty-one calendar days of the incident described in your complaint.⁶² In some cases, the IGP supervisor can approve exceptions to this time limit if you attempt to resolve the situation on your own or if your complaint is referred back to the IGP by the courts.⁶³ If for some reason a Grievance Form is not available, you should submit your complaint to the clerk on a piece of paper. Your Grievance Form must include:

- Your name;
- Department Identification Number;
- Housing unit, program assignment, and other identifying information;
- A short, specific description of the problem and the remedies you are requesting; and
- Details of the actions you have already taken to try to resolve the complaint, including people you have contacted and responses you have received.

If you submit your complaint on a plain piece of paper, be sure to include the same information.

(ii) IGRC Hearing⁶⁴

If there is no immediate resolution after you file your complaint, the full IGRC will consider your complaint. If a hearing is necessary, it must be held within sixteen calendar days after your complaint

58. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(2)(ii); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(ii) (2016).

59. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(2)(iii); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(iii) (2016).

60. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 701–702.

61. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(a) (2016).

62. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(1); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(a)(1) (2016).

63. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(g); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(g) (2016).

64. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(2); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2) (2016).

is received.⁶⁵ The IGRC will conduct the hearing at a set time and place. At the hearing, you, your advisor, anyone the grievance directly affects, or any witnesses, can offer evidence. The IGRC will judge the relevance and importance of the evidence offered.⁶⁶

You can miss your IGRC hearing twice before the committee will rule in your absence, but only if you miss your hearing for a legitimate reason, such as a visit, parole hearing, program committee, sick call, keeplock (confinement to cell), etc.⁶⁷ However, at the third scheduled hearing, it will rule in your absence, even if you have a good excuse. You should make every effort to be at the hearing so you can explain your evidence.

If your confinement status prevents you from appearing within sixteen days and you will be released within thirty calendar days, you can have the hearing postponed until your release or have the hearing held in your absence.⁶⁸ But if you will not be released within thirty days, the hearing will be held without you.⁶⁹

(iii) Committee Decision/Recommendation⁷⁰

After the hearing, the IGRC will discuss the complaint privately. When it has reached a decision, the IGRC may choose to tell you its decision orally. Within two working days of the hearing, the Committee must inform you of its decision and reasons in writing.⁷¹ If the decision requires action by the Superintendent or Central Office, the IGRC will make recommendations for the Superintendent to respond and take action. If a majority of the committee cannot agree on a decision, your complaint will be sent to the Superintendent for a response.⁷²

(iv) Dismissals⁷³

As discussed in Part C, the IGRC may dismiss and close your grievance if it decides: (1) you have made no effort to resolve the complaint on your own “through existing channels,” (2) you are not or will not be personally affected by the issue you raise, (3) you seek a remedy that is available through other DOCCS programs, (4) your grievance involves issues outside the supervision of DOCCS, or (5) the grievance is institutional and the only person affected by the grievance has been released or paroled.⁷⁴

65. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(2)(ii); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii) (2016).

66. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(2)(ii)–(iii); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii)–(iii) (2016).

67. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(2)(ii)(b)–(c); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii)(b)–(c) (2016).

68. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(2)(ii)(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii)(a) (2016).

69. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(2)(ii)(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii)(a) (2016).

70. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(3); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(3) (2016).

71. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(3)(i); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(3)(i) (2016).

72. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(3)(ii); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(3)(ii) (2016).

73. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4) (2016).

74. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b)(4)(i)(a)–(e); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(i)(a)–(e) (2016).

(c) Appealing to the Superintendent

(i) Filing an Appeal⁷⁵

Within seven calendar days of receiving the Committee's written response to your grievance, you may appeal the decision to the Superintendent by filing an appeal (Form 2131) with the Grievance Clerk. If you want to appeal the decision, it is important that you file on time. If you do not file within seven calendar days, it will be presumed that you have accepted the IGRC's decision.⁷⁶

(ii) Superintendent's Action⁷⁷

The Superintendent's response to your appeal will depend on whether the issue involved is departmental or institutional. A Departmental Grievance is one that affects you during your confinement at any of the many facilities in the Department.⁷⁸ An Institutional Grievance is one affecting you only as long as you remain a resident of the facility in which you filed the grievance.⁷⁹

If the matter concerns changing or revising a Departmental policy or directive, then the Superintendent will forward the grievance papers and a recommendation to the CORC for further review—and notify you that he has done so—within seven calendar days of the appeal. But if the matter does not concern changing or revising a Departmental policy directive, then the Superintendent will answer your appeal within 20 calendar days.⁸⁰

In all institutional matters, the Superintendent will make a decision and notify you of it, with reasons stated, within 20 calendar days of the appeal.⁸¹

(d) Appeal to the CORC

(i) Filing an Appeal⁸²

If you are not satisfied with the Superintendent's decision, you may appeal the Superintendent's action to the CORC. To do so, you must file an appeal (Form 2133) with the Grievance Clerk within seven calendar days of receiving the Superintendent's written response to your grievance.⁸³

75. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(c)(1); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(c)(1) (2016).

76. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(c)(1); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(c)(1) (2016).

77. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(c)(3); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(c)(3) (2016).

78. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(b); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.2(b) (2016).

79. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(c); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.2(c) (2016).

80. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(c)(3)(i); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(c)(3)(i) (2016).

81. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(c)(3)(ii); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(c)(3)(ii) (2016).

82. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(1); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(1) (2016).

83. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(1)(i); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(1)(i) (2016).

(ii) CORC Action

The CORC will review the appeal, make a decision, and inform you of its decision, with reasons for its decision, within 30 calendar days from the time it receives the appeal.⁸⁴ It may take the CORC up to seven calendar days to actually receive your appeal. However, if you have not received notice of receipt or a decision within 45 days of filing your appeal, you should send a letter to the IGP supervisor to confirm that your appeal was filed and sent to the CORC.⁸⁵

(e) Procedural Safeguards for Fair Consideration of Grievances

(i) Advisors⁸⁶

During the grievance process, you may present the grievance yourself without help, or you may receive advice or assistance from a staff member who is willing to serve as an advisor. You may also receive assistance from another incarcerated person. An advisor is not a direct party to a grievance.⁸⁷ A direct party is a person who is so affected by the grievance that he is given the opportunity to provide input before the decision, and he can also appeal the decision afterward.⁸⁸

If you are incarcerated in the Special Housing Unit, you will have restricted access to other incarcerated people and may be prohibited from using another incarcerated person as an advisor. In that case, you may also be prohibited from serving as an advisor to another incarcerated person. In this situation, a willing staff member can serve as your advisor.⁸⁹

(ii) Reprisals Prohibited⁹⁰

Reprisal means “any action or threat of action against anyone for the good faith use of ... the grievance procedure.”⁹¹ The reprisal rule forbids anyone from retaliating against you if you use the IGP to file a grievance about an issue you believe is appropriate for the grievance process. If such retaliation occurs, you can respond by filing a complaint. You also cannot receive a misbehavior report only for making a supposedly false statement to the IGP.⁹²

(iii) Objection to IGRC Representatives⁹³

If you object to any of the incarcerated representatives on the IGRC, that incarcerated representative will not take part in the resolution of your grievance and will be replaced by one of the

84. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(3)(ii); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(3)(ii) (2016). It is important to note that some versions of the New York regulations have an error and does not have § 701.5(d)(3) in between § 701.5(d)(2) and § 701.5(d)(4). Instead, it lists § 701.5(d)(2) twice. The *JLM* cites to § 701.5(d)(3) when it refers to the second § 701.5(d)(2) that is listed. However, you should cite to § 701.5(d)(2) if you are using this provision in written documents.

85. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(d)(3)(i); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.5(d)(3)(i) (2016).

86. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 701.2(h), 701.6(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program §§ 701.2(h), 701.6(a) (2016).

87. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(h); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.2(h) (2016).

88. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(i); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.2(i) (2016).

89. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7(c)(3); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.7(c)(3) (2016).

90. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(b); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(b) (2016).

91. 28 C.F.R. § 40.9 (2016).

92. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(b); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(b) (2016).

93. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(c); State of New York, Department of Corrections and

alternates. If you object to all of the incarcerated representatives and the alternates, the committee staff members will make the decision on their own, without any incarcerated representatives. In addition, a staff representative who is a party to your grievance cannot vote on the matter. In some especially sensitive circumstances, only staff members will conduct the investigation, even if you do not object to the incarcerated representatives.⁹⁴ If that happens, the incarcerated representatives will still vote.

(iv) Code of Ethics⁹⁵

A Code of Ethics for IGRC staff and incarcerated representatives, clerks, and chairpersons has been established to strengthen the credibility and effectiveness of the IGP.⁹⁶ For example, the Code of Ethics prohibits IGRC members from preventing an incarcerated person from filing a grievance⁹⁷ or improperly disclosing confidential information (including confidential medical information).⁹⁸ Under the Code of Ethics, a member must have a willing, tactful attitude, a working knowledge of the IGP, and awareness of his responsibilities under the IGP.⁹⁹

(v) Time Limits¹⁰⁰

The IGRC may only get an extension on the time limit for review if you consent in writing. Otherwise, if the IGRC does not decide a matter within the time limit, you may appeal to the next level.¹⁰¹

(vi) File Maintenance/Confidentiality¹⁰²

Grievance files are maintained in a specific area to be used by the IGRC and the clerk. Unless you consent in writing, no copies of documents may be placed in your central file or facility file. None of the grievance materials will be given to anyone other than you, a direct party, or someone involved in the review process without the IGP supervisor's approval.¹⁰³ The superintendent is responsible for assuring the confidentiality and maintenance of grievance records. Grievance files are kept for at least four years following their conclusion.¹⁰⁴

Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(c) (2016).

94. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(e)(2); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(e)(2) (2016).

95. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(f); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(f) (2016). The Code of Ethics can be found in N.Y. COMP. CODES R. & REGS. tit. 7, § 701.11 and in the State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.11 (2016).

96. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(f)(1); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(f)(1) (2016).

97. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.11(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.11(a) (2016).

98. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.11(e); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.11(e) (2016).

99. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 701.11(b), (h); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program §§ 701.11(b), (h) (2016).

100. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(g)(2); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(g)(2) (2016).

101. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(g)(2); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(g)(2) (2016).

102. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(k); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(k) (2016).

103. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(k); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(k) (2016).

104. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(k)(3); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(k)(3) (2016).

(vii) IGRC Reference Materials¹⁰⁵

The IGRC at each facility is responsible for keeping an up-to-date set of code “A B” departmental directives and a set of the IGP monthly index of written opinions. A copy of the index must also be kept in the prison law library.

(viii) Emergencies¹⁰⁶

If your grievance is an emergency, it will be referred directly to the superintendent or the CORC, depending on who has the authority to ensure a quick and meaningful response. Emergencies include situations in which your health, safety, or welfare is in danger.

(f) Procedures for Incarcerated People in Special Housing Units¹⁰⁷

If you are living in a Special Housing Unit (“SHU”), your access to the IGRC may be more restricted than that of incarcerated people living with the general population. Facilities must follow slightly different procedures to help you file a grievance.

The area supervisor must make inmate grievance complaint forms (Form 2131) available to you at all times.¹⁰⁸ You will be given envelopes so you may forward your grievance confidentially to the Inmate Grievance Office.¹⁰⁹ Your facility may also use an inmate grievance deposit box. This box must be kept locked. Only the IGP supervisor and IGRC staff representatives should have keys to it, and they should collect any inmate grievances at least twice a week.¹¹⁰ You should also be able to directly speak to IGRC staff members, who must make rounds to all SHUs at least once a week to “give inmates who are having communication problems or difficulty writing their complaints an opportunity to request and receive assistance.”¹¹¹ For security reasons, you may have to use a staff member, rather than another incarcerated person, as your advisor.¹¹²

The IGP supervisor is responsible for monitoring the grievance procedure in SHUs and for making sure that all of the requirements are met.¹¹³ If the procedures are not being followed, for example if there are never any envelopes or Inmate Grievance boxes, you should tell the IGP supervisor.

(g) Employee Harassment¹¹⁴

There are faster procedures for grievances concerning employee harassment. Employee harassment is defined as “employee misconduct meant to annoy, intimidate or harm an inmate.”¹¹⁵ For example, if a Corrections officer made sexually suggestive comments towards you or assaulted

105. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(l); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(l) (2016).

106. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(m); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.6(m) (2016).

107. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7; State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.7 (2016).

108. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7(a)(1) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.7(a)(1) (2016).

109. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7(a)(2) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.7(a)(2) (2016).

110. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7(b) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.7(b) (2016).

111. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7(c)(1) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.7(c)(1) (2016).

112. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7(c)(3); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.7(c)(3) (2016).

113. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7 (2019).

114. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8 (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.8 (2016).

115. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(e) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.2(e) (2016).

you, that would be “employee harassment.”¹¹⁶ If this happens to you, you should first report the problem to the harassing employee’s immediate supervisor; but you can still file a complaint in the IGP if you choose not to report the employer to his supervisor.¹¹⁷

In order to make a stronger case, you should write down and keep a record of every incident of harassment. Your records should include the time, date, nature of the harassment, who was involved, and if there were any other witnesses. You should also keep a record of anything that happened after the harassment, like a conversation you had with someone else about the incident.

In cases of harassment, your grievance and supporting documents should be forwarded directly to the superintendent by the end of the day.¹¹⁸ If the superintendent concludes that the issue does not relate to harassment, then the grievance will be returned to the IGRC for normal processing.¹¹⁹ If the superintendent determines that the issue *does* relate to harassment, he must investigate further. If the superintendent investigates further, you will not be allowed to withdraw your complaint.¹²⁰ The superintendent will then make a decision within 25 calendar days and inform you of the decision, with reasons stated.¹²¹ That time limit can be extended only with your consent. If the superintendent does not respond within 25 days, you may appeal to the CORC by filing a Form 2133 with the inmate grievance clerk.¹²² If you receive a decision from the superintendent and you want to appeal, you must file your appeal with the inmate grievance clerk within seven calendar days.¹²³

(h) Unlawful Discrimination¹²⁴

There is also a faster grievance process if you suffer unlawful discrimination. Unlawful discrimination includes “acts or policies which adversely affect individuals based on race, religion, national origin, sex, sexual orientation, age, disabling condition(s) or political belief, except as provided by law.”¹²⁵ You may only file a grievance if you are personally and directly affected by the act or policy.¹²⁶ If you are being unlawfully discriminated against by an employee, program, policy, or procedure, you should report the incident to the immediate supervisor of the offending employee or the administrator of the policy. However, this is not required before filing a complaint in the IGP.¹²⁷ This grievance will be forwarded to the superintendent, and a copy sent to the office of diversity

116. *See Morris v. Eversley*, 205 F. Supp. 2d 234, 240 (S.D.N.Y. 2002) (finding that sexually suggestive comments, forcible restraint, and sexual assault by a corrections officer were “employee harassment”).

117. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(a) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.8(a) (2016).

118. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(b) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.8(b) (2016).

119. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(c) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.8(c) (2016).

120. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(d)–(e) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.8(d)–(e) (2016).

121. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(f) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.8(f) (2016).

122. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(g) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.8(g) (2016).

123. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(h) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.8(h) (2016).

124. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.9 (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.9 (2016).

125. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(f) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.2(f) (2016).

126. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3(b) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.3(b) (2016).

127. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.9(a); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.9(a) (2016).

management within 24 hours.¹²⁸ Either a high-ranking supervisor or the office of diversity management will investigate your grievance.¹²⁹

After supervising an investigation, the superintendent will give a decision within 25 calendar days of the grievance and inform you of the decision, with reasons stated.¹³⁰ If the superintendent does not respond within 25 days, you may appeal to the CORC by filing a Form 2133.¹³¹ If you receive a decision from the superintendent and want to appeal, you must file Form 2133 with the clerk within seven calendar days.¹³²

Directive 4041: The Inmate Grievance Program Modification Plan

(a) Application of the IGP Modification Plan

It may be difficult for some incarcerated people to participate in regular IGP procedures. For example, if you are involved in a temporary release program, you may spend many hours each day looking for a job or education, and you may have weekend furloughs (leaves of absences) and daily family visits. In cases like these, the IGP Modification Plan is used to allow you the same opportunity to file a grievance.¹³³

(b) Procedures

The procedures for filing a grievance under the Modification Plan are found in N.Y. Comp. Codes R. & Regs. tit. 7, § 702.4 and in DOCCS Directive 4041 § 702.4(a)–(c). First, you must request a grievance form, and the facility's duty office will provide you with one within 24 hours of your request. You can ask for help in filling out the form from any incarcerated person or staff member. A designated staff member will try to resolve your grievance informally within 16 days. If resolution is not possible in that time period, the staff member must request an IGRC hearing.¹³⁴ The IGRC members will include two staff representatives and a non-voting chairperson the superintendent chooses, and two incarcerated people you choose. After the hearing, the IGRC will make a recommendation about your claim and send it to you in writing.

If you disagree with the IGRC's recommendation, you can appeal to the superintendent within seven days of receiving the written recommendation from the IGRC.¹³⁵ The appeal will follow the procedure described in Part E(1)(c) of this Chapter. If you do not file an appeal within seven days, you are presumed to have accepted the recommendation.¹³⁶

128. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.9(c) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.9(c) (2016).

129. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.9(d) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.9(d) (2016).

130. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.9(e) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.9(e) (2016).

131. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.9(f) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.9(f) (2016).

132. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.9(g) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Inmate Grievance Program § 701.9(g) (2016).

133. N.Y. COMP. CODES R. & REGS. tit. 7, § 702.2(a) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4041, Inmate Grievance Program Modification Plan § 702.2(a) (2011) (*as revised* Apr. 30, 2015).

134. N.Y. COMP. CODES R. & REGS. tit. 7, § 702.4(a)(4) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4041, Inmate Grievance Program Modification Plan § 702.4(a)(4) (2011) (*as revised* Apr. 30, 2015).

135. N.Y. COMP. CODES R. & REGS. tit. 7, § 702.4(b)(1) (2019).

136. N.Y. COMP. CODES R. & REGS. tit. 7, § 702.4(b)(1) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4041, Inmate Grievance Program Modification Plan § 702.4(b)(1) (2011) (*as revised* Apr. 30, 2015).

Within seven calendar days of receiving the Superintendent's response, you can appeal to the CORC.¹³⁷ The appeal will follow the procedure described in Part E(1)(d) of this chapter.

2. Directive 4002: The Inmate Liaison Committee

The superintendent in your facility must establish an Inmate Liaison Committee ("ILC").¹³⁸ This committee's goal is to provide effective communication between incarcerated people and the administration, and to promote the accurate distribution and exchange of information. The ILC must discuss the incarcerated people's general welfare with prison officials. This includes, for example, suggestions from incarcerated people on facility operations. These discussions may not relate to specific problems of individual incarcerated people. The superintendent and Facility Executive Team will meet with the ILC monthly, and informal discussions should occur consistently.

The ILC is made up of a group of incarcerated people chosen by the general population. Representatives are elected by secret ballot for a term of six months and may serve for two terms in a row. The ILC will elect officers and an executive committee who can serve for one six-month term per year. The superintendent can deny membership to incarcerated people with recent or ongoing disciplinary problems.¹³⁹

The ILC must have a room with facilities, including a typewriter, desks, supplies, and stationery.¹⁴⁰ The ILC will be governed by a Constitution and By-Laws, which it will prepare with the help of a staff member. A suggested format for the Constitution and By-Laws is attached to Directive 4002.¹⁴¹

F. Rules for Inmate Grievance Procedures in Other States

In 1979, Congress set out minimum standards for formal inmate grievance procedures to help reduce the large number of civil rights cases by incarcerated people that were waiting to be heard in courts.¹⁴² States with grievance procedures that meet these standards are certified by the Attorney General.¹⁴³ Remember, you must exhaust all available administrative procedures before you can file a claim under 42 U.S.C. § 1983.¹⁴⁴

In order for an inmate grievance procedure to be certified, the state must meet certain federal minimum standards for the communication of those procedures to all incarcerated people.¹⁴⁵ A certified inmate grievance procedure must be readily available to all incarcerated people and employees of the institution. Every incarcerated person and employee must receive written notification and verbal explanation of the procedure when they get to the institution. You should also have the opportunity to ask questions about the procedure when it is explained to you. The procedure must be

137. N.Y. COMP. CODES R. & REGS. tit. 7, § 702.4(c)(1) (2019); State of New York, Department of Corrections and Community Supervision, Directive No. 4041, Inmate Grievance Program Modification Plan § 702.4(c)(1) (2011) (*as revised* Apr. 30, 2015).

138. State of New York, Department of Corrections and Community Supervision, Directive No. 4002, Inmate Liaison Committee § II(A)(1) (2017) (*as revised* Aug. 16, 2019). Note, however, that some facilities may be exempt from this requirement.

139. State of New York, Department of Corrections and Community Supervision, Directive No. 4002, Inmate Liaison Committee § II(B) (2017) (*as revised* Aug. 16, 2019).

140. State of New York, Department of Corrections and Community Supervision, Directive No. 4002, Inmate Liaison Committee § II(E) (2017) (*as revised* Aug. 16, 2019).

141. State of New York, Department of Corrections and Community Supervision, Directive No. 4002, Inmate Liaison Committee § II(F) (2017) (*as revised* Aug. 16, 2019).

142. Civil Rights of Institutionalized Persons Act, S. Rep. No. 96-416, at 34 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 787, 816. The minimum standards for inmate grievance procedures can be found at 28 C.F.R. §§ 40.1–40.10 (2019).

143. The procedures for obtaining certification of a grievance procedure can be found at 28 C.F.R. §§ 40.11–40.22 (2019).

144. 42 U.S.C. § 1997e(a); See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law," for more information on § 1983 claims.

145. 28 C.F.R. § 40.11(b) (2019).

written in any language that is spoken by a significant portion of the prison population, and there must be appropriate assistance for incarcerated people who speak other languages, or have disabilities.¹⁴⁶

In general, you should be able to find guidelines and procedures for filing a grievance in your prison law library. Ask your librarian if you need help finding them. It is important for you to understand these rules before filing your grievance to make the best use of the grievance procedure.

G. Conclusion

If you have a grievance, you must go through your state's inmate grievance program before going to court. Once you receive a final decision from the IGP, and have appealed it to the Superintendent and the CORC, you may file a complaint in court. If you fail to exhaust your remedies, your case will be dismissed. Even if you feel that the grievance system in your prison is unfair, inefficient, or pointless, you must exhaust it. Though all of the requirements under the PLRA may seem complicated and intimidating, you should try your best to properly exhaust your grievance. If you make an honest, good faith effort to comply with the requirements, the courts are more likely to excuse mistakes. For example, if you miss a deadline, you should not give up. Continue to pursue your grievance and request to be excused from the rule you failed to follow, or ask to be able to re-file your grievance and start over.

146. 28 C.F.R. § 40.3 (2019).

CHAPTER 16

USING 42 U.S.C. § 1983 TO OBTAIN RELIEF FROM VIOLATIONS OF FEDERAL LAW*

A. Introduction

1. Overview

The U.S. Constitution and federal law provide you with numerous individual rights that you can use to protect yourself from unfair government actions. For example, the Eighth Amendment protects your right to be free from cruel and unusual punishment, while the First Amendment protects your right to practice your religion.¹ Incarcerated people may bring lawsuits challenging violations of either their constitutional or federal statutory rights using the Civil Rights Act of 1871 (“Section 1983”).² Section 1983 allows you to sue state and local officials, and to challenge state prison rules and regulations, that violate your constitutional and statutory rights.³ For example, you can use Section 1983 to challenge prison rules that violate your practice of religion, or to challenge prison officers who assault you in prison. (For more information on your right to practice religion and your right to be free from assault, see Chapter 24, “Your Right to Be Free from Assault by Prison Guards and Incarcerated People” and Chapter 27, “Religious Freedom in Prisons” of the *JLM*.)⁴

Section 1983 does not allow you to sue federal officials. However, there are lawsuits called “*Bivens*” actions which allow you to sue federal officials.⁵ *Bivens* actions often rely on case law (law based on

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1. U.S. CONST. amend. VIII.; U.S. CONST. amend. I. See Figure 1 of this Chapter for a list of other important rights granted to you by the Constitution.

2. *Constitutional rights* are rights guaranteed by the U.S. Constitution. Section 1983 may allow you to sue someone who violates your constitutional rights if that person is acting “under color of law,” meaning that person was acting under the state’s authority. Section 1983 cases usually involve constitutional rights found in the first ten amendments to the Constitution (also called the Bill of Rights) or in the 14th Amendment. The Bill of Rights originally limited only the power of the *federal* government. Using the legal theory of “incorporation” and the Due Process Clause of the 14th Amendment, the Supreme Court has ruled that most of its guarantees also protect citizens against *state* governments. *See, e.g.,* *Ingraham v. Wright*, 430 U.S. 651, 673 n.42, 97 S. Ct. 1401, 1413 n.42, 51 L. Ed. 2d 711, 731 n.42 (1977) (noting that the 4th Amendment was incorporated against the states by the 14th Amendment). This means that state actors have to respect most of the rights found in the Bill of Rights as well. See Part B(2) of this Chapter for more information about constitutional rights and Section 1983. *Federal statutory rights* are those rights created by federal laws passed by Congress. Many federal statutes include their own “enforcement provisions,” which means that the statute gives you a particular right and allows you to sue someone for violating that right. If a federal statute has its own enforcement provision, you must use that statute rather than Section 1983 to bring your lawsuit. See Part B(3) of this Chapter for more information about statutory rights and Section 1983.

3. 42 U.S.C. § 1983. See Part B(1) of this Chapter for the full text of the statute. *See* *Monroe v. Pape*, 365 U.S. 167, 172–174, 81 S. Ct. 473, 476–477, 5 L. Ed. 2d 492, 497–498 (1961) (explaining that Section 1983 gives a federal remedy to parties deprived of constitutional rights, privileges, and immunities by an official’s abuse of his position), *overruled in part on other grounds by* *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). If an official deprives you of constitutional or federal statutory rights, you may also be able to sue that official under state law. However, Section 1983 allows you to sue that official under federal law even if there is no state remedy available. *Monroe v. Pape*, 365 U.S. 167, 183, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492, 503 (1961) (noting that Section 1983 provides an alternative to state remedies).

4. *See, e.g.,* Chapter 27 of the *JLM*, “Religious Freedom in Prison”; Chapter 24, “Your Right to Be Free from Assault by Prison Guards and Other Prisoners.”

5. *Bivens* actions are named after *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397, 91 S. Ct. 1999, 2005, 29 L. Ed. 2d 619, 627 (1971) (holding that an implied cause of action may

prior judicial decisions) that interprets Section 1983. Although *Bivens* actions are similar to Section 1983 claims, the Supreme Court has recently said that you can only bring *Bivens* actions in three specific situations.⁶ These specific situations will be discussed in Part E of this Chapter.

This Chapter focuses only on 1983 claims for people who have been officially convicted of a crime (either through a guilty verdict at trial or by pleading guilty). If you are a pretrial detainee, please see Chapter 34 of the *JLM*, “The Rights of Pretrial Detainees.”⁷ This Chapter is organized into several Parts. This Part, Part A, is the introduction, and includes seven essential tips to follow when bringing Section 1983 claims. Part B explains how to use Section 1983 to challenge state prison conditions and other practices that violate your constitutional or federal statutory rights. Part C explains what you can sue for (the types of relief, like money damages, injunctions, etc.), whom to sue, typical defense arguments you will have to defeat, when to sue, where to sue, and how to proceed with your Section 1983 suit. Part D describes other ways to bring lawsuits, including class actions and state court lawsuits. Part E explains *Bivens* actions against federal officials. Remember, *Bivens* actions closely rely on case law that interprets Section 1983, so you should still read this entire Chapter if you want to bring a *Bivens* action. Finally, the Appendices to this Chapter have sample forms that you can use as examples when preparing your case.

2. Seven Essential Tips for Bringing Section 1983 and *Bivens* Actions

(a) It Is VERY Important That You Read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” Before You Begin Your Section 1983 Claim.

The Prison Litigation Reform Act (“PLRA”) is a federal law that significantly affects Section 1983 cases.⁸ You should be aware of the PLRA’s “three strikes” rule.⁹ This rule gives you a “strike” whenever you have a case dismissed as frivolous, malicious, or failing to state a valid legal claim. If you have three cases dismissed as “strikes,” you will not be able to use the *in forma pauperis* procedure (which allows you to file a lawsuit as a “poor person” without having to pay the normal court fees or costs) unless you are under imminent danger of serious physical injury, or you may lose good time credit.¹⁰ So, you must be sure that you meet all of the PLRA requirements before you begin any lawsuit. In particular, you should be careful about the PLRA requirement that you need to exhaust (use up) all your administrative remedies—such as prison grievance procedures and appeals—*before* you go to court. In other words, you need to figure out what procedures exist within your prison to protest your situation and use all of those procedures before you file a lawsuit.¹¹ Although some courts used to require that you describe what you have done already to exhaust your remedies in your complaint, the Supreme Court recently said that such requirements are not allowed.¹² The complaint only begins the lawsuit, however. You will still have to describe what you have done to exhaust administrative remedies at some point. Many incarcerated people’s Section 1983 complaints are dismissed because they did not exhaust their prison’s administrative remedies.¹³

exist where an individual’s 4th Amendment right to be free from unreasonable searches and seizures has been violated by federal agents).

6. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855, 198 L. Ed. 2d 290, 306 (2017) (explaining that the Supreme Court has only allowed individuals to sue over constitutional violations without an explicit statutory cause of action in three cases).

7. *See generally* Chapter 34 of the *JLM*, “The Rights of Pretrial Detainees.”

8. 42 U.S.C. § 1997e.

9. U.S.C. § 1915(g).

10. *See* Stephen Michael Sheppard, *In Forma Pauperis (I.F.P. or IFP)*, in *THE WOLTERS KLUWER BOUVIER LAW DICTIONARY* (Desk ed., 2012); 28 U.S.C. § 1932.

11. *See* Chapter 15 of the *JLM*, “Inmate Grievance Procedures.”

12. *Jones v. Bock*, 549 U.S. 199, 215–216, 127 S. Ct. 910, 921–922, 166 L. Ed. 2d 798, 813–814 (2007) (holding that an incarcerated person is not required to plead or demonstrate exhaustion in his complaint).

13. *See, e.g., Booth v. Churner*, 532 U.S. 731, 741, 121 S. Ct. 1819, 1825, 149 L. Ed. 958, 967 (2001) (affirming dismissal of prisoner’s Section 1983 complaint for failure to exhaust all available administrative remedies because prisoner did not appeal an unfavorable administrative decision to the highest level of review).

(b) Your Constitutional Rights Are Not Absolute.

In most cases, your constitutional rights will be balanced against the state or federal government's interest in maintaining a secure prison environment. In many situations, your constitutional rights may be outweighed by the government's interest in prison security. For most constitutional claims, courts use a test established in a case called *Turner v. Safley* to determine whether your constitutional rights have been violated.¹⁴ This test is discussed in detail in Part B(2)(a) of this Chapter.

(c) Do NOT Use Section 1983 to Challenge Your Original Criminal Conviction, Your Sentence, Loss of Good Time, or Denial of Parole.

You cannot use Section 1983 to claim that your constitutional rights were violated based on the fact that you were convicted or based on the length of your sentence, except in very limited circumstances.¹⁵ Instead of using Section 1983, you can challenge your conviction or sentence by appealing or, if your appeal is denied, by filing for a writ of habeas corpus or other post-conviction relief.¹⁶ You also cannot use Section 1983 to challenge a loss of good time credit, a parole denial, or other official actions that *directly* affect how much time you spend in prison.¹⁷ You should use state procedures to challenge these losses. For example, in New York, incarcerated people can challenge the loss of good time credit or denial of parole through an Article 78 proceeding.¹⁸ For information about Article 78 proceedings, see Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules".

However, you can usually use Section 1983 to challenge administrative decisions that do not *directly* affect the length of your sentence.¹⁹ This Chapter mostly focuses on how you can use a Section 1983 suit if government officials have abused or denied your constitutional or federal statutory rights while you have been in prison. Again, you should not use Section 1983 to challenge the amount of time to be spent in prison.

14. *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987); *Turner* does not apply to claimed violations of the 8th Amendment's prohibition on "cruel and unusual punishment." *Johnson v. California*, 543 U.S. 499, 510–511, 125 S. Ct. 1141, 1149–1150, 160 L. Ed. 2d 949, 961–962 (2005). See Part B(2)(a) of this Chapter for more information about *Turner*. Remember that you may have a better claim under a different federal statute than under Section 1983 and *Turner*.

15. *See Heck v. Humphrey*, 512 U.S. 477, 486–487, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383, 393–394 (1994) (holding that Section 1983 suits are not available if the outcome of the suit would imply that a prisoner's conviction or sentence is invalid, unless he proves that his "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such [a] determination, or called into question by a federal court's issuance of writ of habeas corpus").

16. *See* Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence"; Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence"; Chapter 13, "Federal Habeas Corpus"; and Chapter 21, "State Habeas Corpus: Florida, New York, and Texas," and state-specific habeas Chapters in the upcoming State Supplements for more information on post-conviction relief.

17. *See Edwards v. Balisok*, 520 U.S. 641, 648, 117 S. Ct. 1584, 1589, 137 L. Ed. 2d 906, 915 (1997) (holding that a Section 1983 claim alleging that the incarcerated person was deprived of good time credits without procedural due process could not go forward, because if successful it would imply that the deprivation of good time credits was invalid).

18. If you are an incarcerated person in New York and your prison is not following its own rules or policies, you can file an Article 78 petition. For more information, see Chapter 22 of the *JLM*, "How To Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

19. *See Wilkinson v. Dotson*, 544 U.S. 74, 82, 125 S. Ct. 1242, 1248, 161 L. Ed. 253, 262–263 (2005) (allowing incarcerated people to use Section 1983 to challenge parole procedures to request new reviews of parole eligibility, where winning the lawsuit would not necessarily result in their obtaining earlier parole); *Muhammad v. Close*, 540 U.S. 749, 754–755, 124 S. Ct. 1303, 1306, 158 L. Ed. 2d 32, 38 (2004) (holding that a Section 1983 claim may challenge an administrative decision as long as it does not dispute the validity of the underlying conviction); *Leamer v. Fauver*, 288 F.3d 532, 543 (3d Cir. 2002) (finding valid a Section 1983 claim that challenged a disciplinary action which could affect the granting of parole, but would not directly affect length of sentence); *Jenkins v. Haubert*, 179 F.3d 19, 27 (2d Cir. 1999) (holding that Section 1983 may be used to challenge an incarcerated person's term of disciplinary segregation, which did not implicate the length of confinement).

(d) Be Sure That All Defendants in Your Section 1983 Lawsuit Had Personal Involvement in the Violation of Your Rights.²⁰

Pro se litigants (people who file a suit without a lawyer) often want to include everybody they can think of as defendants, including supervisory prison officials like wardens or the head of the state department of corrections. You may want to do this too, but naming everybody is often not a good idea. Courts usually dismiss all claims against supervisory officials unless you provide enough facts in your complaint to show that the supervisory officials you name were personally involved in violating your rights.²¹ If you make claims against defendants that the court quickly dismisses because they were not personally involved, the judge may be less likely to trust the rest of your claims. Try your best to find out which officials were personally involved.

(e) Explain the Facts of Your Case in as Much Detail as Possible.

The most common mistake made by *pro se* litigants is not stating the facts clearly and adequately. Remember, the court already knows something about the law, but it knows *nothing* about the facts of your claim. Make sure that you tell the court exactly *what* happened to you, *when* and *where* it happened, *who* was involved, and *how* it happened. If you know *why* your rights were violated, you should explain that too. More than anything else, the facts of your case will determine the success of your claim. For an example of a written complaint, see Appendix A-29 of this Chapter.

Here's an example. Imagine that you are claiming that your access to the prison law library has been unfairly restricted. The court will want to know the details. When did you want to get into the library? Why did you need access to the library? Are there any set rules in your prison for library access? Exactly how did the denial of access hurt you? Were you unable to meet a filing deadline or respond to a legal argument? Did you have a case pending or a court date? What research were you trying to do? Who stopped you? How many times did this happen, and when? Include as much of this information as possible in your complaint. Of course, the kinds of questions you will want to ask yourself and answer for the court depends on your claim. Give as much relevant detail as possible.²²

If possible, try to get sworn, written statements—also known as affidavits or declarations—from witnesses who saw your rights being violated.²³ Try to get as much proof as possible that supports the factual claims you are making in your case.

(f) Confirm the Information in This or Any Other Chapter of the *JLM* Through Library Research.

Remember that the cases discussed in this Chapter are only examples to use as starting points in your research. There are many court decisions relating to Section 1983 claims. It is essential that you research and make sure the courts still follow the cases in the footnotes of this Chapter.²⁴ Although we have tried to make the *JLM* as up-to-date as possible, some cases may not be good law anymore if a higher court has made a different decision.²⁵

20. Part B(1)(a) of this Chapter explains how you can prove a defendant official was personally involved in violating your rights.

21. See *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 663 n.7, 98 S. Ct. 2018, 2022 n.7, 56 L. Ed. 2d 611, 619 n.7 (1978) (holding that supervisory officials are not automatically responsible for the actions of their employees). However, sometimes you can name supervisory officials as defendants even if they were not directly involved in violating your rights. See Part C(2)(b) of this Chapter ("Supervisor Liability").

22. *Relevance* is a legal idea. Evidence is "relevant" where it "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining [your claim]." FED. R. EVID. 401. Basically, relevant evidence is anything that helps to prove your story or your legal claim.

23. See Chapter 6 of the *JLM*, "An Introduction to Legal Documents."

24. See Chapter 1 of the *JLM*, "How to Use the *JLM*," and Chapter 2, "Introduction to Legal Research," for more information.

25. It is very important that you read the full cases contained in these footnotes. You should also try to read any cases cited in those cases. If possible, look up 42 U.S.C. § 1983 in the United States Code Annotated (U.S.C.A.) or United States Code Service (U.S.C.S.). The U.S.C.A. and U.S.C.S. are commercial publications of

(g) *Bivens* Actions Against Federal Officials Are Similar to Section 1983 Claims Against State or Local Officials, but the Grounds on Which These Lawsuits May Be Brought Are Much More Limited.

If you want to sue federal officials, you cannot use Section 1983. Instead, you can bring a type of lawsuit based on case law which is called a *Bivens* action. Most federal incarcerated people bring *Bivens* actions, which are described in Part E of this Chapter. *Bivens* actions are very similar to Section 1983 claims, so you should still read Parts B and C of this Chapter discussing Section 1983 claims. However, since 2017 the grounds on which you can bring *Bivens* actions have been limited to three types of situations, which are described in Part E of this Chapter.

B. Using 42 U.S.C. § 1983 to Challenge State or Local Government Action

1. Essential Requirements for Obtaining Relief Under Section 1983

Section 1983 states:

Every *person* who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]²⁶

The words and phrases in italics state the three essential requirements (also known as elements) that you must fulfill when bringing a lawsuit under Section 1983. In your complaint, you need to show that *all three* elements of Section 1983 are met.

(a) First Requirement: *Person*

Section 1983's first requirement is that you show your rights were violated by a "person." The legal definition of "person" for Section 1983 claims includes more than actual people (prison wardens, guards, etc.). A city, county, or municipality can also be a "person" under Section 1983.²⁷ The definition of "person," however, does not include *state* governments or their agencies.²⁸ For example, you cannot sue the State of New York or the New York State Department of Corrections and Community Supervision under Section 1983.²⁹ Thus, while *officials* (actual people) at any level of government (including state government) may be sued under Section 1983, only *non-state governments* and their agencies (such as cities, counties, local agencies, and private corporations) may be sued as a "person"

the United States Code that include the federal statutes and summaries of cases interpreting those statutes. You should also look at the Federal Practice Digest and other digests that have case summaries organized by subject matter. The process of making sure a case is up-to-date—that the decision is still valid and another court has not overruled it—is called "Shepardizing." See Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on how to Shepardize a case.

26. 42 U.S.C. § 1983 (emphasis and alteration added).

27. See *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035–2036, 56 L. Ed. 2d 611, 635 (1978) (holding that municipalities and local government units are considered "persons" under Section 1983).

28. See *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 58 (1989) (holding that states may not be sued under Section 1983).

29. You may, however, be able to sue states and state agencies under other federal laws, such as the Americans with Disabilities Act. See *United States v. Georgia*, 546 U.S. 151, 159, 126 S. Ct. 877, 882 163 L. Ed. 2d 650, 660 (2006) (holding that the Americans with Disabilities Act creates a right to sue states for damages from violations of the 14th Amendment); *Pennsylvania Dep't. of Corr. v. Yeskey*, 524 U.S. 206, 213 118 S. Ct. 1952, 1956 141 L. Ed. 2d 215, 221 (1998) (holding that the protections of the Americans with Disabilities Act extend to state incarcerated people). See generally 42 U.S.C. §§ 12101–12213. For information on the rights of incarcerated people with disabilities, see the Rehabilitation Act of 1973, 29 U.S.C. § 701 and Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities."

under Section 1983.³⁰ See Part C(2) of this Chapter, “Whom to Name as Defendants” for more information on whom you can sue using Section 1983.

You should name all “persons” who violated your rights as defendants. This includes individuals, local government agencies, or both. You may name as many defendants as you choose, as long as *each* of them is *personally involved* in violating your rights. Courts consider officials and local government agencies to be personally involved if they:

- (1) Directly participated in the wrong; or
- (2) Was told about the wrong but did not try to stop or fix it; or
- (3) Failed to oversee the people who caused the wrong, for example by hiring unqualified people or failing to adequately train their staff; or
- (4) Deliberately failed to act on information showing that a wrong was happening; or
- (5) Created a policy or custom that allowed the wrong to occur.³¹

The situations listed in (1), (2), (3), and (4) are most common in cases where you are challenging defendants’ specific behavior or failure to act. The fifth situation occurs when you challenge general rules of the prison.

An example of a type (1) situation could be a guard refusing to get help for an injured incarcerated person who asks him for medical care. An example of a type (2) situation could be when, after receiving reports that a person in a prison had been attacked by other detainees and that there was a hit on their life, a warden or other official fails to do anything to protect that individual from the threat on their life. In a type (3) situation, prison officials may be held liable for hiring unqualified people or failing to properly train or supervise their staff.³² An example of a type (4) situation could be a guard seeing an incarcerated person being attacked by other incarcerated people and not trying to stop the attack.

Finally, in a type (5) situation, prison officials can be liable for creating rules, policies, or customs that violate your rights. These rules and policies can be written or unwritten.³³ You should always be specific about what kind of rule or practice you are challenging and who was responsible for creating

30. See *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 365, 116 L. Ed. 2d 301, 313 (1991) (finding state officials, sued in their individual capacities, to be “persons” within the meaning of Section 1983, and not absolutely immune from personal liability or barred from being sued under the 11th Amendment).

31. See *Littlejohn v. City of New York*, 795 F.3d 297, 314 (2d Cir. 2015) (noting the ways that a plaintiff can establish that officials and local government agencies were personally involved in their U.S.C. § 1983 violation).

32. See *Bd. of the Cty. Comm’rs v. Brown*, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (holding that a municipality may be liable for hiring decisions under a deliberate indifference standard if adequate screening of the employee alleged to have violated the plaintiff’s rights would have made it clear to a reasonable policymaker that hiring the employee was highly likely to result in the particular type of constitutional violation alleged by the plaintiff). See *City of Canton v. Harris*, 489 U.S. 378, 388–389, 109 S. Ct. 1197, 1204–1205, 103 L. Ed. 2d 412, 426–427 (1989) (holding that a city could be held liable under Section 1983 for failing to train employees if the failure amounted to deliberate indifference to the constitutional rights of persons coming into contact with those employees).

33. See, e.g., *Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001) (holding that a prison’s written policy of strip searching all persons arrested for misdemeanors without requiring reasonable suspicion was unconstitutional); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 287 (D. N.H. 2003) (allowing an incarcerated person who suffered from gender identity disorder to proceed with a claim that a prison’s written policy of refusing to consider surgical or hormonal treatment for any incarcerated person regardless of medical condition violated her 8th Amendment right to adequate medical care). See, e.g., *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (holding that city’s failure to have procedures in place to verify warrants was an unwritten policy that violated right to due process of plaintiff who was mistakenly held on outstanding warrants for the arrest of his twin brother); *Garrett v. Unified Gov’t of Athens-Clarke Cty.*, 246 F. Supp. 2d 1262, 1279–1280 (M.D. Ga. 2003) (noting that even when there is no formal written policy, supervisors can be held liable where there is enough use of an unconstitutional practice that it becomes an unconstitutional custom), *rev’d on other grounds sub nom.*, *Garrett v. Athens-Clarke Cty.*, 378 F.3d 1274 (11th Cir. 2004) (*per curiam*); *Gonzalez v. City of Schenectady*, 141 F. Supp. 2d 304, 307 (N.D.N.Y. 2001) (holding that an unwritten city policy of strip searching all detainees prior to court action was unconstitutional).

the rule or practice (if you know). If you are arguing that an unwritten policy or custom violated your rights, you need to gather as much evidence as possible to show that it is widely followed in your jail or prison. This will show the court that it is an actual policy or custom.³⁴ An example of a type (5) situation could be guards making sure that incarcerated people who violate a prison rule do not receive medical care for a month, even if they are sick or injured.

Sometimes, several people or agencies will be involved in violating your rights, and they will all be involved in different ways. For example, if a prison guard assaults you, you can sue that guard because he violated your rights. If another guard sees the assault but does not try to stop it, you can sue that guard as well, because he did not try to stop or fix the wrong. If you complain to the warden that this guard has assaulted you several times, and the warden does nothing, you might also be able to sue the warden. If you can show there is an informal prison policy of allowing guards to assault incarcerated people, or if you find out that the guard had a history of assaulting incarcerated people at his previous job, then you might be able to sue the local department of corrections for creating an unconstitutional policy or hiring an unqualified guard. In this situation, it is probably obvious to you that the guard who assaulted you and the guard who watched the assault were personally involved in violating your rights. However, it is much more difficult to figure out whether the warden and/or the local department of corrections were personally involved. Remember, if you cannot give specific facts showing that a defendant was personally involved, the judge will dismiss your claims against the defendant. For more about showing personal involvement, see Part C(2)(b) of this Chapter, “Supervisor Liability,” and Part C(2)(c) of this Chapter, “Municipal or Local Government Liability.”

(b) Second Requirement: Under Color of State Law

The second requirement for suing under Section 1983 is that the person who violated your rights must have been acting “under color of state law.” This means that the person you sue must be someone who was acting under the state’s authority. States have authority over their own agencies and employees. They also have authority over cities, counties, and municipalities, as well as over the employees of cities, counties, and municipalities. In prison, persons acting under color of state law include:

- (1) Employees of state or local prisons or jails, like prison doctors and guards; and
- (2) Private parties who make contracts with the state to perform services.³⁵

34. *See, e.g.,* Henry v. Farmer City State Bank, 808 F.2d 1228, 1237 (7th Cir. 1986) (explaining that if there is no formal written policy, “the plaintiff must allege a specific pattern or series of incidents that support the general allegation of a custom or policy; alleging one specific incident in which the plaintiff suffered a deprivation will not suffice.”); Gailor v. Armstrong, 187 F. Supp. 2d 729, 734 (W.D. Ky. 2001) (holding that one incident of failure to follow a jail’s excessive force policy plus thirty to forty other instances of excessive force over a ten-year period for which officers were punished was not enough to show a custom of failing to follow the excessive force policy).

35. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71 n.5, 122 S. Ct. 515, 522 n.5, 151 L. Ed. 2d 456, 466 n.5 (2001) (noting that people incarcerated in state prisons may sue private prison corporations under Section 1983); West v. Atkins, 487 U.S. 42, 54–57, 108 S. Ct. 2250, 2258–60, 101 L. Ed. 2d 40, 53–57 (1988) (holding that a private doctor under contract with a state to provide medical services to people incarcerated at a state prison hospital on a part-time basis acts under color of state law within the meaning of Section 1983); Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (holding that private prison-management corporations and their employees may be sued under Section 1983); Conner v. Donnelly, 42 F.3d 220, 223 (4th Cir. 1994) (holding that “a physician who treats a prisoner acts under color of state law even though there was no contractual relationship between the prison and the physician.”); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (holding that private corporation under contract with the state to operate its prisons may be sued under Section 1983); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985) (noting that employees of Prison Health Services, a private company providing medical care to incarcerated people, were clearly state actors); Christy v. Robinson, 216 F. Supp. 2d 398, 412 (D.N.J. 2002) (holding that doctors employed by a private medical association that contracts with the state to provide medical services to incarcerated people acted under color of state law); Mauldin v. Burnette, 89 F. Supp. 2d 1371, 1376–1377 (M.D. Ga. 2000) (holding that a private individual who was responsible for signing an incarcerated person in and out of prison and supervising him on work release

Be aware that a person may act under color of state law even though the person does something that is illegal under state law. In other words, for something to be done under color of state law, it does not have to be legal to do it. For example, state law forbids a prison guard from assaulting you. But, if a prison guard assaults you, he is acting under color of state law because the guard carries a “badge of authority” from the state.³⁶ Thus, “under color of state law” loosely means “as a representative of the state.”

(c) Third Requirement: Deprivation of Federal Right

The third and final requirement is that each person you sue must have deprived you of a right, privilege, or immunity you have under the Constitution or federal laws. In simpler terms, the person must have violated one of your constitutional or federal statutory rights. Section 1983 does not itself create any *substantive* right; instead, it creates the *procedural* right to sue for the violation of a substantive violation of federal law. Part B(2) of this Chapter explains the general rules for determining whether the constitutional rights of incarcerated people have been violated. It also gives examples of violations of constitutional rights. Part B(3) of this Chapter discusses Section 1983 claims for violations of rights that have been created by federal statutes.

2. Constitutional Bases for Section 1983 Claims

Not every violation of state law or prison regulations is a constitutional violation that you can challenge using Section 1983. For example, a prison may have a regulation stating that all persons in the general population are allowed five phone calls each week. This “right to five phone calls” is not a constitutional right. If the prison suddenly allows only one call each week, you won’t be able to sue using Section 1983. Instead, you may want to challenge that change in privileges through your prison’s grievance system or in a state court.³⁷

Similarly, if a prison guard harms you or your property by acting negligently (carelessly), you won’t be able to sue using Section 1983. Instead, you may be able to sue using state tort law.³⁸ For example, the Supreme Court has said that in a case where an incarcerated person’s mail was lost because a prison official negligently failed to follow proper mail procedures, the official’s action wasn’t enough for a Section 1983 claim. The Court ruled that this wasn’t a failure of the state’s procedures but rather one person’s failure.³⁹ Instead, the Court said that the incarcerated person should sue through state tort law, because the state already had a process that covered situations like this where state actors carelessly did something that resulted in an incarcerated person losing property.⁴⁰ The Supreme Court has also held that where a person was injured because he slipped on a pillow that a sheriff’s deputy

acted under color of state law). However, some courts have found that independent contractors were not acting under color of state law. *See, e.g.,* Black v. Ind. Area Sch. Dist., 985 F.2d 707 (3d Cir. 1993) (affirming that a bus company and its driver employee that contracted with the school district to transport children were not state actors because they were independent contractors, and thus could not be liable in a Section 1983 action); Nunez v. Horn, 72 F. Supp. 2d 24, 27 (N.D.N.Y. 1999) (holding that a doctor who treated the incarcerated person was not acting under color of state law because the treatment was provided at a non-prison hospital and the doctor was not under contract with the state or Bureau of Prisons to treat incarcerated people).

36. *See* Monroe v. Pape, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492, 497 (1961) (holding that officials who violate constitutional rights act under color of state law for the purposes of Section 1983, whether they act in accordance with their authority, abuse their authority, or act illegally), *overruled in part on other grounds by* Monell v. Dep’t. of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

37. If a New York state prison is not following its own rules or policies, incarcerated people can also file an Article 78 petition. *See* Chapter 22 of the *JLM*, “How To Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” for information on filing Article 78 petitions.

38. *See* Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on bringing a tort claim.

39. *Parratt v. Taylor*, 451 U.S. 527, 543, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420, 433–434 (1981), *overruled in part on other grounds by* *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

40. *Parratt v. Taylor*, 451 U.S. 527, 543–544, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420, 433–434 (1981), *overruled by* *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

carelessly left on a stairway, this was not a constitutional violation that could lead to a Section 1983 case, but rather a case that was better left to state tort law.⁴¹ On the other hand, if a prison guard were to intentionally or recklessly push you down the stairs, or you could prove that the guards in a prison had an unofficial game of intentionally leaving objects on stairs to injure people and you were injured as a result, you might be able to bring a Section 1983 claim in that case.⁴²

The next part of this Section begins with a general discussion of incarcerated people's constitutional rights and the "reasonably related" test (*Turner* test). Parts B(2)(b) and B(2)(c) of this Chapter explain two specific constitutional rights that incarcerated people have and which specific constitutional amendments give them those rights. Make sure you read the other chapters of the *JLM* that also talk about these particular rights. Also, remember that your claim might involve violations of more than one constitutional right. Think about your situation from as many different angles as possible.

(a) General Framework for Constitutional Rights in Prison

As discussed earlier, keep in mind that your constitutional rights are not absolute. *The government is allowed to take away some of your rights in order to run the prison more safely or smoothly.* When you sue government officials or agencies for violating your rights, the officials or agencies must explain to the court why they acted that way. The reasons they give must have some reasonable relationship to the violation of your rights. The court then balances your constitutional rights against the reasons given by the defendants for taking away some of those rights. Most of the time, courts accept the prison officials' explanation for the violation and rule against the incarcerated person.

In your claim, you should emphasize why your right is important and reasonable and why the prison officials' actions were unnecessary or unreasonable. Just saying that your rights were violated is usually not enough. You must try to expect and respond to the arguments that the prison will make about the need for security or order.

One of the leading Supreme Court cases dealing with constitutional rights in prison is *Turner v. Safley*.⁴³ In *Turner*, the Supreme Court held that when a prison regulation has an impact on constitutional rights, the regulation is still valid if it is "reasonably related to legitimate penological interests."⁴⁴ A penological interest is legitimate if it is a valid and justifiable concern for the prison and/or the officials operating the prison. "Legitimate penological interests" may include concerns for safety, discipline, effective punishment, and other management issues. Under the *Turner* test (also called the "reasonably related" test), a court will compare the importance of the state's valid penological interests to the impact of the state's actions on your rights.

The *Turner* test has been used in cases challenging both formal and informal prison policies and practices. It has also been used in cases challenging individual actions.⁴⁵ The test applies both to prison regulations and to actions taken by prison officials. Note that *Turner* does not apply to claims of racial

41. *Daniels v. Williams*, 474 U.S. 327, 335–336, 106 S. Ct. 662, 667, 88 L. Ed. 2d 662, 671 (1986).

42. *See Smith v. Wade*, 461 U.S. 30, 51, 103 S. Ct. 1625, 1637, 75 L. Ed. 2d 632, 648 (1983) (upholding a jury award for an incarcerated person's Section 1983 claim that a prison guard recklessly placed him in a cell with other incarcerated people who were likely to assault him and rejecting the argument that the incarcerated person needed to show that the prison guard knew that he was likely to be assaulted by his cellmates).

43. *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

44. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987).

45. *See, e.g., Allah v. Al-Hafeez*, 208 F. Supp. 2d 520, 529–531 (E.D. Pa. 2002) (applying the *Turner* test to a chaplain's decision to exclude an incarcerated person from religious services after the person disrupted the service); *Youngbear v. Thalacker*, 174 F. Supp. 2d 902, 914 (N.D. Iowa 2001) (applying the *Turner* test to an administrative decision resulting in a yearlong delay in building a sweat lodge).

discrimination,⁴⁶ Eighth Amendment violations,⁴⁷ restrictions on private religious exercise,⁴⁸ or some procedural due process claims.⁴⁹

To use the *Turner* test, courts ask if a regulation (or action) is “reasonably related” to the government’s interests. They do this by looking at four factors:

- (1) Whether there is a valid, rational connection between the regulation and the government’s reason for it;⁵⁰
- (2) Whether you still have other ways of exercising your constitutional right despite the regulation;⁵¹
- (3) Whether there will be a “ripple effect”⁵² on the rights of others if you are allowed to exercise the right;⁵³ and

46. *Johnson v. California*, 543 U.S. 499, 509–511, 125 S. Ct. 1141, 1148–1149, 160 L. Ed. 2d 949, 961–962 (2005) (holding that the *Turner* test could not be used to evaluate the prison policy of assigning new incarcerated people cellmates of the same race, and noting that *Turner* has never been applied to racial classifications). For more information on equal protection rights in prison, including the right against racial discrimination, see Part B(2)(c) of this Chapter.

47. *See, e.g., Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (refusing to apply the *Turner* test to an incarcerated person’s 8th Amendment claim and noting that the Supreme Court has never used *Turner* for an 8th Amendment claim); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1255 (M.D. Ala. 1998) (refusing to apply the *Turner* test to an incarcerated person’s 8th Amendment claim). For information on 8th Amendment claims for “cruel and unusual punishment,” see Part B(2)(b) of this Chapter.

48. The Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc–2000cc-5 (2018), increased the protection for religious freedoms of incarcerated people and people in other institutions. Under RLUIPA, when the government limits the exercise of religion in institutions like prisons, it must show that those restrictions serve a “compelling government interest” and are the “least restrictive means” of achieving that interest. This is a higher standard than *Turner*’s “legitimate penological interest” test for restrictions on constitutional rights. *See Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005).

49. *See Washington v. Harper*, 494 U.S. 210, 223–225, 228–229, 110 S. Ct. 1028, 1037–1038, 1040–1041, 108 L. Ed. 2d 178, 199–200, 202–203 (1990) (using the *Turner* test to analyze an incarcerated person’s substantive due process claim but not applying it to the individual’s procedural due process claim). For further discussion of your procedural due process rights, see Chapter 18 of the *JLM*, “Your Rights at Prison Disciplinary Proceedings.”

50. *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987) (“[T]here must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.”) (quoting *Block v. Rutherford*, 486 U.S. 576, 586, 104 S. Ct. 3227, 3232, 82 L. Ed. 2d 438, 447 (1984)).

51. *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987) (explaining that “[w]here ‘other avenues’ remain available for the exercise of the asserted right, courts should be particularly conscious” of giving weight to prison officials’ decisions (citation omitted)). For example, in *McRoy v. Cook Cty. Dept. of Corr.*, 366 F. Supp. 2d 662, 676–677 (N.D. Ill. 2005), a court upheld a prison’s cancellation of Muslim services on certain occasions, in part because the court found that the prison had provided other opportunities for an incarcerated person to observe his religion, such as allowing him to keep religious materials and allowing incarcerated people to pray together in community rooms.

52. A “ripple effect” means that your exercise of this right could affect the use of prison resources, affect the safety of guards, affect other incarcerated people, etc. For example, if a large group of incarcerated people are allowed to pray in the chapel while everyone else is on lockdown, this might either mean that too many guards have to be there to watch the chapel and leave other parts of the prison unguarded, or that the prison would have groups of unguarded incarcerated people in violation of safety procedures. This in turn might make the non-religious incarcerated people who do have to be in lockdown resentful and demand that they also be allowed special privileges, potentially causing a domino effect.

53. *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987) (“A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . . When accommodation of an asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.”).

- (4) Whether there is an easy way to meet the regulation's goal without limiting your constitutional right.⁵⁴

In most cases challenging prison regulations, the government wins. This is because the *Turner* test only requires the government to have a rational explanation (one that makes sense) for the regulation. Now when you are outside of a prison setting, if the government creates a law or policy that affects your rights, different tests are used. For instance, if the government is controlled by one political party and they create a law saying that you cannot publicly support candidates from the opposite party, that would affect your fundamental right to free speech. Since free speech is a fundamental right, a court would only allow this policy to stay in place if it passes a test called “strict scrutiny”. To pass this test, the government would have to show the court that this law has both a compelling interest and that the law is narrowly tailored to achieve that interest (which means that there cannot be another policy option available that is less restrictive).⁵⁵ However, if the government passes a law for the purposes of protecting people's lives (such as wearing a mask when outside to prevent you from getting a life threatening disease), then the law will most likely have to pass a test called the “rational basis” review. The rational basis test states that when the government has a valid interest—such as public safety or health concerns—it may create laws that are related to protecting that interest even if those laws only minimally relate (or bear very little relation) to those valid interests of the government.⁵⁶ Like the rational basis test, the *Turner* test is not a very high standard for the government to meet.

With the *Turner* test, the government needs to show that there is a connection between the regulation you are challenging and the purpose that it is supposed to accomplish.⁵⁷ However, the government does not need to show that the regulation is better than other regulations that would be less restrictive. This means that even if there are other potential regulations that would help the government achieve its goals without impacting incarcerated people's rights, the government can still pass the *Turner* test.

In the *Turner* case, the Court applied this test to a prison regulation banning incarcerated people from sending or receiving letters from persons incarcerated at other prisons (not including family members). The prison argued that letters between incarcerated people could be used to plan escapes or assaults. Looking at factor (1), the Court first found that preventing escapes and assaults was a valid government interest, and that banning letters between incarcerated people was a rational way to help prevent escapes and assaults. As for factor (2), the Court noted that incarcerated people still had other ways to exercise their First Amendment rights to express themselves, since incarcerated

54. *Turner v. Safley*, 482 U.S. 78, 90–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987) (“[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.”). A prison that is able to meet a goal by using one of several different rules is not required to choose the rule that has the least impact on your rights. However, the fact that there are other rules that accomplish the same goals may be considered evidence that the rule you are challenging is unreasonable, especially if the alternative rules do not have additional drawbacks. *Turner v. Safley*, 482 U.S. 78, 90–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987).

55. *See Citizens United v. FEC*, 558 U.S. 310, 340, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753, 782 (2010).

56. *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257, 270 (1993).

57. *See Walker v. Sumner*, 917 F.2d 382, 385–387 (9th Cir. 1990) (holding that prison officials must provide support for the justifications of their regulations; assertions made without explanation or factual support are not enough); *Hunafa v. Murphy*, 907 F.2d 46, 48 (7th Cir. 1990) (finding the factual record provided by the prison was too “skimpy” to determine whether the prison's refusal to provide a pork-free meal to an incarcerated person was reasonably related to a legitimate penological interest). *But see Whitmire v. Arizona*, 298 F.3d 1134, 1136 (9th Cir. 2002) (noting that a plaintiff's case should not be dismissed unless the prison has provided evidence supporting a rational relationship between a policy and the policy's justification, or unless there is a “common-sense connection” between the policy and the prison's penological interests); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1235 (M.D. Ala. 1998) (refusing to require “evidence demonstrating a valid, rational connection” between the claimed goals of a policy and the policy itself, and instead using a “common sense” approach to whether a policy is reasonably related to legitimate correctional interests).

people could write to and receive letters from anyone besides other incarcerated people. Under factor (3), the Court found that allowing people who are incarcerated to communicate with other incarcerated people would have a significant “ripple effect” on others, because it might threaten the safety of other incarcerated people and prison guards. Finally, looking at factor (4), the Court found that there was no simple other way of ensuring that escapes and assaults were not planned through letters between incarcerated people. After going through the four factors, the Court held that the regulation was “reasonably related” to legitimate interests in security. As a result, the Court held that the prison could keep the rule in place even though it interfered with incarcerated people First Amendment rights to free expression and communication.⁵⁸

However, *Turner* also decided that a regulation preventing incarcerated people from marrying unless the superintendent found “compelling circumstances” was not “reasonably related” to legitimate security concerns.⁵⁹ The prison had claimed that the regulation was justified because “love triangles” among incarcerated people might lead to violence. The Court stated that there was no reasonable relationship between preventing marriage and preventing violence, since “love triangles” were just as likely when incarcerated people were unmarried. The Court also mentioned that a marriage was generally a private decision that would not have a “ripple effect” on others. The Court said that less restrictive regulations on prison marriages, such as those used at many other prisons, would still meet the concerns of prison officials.

As you can see from these examples, you need to carefully consider how to argue your claim in terms of the four factors. You have a better chance of success if a regulation *completely* deprives you of the ability to exercise your right, since such a regulation fails factor (2). In these cases, you should suggest other rules that could accomplish the same prison goal without completely violating your rights. Comparing the bad practices of your prison with the better practices of other prisons may also be helpful.

Figure 1 below explains your rights, the source of these rights, and which chapters of the *JLM* you should read if you think one of these rights has been violated.

Types of Constitutional Rights	Source of Constitutional Rights ⁶⁰	<i>JLM</i> Chapter
Rights to Freedom of Expression and Communication: includes the right to mail, visitation, telephone use, and other communications, as well as the right to express yourself	<i>First Amendment</i>	Chapter 19: “Your Right to Communicate with the Outside World”

58. *Turner v. Safley*, 482 U.S. 78, 93, 107 S. Ct. 2254, 2264, 96 L. Ed. 2d 64, 82 (1987) (“The prohibition on correspondence is reasonably related to valid corrections goals. The rule is content neutral, it logically advances the goals of institutional security and safety . . . and it is not an exaggerated response to those objectives.”). *But see* *Allen v. Coughlin*, 64 F.3d 77, 81 (2d Cir. 1995) (holding that a prison had not established a valid reason for a regulation banning newspaper clippings sent through the mail).

59. *Turner v. Safley*, 482 U.S. 78, 97–98, 107 S. Ct. 2254, 2266, 96 L. Ed. 2d 64, 84 (1987) (“The Missouri prison regulation . . . [restricting prisoner marriage] represents an exaggerated response to . . . security objectives. There are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a [minimal] burden on the pursuit of security objectives.”). Although the right to marry comes from the substantive due process part of the 14th Amendment, and not from the 1st Amendment, the analysis on how to balance the rights is the same.

60. This chart is only a simple outline for what parts of the Constitution establish these rights. Some of these rights may also be protected by federal statutes. Your case will depend on your particular facts, so you should use this chart to begin your research, not end it.

Types of Constitutional Rights	Source of Constitutional Rights ⁶⁰	<i>JLM</i> Chapter
Religious practices ⁶¹	<i>First Amendment</i>	Chapter 27: “Religious Freedom in Prison”
Freedom from unreasonably intrusive body searches ⁶²	<i>Fourth Amendment</i>	Chapter 25: “Your Right to Be Free from Illegal Body Searches” ⁶³
Prison conditions: overcrowding, cleanliness, etc.	<i>Eighth Amendment</i>	Chapter 16 (This Chapter)
Medical care	<i>Eighth Amendment</i>	Chapter 23: “Your Right to Adequate Medical Care”
Assault/failure to protect	<i>Eighth Amendment & Fourteenth Amendment</i>	Chapter 24: “Your Right to Be Free from Assault by Prison Guards and Other Incarcerated people
Privacy of medical information	<i>Fourteenth Amendment</i>	Chapter 26: “Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prisons” & Chapter 23: “Your Right to Adequate Medical Care”

61. If your religious rights are being violated, instead of bringing a Section 1983 claim, you may want to sue under the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb-1 (2018). You may not bring a lawsuit against state governments or officials under RFRA. You can only sue federal officials and agencies. *See City of Boerne v. Flores*, 521 U.S. 507, 534–536, 117 S. Ct. 2157, 2171–2172, 138 L. Ed. 2d 624, 648–649 (1997) (holding RFRA’s application to state governments and state officials unconstitutional); *see also O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (finding that RFRA could constitutionally be applied to federal officers and agencies). Also, if the agency that operates your prison receives federal funding you can sue under another law called the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). 42 U.S.C. § 2000cc-1 (2018). Prisons also have a harder time defending these suits. *See Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005) (noting that RLUIPA was designed to enhance protection of incarcerated people’s religious freedom by replacing the *Turner* “legitimate public interest” test with a “compelling interest” test).

62. *See, e.g., Hurley v. Ward*, 584 F.2d 609, 611 (2d Cir. 1978) (holding that invasive anal and genital searches of an incarcerated person, without probable cause, outweighed the prison’s security justifications).

63. Note that in most cases, this does not apply to cell searches. *See Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402–403 (1984) (holding that the 4th Amendment prohibition against unreasonable searches does not apply to prison cells because “[t]he recognition of privacy rights for incarcerated people in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions”); *Willis v. Artuz*, 301 F.3d 65, 68–69 (2d Cir. 2002) (holding that incarcerated people are not protected from cell searches initiated by prosecutors or police even when such searches are not related to prison security).

Types of Constitutional Rights	Source of Constitutional Rights ⁶⁰	<i>JLM</i> Chapter
Due Process in disciplinary hearings ⁶⁴	<i>Due Process Clause of the Fifth & Fourteenth Amendments</i> ⁶⁵	Chapter 18: “Your Rights at Prison Disciplinary Proceedings”
Discrimination on the basis of race, ethnicity, etc.	<i>Equal Protection Clause of the Fourteenth Amendment</i>	Chapter 16 (This Chapter)
Discrimination on the basis of gender	<i>Equal Protection Clause of the Fourteenth Amendment</i>	Chapter 16 (This Chapter)
Rights of persons with mental illness	<i>Eighth & Fourteenth Amendments</i>	Chapter 29, “Special Issues for Incarcerated people with Mental Illness”
Discrimination on the basis of disability	<i>Equal Protection Clause of the Fourteenth Amendment</i>	Chapter 28, “Rights of Incarcerated people with Disabilities”
Discrimination on the basis of sexual orientation or gender identity	<i>Equal Protection Clause of the Fourteenth Amendment</i>	Chapter 30: “Special Information for Lesbian, Gay, Bisexual, and Transgender Incarcerated people”
Access to courts—law libraries or legal assistance	<i>First, Sixth, & Fourteenth Amendments</i>	Chapter 3: “Your Right to Learn the Law and Go to Court”

Since Eighth Amendment claims are some of the most common Section 1983 claims (as well as *Bivens* Actions) brought by people incarcerated in federal prisons, Part B(2)(b) of this Chapter goes into those claims in more detail. Additionally, B(2)(c) of this Chapter addresses discrimination claims on the basis of race, ethnicity, and gender. Sometimes these rights relate to one another, so make sure you read any other relevant *JLM* chapters.

(b) Eighth Amendment Claims

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.”⁶⁶ Most prison cases brought under the Eighth

64. The Due Process Clause of the 14th Amendment says that the state cannot “deprive any person of life, liberty, or property, without due process of law.” See U.S. CONST. amend. XIV, §1. The right to liberty includes some rights you keep if you are in prison. However, the government only violates these rights when it acts in a way that is not related to a legitimate goal. Whether a government action reasonably relates to a legitimate goal is determined using the *Turner* test, described in Part B(2)(a) of this Chapter.

65. The government cannot deprive you of life, liberty, or property without going through certain procedures. This right is created by the 5th and 14th Amendments. The 14th Amendment applies to state government action. The 5th Amendment contains an identical prohibition: “No person shall be ... deprived of life, liberty, or property, without due process of law” and applies to the federal government. U.S. CONST. amend. V. People incarcerated in federal prisons therefore usually use the 5th Amendment instead of the 14th Amendment to challenge due process violations. As mentioned in Figure 1, see Chapter 18 of the *JLM* for more details about your due process rights.

66. U.S. CONST. amend. VIII (emphasis added).

Amendment relate to “cruel and unusual punishment.” There are several types of claims that courts will consider under the cruel and unusual punishment part of the Eighth Amendment. These claims can include harm resulting from prison conditions, inadequate medical care, and assault. The cases below provide some specific examples of Eighth Amendment claims that courts have recognized.

Note that you should read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act” (“PLRA”), if you plan to file a claim for cruel and unusual punishment under the Eighth Amendment. Under the PLRA, incarcerated people may not seek compensatory damages for mental or emotional injury without an accompanying physical injury, with limited exceptions.⁶⁷

A claim that prison conditions or practices constitute cruel and unusual punishment must satisfy two tests. These tests are referred to as the “objective” and “subjective” tests:

- (1) The *objective test* requires proof that prison conditions were bad enough to be considered cruel and unusual. Conditions must amount to “unquestioned and serious deprivations of basic human needs” or deprivation of the “minimal civilized measure of life’s necessities,” or they must include the “wanton and unnecessary infliction of pain.”⁶⁸ Supreme Court cases have emphasized that, in general, prison conditions must pose serious threats to health and safety.⁶⁹ However, under some circumstances, conditions do not need to inflict or threaten serious injury to meet the objective test. For example, cell searches causing “calculated harassment unrelated to prison needs” may be considered cruel and unusual punishment.⁷⁰ Similarly, excessive force may violate the Eighth Amendment if it is “repugnant to the conscience of mankind”⁷¹ (even if it inflicts little physical injury). It is possible that other conditions that do not actually cause physical injury (like sexually

67. Compensatory damages are awarded to make you “whole” by putting you back in the same position you were in before you suffered the wrong. An example of compensatory damages would be the cost of medical bills. They are different from punitive damages, which are meant to punish a wrongdoer rather than compensate you for your injuries. See Part C(1)(a) of this Chapter for a more complete explanation of compensatory damages. 42 U.S.C. § 1997e(e) (2018) (The statute states that “[n]o Federal civil action may be brought by an incarcerated person confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury[.]”). Courts have held that the statute only prohibits compensatory damages for mental or emotional injury, so incarcerated people can still claim other forms of damages or injunctive relief for mental or emotional injuries. *See, e.g.,* *White v. Holmes*, 21 F.3d 277, 281 (8th Cir. 1994) (finding that “. . .some actual injury is required in order to state an 8th Amendment violation.”). Courts are split on the applicability of Section 1997e(e) to 1st Amendment claims. *Compare* *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir.1998) (“The deprivation of [1st] Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred.”), *and* *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006) (holding that Section 1997e(e) of the PLRA is unconstitutional as applied to 1st Amendment claims to the extent that it bars recovery of damages for emotional harms without physical injury), *with* *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (“The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted.”).

68. *Rhodes v. Chapman*, 452 U.S. 337, 347–348, 101 S. Ct. 2392, 2399–2400, 69 L. Ed. 2d 59, 69–70 (1981) (finding that a practice of placing two incarcerated people in a single cell did not violate the 8th Amendment, when the practice was necessary due to an increase in prison population and the practice did not cause “unnecessary and wanton pain”).

69. *See, e.g.,* *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (finding that knowing disregard of excessive risk to inmate health and safety—whether for reasons unique to one incarcerated person or to all in his situation—could qualify as a violation of the 8th Amendment).

70. *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S. Ct. 3194, 3202, 82 L. Ed. 2d 393, 405 (1984). Note that the court in *Hudson* did not find the conduct by prison guards rose to the level of calculated harassment.

71. *Hudson v. McMillian*, 503 U.S. 1, 10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 168 (1992) (allowing the claim to go forward even where there was no significant injury or need for medical attention).

intrusive searches,⁷² credible threats of immediate harm that are not acted upon,⁷³ conditions that “pose an unreasonable risk of serious damage to . . . future health,”⁷⁴ and psychological torture⁷⁵ may also be considered cruel and unusual punishment.

- (2) The *subjective test* requires that prison officials had a certain state of mind when they created the conditions you are challenging. In most prison conditions cases, the standard is “deliberate indifference,” which means that the officials must have had actual knowledge that they were subjecting you to an excessive risk of harm or other unconstitutional conditions.⁷⁶ In use of force cases, however, the test is harder to meet than the “deliberate indifference” test. Instead, you must show that the official who used force against you acted “maliciously and sadistically” in order to cause harm.⁷⁷

Under the objective test, as mentioned above, if your complaint is about the conditions of your imprisonment, you have to show that, “alone or in combination,” the conditions deprived you of “the minimal civilized measure of life’s necessities.”⁷⁸ Life’s necessities (or basic human needs) include “food, clothing, shelter, medical care, and reasonable safety,”⁷⁹ warmth,⁸⁰ exercise,⁸¹ and the “basic elements of hygiene.”⁸² If you are trying to show that several conditions combined to deprive you of a

72. See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1522, 1530–1531 (9th Cir. 1993) (*en banc*) (holding that a policy of “random, non-emergency, suspicionless clothed body searches on female prisoners” by male guards violated the 8th Amendment).

73. See, e.g., *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (holding that, if true, an allegation that a corrections officer brandished a gun and threatened to kill an incarcerated person could be an 8th Amendment violation); *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986) (holding that an incarcerated person has a right to be free from “the terror of instant and unexpected death at the whim of his allegedly bigoted custodians”).

74. *Helling v. McKinney*, 509 U.S. 25, 33, 35–36, 113 S. Ct. 2475, 2480–2482, 125 L. Ed. 2d 22, 31, 33 (1993) (explaining “[w]e have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate’s current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year” and allowing an incarcerated person assigned a cellmate who smoked five packs of cigarettes a day to make a claim of future harm from secondhand smoke).

75. See, e.g., *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (finding that a paraplegic incarcerated person who was threatened with a knife, denied requests for medical attention, and continuously and aggressively taunted by a guard could claim a violation of the 8th Amendment).

76. *Farmer v. Brennan*, 511 U.S. 825, 839–843, 114 S. Ct. 1970, 1980–1982, 128 L. Ed. 2d 811, 826–829 (1994).

77. *Hudson v. McMillian*, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992).

78. *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981).

79. *Helling v. McKinney*, 509 U.S. 25, 32, 113 S. Ct. 2475, 2480, 125 L. Ed. 2d 22, 31 (1993) (quoting *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 199–200, 109 S. Ct. 998, 1005, 103 L. Ed. 2d 249, 261–262 (1989)).

80. *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991); *Palmer v. Johnson*, 193 F.3d 346, 352–353 (5th Cir. 1999) (holding that overnight exposure to winds and cold with no means of keeping warm could violate the 8th Amendment). But see *Bibbs v. Early*, 541 F.3d 267, 272, 275 (5th Cir. 2008) (holding that only exposure to “extreme” cold could violate the 8th Amendment, and that an incarcerated person with two blankets and layers of clothes was not exposed to “extreme” cold, even in alleged 20-degree temperature).

81. *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991); *Perkins v. Kan. Dept. of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999) (holding that an allegation of prolonged denial of outdoor exercise could violate the 8th Amendment).

82. *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999) (quoting *Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971)) (holding that depriving 49 incarcerated people of toilet facilities in a small area could violate the 8th Amendment); see also *Bradley v. Puckett*, 157 F.3d 1022, 1025–1026 (5th Cir. 1998) (holding that the defendant who alleged an inability to bathe for several months—resulting in a fungal infection that required medical attention—stated an 8th Amendment claim). But see *Davis v. Scott*, 157 F.3d 1003, 1006 (5th Cir. 1998) (holding that confinement in a cell with blood on the floor and excrement on the wall was not unconstitutional because it was only for three days and cleaning supplies were available).

life necessity, keep in mind that the conditions must have a “mutually enforcing [(in other words, combined)] effect that [deprives you] of a single, identifiable human need such as food, warmth, or exercise.”⁸³ For example, you may suffer cruel and unusual punishment if the inadequate heat in your cell-block, combined with the prison’s failure to issue blankets, deprives you of warmth.⁸⁴

The amount of harm that the court will require you to show also varies depending on the type of Eighth Amendment claim that you bring. For example, if you are complaining about prison guard brutality, you may not have to show that your injury was “serious.” Instead, you may only have to show that it was more than minor and that the assault was unjustified under the circumstances.⁸⁵ On the other hand, if your claim is that you were deprived of medical care, you will have to show that your medical needs were sufficiently “serious” and that prison officials were “deliberately indifferen[t]” to them.⁸⁶ Ultimately, it is important to remember that you must show different things for different types of Eighth Amendment Claims. Parts B(2)(b)(i) through B(2)(b)(iv) of this Chapter provide more information on the different types of Eighth Amendment claims you can make.

(i) Prison Conditions

Poor prison conditions may amount to cruel and unusual punishment. If they do, then they violate the Eighth Amendment. Such conditions can include a lack of basic necessities or the presence of safety hazards, like poor fire prevention safety measures.⁸⁷ Excessively long confinement in a small cell and denial of outdoor exercise can also violate the Eighth Amendment.⁸⁸ Other conditions that may constitute cruel and unusual punishment include unsanitary facilities, overcrowding, and inadequate

83. *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d. 271, 283 (1991) (“Some conditions of confinement may establish an [8th] Amendment violation ‘in combination’ when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.”).

84. *See, e.g., Wilson v. Schomig*, 863 F. Supp. 789, 795–796 (N.D. Ill. 1994) (holding that lack of heat in prison cells may, combined with other circumstances such as cold temperatures, could be found to violate 8th Amendment principles).

85. *See, e.g., Hudson v. McMillian*, 503 U.S. 1, 10–11, 112 S. Ct. 995, 1000–1001, 117 L. Ed. 2d 156, 168–169 (1992) (holding that an assault on an incarcerated person by prison guards resulting in a cracked dental plate and minor bruises and swelling was enough harm to constitute a valid 8th Amendment claim).

86. *See Wilson v. Seiter*, 501 U.S. 294, 297, 111 S. Ct. 2321, 2323, 115 L. Ed. 2d 271, 278 (1991) (holding that a claim of an 8th Amendment violation must show at least deliberate indifference to serious medical needs by prison officials). To bring a claim for inadequate medical care, see Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.”

87. *See, e.g., Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977) (holding that a state must provide “prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety so as to avoid the imposition of cruel and unusual punishment”), *rev’d on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (*per curiam*); *Nicholson v. Choctaw Cty.*, 498 F. Supp. 295, 308–312 (S.D. Ala. 1980) (finding that prison violated 8th Amendment rights through, among other things, the unsanitary conditions in the jail, the lack of adequate medical care, unsafe conditions, and the lack of religious services or instruction). *See, e.g., Hoptowit v. Spellman*, 753 F.2d 779, 783–784 (9th Cir. 1985) (holding that a hazardous work environment including inadequate lighting, plumbing, fire safety, ventilation, and vermin infestation, could constitute inhumane conditions in violation of the 8th Amendment); *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977) (holding that a state must provide “prisoners with reasonably adequate . . . personal safety so as to avoid the imposition of cruel and unusual punishment”), *rev’d on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (*per curiam*). *But cf. Osolinski v. Kane*, 92 F.3d 934, 938–939 (9th Cir. 1996) (finding that failure to repair a broken oven, without additional aggravating factors, cannot reasonably be said to violate the 8th Amendment).

88. *See Perkins v. Kan. Dept. of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999) (holding allegation of prolonged denial of outdoor exercise could violate the 8th Amendment); *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) (stating that with the exception of “inclement weather, unusual circumstances, or disciplinary needs . . . [that make it] impossible,” outdoor exercise is required when incarcerated people are otherwise confined to small cells 24 hours per day).

heating and ventilation.⁸⁹ Some courts have held that failing to protect incarcerated people from secondhand smoke may violate the Eighth Amendment.⁹⁰ However, secondhand smoke cases usually require incarcerated people to show that the secondhand smoke poses an unreasonable risk of future harm to their health.⁹¹ For more information about addressing secondhand smoke exposure, see Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.” Although,

Overcrowding is not unconstitutional in itself,⁹² but courts have found that it can violate the Eighth Amendment rights of people who are incarcerated when it leads to harmful consequences.⁹³ For example, successful lawsuits have been brought when a prison’s failure to check newcomers for contagious diseases, combined with overcrowding, increased the risk of infection.⁹⁴ Since 2011, the Supreme Court has been more willing to consider overcrowding as a violation of the Eighth Amendment rights of people who are incarcerated. For example, in *Brown v. Plata*, the Supreme Court held that the number of people in prisons in California had to be capped at 137.5% of each prison’s maximum capacity.⁹⁵ The Court found that there was enough evidence to support the fact that “crowding creates unsafe and unsanitary conditions that hamper effective delivery of medical and mental health care. It also promotes unrest and violence and can cause incarcerated people with latent mental illnesses to worsen and develop overt symptoms.”⁹⁶ In *Plata*, the Court also said that overcrowding was the main reason for many constitutional violations.⁹⁷

89. See, e.g., *Palmer v. Johnson*, 193 F.3d 346, 352–353 (5th Cir. 1999) (finding that the combined circumstances of overnight outdoor confinement without shelter, blanket, heating, or access to bathroom facilities were a denial of necessities in violation of the 8th Amendment); *DeMallory v. Cullen*, 855 F.2d 442, 445 (7th Cir. 1988) (finding that an incarcerated person stated sufficient 8th Amendment claim in Section 1983 complaint alleging unsanitary and dangerous conditions); *French v. Owens*, 777 F.2d 1250, 1252–1255, 1257–1258 (7th Cir. 1985) (holding that overcrowding, medical neglect, and failure to protect incarcerated people from threats to safety violated the 8th Amendment); *Morales Feliciano v. Hernandez Colon*, 697 F. Supp. 37, 40–45 (D.P.R. 1988) (ruling that overcrowding, vermin-infestation, and otherwise unsanitary conditions violated the 8th Amendment), *aff’d sub nom. Morales-Feliciano v. Parole Bd.*, 887 F.2d 1 (1989); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1409–1411 (N.D. Cal. 1984) (finding constitutional violation due to certain conditions, including double-celling, insufficient ventilation and heating, and inadequate and unsanitary clothing and bedding supplies), *aff’d in part and rev’d in part*, 801 F.2d 1080 (9th Cir. 1986).

90. See, e.g., *Atkinson v. Taylor*, 316 F.3d 257, 262–269 (3d Cir. 2003) (allowing an incarcerated person to go forward with 8th Amendment claim that exposure to secondhand smoke posed a substantial risk of future harm); *Gill v. Smith*, 283 F. Supp. 2d 763, 769 (N.D.N.Y. 2003) (allowing an incarcerated person with asthma to go forward with 8th Amendment claim that exposure to secondhand smoke posed an unreasonable risk of future harm to his health).

91. See *Helling v. McKinney*, 509 U.S. 25, 35–36, 113 S. Ct. 2475, 2482, 125 L. Ed. 2d 22, 33 (1993) (holding that exposure to extreme levels of tobacco smoke that pose an unreasonable risk to future health may be an 8th Amendment violation, and that the plaintiff did not need to wait until he was actually harmed to ask a court to correct unsafe conditions); *Atkinson v. Taylor*, 316 F.3d 257, 262–269 (3d Cir. 2003) (same); *Gill v. Smith*, 283 F. Supp. 2d 763, 769 (N.D.N.Y. 2003) (same).

92. See *Rhodes v. Chapman*, 452 U.S. 337, 348, 101 S. Ct. 2392, 2400, 69 L. Ed. 2d 59, 69–70 (1981) (finding no constitutional violation when double-celling “did not lead to deprivations of essential food, medical care, or sanitation” and did not “increase violence among inmates or create other conditions intolerable for prison confinement”).

93. See *Tillery v. Owens*, 907 F.2d 418, 427–428 (3d Cir. 1990) (holding that double-celling due to overcrowding, in combination with other factors, such as the physical condition of the cell, violated the 8th Amendment); *Mitchell v. Cuomo*, 748 F.2d 804, 807–808 (2d Cir. 1984) (granting incarcerated people an injunction against the closing of a facility that would result in overcrowding in other prisons); *Fisher v. Koehler*, 692 F. Supp. 1519, 1561–1565 (S.D.N.Y. 1988) (holding that the level of both prisoner-prisoner violence and staff-prisoner violence resulting, in part, from overcrowding violated the 8th Amendment), *aff’d*, *Fisher v. Koehler*, 902 F.2d 2 (2d Cir. 1990).

94. See *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (finding failure to screen for diseases constituted inadequate medical practice that violated the 8th Amendment).

95. *Brown v. Plata*, 563 U.S. 493, 493, 131 S. Ct. 1910, 1917, 179 L. Ed. 2d 969, 976 (2011).

96. *Brown v. Plata*, 563 U.S. 493, 495, 131 S. Ct. 1910, 1919, 179 L. Ed. 2d 969, 978 (2011).

97. *Brown v. Plata*, 563 U.S. 493, 495, 131 S. Ct. 1910, 1919, 179 L. Ed. 2d 969, 978 (2011).

Some Section 1983 claims challenge prison housing arrangements. Courts have generally held that double-celling (placing two persons in each cell) is constitutional as long as both persons are provided with their basic needs, such as having enough space to sleep and a clean interior. Double-celling is not a constitutional violation by itself because incarcerated people may still exercise their rights and because prison officials have strong administrative concerns in providing housing for everyone in the prison population.⁹⁸ Similarly, administrative segregation does not violate a person's rights.⁹⁹ However, it is unconstitutional for prison officials to put you in administrative segregation in order to get back at you for filing a complaint or claim.¹⁰⁰ If you bring a case because you were administratively segregated, it must be brought as a procedural due process claim, not as an Eighth Amendment claim. For a discussion of procedural due process, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings." Claims for inadequate cell assignments often overlap with Eighth Amendment claims for assault. If you think you have these claims, you should be sure to review the cases cited in this section and Chapter 24 of the *JLM*, "Your Right to Be Free from Assault by Prison Guards and Other Incarcerated people."

(ii) Inadequate Medical Care and Other Health Risks

Inadequate medical care can also violate the Eighth Amendment. As discussed above, the Court held in *Brown v. Plata* that unreasonable risks to your health may violate the Eighth Amendment even if you have not been harmed yet.¹⁰¹ For information on your right to medical care, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

(iii) Assault

In at least one Section 1983 case, the Supreme Court has held that the infliction of pain by guards through practices such as handcuffing to hitching posts for prolonged periods of time violates the Eighth Amendment.¹⁰² Further, many Section 1983 cases have claimed that prison officials' failure to protect incarcerated people from assaults violates the Eighth Amendment. For more detailed information, see Chapter 24 of the *JLM*, "Your Right to Be Free from Assault by Prison Guards and Other Incarcerated people."

98. See *Rhodes v. Chapman*, 452 U.S. 337, 348, 101 S. Ct. 2392, 2400, 69 L. Ed. 2d 59, 69 (1981) (holding that double-celling did not violate the 8th Amendment since it did not lead to deprivations of basic needs, and did not "increase violence among inmates or create other conditions intolerable for prison confinement").

99. See, e.g., *Sealey v. Giltner*, 197 F.3d 578, 589–590 (2d Cir. 1999) (finding that administrative confinement, after a required factual determination that plaintiff posed a threat to prison safety, was not an "atypical and significant hardship" when compared to the ordinary conditions of prison life). Note that *Sealey* is not an 8th Amendment case, but was brought under the Due Process Clause of the 14th Amendment.

100. See *Allah v. Seiverling*, 229 F.3d 220, 223–226 (3d Cir. 2000) (allowing an incarcerated person to go forward with a due process claim that he was kept in administrative segregation in retaliation for filing civil rights suits).

101. See *Brown v. Plata*, 563 U.S. 493, 495, 131 S. Ct. 1910, 1919, 179 L. Ed. 2d 969, 978 (2011); see also *Helling v. McKinney*, 509 U.S. 25, 34–36, 113 S. Ct. 2475, 2481–2482, 125 L. Ed. 2d 22, 32–33 (1993) (holding that exposure to extreme levels of environmental tobacco smoke that pose an unreasonable risk to future health may be an 8th Amendment violation, and that the plaintiff did not need to wait until he was actually harmed to ask a court to correct unsafe conditions). But see *Glick v. Henderson*, 855 F.2d 536, 538–540 (8th Cir. 1988) (denying an incarcerated person's 8th Amendment claim based on exposure to HIV in prison, because it was based on an "unsubstantiated fear").

102. See *Hope v. Pelzer*, 536 U.S. 730, 738, 745–746, 122 S. Ct. 2508, 2514–2515, 2518, 153 L. Ed. 2d 666, 677–678, 682 (2002) (reversing judgment that guards were entitled to qualified immunity and holding that defendants could be liable under Section 1983 for violating an incarcerated person's 8th Amendment rights by handcuffing the incarcerated person to a hitching post for seven hours in extreme heat, and without bathroom breaks or an adequate supply of drinking water).

(iv) Exercise, Work, and Education

Eighth Amendment claims challenging deprivations of exercise and recreation have had mixed results. Whether a right to exercise has been violated depends on whether you have been deprived of your basic needs. Because prison officials are constitutionally required to provide for your health, they must generally allow you to have certain minimum levels of exercise.¹⁰³ However, this right has been found to be violated only if a person's movement is so restricted that his muscles are allowed to waste or his health is threatened.¹⁰⁴ Most courts will not find that a deprivation of recreation time violates constitutional rights, since general *recreation*, unlike *exercise*, does not necessarily affect health.

Eighth Amendment claims challenging deprivations of meaningful work or educational programs have not been very successful. The Supreme Court has said that limited work hours or delays in accessing education do not cause pain and are not punishments, and that therefore the Eighth Amendment does not generally protect against deprivations like these.¹⁰⁵

(c) Fourteenth Amendment Claims: The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment guarantees every person in the United States, including those who are incarcerated, "the equal protection of the laws."¹⁰⁶ This means that the state may not treat you differently (discriminate against you) because you belong to a particular group or "class" of people. In general, when you are incarcerated, you must meet two requirements to make a claim under the Equal Protection Clause.¹⁰⁷ First, your claim must state that you were treated differently from others who were in a similar situation or similar circumstances.¹⁰⁸ Second, your claim

103. See *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (finding an 8th Amendment violation where incarcerated people in a segregation unit were allowed only one hour each week of exercise outside of their cells); *Spain v. Proconier*, 408 F. Supp. 534, 547 (N.D. Cal. 1976) ("[T]he denial of fresh air and regular outdoor exercise and recreation constitutes cruel and unusual punishment. . ."), *aff'd in part and rev'd in part*, 600 F.2d 189 (9th Cir. 1979). But see *Anderson v. Coughlin*, 757 F.2d 33, 36 (2d Cir. 1985) ("[N]either an occasional day without exercise when weather conditions preclude outdoor activity nor reliance on running, calisthenics, and isometric and aerobic exercises in lieu of games is cruel and unusual punishment."); *French v. Owens*, 777 F.2d 1250, 1255–1256 (7th Cir. 1985) (holding prison provided sufficient opportunity for exercise that did not rise to level of 8th Amendment violation).

104. See *French v. Owens*, 777 F.2d 1250, 1255–1256 (7th Cir. 1985) ("Lack of exercise may certainly rise to a constitutional violation. Where movement is denied and muscles are allowed to atrophy, the health of the individual is threatened and the state's constitutional obligation is compromised."); see also *Mammanna v. Fed. Bureau of Prisons*, 934 F.3d 368, 373–374 (3d Cir. 2019) ("[A]lleged deprivations and exposure reflect more than the denial of a 'comfortable prison[]', but rather the denial of 'the minimal civilized measure of life's necessities,' in particular, warmth and sufficient sleep."); *Mitchell v. Rice*, 954 F.2d 187, 192 (4th Cir. 1992) (stating that prisons may restrict exercise only in exceptional circumstances, such as when an adult incarcerated person is in disciplinary segregation).

105. See *Rhodes v. Chapman*, 452 U.S. 337, 348, 101 S. Ct. 2392, 2400, 69 L. Ed. 2d 59, 70 (1981) ("[L]imited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments."); *Granillo v. Corr. Corp. of Am.*, No. 99-5720, 2000 U.S. App. LEXIS 28037, at *2–3 (6th Cir. Nov. 6, 2000) (*unpublished*) (dismissing as frivolous a complaint where an incarcerated person claimed administrative detention deprived him of "goods, recreation, work opportunities, money, schooling, television, telephone, contact visitation, and a microwave to heat his cold meals"); *Women Prisoners v. District of Columbia*, 93 F.3d 910, 927 (D.C. Cir. 1996) (noting that an incarcerated person "has no constitutional right to work and educational opportunities"); *Higgason v. Farley*, 83 F.3d 807, 810 (7th Cir. 1996) (determining that reduction in privileges, including educational programs, "did not infringe on a protected liberty interest").

106. U.S. CONST. amend. XIV.

107. See *Veney v. Wyche*, 293 F.3d 726, 730–731 (4th Cir. 2002) (naming the two requirements that must be met for an incarcerated person to make an equal protection claim); *Wilson v. Taylor*, 515 F. Supp. 2d 469, 472 (D. Del. 2007) (same); *Williams v. Manternach*, 192 F. Supp. 2d 980, 990 (N.D. Iowa 2002) (same).

108. *Klinger v. Dept. of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994) (noting that the Equal Protection Clause

must state that the unequal treatment resulted from intentional or purposeful discrimination.¹⁰⁹ You are most likely to be able to make an equal protection claim if you have been discriminated against because of your race, gender, ethnicity, or disability.¹¹⁰

You may also have an equal protection claim if you are discriminated against because of your custodial status (e.g., the type of custody you are in, such as protective custody, or general population).¹¹¹ However, in practice, equal protection claims for discrimination based on custodial status are difficult to win. This is because treating incarcerated people in different ways is allowed as long as the prison has *some* reasonable explanation.¹¹²

The Supreme Court has also said that it may be possible to make an equal protection claim if you are singled out as an individual for “arbitrary and irrational treatment,” meaning you were singled out for no apparent or logical reason, even if you are not being discriminated against as a member of

requires the state to treat people alike when they are in similar situations).

109. *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262, 278 (1987) (noting that a successful equal protection claim must prove that there was purposeful discrimination). This means that it is not enough to argue that you were treated differently, but that you must also argue that you were *intentionally* treated differently (treated differently on purpose).

110. *See Johnson v. California*, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 963 (2005) (finding that an incarcerated person’s 14th Amendment rights to equal protection are violated if the prison discriminates on the basis of race, unless the prison can demonstrate that such discrimination is *necessary* to achieve a *compelling* government interest); *Sockwell v. Phelps*, 20 F.3d 187, 191–192 (5th Cir. 1994) (finding equal protection violations where incarcerated people were segregated by race in their cells, because a general fear of racial violence could not justify segregation); *Santiago v. Miles*, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) (finding that plaintiffs had proven the existence of equal protection violations based on a pattern of racism affecting job placement, housing assignments, and discipline). *But see Wilson v. Taylor*, 515 F. Supp. 2d 469, 473 (D. Del. 2007) (dismissing equal protection claim based on race discrimination in prison discipline because the incarcerated person did not provide evidence that the discipline was racially motivated or that white incarcerated people who were similarly situated were treated differently); *Hill v. Thalacker*, 399 F. Supp. 2d 925, 929 (W.D. Wis. 2005) (dismissing incarcerated person’s claim of race discrimination in promotion policy because he did not provide any evidence that the white incarcerated people who were promoted before him were similarly situated); *Bass v. Becher*, No. 04-C-033-C, 2004 U.S. Dist. LEXIS 2372, at *12 (W.D. Wis. Feb. 17, 2004) (*unpublished*) (dismissing claim of equal protection violation based on race because the plaintiff did not provide facts to show how his treatment was different from that of a white incarcerated person in the same position); *Brown v. Byrd*, No. 00-3118, 2000 U.S. Dist. LEXIS 17354, at *15–19 (E.D. Pa. Dec. 1, 2000) (*unpublished*) (finding that defendants’ policy of assigning cells based on whether they thought incarcerated people would get along, even if shown to have a racial impact, did not violate the Equal Protection Clause because it was reasonably related to the prison’s legitimate interests in safety and security); *Giles v. Henry*, 841 F. Supp. 270, 275 (S.D. Iowa 1993) (finding African-American plaintiff’s argument that defendants treated similarly situated white incarcerated people more favorably than him to be unpersuasive because there was no clear pattern of discrimination in the evidence). For information on and cases regarding equal protection violations based on gender, see Chapter 41 of the *JLM*, “Special Issues of Women Prisoners.” *See Jean v. Nelson*, 711 F.2d 1455, 1485 n.29 (11th Cir. 1983) (noting that “[a] claim of discrimination based on nationality does not differ from that based on race”), *vacated on other grounds en banc*, 727 F.2d 957 (11th Cir. 1984); *Parisie v. Morris*, 873 F. Supp. 1560, 1562–1563 (N.D. Ga. 1995) (finding that a plaintiff’s claim that the parole board had impermissibly considered his ethnicity in denying him parole was valid). *See Green v. McKaskle*, 788 F.2d 1116, 1125 (5th Cir. 1986) (noting restrictions on movement and access based on disability may violate equal protection if no possible justification is shown). *See* Chapter 28 of the *JLM*, “Rights of Prisoners with Disabilities,” for more information on disability discrimination.

111. *Williams v. Manternach*, 192 F. Supp. 2d 980, 989–992 (N.D. Iowa 2002) (finding that plaintiff made a valid equal protection claim by stating that, “as a lifer”, he was treated differently with regard to jobs and classification). *But see Gerber v. Hickman*, 291 F.3d 617, 623 (9th Cir. 2002) (*en banc*) (finding no equal protection violation for a life incarcerated person barred from providing his wife with a sperm sample for the purposes of artificial insemination because keeping up with contacts outside of prison is not as important for incarcerated people who will never be released from prison).

112. *See, e.g., Little v. Terhune*, 200 F. Supp. 2d 445, 452 (D.N.J. 2002) (rejecting plaintiff’s equal protection claim because the lack of programming available to incarcerated people in administrative segregation compared with those in the general population was rationally related to the prison’s security concerns and budgetary constraints).

a certain group.¹¹³ However, like other constitutional rights, the right to equal protection is compared to the state's legitimate interests. One of these legitimate interests is keeping prisons safe and orderly.

3. Federal Statutory Bases for Section 1983 Claims

Sometimes, in addition to claims based on federal constitutional violations, you can bring a Section 1983 claim if a state actor has violated a right created by a federal statute.¹¹⁴ However, only a few federal statutes can be enforced using Section 1983.

One example is a claim related to payment of veteran's benefits. At least one court has held that the statute dealing with this, 38 U.S.C. § 5301(a), permits a Section 1983 lawsuit to be brought to enforce the statute.¹¹⁵

You may also be able to bring a Section 1983 claim if a prison has violated your rights under certain international treaties. For example, a few courts have held that Article 36 of the Vienna Convention on Consular Relations ("VCCR") can be used as the basis for a Section 1983 claim. The VCCR describes foreign nationals' right to consular access.¹¹⁶ Consular access means granting permission to contact your home nation's embassy in the United States. If you are a foreign national, and you are arrested or detained, the federal, state, or local law enforcement agency responsible for your arrest or detention must ask you whether you would like to notify your embassy of your arrest. If so, then they must notify a consular official from your embassy. They must also grant the consular official access to you.

Some federal statutes, such as provisions of the Americans with Disabilities Act, cannot be enforced through Section 1983 because they have their own enforcement provisions.¹¹⁷

Sometimes it is easier to show that your rights under a statute have been violated than it is to show a constitutional violation. If courts have already found that a particular statute can be used as

113. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074–1075, 145 L. Ed. 2d 1060, 1063 (2000) (finding that equal protection claims can be made by a "class of one" if the plaintiff has been arbitrarily and irrationally singled out and treated differently from others in similar situations and there is no rational basis for the difference in treatment).

114. *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S. Ct. 2502, 2504, 65 L. Ed. 2d 555, 559 (1980) (holding that Section 1983 may be used to sue for violations of a right created by a federal statute).

115. *Higgins v. Beyer*, 293 F.3d 683, 689–690 (3d Cir. 2002) (holding that 38 U.S.C. § 5301(a) which prohibits veterans benefits from being seized or attached, creates a right that can be enforced under Section 1983). In *Higgins*, an incarcerated person brought a Section 1983 claim against the New Jersey Department of Corrections and other defendants for taking a portion of the money from his veteran's disability check to pay a fine the incarcerated person owed to the Victims of Crime Compensation Board. *Higgins v. Beyer*, 293 F.3d 683, 685–687 (3d Cir. 2002).

116. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 100, 596 U.N.T.S. 261, 292. Note that the federal courts disagree on whether Article 36 of the Vienna Convention on Consular Relations ("VCCR") creates a right enforceable by an individual who has been arrested. *Compare* *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (holding that Article 36 of the VCCR confers individual rights on detained nationals), *with* *Gandara v. Bennett*, 528 F.3d 823, 827–829 (11th Cir. 2008) (holding that Article 36 of the VCCR does not create individual rights), *De Los Santos Mora v. New York*, 524 F.3d 183, 209 (2d Cir. 2008) (holding same), *and* *Cornejo v. County of San Diego*, 504 F.3d 853, 855 (9th Cir. 2007) (holding same). The majority of federal courts that have addressed the issue have concluded that the Vienna Convention does *not* create enforceable individual rights. The Supreme Court has not yet addressed the issue of whether Article 36 can provide the basis for a Section 1983 claim. *United States v. Perez-Sanchez*, No. CR02-4065-MWB, 2006 WL 2949503, at *8 (N.D. Iowa Oct. 17, 2006) (*unpublished*) (noting that federal circuit courts have not agreed on the enforceability of VCCR Article 36 and that the Supreme Court has declined to decide the issue). For more information on consular access, see the Immigration and Consular Access Supplement to the *JLM*.

117. *See* *Blessing v. Freestone*, 520 U.S. 329, 341, 117 S. Ct. 1353, 1360, 137 L. Ed. 2d 569, 582 (1997) (quoting *Smith v. Robinson*, 468 U.S. 992, 1005, n. 9, 104 S. Ct. 3457, 3464 n.9, 82 L. Ed. 2d 746, 760 n.9 (1984)) ("[D]ismissal is proper if Congress 'specifically foreclosed a remedy under § 1983' . . . by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."); *Williams v. Pa. Human Relations Comm'n*, 870 F.3d 294, 297–300 (3d Cir. 2017) (holding that provisions of the American with Disabilities Act (ADA) may not be enforced using Section 1983). For more about your rights under the ADA, see Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities." For more about your rights under RLUIPA, see Chapter 27 of the *JLM*, "Religious Freedom in Prison."

the basis for a Section 1983 claim, you should examine the cases interpreting that statute to see if your case is similar to them. You should pay special attention to which cases rely on Section 1983 and which do not.¹¹⁸

C. Procedural Requirements for Your Lawsuit

1. Types of Relief a Court May Grant

Whether your Section 1983 claim is based on a violation of constitutional or federal statutory rights, you may generally ask a federal district court for several types of relief. These types of relief include: damages (money payment), injunctive relief (an order from the court to the person you sued to do something or to stop doing something), and declaratory relief (a court statement of what your rights are). You may ask for more than one type of relief in your suit. However, the type of relief you can ask for may be different depending on whom you sue or name as defendants.¹¹⁹

(a) Money Damages

The court may require individual defendants (such as a warden, guard, or employee) to pay you money damages. You generally cannot get a judgment for money damages against states or state agencies like state prisons.¹²⁰ However, you can get a judgment for money damages against municipalities and private corporations. If you are suing for damages, either you or the defendant can demand a trial by jury.

There are three general categories of money damages: compensatory, punitive, and nominal damages. *Compensatory damages*, also known as actual damages, are awarded to make you “whole.” This means that they are supposed to put you back in the same position you were in before you suffered the wrong. For example, imagine that an item of your property has been unlawfully damaged by a prison official and the property was worth seventy dollars. If you win your suit, you could receive seventy dollars in damages or a lesser amount that is enough to repair or restore the item to its original condition. Or, if you were physically injured by the defendant’s conduct, a court or jury might award you enough money to cover your medical expenses or to compensate you for a resulting disability. In addition, compensatory damages may include pain and suffering damages. These try to compensate you financially for the physical pain and suffering you experienced because of the wrongful conduct. When you ask for compensatory damages, you must state and prove the nature, extent, and cause of your injuries in detail.

The second type of money damages is *punitive damages*. These are not awarded very often. The purpose of punitive damages is to punish the defendants for what they did, rather than just to compensate you for what happened. Punitive damages are available when the defendants acted with

118. Courts generally decide on a case-by-case basis which statutes can be used as the basis for Section 1983 lawsuits, depending on how the court thinks that Congress intended the statute to work. *See* *Blessing v. Freestone*, 520 U.S. 329, 340–341, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569, 581–582 (1997) (discussing how courts have traditionally determined whether federal statutes create rights that are enforceable using Section 1983). For example, courts have held that juvenile offenders who are illegally housed with adult offenders in adult prisons can use Section 1983 to enforce their right to be housed separately. *See* *Hendrickson v. Griggs*, 672 F. Supp. 1126, 1136–1137 (N.D. Iowa 1987) (holding that the Juvenile Justice and Delinquency Prevention Act, codified at 42 U.S.C. § 5633(a)(12)–(14), creates enforceable rights under Section 1983). However, if you are an adult whose criminal history is wrongfully disclosed, you cannot sue under Section 1983. *See* *Polchowski v. Gorris*, 714 F.2d 749, 751 (7th Cir. 1983) (holding that 42 U.S.C. § 3789g does not create enforceable rights under Section 1983). Sometimes, different courts do not agree on whether a particular statute can be used as the basis for a Section 1983 claim. You should research your jurisdiction’s case law about bringing Section 1983 claims based on federal statutory rights.

119. For a list of the types of relief available from different defendants, see Figure 2 in Part C(3)(c) of this Chapter.

120. As a practical matter, it is often the case that if you sue state employees in their individual capacity (as opposed to the actual state or state agency), the state will voluntarily pay the damages for the employees. This is called “indemnification.”

“evil motive or intent” or “reckless or callous indifference” to your federal rights.¹²¹ A court cannot award punitive damages against governmental agencies, like a prison or a jail, but it can award them against individual officials or employees.¹²²

The third type of money damages is *nominal damages*. Nominal damages are symbolic, and usually no more than one dollar.¹²³ You may be awarded nominal damages instead of compensatory damages if you prove that the defendants violated your rights, but did not cause you any harm.¹²⁴ If you are awarded nominal damages, you *may* be able to get punitive damages as well.¹²⁵

However, if even if a court awards you money damages for your Section 1983 case, there are laws that might prevent you from receiving all of your award.

At least thirty-one states, and the federal government, have some type of “Son of Sam” statute.¹²⁶ The purpose of these statutes is to stop people who are convicted of a crime from profiting off of that crime. If you profit from that crime, “Son of Sam” statutes allow the victims of that crime to sue for some, if not all, of those profits. For instance, if you are convicted of a crime and later on write a book or a movie based off of that crime, “Son of Sam” statutes could allow any victim of that crime to seek

121. See *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632, 651 (1983) (holding that an incarcerated person may be awarded punitive damages for recklessness or serious indifference to his rights, as well as for “evil intent”); see also *Reilly v. Grayson*, 310 F.3d 519, 521 (6th Cir. 2002) (upholding punitive damages award against prison officials whose refusal to house asthmatic incarcerated person in smoke-free environment was found to be a reckless disregard for his rights); *Blissett v. Coughlin*, 66 F.3d 531, 535–536 (2d Cir. 1995) (upholding jury award of punitive damages against prison guards for assault and unlawful confinement of incarcerated person).

122. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 634–635 (1981) (holding that punitive damages are not available against a municipality in a Section 1983 suit); *Ciraolo v. City of N.Y.*, 216 F.3d 236, 241–242 (2d Cir. 2000) (reversing an award of punitive damages against New York City in a Section 1983 action based on *City of Newport* and holding that municipal immunity from punitive damages is absolute, with no “outrageous conduct” exception).

123. Courts may award more than one dollar. See, e.g., *Hatch v. Yamauchi*, 809 F. Supp. 59, 61 (E.D. Ark. 1992) (awarding nominal damages in the amount of ten dollars for violation of incarcerated person’s right to access the courts, including access to the law library and trained legal assistance).

124. See *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (holding that under the Prison Litigation Reform Act (“PLRA”) claims for constitutional violations without physical injury need not be dismissed outright, but recovery is limited to nominal and punitive damages (as well as injunctive and declaratory relief) because allowing compensatory damages without physical injuries would amount to recovery for mental or emotional injury, which the PLRA prohibits); see also *Royal v. Kautzky*, 375 F.3d 720, 722–723 (8th Cir. 2004) (holding that the compensatory damages limitation of the PLRA applies to all federal prisoner lawsuits, including those for 1st Amendment violations); *Searles v. Van Bebber*, 251 F.3d 869, 875–877 (10th Cir. 2001) (holding that an incarcerated person could not recover compensatory damages for the violation of his constitutional rights without first showing a physical injury). However, some courts do not require any showing of physical injury where the deprivation involves the 1st Amendment. See *Williams v. Ollis*, Nos. 99-2168/99-2234, 2000 U.S. App. LEXIS 23671, at *5–6 (6th Cir. Sept. 18, 2000) (*unpublished*) (stating that the plaintiff’s 1st Amendment claim for money damages was not precluded by PLRA); *Rowe v. Shake*, 196 F.3d 778, 781–782 (7th Cir. 1999) (holding that “[a] deprivation of First Amendment rights standing alone is a cognizable injury,” and therefore “[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained”); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (holding that “[t]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show”).

125. See *Allah v. Al-Hafeez*, 226 F.3d 247, 251–252 (3d Cir. 2000) (noting that in appropriate cases, both nominal and punitive damages may be awarded for a violation of constitutional rights without an accompanying injury). In the cited case, the plaintiff sought punitive damages for the alleged violation of his constitutional right to the free exercise of religion, but not for any emotional or mental distress that he may have suffered as a result of that violation. However, his claims for compensatory damages were barred by the court. See *Allah v. Al-Hafeez*, 226 F.3d 247, 250–251 (3d Cir. 2000).

126. Validity, construction, and application of “Son of Sam” laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210 (Originally published in 1988).

those profits.¹²⁷ However, many states like New York have expanded these statutes, and if you are convicted of a crime, the individuals who are considered victims of that crime may sue you for *any* funds that you might receive—which would include money damages from your §1983 case.¹²⁸ While many “Son of Sam” laws are similar to New York’s, each law will likely have unique features. So, before seeking money damages in your Section 1983 suit it is important to consider the “Son of Sam” laws of that state in which you were convicted, as well as the federal “Son of Sam” law.

No matter which type of damages you ask for, you should read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.” The PLRA limits the types of damages you can recover in different situations.¹²⁹

(b) Injunctive Relief

Another type of relief the court can award in a Section 1983 action is an *injunction*. An injunction is an order to prison officials either *to take* or *not to take* certain actions. For example, a judge may order a prison to act to improve the conditions of your confinement. Or, a judge may order a prison to stop censoring your mail.¹³⁰ An injunction is often referred to as “equitable relief.”

When you make the decision to ask a court for a *permanent injunction*, there are a few actions that you should take first. First, you might seek a temporary restraining order (“TRO”). Courts will only grant a TRO in exceptional and urgent situations. To get a TRO, you must show that you will suffer “immediate and irreparable injury, loss, or damage” if you have to wait for a hearing.¹³¹

If you believe you are eligible for a TRO, you must file an “Order to Show Cause and Temporary Restraining Order” with the court. See Appendix A-4 of this Chapter for an example. If possible, you must also notify the prison officials that you are requesting a TRO and send them copies of your request. You must also submit to the court an affidavit that describes your efforts to contact the prison officials, and a short memorandum stating the reasons why the court should grant your request for a TRO.¹³² If you are granted a TRO, the court will set a date for a hearing as soon as possible. At this

127. Validity, construction, and application of “Son of Sam” laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210 (Originally published in 1988).

128. N.Y. EXEC. LAW § 632-a (McKinney 2020); *see also* Validity, construction, and application of “Son of Sam” laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210 (Originally published in 1988).

129. *See Harris v. Garner*, 216 F.3d 970, 974 (11th Cir. 2000) (*en banc*) (holding that the PLRA’s language stating that “[n]o action shall be brought” operates as a bar to an incarcerated person’s entire suit absent physical injury). Note that *Harris v. Garner* was specifically about lawsuits that are filed while the plaintiff is in jail, prison, or some other correctional facility, but which are not decided until after he is released. *Compare Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (“§ 1997e(e) precludes claims for emotional injury without any prior physical injury, regardless of the statutory or constitutional basis of the legal wrong.”), *with Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999) (citation omitted) (“§ 1997e(e) applies only to claims for mental or emotional injury. Claims for other types of injury do not implicate the statute.”), *and Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (“The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment claims regardless of the form of relief sought.”).

130. *See, e.g., Koch v. Lewis*, 216 F. Supp. 2d 994, 1007 (D. Ariz. 2001) (ordering prison to release incarcerated person from segregation into the general population after finding that indefinite segregation based solely on gang membership was unconstitutional), *vacated on other grounds, Koch v. Schriro*, 399 F.3d 1099 (9th Cir. 2005); *Northern v. Nelson*, 315 F. Supp. 687, 688 (N.D. Cal. 1970) (ordering prison to allow Muslim incarcerated person to practice his religion), *aff’d*, 448 F.2d 1266 (9th Cir. 1971); *Luparar v. Stoneman*, 382 F. Supp. 495, 502 (D. Vt. 1974) (ordering prison to allow circulation of current issue of prison newspaper).

131. FED. R. CIV. P. 65(b).

132. There are no technical rules that you must follow in writing your supporting memorandum. Simply state your arguments as clearly as possible and stress what will happen if the court does not grant your request. Be sure to tell the court why you need action immediately and why you cannot wait for a hearing. Chapter 2 of the *JLM*, “Introduction to Legal Research,” explains how to conduct research for a memorandum of law. Chapter 6 of the *JLM*, “An Introduction to Legal Documents,” will also help you in writing your memorandum.

hearing, you must convince the court to convert the TRO into a preliminary injunction.¹³³ Additionally, If the court grants you a TRO, it may require you to provide money for assurance purposes. You can ask the court to waive this requirement. To take advantage of this waiver, you should file your TRO request *in forma pauperis*.¹³⁴ See Appendix A-5 of this Chapter for sample *in forma pauperis* documents.

Regardless of whether you are eligible for a TRO, before you seek a *permanent injunction* you should request what is known as a *preliminary injunction*. With a *preliminary injunction*, if you can show that an injunction is necessary to protect your rights until the end of your trial, you may be able to get a temporary injunction before the end of the trial and even before it begins.¹³⁵ In order to get a *preliminary injunction*, you must follow the procedures described in Rule 65(a) of the Federal Rules of Civil Procedure. Most courts also require you to show that:

- (1) You are likely to succeed on the merits of your claim,
- (2) You are likely to suffer irreparable harm if the preliminary injunction is denied,
- (3) If the injunction is denied, you will suffer more than the defendant would suffer if the injunction were to be granted, and
- (4) Granting the preliminary injunction is consistent with the public interest.¹³⁶

133. FED. R. CIV. P. 65(b)–(c).

134. “*In forma pauperis*” is Latin for “in the manner of a pauper” — basically, in a poor person’s manner. It means that you cannot afford the fee or costs and are asking the court to waive them. *See In Forma Pauperis*, BLACK’S LAW DICTIONARY (11th ed. 2019). Some states use the English “Poor Person Status” instead of the Latin term.

135. *See, e.g., Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984) (upholding preliminary injunction that prohibited closing a prison where incarcerated people proved that if the prison were closed they would be moved to prisons that were already too crowded); *Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 23–24 (2d Cir. 1971) (granting preliminary injunctive relief to incarcerated people after extended mistreatment by prison guards, where prison officials had not taken sufficient steps to ensure that such mistreatment would not continue during trial); *Campos v. Coughlin*, 854 F. Supp. 194, 214 (S.D.N.Y. 1994) (granting preliminary injunction requiring prison to allow incarcerated people to wear religious beads); *Dean v. Coughlin*, 623 F. Supp. 392, 405 (S.D.N.Y. 1985) (ordering prison officials to provide “adequate dental care to inmates with serious dental needs”). *But see Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1037 (11th Cir. 2001) (finding plaintiff was not entitled to a preliminary injunction since he was unable to show that there was a substantial likelihood of success on the merits of his claims); *Espinal v. Goord*, 180 F. Supp. 2d 532, 541 (S.D.N.Y. 2002) (denying plaintiff’s motion for a temporary restraining order or preliminary injunction because plaintiff had not made a “substantial showing of likelihood of success on the merits of his due process claims”).

136. Consistency with the public interest is the standard for a preliminary injunction in most federal courts. *See Yoltan v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578–581 (6th Cir. 2006) (affirming grant of preliminary injunction), *abrogated on other grounds by M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 135 S. Ct. 926, 190 L. Ed. 2d 809 (2015); *Joelner v. Village of Washington Park*, 378 F.3d 613, 619 (7th Cir. 2004) (affirming and reversing grants and denials of various preliminary injunctions); *Rodde v. Bonta*, 357 F.3d 988, 999–1000 (9th Cir. 2004) (affirming grant of preliminary injunction); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 130 (1st Cir. 2003) (affirming grant of preliminary injunction); *Shire U.S., Inc. v. Barr Labs., Inc.*, 329 F.3d 348, 358–359 (3d Cir. 2003) (affirming denial of preliminary injunction); *Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (vacating denial of preliminary injunction and remanding for reconsideration); *In re Sac & Fox Tribe*, 340 F.3d 749, 758 (8th Cir. 2003) (affirming grant of preliminary injunction); *Kikumura v. Hurley*, 242 F.3d 950, 955, 963 (10th Cir. 2001) (affirming and reversing on preliminary injunction factors); *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1035 (11th Cir. 2001) (affirming denial of preliminary injunction); *Wenner v. Tex. Lottery Comm’n*, 123 F.3d 321, 325 (5th Cir. 1997) (respecting grant of preliminary injunction by Pennsylvania district court). However, some courts modify the test slightly. Courts in the Second Circuit require you to show that: (1) you are likely to suffer irreparable harm if the preliminary injunction is denied, and (2) either (a) you are likely to succeed on the merits of your claim, or (b) your claim raises sufficiently serious questions to justify litigation and you will suffer more if the injunction is denied than the defendant will suffer if it is granted. *See Mitchell v. Cuomo*, 748 F.2d 804, 806–808 (2d Cir. 1984) (upholding preliminary injunction that prohibited the closing of a prison where incarcerated people proved that if the prison were closed they would be moved to prisons that were already too crowded).

In general, you can only receive a preliminary injunction *after* a hearing where your opponent has the opportunity to argue against the injunction.

Note though under 18 U.S.C. § 3626(a)(2) of the PLRA, any preliminary injunction that is granted will automatically expire after 90 days, unless the court finds that a permanent injunction should be granted and issues a final order for an injunction before the 90-day period is over.¹³⁷ It is often difficult or impossible for the parties to complete discovery and for the court to complete a trial and issue a decision within 90 days. However, the court can issue a new preliminary injunction if it finds that you still face the risk of irreparable (irreversible) harm if it is not granted.¹³⁸

Now in order to get a *permanent injunction* you must meet a four-factor test. First, you must show that there is a likelihood of substantial, immediate, and irreparable (irreversible) injury without an injunction. To meet the irreparable injury requirement, you must show that your injury is likely to happen to you again in the foreseeable (likely) future, and that your injury was not the result of a single, isolated incident.¹³⁹ You can effectively show that you are likely to suffer future harm under a written policy. Or, you may show that the defendant is engaging in a pattern or custom of officially sanctioned behavior (behavior approved by officials).¹⁴⁰ You also have to prove that your injury is substantial and irreparable (irreversible).¹⁴¹ You can show that your injury is substantial (serious) by pointing out the specific ways that you are being harmed. Demonstrating that your injury is irreparable means showing that you are being harmed in a way that cannot be fixed in the future. Many courts say that the ongoing violation of a constitutional right causes substantial and irreparable harm.¹⁴²

137. See 18 U.S.C. § 3626(a)(2).

138. See, e.g., *Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001) (upholding a district court's second preliminary injunction allowing incarcerated people to attend religious services without being punished).

139. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 1669, 75 L. Ed. 2d 675, 688 (1983) (holding that injunctive relief is unavailable where plaintiff has not shown that "he is realistically threatened by a repetition of [the violation]," where the plaintiff sought to enjoin the general use of chokeholds by police); *Hague v. CIO*, 307 U.S. 496, 518, 59 S. Ct. 954, 965, 83 L. Ed. 1423, 1438 (1939) (granting injunctive relief because the threat of continued police misconduct in the enforcement of a municipal ordinance made the threat of constitutional deprivations ongoing); *Kritenbrink v. Crawford*, 313 F. Supp. 2d 1043, 1053 (D. Nev. 2004) ("The mere fact that a plaintiff has suffered an injury in the past is not sufficient to allege standing for injunctive relief.").

140. See *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001) (stating that a realistic threat of a repeating injury may arise from a written policy or a pattern of officially sanctioned behavior), *abrogated on other grounds* by *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005).

141. See *Williams v. Cozza-Rhodes*, No. 12-CV-01580-BNB, 2012 U.S. Dist. LEXIS 159527, at *6 (D. Colo. Nov. 7, 2012) (*unpublished*) (denying an order enjoining prison guards from banging on incarcerated person's cell door at night and confiscating his property because the incarcerated person failed to "demonstrate that he will suffer substantial and irreparable harm if a preliminary injunction is not issued"); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S. Ct. 1660, 1670, 75 L. Ed. 2d 675, 690 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502, 94 S. Ct. 669, 679, 38 L. Ed. 2d 674, 687 (1974)) (finding injunction unavailable "where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a 'likelihood of substantial and immediate irreparable injury'"); *Heron v. City of Denver*, 317 F.2d 309, 311 (10th Cir. 1963) (explaining that "the injury incurred or impending under the circumstances here existing must be substantial and irreparable; it must be clear and imminent").

142. See, e.g., *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (stating that there is a "presumption of irreparable injury that flows from a violation of constitutional rights"); *Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990) ("Even a temporary deprivation of [1st] amendment freedom of expression rights is generally sufficient to prove irreparable harm."); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) (noting that deprivation of a constitutional right amounts to irreparable harm); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (holding that a plaintiff need not show irreparable harm when an alleged violation of a constitutional right is shown). But see *Wis. Cent. Ltd. v. Pub. Serv. Comm'n*, 95 F.3d 1359, 1372 (7th Cir. 1996) (holding that where the only constitutional right at issue related to the procedures for receiving compensation for a governmental taking of property, irreparable harm was not shown because plaintiffs failed to avail themselves of the available procedures); *Pinckney v. Bd. of Educ.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996) (noting that although courts will usually find irreparable harm when substantive constitutional rights are violated, when procedural

Second, you must show that the “remedies at law,” such as money damages, are inadequate.¹⁴³ This means that you have to show that no other available legal remedy will address your injury. In other words, you must show that an injunction is the only way to prevent and correct the source of your injury, and that money damages will not do this.¹⁴⁴ Because an injunction often involves court monitoring, you should also explain why such ongoing court involvement is necessary.

When attempting to decide whether these requirements have been met, just like with a preliminary injunction, a court will have to consider who will suffer more between you and the defendant if they grant the injunction in your favor, or deny the injunction in the defendant's favor.¹⁴⁵ It is your responsibility to show the court that that harm you would suffer if your injunction is denied, is greater than the harm the defendant would suffer if your injunction is granted. Finally, you also need to convince the court that granting your *permanent injunction* would not hurt the public interest. As with a preliminary injunction, you can attempt to satisfy these requirements by showing that granting the injunction will not have a negative impact on public resources.¹⁴⁶

(c) Declaratory Relief

Finally, the court may issue a *declaratory judgment*. A declaratory judgment is a statement about the nature and limits of your rights. An example would be a court order declaring that a particular prison procedure is unconstitutional. The court can issue a declaratory judgment in response to a pleading that appropriately states that your rights have been violated, or it can be granted as part of the final relief in the lawsuit.¹⁴⁷ A declaratory judgment can be useful if prison officials threaten to take some action that you believe would violate your rights. In these cases, you may use Section 1983 to ask the court for a declaratory judgment saying that it would be illegal for the prison to take that action. You may ask for a declaratory judgment even if you are not seeking any other type of relief, but a lawsuit often asks for another type of relief, like an injunction ordering a prison to change its procedures, in addition to declaratory judgment.¹⁴⁸ So, if you believe that the declaratory judgment is not enough to protect you, you can still ask for an injunction.

due process violations are involved, “courts must consider the nature of the constitutional injury before making such a conclusion.”).

143. See *O’Shea v. Littleton*, 414 U.S. 488, 502, 94 S. Ct. 669, 679, 38 L. Ed. 2d 674, 687 (1974) (noting that to obtain equitable relief, plaintiff must prove “likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law”); *Younger v. Harris*, 401 U.S. 37, 46, 91 S. Ct. 746, 751, 27 L. Ed. 2d 669, 676 (1971) (stating that proof of an irreparable injury is required for any injunction). These requirements are often referred to as the requirements for “standing” (the right to make a legal claim before the court) to seek injunctive relief.

144. See *O’Shea v. Littleton*, 414 U.S. 488, 502, 94 S. Ct. 669, 679, 38 L. Ed. 2d 674, 686–687 (1974) (holding that plaintiffs did not meet the requirements for injunctive relief because there were state and federal remedies that could provide them with adequate relief for their alleged wrongs); *Pinckney v. Bd. of Educ.*, 920 F. Supp. 393, 400–401 (E.D.N.Y. 1996) (holding that irreparable harm was not shown by alleged procedural due process violation where plaintiff could be compensated with money damages).

145. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641, 645 (2006); see also *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 1404 n.12, 94 L. Ed. 2d 542, 556 n. 12 (1987).

146. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641, 645 (2006); see also *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 1404 n.12, 94 L. Ed. 2d 542, 556 n. 12 (1987).

147. Declaratory Judgment Act, 28 U.S.C. § 2201(a).

148. Declaratory Judgment Act, 28 U.S.C. § 2201(a); see, e.g., *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995) (granting plaintiffs’ motion for declaratory judgment that the corrections department deprived them of equal protection of law by creating a special unit for deaf incarcerated people that was unavailable to male but not female incarcerated people).

2. Whom to Name as Defendants

Figuring out exactly whom to name as a defendant in your Section 1983 lawsuit can be confusing. As noted in Part B(1)(a) above, you can only sue a “person” who violated your rights while acting “under color” of state law. For the purposes of Section 1983, the definition of a “person” includes individual people (like prison wardens, guards, and other employees). The definition also includes *cities, counties, or municipalities* that adopt policies, rules, or regulations that violate your rights.¹⁴⁹ However, the definition of a “person” does not include *state* governments and their agencies (including your state’s department of corrections).¹⁵⁰

(a) Individual Defendants

If any of your defendants are individuals, you must decide in what “capacity” you will sue them. You can sue them in their “individual capacities,” in their “official capacities,” or both. When you sue someone in his individual capacity, you are suing him personally. When you sue someone in his official capacity, you are suing his office. For example, if you sue someone in his official capacity, you are suing the county jail warden’s office rather than suing the individual who happens to be the county jail warden. Whether you sue a particular individual in his individual capacity, his official capacity, or both, will affect the type of damages you can receive. It will also affect the defenses that the individual can raise.¹⁵¹

In general, if you want to get an injunction (described in Part C(1)(b) of this Chapter), you should sue defendants in their official capacities. If you want to receive money damages, you should generally sue defendants in their individual capacities. For example, if one of the defendants in your case is a state official, and you sue them in their official capacity, the suit would be considered a suit against the state rather than that person.¹⁵² So if you were to sue a state official in their official capacity, they would not be considered a “person” under the definition of Section 1983 and they would be immune from liability.¹⁵³ If you are seeking money damages against a high-ranking local official, like a sheriff or a warden, then you should probably sue him in both his official and individual capacities. If you are confused about which capacity to use for a particular defendant, you always have the option of suing that defendant in both capacities. However, you should be aware that suing defendants in both capacities might lead the defendants to file motions asking that a part of your lawsuit be dismissed. These motions can delay your lawsuit.

Sometimes you may not know the name of the person who violated your rights. In such a case, you must refer to the defendant as “John (or Jane) Doe.”¹⁵⁴ This tells the court that you do not know the person’s name. You must, however, locate and identify all John and Jane Does at some point or the claims against them will be dismissed.¹⁵⁵ You also have to be concerned with the statute of limitations

149. See *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 690–691, 98 S. Ct. 2018, 2035–2036, 56 L. Ed. 2d 611, 635 (1978) (holding that municipalities and local governments are considered “persons” under Section 1983 when an official government policy or custom caused a constitutional violation).

150. See *Will v. Mich. Dep’t. of State Police*, 491 U.S. 58, 68–71, 109 S. Ct. 2304, 2311–2312, 105 L. Ed. 2d 45, 56–58 (1989) (holding that states and state defendants sued in their official capacities are not “persons” under Section 1983 and therefore may not be sued for money damages).

151. See Part C(3) of this Chapter for an explanation of how individual and official capacities affect potential defenses and the types of damages you can receive.

152. See *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 361, 116 L. Ed. 2d 301, 309 (1991); see also *Will v. Michigan Dep’t. of State Police*, 491 U.S. 58, 70–71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 57 (1989).

153. See *Will v. Michigan Dep’t. of State Police*, 491 U.S. 58, 70–71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 57 (1989); see also Figure 2 of this Chapter.

154. See *Roper v. Grayson*, 81 F.3d 124, 126 (10th Cir. 1996) (holding that it is permissible to name John or Jane Doe as a defendant “so long as the plaintiff provides an adequate description of some kind which is sufficient to identify the person involved so process eventually can be served”); *Dean v. Barber*, 951 F.2d 1210, 1215–1216 (11th Cir. 1992) (finding plaintiff adequately identified unnamed defendant such that he could be added later when his identity was determined).

155. See, e.g., *Figueroa v. Rivera*, 147 F.3d 77, 82–83 (1st Cir. 1998) (upholding dismissal without

that sets the time limit for the claim. You will need to identify the John and Jane Does and amend your complaint before the statute of limitations on the claim has expired.¹⁵⁶ Once the lawsuit is started, you should be able to learn the defendants' identities through discovery. For more information on discovery, see Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery."

(b) Supervisor Liability¹⁵⁷

A supervisory official who causes or participates in a violation of your rights may be liable. "*Respondeat superior*" is the idea that supervisors are legally responsible for their subordinates' (lower-ranked staff members') actions, whether or not the supervisor knew about those actions.¹⁵⁸ However, the concept of "*respondeat superior*" does not apply to Section 1983 lawsuits.¹⁵⁹ Instead, in Section 1983 lawsuits, supervisory officials can only be charged with responsibility for lower officials' acts if they were personally involved in them.¹⁶⁰ A supervisor is considered to be "personally involved" in a constitutional violation if:

- (1) The supervisor, "participated directly in the alleged constitutional violation"; or
- (2) The supervisor, "after being informed of the violation [of your rights] . . . failed to remedy the wrong"; or
- (3) The supervisor "created a policy or custom under which" your constitutional rights were violated, "or allowed such a policy or custom to continue"; or
- (4) The supervisor was "grossly negligent" in that he did not adequately supervise the subordinates who violated your rights; or
- (5) The supervisor, "exhibited deliberate indifference to the right by failing to act on information indicating unconstitutional acts were occurring".¹⁶¹

To win in a supervisor liability claim, you must be able to show two things: (1) that your constitutional rights were actually violated, and (2) that there was a clear connection between the violation of your rights and the supervisor's actions or failure to act.¹⁶² If the supervisor participated

prejudice of a claim where plaintiffs had made no attempt to identify or to serve John Doe defendants 17 months after filing the lawsuit). Note that under the Federal Rules of Civil Procedure 4(m), "a district court may dismiss a complaint without prejudice as to a particular defendant if the plaintiff fails to serve that defendant within 120 days after filing the complaint." *Figueroa v. Rivera*, 147 F.3d 77, 83 (1st Cir. 1998).

156. See *Singletary v. Pa. Dept. of Corrections*, 266 F.3d 186, 196–200 (3d Cir. 2001).

157. Please note that the law on Supervisory Liability changes frequently, and varies depending on the federal circuit in which your case is being heard. For example, as this edition of the *JLM* went to print, the Second Circuit released a decision that makes it harder to show personal involvement by a supervisor. See *Tangreti v. Bachmann*, No. 19-3712, 2020 U.S. App. LEXIS 40392, at *15 n.4 (2d Cir. Dec. 28, 2020). Although this chapter list five ways in which a supervisor may be considered personally involved, if your case is being heard in the Second Circuit, only factor (1) and the first half of factor (3), which states that the supervisor "created a policy or custom un which your constitutional rights were violated," may be used to show that a supervisor was personally involved in violating your constitutional rights. As the law continues to develop, please be sure to review recent cases in the federal circuit in which your case is being heard.

158. *Respondeat superior* is Latin for "let the superior [master] make answer." *Respondeat Superior*, Black's Law Dictionary (10th ed. 2014).

159. See, e.g., *Worrel v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000) ("Under § 1983, a defendant may not be held liable under a theory of *respondeat superior*"); *Aponte Matos v. Toledo Davila*, 135 F.3d 182, 192 (1st Cir. 1998) (quoting *Seekamp v. Michaud*, 109 F.3d 802, 808 (1st Cir.1997)) ("Supervisory liability under § 1983 'cannot be predicated on a respondeat theory, but only on the basis of the supervisor's own acts or omissions.'").

160. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676–677, 129 S. Ct. 1937, 1948–1949, 173 L.Ed.2d 868, 883 (2009).

161. See *Brandon v. Kinter*, 938 F.3d 21, 36–37 (2d Cir. 2019) (discussing the ways in which supervisors may be found liable under Section 1983); *Warren v. Pataki*, 823 F.3d 125, 136 (2d Cir. 2016); see also *Lilly v. Town of Lewiston*, No. 1:18-CV-00002 EAW, 2020 U.S. Dist. LEXIS 53904, at *25 (W.D.N.Y. Mar. 27, 2020) (*unpublished*); *Hincapie v. City of N.Y.*, 434 F. Supp. 3d 61, 77 (S.D.N.Y. 2020) (S.D.N.Y. Jan. 22, 2020) (*unpublished*).

162. See *Peatross v. City of Memphis*, 818 F.3d 233, 241–242 (6th Cir. 2016) (detailing the requirements for supervisory liability); see also *Dodds v. Richardson*, 614 F.3d 1185, 1197–1202 (10th Cir. 2010) (explaining

directly in the alleged violation, they clearly may be held liable as a supervisor or in their individual capacity.¹⁶³ What follows is a discussion of the four other types of situations in which you may be able to hold a supervisor liable.

(i) Failure to Act to Remedy A Wrong

Before 2009, a supervisor could be liable under Section 1983 if he became aware of a violation of your rights but did not take steps to remedy that violation.¹⁶⁴ However, in 2009, the Supreme Court made it harder to assert supervisor liability. Now, a supervisor will only be held liable under Section 1983 when you can show that *he actually participated* in the constitutional violation.¹⁶⁵ Due to this, if you are looking to bring a supervisory liability claim, do not use cases that took place before 2009.

(ii) Creating or Allowing an Unconstitutional Policy or Custom

A supervisor may be personally involved in a violation of your rights if he develops an unconstitutional policy or if he allows an unconstitutional policy to continue.¹⁶⁶ Supervisors can be liable for an unconstitutional policy even if that policy is not written down. Unwritten policies include informal policies or customs.¹⁶⁷ Supervisors generally cannot be held liable for a constitutional policy that a subordinate simply fails to follow.¹⁶⁸ However, the supervisor *can* be held liable if subordinates fail to follow the policy because the supervisor did not do a good enough job of hiring or training them. This exception is discussed in Part C(2)(b)(iii), below.

how the Supreme Court's ruling in *Iqbal* effected the requirements for § 1983 supervisory liability claims).

163. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868, 882 (2009); see also *Brandon v. Kinter*, 938 F.3d 21, 36 (2d Cir. 2019); *Littlejohn v. City of New York*, 795 F.3d 297, 314 (2d Cir. 2015).

164. See, e.g., *Vance v. Peters*, 97 F.3d 987, 993 (7th Cir. 1996) (permitting supervisor liability where “[t]he plaintiff . . . [demonstrated] that the communication, in its content and manner of transmission, gave the prison official sufficient notice to alert him or her to [a constitutional violation] . . .”) (citation omitted); *Taylor v. Mich. Dept. of Corr.*, 69 F.3d 76, 81–82 (6th Cir. 1995) (finding that the warden could be found to have known of the possibility that an incarcerated person would be raped because warden knew that there were problems in the classification procedures and that young incarcerated people were more vulnerable to sexual assaults); *Williams v. Smith*, 781 F.2d 319, 324 (2d Cir. 1986) (holding that a supervisor who affirmed an incarcerated person's disciplinary conviction when that incarcerated person had not been permitted to call witnesses may be liable for violating the incarcerated person's due process rights); *Boone v. Elrod*, 706 F. Supp. 636, 638 (N.D. Ill. 1989) (finding supervisors would be liable under Section 1983 where plaintiff claimed they ignored complaints of threats and attacks by other incarcerated people).

165. In 2009, the Supreme Court held that “[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868, 882 (2009) (emphasis added). In *Iqbal*, the Supreme Court explicitly rejected the argument that a supervisor could be liable merely by knowing of a subordinate's discriminatory intent. *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 883 (2009) (finding that “a supervisor's mere knowledge of his subordinate's discriminatory purpose . . .” does not make them liable for a constitutional violation).

166. See *Taylor v. Mich. Dept. of Corr.*, 69 F.3d 76, 84 (6th Cir. 1995) (finding that a warden could be liable for failure to adopt reasonable policies to ensure that transferees were not placed in grave danger of rape); *Redman v. Cty. of San Diego*, 942 F.2d 1435, 1446–1447 (9th Cir. 1991) (*en banc*) (noting that sheriff could be liable for incarcerated person's rape where he approved a deficient classification policy and knew of overcrowding at the facility), *abrogated on other grounds by* *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L.E. 2d 811 (1994); *Williams v. Coughlin*, 875 F. Supp. 1004, 1014–1015 (W.D.N.Y. 1995) (finding that the superintendent of a prison could be liable for policy of withholding food from incarcerated people who committed disciplinary infractions if they knew such a policy was in place and failed to take actions to remedy it).

167. See *Leach v. Shelby Cty. Sheriff*, 891 F.2d 1241, 1247–1248 (6th Cir. 1989) (stating that a sheriff may be liable for an unwritten policy of deliberate indifference to incarcerated people's serious medical needs).

168. See *Buffington v. Balt. Cty.*, 913 F.2d 113, 122–123 (4th Cir. 1990) (holding that the county was not liable for subordinates' violation of a suicide prevention policy); *Vasquez v. Coughlin*, 726 F. Supp. 466, 473–474 (S.D.N.Y. 1989) (noting that a supervisor was not liable for a subordinate's violation of incarcerated person's rights where policies existed that were designed to prevent such violations).

(iii) Deficient Management of Subordinates

A supervisor may be liable if a subordinate violates your constitutional rights because of the supervisor's mismanagement of his subordinates. A subordinate is an individual who works under the command of the supervisor. This type of liability can occur when the supervisor:

- (1) Knew of a subordinate's past misconduct and failed to take action to fix it;¹⁶⁹ or,
- (2) Failed to set up policies that help guide subordinates' conduct to prevent violations of constitutional rights;¹⁷⁰ or,
- (3) Failed to inform and train subordinates on policies designed to avoid violations of constitutional rights;¹⁷¹ or,
- (4) Failed to properly supervise subordinates to make sure that they followed policies.¹⁷²

If your complaint alleges that inadequate training caused a violation of your rights (as described in situation (3) above), then you must show that the failure to train staff was so reckless or negligent that bad behavior from the staff was almost guaranteed to happen.¹⁷³

(iv) Deliberate Indifference

For situation (4), the definition of deliberate indifference can vary from one circuit to another. It may also depend on the type of supervisor liability you are claiming. Be sure to look at cases in your circuit to see how your circuit defines "deliberate indifference" for the purposes of supervisor liability. Most courts say that a supervisor acts with "deliberate indifference" when they know or should have known that there is a substantial risk of harms that violate your constitutional rights and they also fail to prevent or remedy those harms.¹⁷⁴

(c) Municipal or Local Government Liability

A municipality or local government—such as a county, city, or town—can be held liable under Section 1983. You must show that the violation of your constitutional rights was either (1) caused by a policy or custom of the municipality *or* (2) caused by a municipal policymaker's failure to do certain things, like properly train employees. In the first situation, the municipality has "direct liability" for violating your rights. In the second situation, the municipality has "indirect liability" for violating your

169. See *Estate of Davis v. Delo*, 115 F.3d 1388, 1396 (8th Cir. 1997) (affirming a finding that the superintendent of a prison was liable for a guard's use of excessive force where the superintendent knew of the guard's propensity for excessive force, had received written complaints about the guard, and nonetheless failed to take steps to investigate and correct the problem).

170. See *Bryant v. McGinnis*, 463 F. Supp. 373, 387–388 (W.D.N.Y. 1978) (holding that a commissioner could be liable for failing to create policies for protecting and allowing Muslim religious practices).

171. See *Gilbert v. Selsky*, 867 F. Supp. 159, 166 (S.D.N.Y. 1994) (finding that a Director of Inmate Discipline may be liable for failing to adequately train disciplinary hearing officers who violated incarcerated people's rights by refusing to allow them to call relevant witnesses at a disciplinary hearing).

172. See *Taylor v. Mich. Dept. of Corr.*, 69 F.3d 76, 80–82 (6th Cir. 1995) (noting that a warden's failure to ensure that staff properly carried out a transfer policy may create supervisor liability); *Allman v. Coughlin*, 577 F. Supp. 1440, 1448 (S.D.N.Y. 1984) (finding that a state commissioner could be liable for failing to supervise an emergency response team).

173. *McDaniels v. McKinna*, No. 03-1231, 96 F. App'x 575, 579, 2004 U.S. App. LEXIS 8262, at *8 (10th Cir. Apr. 27, 2004) (quoting *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988)) (*unpublished*); see also *Smith v. Hill*, 510 F. Supp. 767, 775 (D. Utah 1981) (requiring that the actions of the relatively remote supervisors be grossly negligent before liability attaches).

174. See generally *Parker v. Landry*, 935 F.3d 9, 15 (1st Cir. 2019) (citations omitted) (establishing that in the First Circuit "[a] showing of deliberate indifference has three components: the plaintiff must show (1) that the officials had knowledge of facts, from which (2) the official[s] can draw the inference (3) that a substantial risk of serious harm exists."); see generally *Morgan v. Dzurenda*, 956 F.3d 84, 89 (2d Cir. 2020) (noting that for an 8th Amendment deliberate indifference claim, a prison official must "know[] of and disregard[] an excessive risk to inmate health or safety ... [and] be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

rights. The requirements for each type of liability are discussed in detail in Parts C(2)(c)(i) and (ii) of this Chapter below.

There are several benefits to naming a municipality as a defendant. First, you can sue it for both compensatory damages and injunctive relief.¹⁷⁵ But note that you cannot recover punitive damages from a municipality.¹⁷⁶ Second, municipalities, unlike individuals, cannot claim qualified immunity.¹⁷⁷ Third, if you win, the municipality will probably make broad changes in handling situations like yours – possibly helping others in the future.

(i) “Direct” Municipal Liability

In order to hold a municipality directly liable for violating your rights, you must meet the regular requirements for a Section 1983 claim, and you must also show that:

(1) A policy or custom of the municipality caused your rights to be violated;¹⁷⁸ *and*

(2) The policy was created by someone who is a final policymaker for the municipality.¹⁷⁹

A policy or custom violates your rights if it is “unconstitutional on its face,” meaning that the policy or custom itself directly causes your rights to be violated.¹⁸⁰ For example, if a jail guard refuses to get medical help for you when you are injured, the municipality will not be liable for failing to provide medical care. However, the municipality *can* be liable if the jail has a known *policy* of delaying medical help to some or all persons in jails,¹⁸¹ or if it has unwritten policies (such as a custom or settled practice) that are unconstitutional.¹⁸² A municipality may also be held liable for the actions of policymakers. For example, if a policymaker fires an employee for an unconstitutional reason, the firing may be considered a “policy.”¹⁸³ A municipality can also be held responsible for a custom or settled practice of

175. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035–2036, 56 L. Ed. 2d 611, 635 (1978) (concluding that local government entities may be sued under Section 1983 for compensatory damages, as well as injunctive and declaratory relief).

176. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 634–635 (1981) (holding that punitive damages are not available against municipalities in Section 1983 actions for reasons of policy and history).

177. *See Owen v. City of Independence*, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L. Ed. 2d 673, 685–686 (1980) (holding that qualified immunity is not available to a municipality). “Qualified immunity” is discussed in further detail in Part C(3)(c) of this Chapter.

178. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 822–823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791, 803–804 (1985) (requiring a showing of an actual connection between the policy or custom and the violation for a finding of municipal liability).

179. *See Pembaur v. Cincinnati*, 475 U.S. 469, 481–483, 106 S. Ct. 1292, 1299–1300, 89 L. Ed. 2d 452, 464–465 (1986) (noting that municipalities can only be held liable under Section 1983 for policies made by officials who had final authority to make the challenged policy).

180. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694–695, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978) (holding that a municipality can be held liable when an unconstitutional official policy is the “moving force” behind a violation).

181. *See Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1189 (9th Cir. 2002) (finding that a municipal policy of delaying medical care to incarcerated people who are “combative, uncooperative or unable to effectively answer questions due to intoxication” may create municipal liability for deliberate indifference to serious medical needs of incarcerated people) (internal quotation marks omitted).

182. *See Bd. of Comm’rs v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626, 639 (1997) (observing that a policy or custom need not be formal or written so long as a plaintiff can demonstrate that the alleged unwritten policy or custom is “so widespread as to have the force of law”); *Paige v. Coyner*, 614 F.3d 273, 284 (6th Cir. 2010) (“[A] policy or custom does not have to be written law; it can be created ‘by those whose edicts or acts may fairly be said to represent official policy.’” (quoting *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978))).

183. *See Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 196 (4th Cir. 1994) (holding that a school board that had final authority to make firing decisions could be liable for the unconstitutional firing of teacher); *Bowles v. City of Camden*, 993 F. Supp. 255, 268–269 (D.N.J. 1998) (allowing plaintiff to go forward with his claim against city and mayor for unconstitutional firing). eHowever, the municipality must, in some way, have *deliberately* caused the injury. *See Pembaur v. Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452, 465

the municipality that is unconstitutional.¹⁸⁴ In all of these situations, you must be able to show a clear link between the existence of the policy or custom and the constitutional violation.¹⁸⁵

Under the second requirement for “direct” municipal liability, the person who created the policy must be someone who has final authority to make that particular policy for the municipality.¹⁸⁶ A court will look at the law in your state to see if your state gives that individual the authority to make policy.¹⁸⁷

If you are claiming that a municipal custom (rather than an official policy) caused a violation of your rights, you generally must show that the custom was so widespread that policymakers knew about it or should have known about it.¹⁸⁸ In other words, you will be arguing that, because the custom was so widespread, policymakers must have approved of it.¹⁸⁹

(ii) “Indirect” Municipal Liability

There are two “indirect” ways that a municipality can be held responsible when its employees violate your rights. The first involves bad training. A municipality may be liable when its failure to adequately train, supervise, or discipline its employees results in an employee violating your rights.¹⁹⁰ The second involves bad hiring. A municipality may be liable for failing to adequately screen (look at the background of) an employee during hiring if that employee later violates your rights. For both of these, you will need to show that an employee of the municipality violated your constitutional rights and that the municipality showed “deliberate indifference” to your constitutional rights. To prove

(1986) (“municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives”).

184. See *Monell v. Dep't. of Social Servs.*, 436 U.S. 658, 690–691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978) (finding a municipality may be liable for a custom that causes a violation of rights where a plaintiff can demonstrate that the custom is so “persistent and widespread” that it constitutes a “permanent and well settled” city policy (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–168, 90 S. Ct. 1598, 1613–1614, 26 L. Ed. 2d 142, 159–160 (1970))).

185. See *Bd. of Comm'rs v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626, 639 (1997) (“[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. . . . [A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and. . . [is] a direct causal link between the municipal action and the deprivation of federal rights.”). This is a high standard to meet, and you may have to prove that the municipality’s legislative body or authorized decision maker intentionally deprived you of a federally protected right or that the action itself violated federal law. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791, 804 (1985) (finding that municipal liability requires a showing of an actual connection between the policy or custom and the constitutional violation).

186. See *St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107, 118 (1988) (“[O]nly those municipal officials who have ‘final policymaking authority’ may by their actions subject the government to § 1983 liability.” (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452, 465 (1986))).

187. See *McMillian v. Monroe Cty.*, 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1, 8 (1997) (finding that state law determines whether an individual is an authorized policymaker for a municipality).

188. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (“Absent a formal governmental policy, [the plaintiff] must show a ‘longstanding practice or custom which constitutes the standard operating procedure of the local government entity.’” (quoting *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992))).

189. See, e.g., *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002) (holding that in order for a municipality to be liable for a widespread custom, the municipality or a municipal policymaker must have “actual or constructive knowledge” of the custom); *Sorlucco v. N.Y.C. Police Dept.*, 971 F.2d 864, 871 (2d Cir. 1992) (concluding a plaintiff may establish a municipality’s liability by showing that the actions of subordinate officers are sufficiently widespread to amount to “constructive acquiescence,” or implied approval, by senior policymakers).

190. See *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412, 426 (1989) (holding that a city could be liable under § 1983 for failure to train its employees, but only if that failure “amount[ed] to deliberate indifference to the rights of persons with whom the [employees] come into contact”).

“deliberate indifference” here, you must show that the municipal policymakers knew that their actions were likely to cause someone’s rights to be violated in a particular way.¹⁹¹

(iii) Failure to Train, Supervise, or Discipline

Some types of training are so obviously necessary that a municipality can be held liable for not providing such training. For example, failing to train armed jail guards about when they may use deadly force would likely be illegal. That training failure would create an obvious risk that an incarcerated person’s rights will be violated and can amount to “deliberate indifference.”¹⁹²

In other situations, existing trainings might not be enough. For example, there may be a pattern of repeated unconstitutional behavior by municipal employees. At some point, this pattern makes it obvious that better training, supervision, or discipline is needed.¹⁹³ A municipality may be held liable for failing to adequately address these obvious needs.¹⁹⁴ In all cases, you must be able to show that the inadequate training policies were the direct cause of, or the “moving force” behind, your injuries.¹⁹⁵ Importantly, just because the training is imperfect or not done exactly how you would prefer is not enough to establish municipal liability.¹⁹⁶ Also, it is not enough to claim that only one officer (perhaps

191. See *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1076 (9th Cir. 2016) (finding that “deliberate indifference” is an objective standard, and noting that even in cases that do not involve pre-trial detainees, this objective standard applies.); *Gibson v. County of Washoe*, 290 F.3d 1175, 1186 (9th Cir. 2002) (“[T]he plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation.”); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir. 2001) (“To survive summary judgment on a failure to train theory, the [plaintiffs] must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker’s failure to respond amounts to deliberate indifference.”).

192. See *City of Canton v. Harris*, 489 U.S. 378, 390, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427 (1989) (“[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.”).

193. See *Bd. of the Cty. Comm’rs v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390, 137 L. Ed. 2d 626, 641 (1997) (“If a [training] program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to [an insufficient training program] may establish the . . . ‘deliberate indifference’ . . . necessary to trigger municipal liability.”); *City of Canton v. Harris*, 489 U.S. 378, 397, 109 S. Ct. 1197, 1209, 103 L. Ed. 2d 412, 432 (1989) (O’Connor, J., concurring in part and dissenting in part) (“[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements.”).

194. See, e.g., *Young v. City of Providence*, 404 F.3d 4, 27–28 (1st Cir. 2005) (concluding that municipal liability could be established where a city failed to train police officers to avoid misidentifications of off-duty police officers because problems with misidentifications had occurred in the past and a failure to train officers in the area posed an “obvious risk”); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1320 (10th Cir. 2002) (holding that a jury must decide whether a county’s failure to train its officers to recognize detainees’ symptoms of Obsessive Compulsive Disorder—which the court noted is a fairly common disease—amounts to deliberate indifference); *Davis v. Lynbrook Police Dept.*, 224 F. Supp. 2d 463, 479 (E.D.N.Y. 2002) (finding that six reports and complaints alleging potential unconstitutional conduct of a police officer could “demonstrate [to a jury] an ‘obvious need for more or better supervision to protect against constitutional violations’”) (quoting *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995)); *Perrin v. Gentner*, 177 F. Supp. 2d 1115, 1125 (D. Nev. 2001) (finding that evidence of a municipality’s failure to adequately train police officers and discipline them for use of excessive force could support an inadequate training and supervision claim).

195. See *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 1204–1205, 103 L. Ed. 2d 412, 427 (1989) (noting that the deliberate indifference standard “is most consistent with our admonition in *Monell* . . . that a municipality can be liable under § 1983 only where its policies are the ‘moving force [behind] the constitutional violation’”) (quoting *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2038, 56 L. Ed. 2d 611, 638 (1978)).

196. See *City of Canton v. Harris*, 489 U.S. 378, 391, 109 S. Ct. 1197, 1206, 103 L. Ed. 2d 412, 428 (1989) (observing that imperfect training cannot itself be the basis for § 1983 liability); *Grazier ex. rel. White v. City of*

the one who violated your rights) was inadequately trained. Rather, you must claim that the training program as a whole is inadequate.¹⁹⁷

(iv) Inadequate Screening

You can also make an inadequate screening claim. Here, you are claiming that the municipality knew or should have known that it was *highly likely* that the individual it hired would violate your rights.¹⁹⁸ For example, imagine that a jail hired a guard who was fired from a previous job for assaulting persons confined in the jail. If that guard then assaulted you, you could claim that the municipality was responsible because it should have known that there was a high risk that this guard would assault someone.¹⁹⁹

In order to win on an inadequate screening claim, you must show that the decision to hire the individual who violated your rights shows “deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the [hiring] decision.”²⁰⁰ It is not enough to show that the city or town hired someone who committed bad acts in the past.²⁰¹ Instead, you must show that an adequate look at the job applicant’s background would cause an objectively “reasonable policymaker” to conclude that it was “plainly obvious” that hiring that person would result in a violation of someone’s federal rights.²⁰² You must also show that it was highly likely—not simply possible or probable—that the particular harm you suffered would be the result of hiring the person.²⁰³

Philadelphia, 328 F.3d 120, 125 (3d Cir. 2003) (noting that the scope of failure to train liability is narrow, and it is likely not sufficient for plaintiffs to “merely allege that a different training program than the one in place would have been more effective”).

197. Palmquist v. Selvik, 111 F.3d 1332, 1345 (7th Cir. 1997) (finding that where a town gave police officers some training on handling suspects exhibiting abnormal behavior, the argument that even more training should have been given was unpersuasive, given that “[i]n determining the adequacy of training, the focus must be on the program, not whether particular officers were adequately trained”).

198. See Bd. of the Cty. Comm’rs v. Brown, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (“[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that [the particular] officer was highly likely to inflict the *particular* injury suffered by the plaintiff.”).

199. See Romero v. City of Clanton, 220 F. Supp. 2d 1313, 1318 (M.D. Ala. 2002) (finding plaintiff had validly alleged an inadequate screening claim against a city that hired a police officer who allegedly had a prior history of sexual misconduct and who later attempted to sodomize the plaintiff). Please note that when evaluating the plaintiff’s inadequate screening claim against the city, the court let the complaint proceed because it also saw the inadequate screening as a failure to train on the part of the city.

200. Bd. of the Cty. Comm’rs v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (holding that a plaintiff must show that the decision to hire reflects deliberate indifference to the risk that the particular violation that occurred would follow the decision).

201. See Snyder v. Trepagnier, 142 F.3d 791, 797 (5th Cir. 1998) (holding that evidence that an officer had committed two nonviolent offenses in the past was not enough to hold the municipality liable, on an inadequate screening claim, for that officer having shot the plaintiff in the back); Waterman v. City of New York, No. 96 Civ. 1471 (AGS), 1998 U.S. Dist. LEXIS 17087, at *9–10 (S.D.N.Y. Oct. 26, 1998) (*unpublished*) (concluding that a plaintiff could not prevail on an inadequate screening claim where an off-duty officer caused plaintiff to suffer cuts, bruises, and a laceration to the head because plaintiff only offered evidence that the officer had been arrested once for assault).

202. Bd. of the Cty. Comm’rs v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (finding that in order to hold a municipality liable for a hiring decision, a plaintiff must show that “adequate scrutiny of an applicant’s background would lead a reasonably policymaker to conclude” that the violation is a “plainly obvious consequence” of the decision to hire); see also Lawson v. Dallas County, 286 F.3d 257, 264 (5th Cir. 2002) (“Unlike the deliberate indifference standard applied to individual employees, this standard [for municipal deliberate indifference] is an objective one; it considers not only what the policymaker actually knew, but what he should have known, given the facts and circumstances surrounding the official policy and its impact on the plaintiff’s rights.”).

203. Bd. of the Cty. Comm’rs v. Brown, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (“[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that [the particular] officer was

In other words, the violation of your rights must have a strong link to the bad acts that the supervisor knew or should have known that the employee committed in the past, and it must have been highly likely that the employee would repeat those bad acts.²⁰⁴

Making a successful claim for inadequate screening during hiring is very difficult. A court will demand a very close connection between the information available to the person making the hiring decision and the violation that took place. These claims are not likely to succeed unless the person who violated your rights engaged in similar behavior before he was hired, and the supervisor knew or should have known about it.

3. Defenses That May Be Raised Against Your Claim

There are several ways that the people you are suing might be able to defend themselves against your Section 1983 lawsuit. For example, the defendants might claim that the facts in your complaint are false, or that your legal arguments are incorrect. You will not know how the defendants will choose to defend themselves until after you file your complaint. You do not need to respond to their defenses until after you receive either an answer or a motion to dismiss from the defendants.²⁰⁵ However, your lawsuit is more likely to succeed if you can write your complaint in a way that avoids some of the defenses that you think they might use.

The rest of this Part will explain some of the defenses that are most likely to come up in a Section 1983 lawsuit. Most of the following sections focus on the different kinds of immunities that are almost always an issue in Section 1983 suits. Immunities are rules that protect certain individuals or agencies from liability for their actions even when they may have done something wrong.

(a) Eleventh Amendment Immunity

In general, the Eleventh Amendment to the U.S. Constitution protects states and their agencies from being sued in federal court.²⁰⁶ This means that you cannot name the state itself as a defendant in your Section 1983 suit.²⁰⁷ You also cannot name the Department of Corrections or any other state government agency as a defendant.²⁰⁸ Eleventh Amendment immunity is also known as “sovereign immunity.”

highly likely to inflict the *particular* injury suffered by the plaintiff.”).

204. See *Bd. of the Cty. Comm’rs v. Brown*, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (holding that municipal liability for inadequate screening requires a strong connection between the job applicant’s background and the specific harm he inflicted).

205. See Part C(9) of this Chapter, “What to Expect After Your Legal Papers Have Been Filed in Court,” for an explanation of an “answer” and a “motion to dismiss.”

206. Note, however, that these rules do not apply to claims brought under the Rehabilitation Act of 1973, 29 U.S.C. § 794, or some claims brought under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213. See *United States v. Georgia*, 546 U.S. 151, 154, 159, 126 S. Ct. 877, 879, 882, 163 L. Ed. 2d 650, 656, 659 (2006) (holding that individuals may sue states under the ADA, which incorporates by reference the Rehabilitation Act of 1973, where the conduct alleged to violate the ADA also violates the Constitution). For more information on the rights of prisoners with disabilities, see Chapter 28 of the *JLM*, “Rights of Prisoners with Disabilities.” In addition, some states may allow you to sue the state or its agencies under certain state laws.

207. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 3057, 57 L. Ed. 2d 1114, 1116 (1978) (“[S]uit [alleging 8th Amendment violations in state prisons] against the State. . . is barred by the [11th] Amendment, unless [the State] has consented to the filing of such a suit.”); *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65–66, 109 S. Ct. 2304, 2310, 105 L. Ed. 2d 45, 55 (1989) (holding that a State is not liable to § 1983 suits that result in damages and noting that Congress did not intend for § 1983 to create an exception to the 11th Amendment). But you should note that a state does not automatically receive this immunity. The state still must affirmatively raise an 11th Amendment immunity defense; if they do not, they may waive the ability to raise the defense. *Wis. Dept. of Corr. v. Schacht*, 524 U.S. 381, 389, 118 S. Ct. 2047, 2052–2053, 141 L. Ed. 2d 364, 372 (1998) (“The [11th] Amendment, however, does not automatically destroy original jurisdiction. Rather, the [11th] Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.”) (internal citations omitted).

208. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 3057, 57 L. Ed. 2d 1114, 1116 (1978) (“[S]uit

This same Eleventh Amendment immunity rule prevents you from suing a state official in his “official capacity” in federal court *for money damages*.²⁰⁹ This is considered the same thing as suing the state.²¹⁰ However, this immunity does not apply to suits for *injunctive* or *declaratory*²¹¹ relief against state officials sued in their official capacity. In other words, although you cannot sue the state itself for an injunction, you can sue a state official in his official capacity for an injunction.²¹² Fortunately for you, suing a state official in his official capacity for an injunction has the same effect as suing the state or a state agency for an injunction. When you sue state officials for injunctive relief, remember to sue them in their official capacity.²¹³

Eleventh Amendment immunity does not apply to suits for money damages against state officials sued in their *individual* capacities.²¹⁴ If you are seeking money damages and are suing state officials, you must sue them as an individual, and not in their official job capacity.

Eleventh Amendment immunity does not apply to any suits against county and city officials.²¹⁵ It should be noted, however, that state and county officials may claim one of the personal immunities discussed below. You should read the following Parts carefully so that you will be able to argue why the defendants in your suit are not immune from being sued.

(b) Absolute Immunity of Individuals

Certain types of individuals are absolutely (completely) immune from suit for all actions taken within the scope of their official duties. If an official is absolutely immune it means that he cannot be

against the State and its Board of Corrections is barred by the [11th] Amendment. . . .”); *see also* *Hale v. Arizona*, 993 F.2d 1387, 1399 (9th Cir. 1993) (finding that a governmental agency in charge of the prison industry is “an arm of the state” and therefore protected by 11th Amendment immunity); *Alden v. Maine*, 527 U.S. 706, 747, 119 S. Ct. 2240, 2265, 44 L. Ed. 2d 636, 677 (1999) (asserting that private suits against states who do not waive their sovereign immunity must be rejected given that states’ sovereign immunity derives from the history of the Constitution and not just the Eleventh Amendment therefore such immunity cannot be revoked by Congress).

209. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n.24, 117 S. Ct. 1055, 1070 n.24, 137 L. Ed. 2d 170, 194 n.24 (1997) (“State officers in their **official capacities**, like States themselves, are not amenable to suit for **damages** under § 1983.”) (emphasis added).

210. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S. Ct. 3099, 3107, 87 L. Ed. 2d 114, 123–124 (1985) (noting that official capacity suits for money damages have the same effect as suing the state for money damages, and therefore both types of suits are barred).

211. Injunctive relief is an order by a court that the defendant must stop or correct the practices the plaintiff is challenging. *Injunction*, BLACK’S LAW DICTIONARY (11th ed. 2019). Declaratory relief is a decision by a court that settles the rights or legal relations of the parties for the issue raised by the plaintiff. *Declaratory Judgment*, BLACK’S LAW DICTIONARY (11th ed. 2019).

212. *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 1760, 152 L. Ed. 2d 871, 882 (2002) (allowing a plaintiff to seek injunctive relief against state commissioners sued in their official capacities); *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14, 87 L. Ed. 2d 114, 122 n.14 (1985) (“[O]fficial-capacity actions for prospective [injunctive] relief are not treated as actions against the State.”).

213. Suits for injunctive relief against state officials in their official capacities are said to fall within the “*Ex parte Young* doctrine.” In *Ex parte Young*, the Supreme Court said that state officials can be sued in their official capacities for an injunction in federal court, even though the state itself cannot be sued. *Ex parte Young*, 209 U.S. 123, 155–156, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

214. *See* *Hafer v. Melo*, 502 U.S. 21, 30–31, 112 S. Ct. 358, 364–365, 116 L. Ed. 2d 301, 313 (1991) (holding that state officials, when sued in their individual capacities, are “persons” within the meaning of § 1983 and therefore are not immune under the 11th Amendment). Some states will actually pay any damages awarded against state officials sued in their individual capacities because of state “indemnification” laws. Even though the state will be paying damages, an indemnification law does not turn your lawsuit into a suit against the state that would be barred by the 11th Amendment. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 317 n.10, 110 S. Ct. 1868, 1879 n.10, 109 L. Ed. 2d 264, 279 n.10 (1990) (“Lower courts have uniformly held that States may not cloak their officers with a personal [11th] Amendment defense by promising, by statute, to indemnify them for damage awards imposed on them for actions taken in the course of their employment.”).

215. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690 n.54, 98 S. Ct. 2018, 2035 n.54, 56 L. Ed. 2d 611, 635 n.54 (1978) (noting that the 11th Amendment does not prevent suits against local governments).

sued for money damages and sometimes cannot be sued for injunctive relief either. Legislators,²¹⁶ prosecutors,²¹⁷ witnesses,²¹⁸ and judges (including certain administrative judges)²¹⁹ are usually completely immune from liability for money damages under Section 1983 as long as they were acting within the scope of their official duties. You should be aware of these immunities when deciding whom to name as defendants in your lawsuit.

You usually will not be able to sue any of these individuals for violating your constitutional rights if their actions were within the scope of their official responsibilities. To figure out whether an action falls within the scope of an official's duties, courts look at the nature of the individual's responsibilities and not just the individual's title. For example, many officials with state or federal legislative responsibilities will be completely immune from suit even if they are not named legislators.²²⁰

216. See *Bogan v. Scott-Harris*, 523 U.S. 44, 49, 118 S. Ct. 966, 970, 140 L. Ed. 2d 79, 85 (1998) (“[S]tate and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities . . . Congress did not intend the general language of § 1983 to ‘impinge on [this immunity].’” (citations omitted)) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S. Ct. 783, 788, 95 L. Ed. 1019, 1027 (1951)); *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S. Ct. 783, 786, 95 L. Ed. 1019, 1024–1025 (1951) (extending absolute legislative immunity to protect state legislators); *Kilbourn v. Thompson*, 103 U.S. 168, 202–204, 26 L. Ed. 377, 391–392 (1880) (interpreting the Speech and Debate Clause, U.S. Const. art. I, § 6, to provide absolute immunity to federal legislators when they perform activities typical of legislative sessions or activities related to House business).

217. See *Burns v. Reed*, 500 U.S. 478, 492, 111 S. Ct. 1934, 1942, 114 L. Ed. 2d 547, 562 (1991) (holding that a prosecutor's appearance in court in order to support an application for a search warrant and present evidence were protected by absolute immunity in a civil rights action brought by arrestee); *Imbler v. Pachtman*, 424 U.S. 409, 430–431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 143–144 (1976) (holding that a prosecutor was absolutely immune from suit even though he knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make full disclosure of all facts casting doubt upon the state's testimony). However, you should note that prosecutors may not have immunity for their conduct when they act as “administrator[s] or investigative officer[s].” *Imbler v. Pachtman*, 424 U.S. 409, 430–431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 143–144 (1976). The key factor is whether the prosecutor's actions were “closely associated with the judicial process.” *Burns v. Reed*, 500 U.S. 478, 495–496, 111 S. Ct. 1934, 1944–1945, 114 L. Ed. 2d 547, 564–565 (1991) (denying absolute immunity to a prosecutor for giving legal advice to police). Prosecutorial immunity is also limited to immunity from being sued for money damages. Prosecutors do not have immunity from being sued for injunctive relief. If a prosecutor violates your rights while acting within the scope of his official duties, you can sue him for injunctive relief. See *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 736, 100 S. Ct. 1967, 1977, 64 L. Ed. 2d 641, 656 (1980) (noting that prosecutors, though shielded by absolute immunity for damages liability, may be subject to § 1983 suits for injunctive relief).

218. See *Briscoe v. LaHue*, 460 U.S. 325, 345–346, 103 S. Ct. 1108, 1121, 75 L. Ed. 2d 96, 114 (1983) (holding that a police officer, when testifying in court, is acting as a witness and is therefore entitled to absolute immunity).

219. Before 1996, the Supreme Court had held that judicial immunity did not prohibit declaratory and injunctive relief against a judicial officer acting in his judicial capacity. See *Pulliam v. Allen*, 466 U.S. 522, 541–542, 104 S. Ct. 1970, 1981, 80 L. Ed. 2d 565, 579 (1984) (allowing an injunction against a state judge's practice of incarcerating persons awaiting trial for non-incarcerable offenses and stating that “judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity”). However, in 1996, Congress amended Section 1983 by enacting Section 309(c) of the Federal Courts Improvement Act of 1996, which provided that “in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (1996) (codified at 42 U.S.C. § 1983 (2018)). The Senate report indicates that the amendment “restores the doctrine of judicial immunity to the status it occupied prior to [*Pulliam*]” because *Pulliam* had departed from “400 years of common law tradition and weakened judicial immunity protections.” S. Rep. No. 104-366, at 36 (1996), reprinted in 1996 U.S.C.C.A.N. 4202, 4216. Currently, therefore, judicial immunity prohibits injunctive relief from being granted against a judge acting in his official capacity, unless that judge violated a declaratory decree or declaratory relief is unavailable. While this amendment does not grant judges absolute immunity, it makes securing injunctive relief against a judicial officer extremely difficult.

220. See *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 734, 100 S. Ct. 1967, 1976, 64 L. Ed. 2d 641, 655 (1980) (holding that defendant judges were absolutely immune from suit challenging the state bar disciplinary rules at issue because they acted in a legislative capacity when they created those rules); see also *Bogan v. Scott-Harris*, 523 U.S. 44, 55, 118 S. Ct. 966, 973, 140 L. Ed. 2d 79, 89 (1998) (explaining that “[w]e have recognized that officials outside the legislative branch are entitled to legislative immunity when they

Similarly, officials who perform judicial functions within administrative agencies may be completely immune even though they are not technically judges.²²¹ According to the Supreme Court, prison officials on a prison disciplinary committee are not performing judicial functions.²²² This means that they are not completely immune from liability for violating your rights.

Keep in mind that no official is absolutely immune from being sued for money damages for actions *outside* the scope of his official duties. As described above, you must look at the nature of the official's actions, not just his title, to determine whether his actions are covered by absolute immunity. For example, a prosecutor is absolutely immune from suit only for actions taken within "the scope of his prosecutorial duties."²²³ Therefore, he has absolute immunity for actions related to starting and presenting the government's case against you. He does not, however, have absolute immunity for investigative or other actions that did not relate to his role as prosecutor.²²⁴ In *Buckley v. Fitzsimmons*, the Supreme Court held that a prosecutor did not have absolute immunity for making allegedly false statements to the media about the defendant because giving statements to the press was outside his role as a prosecutor.²²⁵ Absolute immunity also does not cover a prosecutor's investigative actions to establish probable cause to arrest a defendant because this work could be done by police officers or detectives, so it does not relate to his role of preparing for trial.²²⁶ On the other hand, interviewing witnesses and evaluating evidence to prepare for trial are within the prosecutor's role, so they are always covered by absolute immunity.²²⁷

Judges (including certain administrative judges)²²⁸ do not have absolute immunity from damages when they take actions that are not judicial in nature.²²⁹ They also do not have absolute immunity

perform legislative functions"); *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405, 99 S. Ct. 1171, 1179, 59 L. Ed. 2d 401, 412–413 (1979) (holding that regional officials are entitled to absolute immunity where they were officially acting in a capacity comparable to that of state legislators); *Baraka v. McGreevey*, 481 F.3d 187, 195–197 (3d Cir. 2007) (finding a governor and committee chair protected by legislative immunity for advocating and signing a law abolishing position of state poet laureate).

221. See *Butz v. Economou*, 438 U.S. 478, 512–513, 98 S. Ct. 2894, 2914, 57 L. Ed. 2d 895, 920 (1978) (granting administrative judges of the Department of Agriculture absolute individual immunity for damages from wrongful initiation of administrative proceedings).

222. See *Cleavinger v. Saxner*, 474 U.S. 193, 206, 106 S. Ct. 496, 503, 88 L. Ed. 2d 507, 517–518 (1985) (declaring that prison officials on prison disciplinary committees have qualified immunity instead of absolute immunity).

223. *Imbler v. Pachtman*, 424 U.S. 409, 420–424, 96 S. Ct. 984, 990–992, 47 L. Ed. 2d 128, 137–140 (1976) ("[A] prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties.").

224. See *Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000) ("The nature of a prosecutor's immunity depends on the capacity in which the prosecutor acts at the time of the alleged misconduct. Actions taken as an advocate enjoy absolute immunity, while actions taken as an investigator enjoy only qualified immunity. This immunity law applies to *Bivens* actions as well as actions under section 1983.") (citations omitted).

225. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277–278, 113 S. Ct. 2606, 2617–2618, 125 L. Ed. 2d 209, 228–229 (1993) (holding prosecutor's prejudicial out-of-court statements to the press were not within the scope of his duties and therefore not entitled to absolute immunity); see also *Burns v. Reed*, 500 U.S. 478, 496, 111 S. Ct. 1934, 1944–1945, 114 L. Ed. 2d 547, 565 (1991) (denying absolute immunity to a prosecutor for giving legal advice to police).

226. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 273–274, 113 S. Ct. 2606, 2616, 125 L. Ed. 2d 209, 226 (1993) (holding that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," he is not entitled to absolute immunity); *Zahrey v. Coffey*, 221 F.3d 342, 346–347 (2d Cir. 2000) (noting that a prosecutor accused of fabricating false evidence was entitled at most to a qualified immunity defense because the alleged misconduct occurred while he was acting in an investigative capacity).

227. See *Imbler v. Pachtman*, 424 U.S. 409, 430–431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 144 (1976) (holding a prosecutor absolutely immune for all actions performed "in initiating a prosecution and in presenting the State's case").

228. *Butz v. Economou*, 438 U.S. 478, 514, 98 S. Ct. 2894, 2915, 57 L. Ed. 2d 895, 920–921 (1978) ("We therefore hold that persons subject to these [administrative law] restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts").

229. See *Forrester v. White*, 484 U.S. 219, 228–229, 108 S. Ct. 538, 545, 98 L. Ed. 2d 555, 566 (1988)

when they act with a “complete absence of all jurisdiction.”²³⁰ Judges act with the complete absence of jurisdiction when they make a ruling in cases that they have no authority to hear in the first place. For example, family court judges do not have authority to try felony cases. If they did hear such cases, they would be acting without jurisdiction and would not have immunity.²³¹ In contrast, if you think that a judge had the power to hear your case, but made a mistake that harmed you, you cannot sue the judge for money damages. Instead, you should try to appeal the judge’s ruling.

(c) Qualified Immunity of Individuals

Officials who are sued in their individual capacity and who are not completely immune from suit may still have a limited form of immunity, known as “qualified immunity.” State, city, and county officials at all levels may claim some type of qualified immunity.²³² However, private parties (people who are not government officials) who rely on state law or who act under color of state law usually cannot claim qualified immunity.²³³

Officials with “qualified immunity” will only have to pay money damages if “their conduct . . . violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known.”²³⁴ To claim qualified immunity, the official has to show either that it was objectively

(holding that because “it [is] the nature of function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis,” a judge who fired an employee because of her sex was not absolutely immune from suit); *see also* *Leclerc v. Webb*, 270 F. Supp. 2d 779, 793 (E.D. La. 2003) (“The Court is persuaded that the [Federal Courts Improvement Act of 1996] does not bar injunctive relief where a judicial officer acts in other capacities such as the enforcement capacity.”).

230. *See* *Mireles v. Waco*, 502 U.S. 9, 11–12, 112 S. Ct. 286, 287–288, 116 L. Ed. 2d 9, 14 (1991) (*per curiam*) (“[Judicial] immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge’s judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.” (citations omitted)); *Bradley v. Fisher*, 80 U.S. 335, 351–352, 20 L. Ed. 646, 651 (1872) (noting that a judge does not have complete immunity when he acts in a situation where he knows that he has absolutely no jurisdiction over the subject matter of the lawsuit).

231. *Stump v. Sparkman*, 435 U.S. 349, 357 n.7, 98 S. Ct. 1099, 1105 n.7, 55 L. Ed. 2d 331, 339 n.7 (1978) (noting the difference between an act in excess of jurisdiction and one in the absence of jurisdiction: “[I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.”).

232. *See* *Procunier v. Navarette*, 434 U.S. 555, 561–562, 98 S. Ct. 855, 859–860, 55 L. Ed. 2d 24, 30–31 (1978) (noting that the scope of qualified immunity varies depending on the “scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the [official’s] action”), *overruled in part on other grounds by* *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982).

233. *See* *Wyatt v. Cole*, 504 U.S. 158, 168–169, 112 S. Ct. 1827, 1833–1834, 118 L. Ed. 2d 504, 515 (1992) (concluding that the rationales mandating qualified immunity for public officials are not applicable to private parties); *Richardson v. McKnight*, 521 U.S. 399, 412, 117 S. Ct. 2100, 2107, 138 L. Ed. 2d 540, 552 (1997) (holding that prison guards at a privatized prison, unlike prison guards who are employed by the government, were not entitled to qualified immunity where state law “reserves certain important discretionary tasks—those related to prison discipline, to parole, and to good time—for state officials”). *But see* *Eagon ex rel. Eagon v. City of Elk City*, 72 F.3d 1480, 1489–1490 (10th Cir. 1996) (holding that defendant, a private individual acting under the authority of the city but not a city official, was entitled to qualified immunity because she “was not ‘invoking state law in pursuit of private ends’” but was “performing a government function pursuant to a government request”; “a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself” (quoting *Warner v. Grand County*, 57 F.3d 962, 966–967 (10th Cir. 1995))).

234. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). For examples of cases dealing with the issue of qualified immunity, *see* *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523, 531–532 (1987) (holding that since defendant could reasonably have believed that the search at issue was lawful, he should have been allowed to claim a defense of qualified immunity) and *Oliveira v. Mayer*, 23 F.3d 642, 648–649 (2d Cir. 1994) (holding that defendants should have been given the

reasonable for the official to believe that the actions did not violate the law, or that the law was not clearly established at the time of the violation.²³⁵ In other words, prison officials sued in their individual capacity can have qualified immunity even if their conduct is found to be illegal. But this will only happen if the court finds that it was *objectively reasonable* for the official to believe the conduct was legal²³⁶ or that the *law was unclear* when the violation occurred.²³⁷

You do not have to allege in your complaint that the law that was violated was clearly established.²³⁸ The defendant is responsible for raising the qualified immunity defense.²³⁹ If the defendant fails to claim qualified immunity at the trial court level, the defendant may lose the right to raise that defense in later proceedings, such as appeals.²⁴⁰

opportunity to prove that it was reasonable for them to believe that they were not violating settled law and were therefore entitled to a qualified immunity defense).

235. See, e.g., *Oliveira v. Mayer*, 23 F.3d 642, 648 (2d Cir. 1994) (remanding, based on factual dispute related to whether a reasonable officer could believe that his conduct was lawful); *Powell v. Ward*, 643 F.2d 924, 934 n.13 (2d Cir. 1981) (stating that a defendant who “knew or should have known that her conduct violated a constitutional norm” was not entitled to immunity); *Fiscus v. City of Roswell*, 832 F. Supp. 1558, 1564 (N.D. Ga. 1993) (holding that a Supreme Court decision issued the same month as the alleged violation did not constitute clearly established law); *Kaminsky v. Rosenblum*, 737 F. Supp. 1309, 1319 (S.D.N.Y. 1990) (holding that qualified immunity did not apply because the law was objectively clear to prison doctors that their alleged conduct implicated the prisoner’s rights, where prison doctors were also actually aware of such law).

236. “Objectively reasonable” means that it does not matter whether the officer himself believed that the conduct was legal. Instead, the officer has to prove that a reasonable officer could have believed that the conduct was legal.

237. Whether the law is clear depends on the context of the facts of your case. For example, simply showing that the right to bodily privacy is clearly established is not enough to defeat an officer’s qualified immunity to your claim that by strip-searching you, he violated your substantive due process right to privacy. Instead, you would also have to show that at the time you were strip-searched, clearly established law (from the Supreme Court or a court in your circuit or district) stated that strip-searching in a context similar to what you experienced violated your right to bodily privacy. See *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272, 281 (2001) (stating that the question of whether a law is clearly established “must be undertaken in light of the specific context of the case, not as a broad general proposition”), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565, 576 (2009) (holding that the two-step process mandated in *Saucier* for evaluating qualified immunity claims is not mandatory).

238. *Thomas v. Independence Twp.*, 463 F.3d 285, 293 (3d Cir. 2006) (“[A] plaintiff has no obligation to plead a violation of clearly established law in order to avoid dismissal on qualified immunity grounds.”). However, if the defendant does raise a qualified immunity defense, the court may require you to allege additional facts so that it is able to decide the issue of qualified immunity. See *Thomas v. Independence Twp.*, 463 F.3d 285, 302 (3d Cir. 2006) (directing the district court to order the plaintiff to provide a more definite statement and, based on the facts they allege, reconsider the qualified immunity issue).

239. See *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1924, 64 L. Ed. 2d 572, 577–578 (1980) (stating that the Supreme Court “has never indicated that qualified immunity is relevant to the existence of the plaintiff’s cause of action; instead [the Supreme Court] ha[s] described it as a defense available to the official in question”). Note that *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817, 86 L. Ed. 2d 411, 427 (1985), allows defendants to immediately appeal a court’s decision to deny them qualified immunity, provided that the denial turns on an issue of law. These immediate appeals are called “interlocutory appeals.” If a defendant brings an immediate appeal of a denial of qualified immunity, you may attempt to oppose him by arguing to the appellate court that the issue turns on “disputed questions of fact” rather than questions of pure law. See *Tierney v. Davidson*, 133 F.3d 189, 194 (2d Cir. 1998) (“[A] district court’s denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable ‘final decision’ within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.”) (citation omitted); *Kulwicki v. Dawson*, 969 F.2d 1454, 1461 (3d Cir. 1992) (holding that an order denying qualified immunity is subject to interlocutory appeal). See also *Feagley v. Waddill*, 868 F.2d 1437, 1439–1442 (5th Cir. 1989) (holding that “if disputed factual issues material to immunity are present, the district court’s denial of summary judgment sought on the basis of immunity is not appealable”).

240. See *Walsh v. Mellas*, 837 F.2d 789, 799 n.5 (7th Cir. 1988) (holding that the qualified immunity defense was waived because it was not raised prior to the district court’s final decision).

Keep in mind that qualified immunity is not a defense to a claim for injunctive relief.²⁴¹ Even if an individual has qualified immunity, the court can order that individual to stop doing something that violates your rights. Qualified immunity is also not available as a defense for municipalities²⁴² or privately employed prison guards.²⁴³ Qualified immunity is usually (but not always) decided by the judge during summary judgment proceedings.²⁴⁴ Summary judgment is described in Part C(8) of this Chapter.

Figure 2 below should help you understand which defendants are completely or partially immune from suit in federal court, and what kind of relief you can request. You should note that state courts have different immunity rules. If you want to bring your lawsuit in state court (discussed below in Part D(2)), you should research your state's immunity rules.

Type of Defendant	Type of Immunity	Relief You Can Obtain
State or state agency	Eleventh Amendment (sovereign) immunity	None, unless state law authorizes such lawsuits
Any officials sued in their <i>individual</i> capacities	Qualified immunity	Declaratory judgment; Injunctive relief; or Money damages. Money damages are only available if a) the official does not raise the qualified immunity defense or b) he does raise the defense, but you can demonstrate that a reasonable person would have known his actions violated a clearly established right
State officials in their official capacities	Eleventh Amendment (sovereign) immunity from suit for money damages only	Declaratory judgment; Injunctive relief

241. See *Davidson v. Scully*, 148 F. Supp. 2d 249, 254 (S.D.N.Y. 2001); *Project Release v. Prevost*, 463 F. Supp. 1033, 1037 (E.D.N.Y. 1978) (finding that the Court could issue a declaratory judgment against officials despite their qualified immunity).

242. See *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517, 523 (1993) (“[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983. In short, a municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury [because there is no *respondeat superior* municipal liability under § 1983].”); *Owen v. City of Independence*, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L. Ed. 2d 673, 685–686 (1980) (holding that a municipality cannot use the defense of qualified immunity in a Section 1983 action by asserting that its employees acted in good faith); *Cote v. Town of Millinocket*, 901 F. Supp. 2d 200, 227 n.39 (D. Me. 2012) (conceding that “qualified immunity is not a concept applicable to a municipality”). But see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 634–635 (1981) (deeming it “unwise” for punitive damages to be available against a municipality in a Section 1983 suit unless there is a compelling reason for them to be).

243. See *Richardson v. McKnight*, 521 U.S. 399, 412–413, 117 S. Ct. 2100, 2107–2108, 138 L. Ed. 2d 540, 552–553 (1997) (holding that private prison guards cannot use the defense of qualified immunity but acknowledging that the decision is narrow and not necessarily applicable to other contexts, such as cases that may involve a private individual “acting under close official supervision”); *Holly v. Scott*, 434 F.3d 287, 294 (4th Cir. 2006) (noting that the “distinction between public and private correctional facilities is critical”).

244. See *Snyder v. Trepagnier*, 142 F.3d 791, 799–800 (5th Cir. 1998) (noting that qualified immunity is ordinarily determined by the judge, but finding that there was no error in allowing the jury to decide the issue when there were facts in dispute relating to qualified immunity); *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990) (“The better rule, we believe, is for the court to decide the issue of qualified immunity as a matter of law, preferably on a pretrial motion for summary judgment when possible. . . .”); *Halcomb v. Wash. Metro. Area Transit Auth.*, 526 F. Supp. 2d 20, 22–23 (D.D.C. 2007) (noting that pretrial resolution of the qualified immunity defense may not always be practical due to factual disputes); see also *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589, 595 (1991) (“[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”).

Type of Defendant	Type of Immunity	Relief You Can Obtain
Non-state (local or municipal) officials in their official capacities	None	Declaratory judgment; Injunctive relief; Money damages
Witnesses	Absolute immunity	None, unless you are alleging that the individual violated your rights at a time when he was not acting as a witness
Legislators and individuals authorized to perform legislative functions	Absolute immunity from any suit for actions performed within the scope of official legislative duties	None, unless you are alleging that the individual violated your rights while acting outside the scope of his official legislative duties
Prosecutors	Absolute immunity from suit for money damages only, for actions performed within the scope of official prosecutorial duties	Declaratory judgment; Injunctive relief
Judges (including certain administrative judges)	Absolute immunity from suit for money damages only, for actions performed within the scope of official judicial duties, unless acting without any jurisdiction over the case	Declaratory judgment; Injunctive relief, but only if a declaratory judgment has been violated or is not available
Municipalities	Immunity from punitive damages	Declaratory judgment; Injunctive relief; Money damages
Private parties acting under color of state law (such as prison guards at a privately-run prison)	Qualified immunity in some circumstances	Declaratory judgment; Injunctive relief; Money damages

Figure 2: Types of Immunity Available to and Types of Damages Available from Different Defendants

(d) Defenses Based on Required Procedure

The defendants could claim several defenses based on your alleged failure to follow certain procedural rules. First, the defendants may try to convince the court to dismiss your lawsuit by arguing that you have not met important procedural requirements. For example, the court can dismiss your case if you do not meet the filing deadline established by your state's "statute of limitations". See Part C(5) of this Chapter for an explanation of statutes of limitations. Be sure to look up your state's statute of limitations so you can easily avoid this defense by filing your lawsuit before the deadline. As you will see in Part C(5), there is no federal statute of limitation for Section 1983 claims. For this reason, it is very important that you look at the state statute of limitations for the injury that is most similar to your Section 1983 claim.

The defendants may also argue that your claim has already been resolved by an earlier court case or a prior administrative proceeding. If this argument applies to you, the court may refuse to hear your current lawsuit due to one or more of the legal doctrines of "*res judicata*," "collateral estoppel," and "preclusion."²⁴⁵ These doctrines forbid the re-litigation of specific claims or issues that have already

245. *Allen v. McCurry*, 449 U.S. 90, 101–104, 101 S. Ct. 411, 418–420, 66 L. Ed. 2d 308, 317–319 (1980) (holding that collateral estoppel applied to Section 1983 actions and included both civil and criminal state-court decisions); *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed. 2d 552, 559 n.5 (1979) ("Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving

been litigated in previous cases between the same parties. “Non-mutual” collateral estoppel can also be used in some cases where only one of the parties was involved in the prior lawsuit, if that party had a full and fair opportunity to litigate the issue.²⁴⁶ In general, an issue will be barred by *collateral estoppel* if:

- (1) The issue has been actually litigated;
- (2) The issue was subject of a final judgment; and
- (3) The issue was essential to that judgment.²⁴⁷

To avoid these defenses, you should carefully review any claims you have previously filed, and anything a court may have said about those claims, to ensure you are not making claims that have previously been raised in your current case. In general, a claim will be considered to have been “previously raised”—and therefore barred by *res judicata*—if:

- (1) There was a final judgment *on the merits* of the claim in the previous case,²⁴⁸
- (2) The ruling court in the previous case was a court of competent jurisdiction,²⁴⁹
- (3) The prior action involved the same parties as the present case, and
- (4) The prior case involved the same type of claim (cause of action).²⁵⁰

Finally, the defendants may argue that your complaint should be dismissed if you did not exhaust (use up) all administrative procedures available to you before filing. This is because under the Prison Litigation Reform Act, you *must* exhaust all administrative remedies (such as incarcerated person grievance procedures) that are available to you before bringing a suit. See Chapter 14 of the *JLM* for more information on the exhaustion requirement and Chapter 15 of the *JLM* for information on incarcerated person grievances. Remember to keep copies of everything that you or prison officials write in this process, so that if a defendant claims that you did not use all required administrative procedures, you will be able to prove that you did.²⁵¹ Note, however, that neither Section 1983 nor the

the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.”).

246. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L. Ed. 2d 552, 559 (1979) (explaining that collateral estoppel and *res judicata* have the “dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation”).

247. See *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 359, 196 L. Ed. 2d 242, 242 (2016); *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469, 475 (1970) (“‘Collateral estoppel’ is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.”); *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, No. 18-1086, 2020 WL 2477020, at *4 (U.S. May 14, 2020); see generally *Jarosch v. Palmer*, 436 Mass. 526, 530–531, 766 N.E.2d 482, 487–488 (2002) (detailing elements of collateral estoppel).

248. “On the merits” generally means that the previous lawsuit was decided on a motion for summary judgment or after a trial, or was dismissed with prejudice.

249. “Jurisdiction” is a word for a court’s power to hear and decide a case. If the court that heard your original case was not a court with power to hear that case, you can file the same case in another court.

250. See *In re Teltronics Servs., Inc.*, 762 F.2d 185, 190–191 (2d Cir. 1985) (holding that the doctrine of *res judicata* “applies to preclude later litigation if the earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action”); *Comm’r of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 719, 92 L. Ed. 898, 905 (1948) (holding that “when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action,” *res judicata* bars future litigation between the parties or their privies as to any matter which was raised or might have been raised).

251. It is also a good idea to save all documents related to these procedures because if your complaints are ignored, the writings may be evidence of the prison officials’ indifference that can be used in your Section 1983 suit. Their responses might also admit things, like explanations for their behavior, which you can use later at trial.

PLRA requires you to exhaust all possible state court remedies before suing in federal court.²⁵² This means that you do not have to file a lawsuit in state court before filing one in federal court. Instead, you can go directly to federal court. You must only show that you went through the *administrative* procedural process.

4. Where to File

Once you have decided to bring your Section 1983 action in federal district court, you have to figure out *which* federal district court is the correct court.²⁵³ For example, New York is divided into four federal judicial districts; Northern, Eastern, Western, and Southern. Your Section 1983 suit must be filed in the same district where the harm occurred *or* in the district where any defendant lives, but only if all the defendants live in the same *state*.²⁵⁴ If the defendants do not all live in the same state, and there is a reason that you cannot file in the district where the harm occurred, then you can file in a judicial district where any defendant can be found.²⁵⁵ In most cases, this will mean that you have to file in the district where your prison is located. If you have been moved to another prison or have been released since the time you suffered the wrong, you must still file in the district where the harm occurred. Appendix I of the *JLM* contains the addresses of all federal district courts. Appendix I also outlines each New York state prison and the federal district they belong to.

Part of the decision process when figuring out where to file your complaint also involves making sure that the court has the power to hear your case. When filing in a court, you must make sure that the court has “personal jurisdiction” over these defendants (which means that the court you are suing in has power over these defendants).²⁵⁶ For federal courts, personal jurisdiction is governed by the Federal Rules of Civil Procedures that incorporate local state long-arm statutes.²⁵⁷ Long-Arm statutes are state laws that allow people in that state to sue people who live out-of-state in that state’s court, if certain requirements are met.²⁵⁸

If you are filing in the state where the defendants live or work, personal jurisdiction will be satisfied easily. In general, for personal jurisdiction to exist for an out-of-state defendant, the defendant must have made minimum contacts with the state and/or they purposefully availed themselves to that state (meaning they interacted with the state by choice to receive some benefit by being in that state).²⁵⁹ Along with proving minimum contacts and/or purposeful availment, you must

252. See *Jenkins v. Morton*, 148 F.3d 257, 259–260 (3d Cir. 1998) (holding that Congress, with the PLRA, “did not mandate that the prisoner must exhaust his administrative remedies and exhaust his right to judicial appellate review before bringing an action” and noting that the same is true of Section 1983 claims); see also *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (*per curiam*) (“A prisoner’s administrative remedies are deemed exhausted [under the PLRA] when a valid grievance has been filed and the state’s time for responding thereto has expired.”).

253. Visit <http://www.uscourts.gov/court-locator> (last visited June 10, 2020) for help in locating your local federal district court.

254. 28 U.S.C. § 1391(b) (describing requirements for where a plaintiff may bring a civil action in terms of appropriate “venue”).

255. 28 U.S.C. § 1391(b)(3) (stating that “if there is no district in which an action may otherwise be brought as provided in this section,” a civil action may be brought in “any judicial district in which any defendant is subject to the court’s personal jurisdiction”).

256. See *Walden v. Fiore*, 571 U.S. 277, 283–284, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12, 19 (2014).

257. See FED. R. CIV. P. 4(k)(1)(A); FED. R. CIV. P. 4(k)(2); see also *Walden v. Fiore*, 571 U.S. 277, 283, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12, 19 (2014).

258. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473–474, 105 S. Ct. 2174, 2182–2183, 85 L. Ed. 2d 528, 541 (1985) (discussing constitutionality of long-arm statutes).

259. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–884, 131 S. Ct. 2780, 2787–2789, 180 L. Ed. 2d 765, 774–776 (2011). Note that there are different ways to prove that a defendant has made the necessary minimum contacts with a state but unless an accident occurred in that state, simply being in the state once or conducting business in the state once is generally not enough. See e.g. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239–1240, 2 L. Ed. 2d 1283, 1297–1298 (1958) (describing what counts as purposeful availment); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980) (noting that when deciding personal jurisdiction, courts consider whether a defendant’s own conduct and

show that it would be fair to allow that state court to have personal jurisdiction over the out-of-state defendant.²⁶⁰ When deciding if personal jurisdiction is fair, the judge will balance the burden the defendant will face versus the benefit you will receive by having to have the case in that court—while also considering if the jurisdiction you are seeking has a compelling reason to hear this case.²⁶¹ Ultimately, if you are not able to convince a Judge that their court has personal jurisdiction over your case, the case will be dismissed. This means you will need to refile in a more appropriate jurisdiction.

5. When to File

If you have been harmed, you do not have an unlimited amount of time to bring your lawsuit. There are strict deadlines for filing, and so you need to pay attention to the applicable statute of limitations. The statute of limitations is the amount of time you have after the harm occurs until your right to file a lawsuit expires forever. Because there is no federal statute of limitations for Section 1983 claims, this time period is governed by the *state* statute of limitations for the analogous personal injury suits in the state where the court is located.²⁶² This rule applies because the Supreme Court has found that the harms addressed by Section 1983 claims are similar to the harms addressed by tort claims for personal injuries.²⁶³

The statute of limitations for personal injury suits is the amount of time you will have to bring your Section 1983 suit. Even if your Section 1983 claim is based on *intentional* actions, the Supreme Court has explicitly said that the statute of limitations for your Section 1983 suit is not based off of the statute of limitations for the similar intentional tort that state, but instead the statute of limitations for personal injury suits within that state.²⁶⁴ For example, New York law says that personal injury suits have to be brought within three years from the date you suffered the wrong, while intentional torts suits for assault must be brought within one year from the date you suffered the

connection with a state are enough that the defendant would anticipate being sued in that jurisdiction).

260. See *Walden v. Fiore*, 571 U.S. 277, 283, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12, 19 (2014).

261. See *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316–320, 66 S. Ct. 154, 158–160, 90 L. Ed. 95, 101–104 (1945).

262. See *Wallace v. Kato*, 549 U.S. 384, 387, 127 S. Ct. 1091, 1094, 166 L. Ed. 2d 973, 980 (2007) (holding that the statute of limitations for Section 1983 is determined by “the law of the State in which the cause of action arose” and that the statute of limitations “is that which the State provides for personal-injury torts”); *Wilson v. Garcia*, 471 U.S. 261, 280, 105 S. Ct. 1938, 1949, 85 L. Ed. 2d 254, 266 (1985) (holding that the statute of limitations for a Section 1983 claim is the same as for state tort actions for personal injuries), *superseded by statute on other grounds*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313(a), 104 Stat. 5089, 5114–5115 (codified as amended at 28 U.S.C. § 1658(a)). If your state has different statutes of limitations for different types of personal injury actions, courts will apply the state’s general or residual personal injury statute of limitations to your Section 1983 case. See *Owens v. Okure*, 488 U.S. 235, 249–250, 109 S. Ct. 573, 582, 102 L. Ed. 2d 594, 606 (1989) (“[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.”). “General” statutes of limitations apply to all personal injury claims, but have some exceptions. “Residual” personal injury statutes of limitation are those that apply to types of personal injuries not specified elsewhere. Note that Congress has created a four-year “catch-all” statute of limitations applicable to “civil action[s] arising under an Act of Congress enacted after” December 1, 1990. 28 U.S.C. § 1658(a). This four-year statute of limitations applies to all claims “made possible by a post-1990 [congressional] enactment” that do not themselves contain a statute of limitations provision. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382, 124 S. Ct. 1836, 1845, 158 L. Ed. 2d 645, 656 (2004). *Do not be confused* by this new four-year catch-all provision: Section 1983 was enacted *before* 1990 and has not been amended to make any claims possible after December 1, 1990, so courts still apply the statute of limitations established by state law.

263. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 119 S. Ct. 1624, 1638, 143 L. Ed. 2d 882, 904–905 (1999) (finding that “there can be no doubt that claims brought pursuant to [Section] 1983 sound in tort”).

264. See *Owens v. Okure*, 488 U.S. 235, 250–251, 109 S. Ct. 573, 582, 102 L. Ed. 2d 594, 606 (1989).

wrong.²⁶⁵ This means that in New York, you have three years to file a suit under Section 1983.²⁶⁶ You should look up the statute of limitations for personal injury suits in the state where you are filing your claim (you can usually find this information in the state code of statutes).

The statute of limitations period begins to run when the alleged harm occurred. The statute of limitations can sometimes be expanded if you could not reasonably have learned about the harm when it first occurred.²⁶⁷ For example, if the statute of limitations is three years, you have three years to file your case from the date that the injury occurred. However, if you were not reasonably able to discover the harm when it first occurred—e.g. because a surgical instrument was mistakenly left in your body and you learned about it only after it caused an infection much later—or if the injury that violated your rights continues over a period of time—for example, failure to treat a medical condition despite repeated requests for medical care—the statute of limitations may not start to run until the injury period ends. You should not assume, however, that the court will expand the statute of limitations and agree that you could not reasonably have discovered the injury at an earlier time or that your injury is continuing. Therefore, you should bring your lawsuit early enough so that all of the actions in your complaint occurred during the limitations period.

6. What to File

(a) Your Complaint

Your lawsuit begins when you file your “complaint.” Many districts provide model (template) complaint forms for Section 1983 actions. After you figure out in which district you have to file, write to the clerk of that district and ask for the model forms (in New York, you should write to the *pro se* clerk). If you cannot get the forms, make your own using the examples provided in Appendix A of this Chapter. You should also read the local rules of practice for the federal district court where you decide to file. You can get the local rules for a small fee from the court clerk and possibly through your prison law library.

There are several very important things that you must include in your complaint. If you miss some of these things your complaint may be dismissed (rejected), so you should make sure not to leave any of them out.

First, you must identify yourself as the “plaintiff” (the party who is bringing the suit). You also have to identify the “defendant(s)” (the party or parties you are suing).²⁶⁸ In addition, you need to

265. N.Y. C.P.L.R. 214(5) (McKinney 2019) (“The following actions must be commenced within three years: . . . an action to recover damages for a personal injury. . . .”); see *Eagleston v. Guido*, 41 F.3d 865, 871 (2d Cir. 1994) (finding that “[f]or [Section] 1983 actions arising in New York, the statute of limitations is three years”); *Lawson v. Rochester City School Dist.*, 446 Fed. App’x 327, 328 (2d Cir. 2011) (noting that the statute of limitations for a §1983 claim arising in New York was still three years); see also *Laboy v. Ontario Cty.*, 318 F. Supp. 3d 582, 587 (W.D.N.Y. 2018) (citing *Lawson* in regards to the statute of limitations being three years).

266. See *Owens v. Okure*, 488 U.S. 235, 235, 109 S. Ct. 573, 574, 102 L. Ed. 2d 594, 606 (1989) (holding that New York’s three-year statute of limitations for general personal injury suits is the statute of limitations that is applied to [Section] 1983 claims, because “where state law provides multiple statutes of limitations for personal injury actions, courts considering [Section] 1983 claims should borrow the State’s general or residual personal injury statute of limitation”).

267. *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091, 1095, 166 L. Ed. 2d 973, 980 (2007) (“[T]he accrual date of a [Section] 1983 cause of action is a question of federal law . . . governed by federal rules conforming in general to common-law tort principles. . . . [A]ccrual occurs when the plaintiff has ‘a complete and present cause of action, that is, when ‘the plaintiff can file suit and obtain relief.’” (citation omitted)); *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994) (“Section 1983 claims accrue, for the purpose of the statute of limitations, when the plaintiff knows or has reason to know of the injury which is the basis of his action.” (quoting *Johnson v. Johnson Cty. Comm’n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991))); *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir.1980) (holding the same); *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir.1977) (holding the same).

268. You should name the defendants using their full, proper names. If you do not know a defendant’s full name, write down whatever identifying information you do know, such as his nickname, badge number, official position or duties, etc. Only defendants who have been adequately identified can be served with the summons and complaint. For more information on what you should do if you do not know a defendant’s name, see Part C(2)(a)

“state the grounds” for your complaint, which means you must specify the actions by the defendant(s) that violated your constitutional or other rights. When doing this, you must specifically state *which* of your constitutional or federal statutory rights were violated. You also must tell the court what laws give the court “subject matter jurisdiction” (the power to hear your suit). This means that if you are suing in federal court, you must state in your complaint that 28 U.S.C. § 1331²⁶⁹ and § 1343(a)(3)²⁷⁰ give the federal district courts jurisdiction over cases under 42 U.S.C. § 1983. You also have to tell the court the type of relief you are seeking—damages, injunctive relief, declaratory relief, or any combination of these. See Part C(1) of this Chapter for information on the types of relief and remedies that are available. As mentioned in Part C(5), you also have to explain why the court has personal jurisdiction over these defendants.

The Federal Rules of Civil Procedure require you to make a “short and plain statement” of your claim in the complaint.²⁷¹ In your complaint, you should include a reasonably specific description of the incident or practice that is the basis for your claim. Give the court specific details such as names, dates, locations, and injuries suffered. Details help convince the court that you “state a claim for relief” and that your claim should not be dismissed. In particular, your complaint should explain how each person you name as a defendant was involved in the violation about which you are complaining. Being clear about the facts will allow the court to apply the law more accurately to your claim.

The Supreme Court has held that complaints must be “plausible” to avoid dismissal.²⁷² This means that you must include enough facts to describe what happened or is happening to you to allow a court to decide that the defendants you have named violated your rights. It is not enough just to state that the defendant(s) broke the law: you must give facts to support that conclusion. Thus, you can’t just say that “X violated my rights.” You must explain, with specifics details, *how* your rights were violated and how you know that it was the defendant who committed the violation. Even though courts generally look at pro se complaints (complaints by those who represent themselves without an attorney) somewhat less strict than complaints they receive from parties who have an attorney,²⁷³ your

of this Chapter.

269. 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). This means that they have original jurisdiction over Section 1983 actions, which are civil actions arising from a federal law.

270. 28 U.S.C. § 1343(a)(3) (“The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . .”).

271. FED. R. CIV. P. 8(a) (“A pleading that states a claim for relief must contain (1) a short and plain statement of the grounds for the court’s jurisdiction. . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.”).

272. See *Ashcroft v. Iqbal*, 556 U.S. 662, 677–680, 129 S. Ct. 1937, 1949–1950, 173 L. Ed. 2d 868, 883–885 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929, 949 (2007). The Supreme Court laid out a two-step approach to determining whether a complaint should be dismissed for failure to state a claim. First, the factual and legal elements of a claim should be separated. The court must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions. Second, the court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a “plausible claim for relief.” In other words, a complaint must do more than allege the plaintiff’s entitlement to relief. A complaint has to “show” such an entitlement by providing sufficient facts to make its legal claims plausible.

273. See, e.g., *Cohen v. Valentin*, Civil No. 11-1942 (PGS), 2011 U.S. Dist. LEXIS 130300, at *8 (D.N.J. Nov. 9, 2011) (*unpublished*) (explaining that “the sufficiency of this pro se pleading must be construed liberally in favor of Plaintiff, even after *Iqbal*”) (be careful citing to unpublished cases as many jurisdictions do not allow you to cite to unpublished cases); see also *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1086 (2007) (*per curiam*) (reviewing a prisoner’s pro se civil rights complaint shortly after *Twombly* and holding that “[a] document filed *pro se* is ‘to be liberally construed’” (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976))).

complaint still must be plausible to survive dismissal.²⁷⁴ Therefore, a detailed account of the facts is important to make sure that your complaint is considered by the court.

(b) Including Supplemental State Claims in Your Complaint

You may want to add some supplemental state law claims to your federal claim. A state law claim is “supplemental” to a federal constitutional or statutory violation if it arises from the same core set of facts.²⁷⁵ A federal court will consider a supplemental state law claim if it is included in a complaint with a non-frivolous federal claim.²⁷⁶ For example, you could file a single complaint claiming that (1) prison officials violated your Eighth Amendment rights by failing to prevent another incarcerated person from assaulting you *and* (2) the officials were negligent under state tort law.²⁷⁷ For more information on state tort claims, see Chapter 17 of the *JLM*.

7. How to File Your Complaint

Each court has its own detailed procedures for filing a complaint. You should try to obtain a copy of the local Rules of the Court for the district where you are filing your lawsuit. You can get a copy of these rules in your prison’s law library or by writing to the clerk of the court and (sometimes) paying a small fee.

You can also ask the clerk of the district court for model Section 1983 forms and *in forma pauperis* papers (described below). Be sure to ask the clerk how many copies of each document you need to file. You may also need to submit a summons to the court clerk that will be issued to each defendant you are naming in the complaint. A summons is the document that orders the defendant to respond to or “answer” your complaint with their own legal papers. Appendix A-1 of this Chapter has a sample summons form.

You should file your complaint by mailing the complaint, your *in forma pauperis* papers, the summonses, and as many copies of those documents as the court requires all together in a sealed envelope to the clerk of the court for the federal district in which the wrongful act took place. The clerk will call for a United States Marshal to deliver a copy of the complaint and a summons to each defendant. The court clerk will return one copy of each paper to you marked “received by the clerk,” so that you will have a record of all papers that you have officially filed with the court. Although the amount of time it will take for you to receive this copy varies among courts, it should range from one to two weeks. Make sure to keep all of the documents that you receive from the court.²⁷⁸

An *in forma pauperis* declaration is a sworn statement in which you tell the court that you cannot afford the filing fee and other legal expenses. If the court approves your *in forma pauperis* declaration, you do not have to pay certain court expenses, including a fee and travel expenses (a mileage charge) for each summons delivered by the U.S. Marshal.²⁷⁹

274. See, e.g., *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681–682 (D.C. Cir. 2009) (noting liberal construction of pro se complaints but explaining that “even a pro se complainant must plead ‘factual matter’ that permits the court to infer ‘more than the mere possibility of misconduct’” (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868, 884 (2009))); see also *Starr v. Baca*, 652 F.3d 1202, 1215–1216 (9th Cir. 2011) (examining *Twombly*, *Erickson*, and *Iqbal* and finding two common principles: “[f]irst, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action” and, “[s]econd, the factual allegations that are taken as true must plausibly suggest an entitlement to relief”).

275. 28 U.S.C. § 1367 (describing the requirements for a federal court to exercise supplemental jurisdiction over a state law claim).

276. 28 U.S.C. § 1367(a) (“[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”).

277. For more information on state tort claims, see Chapter 17 of the *JLM*.

278. See John W. Witt et al., Section 1983 Litigation: Forms § 1 (2d ed. 2016 & Supp. 2020).

279. See, e.g., U.S. Dist. Ct., EDNY, In Forma Pauperis—Prisoner, *available for download at* <https://www.nyed.uscourts.gov/forms/forma-pauperis> (last visited June 11, 2020);); see also JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 7.02 (2d ed. 2016 & Supp. 2020) (providing sample Form 7-1 for “Application

In forma pauperis status does not relieve you from having to pay the filing fees associated with filing a complaint. These fees are no longer waived in the same manner that they were in the past.²⁸⁰ See Chapter 14 of the *JLM* to determine how you are required to pay the filing fees. If you cannot obtain a form for an *in forma pauperis* declaration from the clerk of the district court, use the form in Appendix A-5 of this Chapter as a model (fill in your answers to the questions) and file it with an *in forma pauperis* motion, an example of which is also contained in Appendix A-5.

If you wish the court to appoint an attorney for you, you should also make this request when filing to proceed *in forma pauperis*. See Appendix A-6 of this Chapter for a sample form to request an attorney. However, because you do not have a right to assigned counsel in Section 1983 proceedings, it will be entirely up to the court whether to grant this request.

To summarize, the following are the general steps required to file a complaint:

- (1) Determine the federal district court in which you must file. This is usually the court in the district where the harm took place. (See Appendix I of the *JLM* if you are in New York.)
- (2) Write to the clerk of that district court (the *pro se* clerk if there is one), and ask:
 - (a) For a model Section 1983 complaint form,
 - (b) For *in forma pauperis* papers,
 - (c) For the local rules of practice for that district,
 - (d) Whether you need a summons for each named defendant, and
 - (e) How many copies of each document (complaint, *in forma pauperis* declaration, and summons) you must file, then
- (3) Complete and mail to the clerk of the court:
 - (a) Your complaint and copies of the complaint, including any affidavits (use the sample complaints in Appendix A of this Chapter as a guide for drafting your complaint if the clerk does not send you model forms);
 - (b) *In forma pauperis* papers and copies (use the forms for an *in forma pauperis* motion and an *in forma pauperis* declaration found in Appendix A-5 of this Chapter if you cannot obtain model forms from the clerk of the district court); and
 - (c) Summonses (if necessary) and copies (see Appendix A-1 of this Chapter for a sample summons).

By mailing these documents to the clerk, you have filed your Section 1983 lawsuit. However, you must also follow-up to make sure that the papers have been properly served upon the defendants. Filing alone is not sufficient; your lawsuit will be dismissed if it is not served properly and on time.

8. What to Expect After Your Legal Papers Have Been Filed in Court

Once you file your complaint, your lawsuit has officially begun. It is your responsibility to make sure that your lawsuit continues to move forward. It is not enough to simply file your complaint and then wait for something to happen. Nothing will happen unless you stay involved.

After you file your complaint and serve the defendant(s), the defendant(s) must respond by filing an “answer.”²⁸¹ Defendants are supposed to file answers within twenty-one days of receiving the complaint,²⁸² but some defendants ask for extra time. The defendant’s answer usually denies that your allegations (claims) or statements of the facts are true.

to Proceed *In Forma Pauperis*”).

280. 28 U.S.C. § 1915(b) (outlining procedures for prisoner payment of filing fees).

281. For more information, see Chapter 6 of the *JLM*.

282. FED. R. CIV. P. 12(a)(1)(A)(i) (“A defendant must serve an answer: (i) within 21 days after being served with the summons and complaint. . .”).

Rather than filing an answer, the defendant may first file a motion to dismiss your complaint under Federal Rule of Civil Procedure 12(b).²⁸³ In the motion to dismiss, a defendant may argue that even if your allegations are true, they do not make out a legal claim that can be granted relief. Basically, the defendant may argue that your complaints are not violations of statutory or constitutional rights covered by Section 1983. The defendant may also argue that the court lacks subject matter over one or more of the claims in your complaint, that the venue (the place where you filed the lawsuit) is incorrect, or that the court lacks personal jurisdiction over one or more of the defendants. The court should give you the opportunity to amend (make changes to) your complaint if you left something important out of your original complaint. If the district court dismisses your complaint without letting you amend it first, you may have grounds for an appeal.²⁸⁴

If the defendant does not respond to your complaint at all, you can move (apply) for a “default judgment.” If the court grants you a default judgment, you win your case because the defendants did not answer. Although the court probably will not grant your motion for a default judgment, it may force the defendant to respond.

Another way a defendant might try to end your lawsuit is by filing for summary judgment under Federal Rule of Civil Procedure 56.²⁸⁵ In a summary judgment motion, the defendants argue that there is no real dispute over the facts, and they should win on the undisputed facts. For example, the defendants may claim that they are immune from suit for your claim.²⁸⁶ If the defendants make a summary judgment motion, you must show that there is a “genuine dispute as to material fact”²⁸⁷ that requires a trial in your lawsuit. To raise a genuine dispute as to material fact, you must provide factual support that would be admissible in evidence for each element of your claim against each defendant. For example, if you are suing supervisory officials, you must provide some evidence that the particular officials are responsible for what happened. Factual support can be your own affidavit or declaration, the affidavit or declaration of other people who witnessed the event, or relevant documents like letters from the defendant(s).²⁸⁸ If you need discovery (the opportunity to obtain more information) in order to defend against a summary judgment motion, you can ask to delay the motion, but you will have to explain to the court what discovery you want and why you think it would help. Since statements in response to a summary judgment motion must be sworn to, you cannot just rely on your complaint unless the complaint is verified. If a verified complaint does not address all the relevant issues, you will still need to support it with a declaration.²⁸⁹

283. FED. R. CIV. P. 12(b)(6) (“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted. . .”).

284. See *Platsky v. CIA*, 953 F.2d 26, 29 (2d Cir. 1991) (holding that the *pro se* plaintiff whose claim was dismissed should be given an opportunity to amend his pleadings and refile his complaint). But see *Woodard v. Hardenfelder*, 845 F. Supp. 960, 969 (E.D.N.Y. 1994) (holding that “leave to file an amended complaint is only appropriate when, based on the plaintiff’s first complaint, it is conceivable that an amended complaint could state a cause of action for a violation of the plaintiff’s civil rights”). Taken together, these cases mean that you should be given a chance to amend your original complaint with additional facts that support your legal claim, unless the court determines that based upon what you wrote in your original complaint, there is no possible way that you can prove additional facts to strengthen your legal claim.

285. FED. R. CIV. P. 56(a) (“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.”).

286. For more information on other possible defenses, see Part C(3) of this Chapter.

287. FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

288. If you give the court documents, you must provide a proper “foundation” (explanation) for the documents so the court knows what the document is, when you received it, who gave it to you, etc. You must explain in an affidavit or declaration what the documents are (for example, that the document is the notice the lieutenant gave you that you were found guilty of a particular disciplinary offense, or that it is the grievance you filed and the decision you received, etc.).

289. See Chapter 6 of the *JLM* for explanations of documents such as affidavits and declarations.

The defendants in your lawsuit may try to stop your case by making it “moot.” A lawsuit is moot when it includes claims that no longer exist. Courts will not hear lawsuits that become moot. For example, if you ask for an injunction against certain bad prison conditions and the prison then improves the conditions, your lawsuit would be moot. Mootness is usually decided when the defendant files a summary judgment motion. To avoid having your claim dismissed because of mootness, you can request money damages for injuries you have already incurred—a damages claim is never moot.²⁹⁰ You can also ask the court to decide if the changes made by prison officials really solve the problem and are not just temporary.²⁹¹

If your suit is not dismissed, the next stage of the proceedings may be the “discovery” or investigation stage. Discovery is the process where each party requests information from the other party about the case. See Chapter 8 of the *JLM* for more information on discovery in a federal civil case. It is your responsibility, not the court’s, to keep your case moving. Once you have filed your complaint, you should begin discovery. This means sending discovery request to the defendants. Defendants often ignore discovery requests from *pro se* plaintiffs such as incarcerated people. If the defendants in your case do this, you should write a letter to the defendants, requesting a response “in a timely manner,” and stating that if you do not hear from them you will write to the judge. Most courts now have what are called “meet and confer” requirements. Under these requirements, you must try to settle any discovery disputes with the defendant before you ask the court for help. If you do not hear from the defendants after you write to them, or if you are unable to resolve a discovery dispute with them, you should write to the judge after a week or two.²⁹² Judges want cases to move quickly. If your discovery demands are proper, the judge should order the defendants to fulfill these demands or help you narrow the request so they may be met. See Appendix A of Chapter 8 of the *JLM* for examples of letters that you may send to defendants and judges.

If you receive discovery requests from the defendants, you should make sure to respond quickly and honestly. This is because you are required to follow the rules of the court when you file a lawsuit. In addition, if you ignore discovery requests or delay your response to them, you might hurt your case and make the judge less likely to believe you in the future.

If you are threatened or punished by prison officials for bringing your suit, you should tell the court or your attorney (if you have been assigned one) as soon as possible. You should also tell the court if your appointed attorney has not communicated with you.

If the court dismisses your suit, make sure that you understand the reasons for the dismissal. A lawsuit can be dismissed with or without prejudice. If the court dismissed your suit “without prejudice,” you can file your suit again.²⁹³ If your suit is dismissed “with prejudice,” you cannot re-file your complaint. Instead, you must appeal the court’s decision to dismiss your complaint *before the deadline to appeal*.

290. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1, 109 S. Ct. 706, 713 n.1, 102 L. Ed. 2d 854, 872 n.1 (1989) (stating that the end of an affirmative action program did not make a challenge to the program moot because the plaintiff had asserted a claim for monetary damages).

291. See *Weinstein v. Bradford*, 423 U.S. 147, 148–149, 96 S. Ct. 347, 348–349, 46 L. Ed. 2d 350, 352–353 (1975) (holding that the release of the plaintiff prisoner on parole mooted his challenge to earlier parole board proceedings, but also noting that where an issue is so short-lived that it will not continue throughout the time it takes to litigate (“capable of repetition, yet evading review”), the issue will not be declared moot if there is a “reasonable expectation that the same complaining party would be subjected to the same action again”); see also *Davis v. FEC*, 554 U.S. 724, 735, 128 S. Ct. 2759, 2769, 171 L. Ed. 2d 737, 749 (2008) (noting that “the established exception to mootness for disputes capable of repetition, yet evading review . . . applies where ‘(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.’”) (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462, 127 S. Ct. 2652, 2662, 168 L. Ed. 2d 329, 342 (2007)).

292. See Chapter 8 of the *JLM*, “Obtaining Information to Prepare Your Case: The Process of Discovery.”

293. For example, if you filed in the wrong district court, you may be allowed to re-file in the right court. Your suit could also be dismissed without prejudice because of a technical problem in your pleadings. If the statute of limitations has not ended, you may have the chance to fix your pleadings and re-file your complaint.

D. Alternate Ways to Bring Lawsuits

1. Filing Your Lawsuit as a Class Action

Section 1983 claims can also be brought as “class action” suits. A class action is a lawsuit brought on behalf of a group of people who experience the same harm or have the same complaint—in other words, all people in the group are “similarly situated.”²⁹⁴

Class actions are very complicated and can take years. It is also very difficult to bring a class action without an attorney. Losing a class action affects the rights of all class members, so having a good lawyer is very important. Courts will probably not “certify” (recognize) a case as a class action if you do not have a lawyer. If you believe that other incarcerated people like you are experiencing similar mistreatment, you should talk with a lawyer about whether bringing a class action would be appropriate.

A class action will only be recognized by the court if it meets *all* of the following conditions:

- (1) The “class” (group) of persons in a similar position must be too large for each person to bring his own lawsuit or even join individual lawsuits;
- (2) The prison officials must have acted or refused to act on grounds that apply to the entire class;
- (3) The personal claims of the main plaintiff(s) (the “class representative(s)”) must be typical of the other plaintiffs; and
- (4) The class representative(s) must fairly and adequately protect the rights of the other members of the class.²⁹⁵

Class actions are appropriate only if the wrong you suffered was also suffered by the other plaintiffs in the suit. All of you together will be considered a “class.” The class members do not need to know each other, but you must have a way to reasonably identify most of them, so they can be made aware of the suit (notice) and given an opportunity to decide whether to participate.²⁹⁶ Again, in order to have your class “certified”, you will probably need to get a lawyer or ask the court to appoint one, because class actions are very complicated.

If you decide to proceed on your own and feel that the case fits the requirements of a class action suit, you should name yourself and “all others similarly situated” as the plaintiffs (for example, “John Smith individually and on behalf of all others similarly situated”). In the complaint, you should include all the facts related to the wrongs done to you and also provide whatever information you have about similar treatment of other incarcerated people. The court will then decide, on the basis of the facts you provide, whether or not a class action would be proper. If the court allows the class action, it may

294. There are two main advantages offered by a class action. First, the suit will not become “moot” if one plaintiff is transferred or released (a suit is “moot” when the suit no longer applies to the person or persons who brought the suit). *See* U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 404, 100 S. Ct. 1202, 1212–1213, 63 L. Ed. 2d 479, 495 (1980) (holding that the resolution of the named plaintiff’s substantive claim does not necessarily moot all other issues in the case, even if class certification has been denied so far); *Sosna v. Iowa*, 419 U.S. 393, 401, 95 S. Ct. 553, 558, 42 L. Ed. 2d 532, 541 (1975) (holding that when a claim is no longer relevant for a named plaintiff in a class action suit, the claim may still be alive and not moot for the class of persons the named plaintiff has been certified to represent). *But see* *Sze v. INS*, 153 F.3d 1005, 1010 (9th Cir. 1998) (noting two exceptions to *Sosna*’s mootness doctrine: where, in a proposed class action, plaintiffs’ claims are “inherently transitory” and “there is a constantly changing putative class,” leaving the court no time to certify the class; and where “but for the ‘relation back’ of a later class certification, putative class members’ claims would be barred by the statute of limitations.” (quoting *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997))), *overruled in part on other grounds en banc* by *United States v. Hovsepian*, 359 F.3d 1144, 1161 (9th Cir. 2004). The second advantage of bringing a class action is that, if you win, each member of the class can enforce the judgment or injunction on behalf of the other class members, which avoids separate enforcement actions. *See, e.g., Daniels v. City of New York*, 198 F.R.D. 409, 422 (S.D.N.Y. 2001) (noting that a judgment in favor of class-action plaintiffs challenging New York’s stop and frisk policy would avoid the need to bring separate enforcement actions).

295. FED. R. CIV. P. 23(a).

296. FED. R. CIV. P. 23(c)(2).

appoint an attorney to represent the class. If the court does not recognize the class action, you will be allowed to amend your complaint and sue by yourself.

2. Using State Law and/or State Courts

There are certain advantages to suing in federal court, such as easier and more generous discovery rules and potentially higher damage awards. But you may want to file in state court if you have only state law claims or if there are other advantages to bringing your Section 1983 claim in a particular state court.

(a) Bringing Your Section 1983 Action in State Court

Even if you have a federal law claim, you may want to consider bringing your Section 1983 action in state court. The advantages and disadvantages of federal court compared with state court are different depending on the state. Some state courts might have more sympathetic judges, more favorable procedural rules, or fewer cases to hear than federal courts. State courts may, however, place restrictions on damages or the amount you can recover for attorney fees. State courts also have different immunity rules (restricting who you can and cannot sue) than federal courts, which might be helpful or harmful to your lawsuit depending on which state you are in and whom you want to sue. You should research the law and practices of your state to see if it has any of these advantages or disadvantages.

Bringing your Section 1983 action in state court will also avoid some, but not all of the restrictions of the PLRA. For example, the barriers in the PLRA for incarcerated people filing *in forma pauperis* (filing as a poor person in order to avoid paying many of the normal fees and costs) do not apply in state court (although, as mentioned above, many states have their own PLRA-like laws that may restrict *in forma pauperis* filing). Another advantage is that the requirement that you exhaust all of your administrative remedies before bringing your Section 1983 claim does apply in state court.

(b) Turning Your Federal Civil Rights Claim into a State Law Claim

By bringing a state claim (instead of a federal civil rights claim) in state court, you can avoid the Prison Litigation Reform Act (“PLRA”), since the PLRA only applies to claims under federal law.²⁹⁷ You can do this by converting your federal civil rights claim into a state tort claim or other state law claim.²⁹⁸ For example, a claim in federal court for “deliberate indifference to serious medical needs” in violation of the Eighth Amendment could instead be brought in state court as a tort action for medical malpractice. Or, if a disciplinary hearing denied you due process, you could file in state court for violation of the state regulations governing prison disciplinary proceedings.

In addition to avoiding the PLRA, you may have a better chance of winning if you file in state court because of the lower standard that you, as the plaintiff, will have to meet to prove your case. For example, a state court may find that you have a valid state medical malpractice tort claim even if you cannot show the prison officials were “deliberately indifferent” as required in a Section 1983 claim.²⁹⁹

297. See *Kozlowski v. Coughlin*, 2001 U.S. Dist. LEXIS 19294, at *10–14 (S.D.N.Y. Nov. 19, 2001) (*unpublished*) (explaining that Congress intended the PLRA to limit federal control in operation of the prison system, and that federal rights are limited to those created by federal law). You may want to avoid the PLRA because it is designed to make it harder for prisoners to take their claim to federal court. For example, the PLRA makes prisoners who file *in forma pauperis* (as a poor person) pay the full \$350 filing fee (as well as an additional \$450 if you wish to appeal the court’s decision). It will also give you a “strike” if you have a case dismissed as frivolous, malicious, or failing to state a valid legal claim. If you get three strikes, you will no longer be able to file claims *in forma pauperis* and will have to pay the full amount of court costs and fees. For more information on the PLRA, see Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

298. For more information on state tort claims, see Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions.”

299. See *Estelle v. Gamble*, 429 U.S. 97, 104–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) (concluding that the “deliberate indifference” standard that must be met to prove a Section 1983 claim against a prison official for denial of medical care consists of “unnecessary and wanton infliction of pain” or conduct that is

However, many state statutes contain PLRA-like restrictions as well.³⁰⁰ You need to research the law in your own state before deciding to file a claim in state court.

Another possible advantage of bringing your claim in state court is that you may be able to enforce rights that are not granted under federal law. State constitutions may protect rights that are not recognized by the U.S. Constitution. This is because the U.S. Constitution protects a minimum level of individual rights and allows the states to provide greater rights for state citizens through their own constitutions, statutes, and rule-making authority.³⁰¹ Again, you will need to research your own state's constitution and statutes to find out whether you can sue for violations of any of those provisions. Please note that if you turn your claim into a state law claim, there may be statutes in the state (such as immunity statutes or statutes about jurisdiction) that can impact money damages. For more information on state tort claims, be sure to see Chapter 17 of the *JLM*.

E. Special Concerns for People Incarcerated in Federal Prisons

1. *Bivens* Actions

There is no statute similar to Section 1983 that clearly allows individuals to sue *federal* officials, rather than state officials, who violate federal rights while acting under color of federal law (acting in their official role as federal officials). However, the Supreme Court has held that, even without a specific statute, federal officials may be sued for damages and “injunctive relief” for violations of your constitutional rights.³⁰² These lawsuits are usually referred to as *Bivens* actions, named after the case

“repugnant to the conscience of mankind,” and not merely the “inadvertent failure to provide adequate medical care” (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 874 (1976) and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 472, 67 S. Ct. 374, 380, 91 L. Ed. 422, 430 (1947))).

300. See, e.g., CAL. CIV. PROC. CODE §§ 391–391.7 (West 2004) (governing vexatious (troublesome) litigants in general, and preventing those litigants that a court has found to be troublesome from filing future lawsuits without the permission of a judge); FLA. STAT. ANN. § 57.085(6)–(7) (West 2004) (allowing a court to dismiss a prisoner's claim if it is frivolous, malicious, or harassing, and requiring that a prisoner who has litigated as an indigent [a person who has demonstrated that he is unable to pay court costs and fees] twice within the previous three years receive permission from a judge before going ahead with another suit), *invalidated in part by* *Mitchell v. Moore*, 786 So. 2d 521, 528 (Fla. 2001); GA. CODE ANN. §§ 42-12-1–42-12-9 (West 1996) (governing payment of certain court fees and costs by a prisoner, and requiring that any prisoner who has filed three or more actions that were later dismissed as frivolous or malicious be barred from filing any future actions unless the prisoner is under imminent danger of serious physical injury); TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001–14.014 (West 1995) (requiring that prisoners exhaust their administrative remedies before filing a claim in state court and that the state court claim be filed within 31 days of when the prisoner receives a written decision from the administrative grievance system, allowing courts to dismiss claims that are frivolous or malicious, and governing costs and fees that the court may require a prisoner to pay).

301. See *People v. Pavone*, 26 N.Y.3d 629, 639, 47 N.E.3d 56, 64, 26 N.Y.S.3d 728, 736 (2015) (“This Court has previously, and repeatedly, applied the State Constitution . . . to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties . . . Thus, our analysis of defendant's claim is grounded in our recognition of the greater expanse of our State Constitution.”) (internal quotations and citations omitted); *State v. LaValle*, 3 N.Y.3d 88, 129, 817 N.E.2d 341, 366, 783 N.Y.S.2d 485, 510 (2004) (“It bears reiterating here that on innumerable occasions this Court has given the State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution.”) (internal quotations omitted); *Cooper v. Morin*, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1193, 424 N.Y.S.2d 168, 174 (1979) (“We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority.”) (internal citations omitted).

302. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394, 91 S. Ct. 1999, 2003, 29 L. Ed. 2d 619, 625–626 (1971) (holding that plaintiff could sue federal agents directly through the 4th Amendment for violating their rights); see also *Carlson v. Green*, 446 U.S. 14, 18–20, 100 S. Ct. 1468, 1471–1472, 64 L. Ed. 2d 15, 23–24 (1980) (finding that the widow of deceased federal prisoner had a *Bivens* remedy directly under the 8th Amendment). But see *FDIC v. Meyer*, 510 U.S. 471, 486, 114 S. Ct. 996, 1006, 127 L. Ed. 2d 308, 323–324 (1994) (refusing to extend *Bivens* doctrine to suits against federal agencies).

where the Supreme Court ruled that the Fourth Amendment guarantees freedom from unreasonable “search and seizures” and creates a cause of action when this freedom is violated by a federal agent.

A *Bivens* action is the federal equivalent of a Section 1983 action. Therefore, most of the discussion of Section 1983 in Part B also applies to a federal *Bivens* action. Before continuing, you should review all of Part B. Appendix A of this Chapter provides sample Section 1983 complaints, which can also be used for *Bivens* actions. This Part explains the differences between Section 1983 suits and *Bivens* actions.

2. Exhaustion of Remedies

Before filing a *Bivens* suit against federal officials, you must exhaust (use up) any and all available administrative remedies, such as internal grievance procedures, regardless of whether you are suing for injunctive relief, declaratory relief, or money damages.³⁰³ See Chapter 14 of the *JLM* for more information.

3. History of Bivens Actions in the Supreme Court

Since the original case in 1971, the Supreme Court has only ever approved a *Bivens* action in two other cases.³⁰⁴ The first case, *Davis v. Passman*, was a Fifth Amendment gender-discrimination case, where a Congressman fired his administrative assistant because she was a woman.³⁰⁵ In that case, the Supreme Court held that she could sue for damages under a *Bivens* action because her right to Due Process under the Fifth Amendment was violated.³⁰⁶ The second case, *Carlson v. Green*, was an Eighth Amendment Cruel and Unusual Punishment case where a mother sued federal prison officials after her son died because the prison failed to properly treat his asthma.³⁰⁷ In *Carlson*, the Court held that the family was allowed to bring a *Bivens* action to get damages for the prison’s violation of the son’s Eighth Amendment rights.³⁰⁸

Besides these three cases, the Supreme Court has never approved of any awards of damages based on *Bivens* Actions. Recently, the Supreme Court has limited *Bivens* Actions to cases that are similar to one of these three cases.³⁰⁹ Due to this, who you can sue, and what you can write in your complaint, has been severely limited.

4. Whom You Can Sue

In bringing a *Bivens* action, you are generally limited to suing the federal official who violated your federal constitutional rights. When you sue for money damages (as opposed to a different type of remedy like declaratory relief), you can sue the federal official only in his *individual* capacity,³¹⁰ not in

303. See *Booth v. Churner*, 532 U.S. 731, 741, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958, 966–967 (2001) (holding that the PLRA requires that all administrative remedies be exhausted before filing suit, regardless of the form of relief sought).

304. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854–1857, 198 L. Ed. 2d 290, 305–309 (2017) (explaining that the Supreme Court has only allowed plaintiffs to bring a *Bivens* remedy in two cases other than *United States v. Bivens* and listing cases where the Court refused to extend *Bivens* to other contexts).

305. *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).

306. *Davis v. Passman*, 442 U.S. 228, 248–249, 99 S. Ct. 2264, 2279, 60 L. Ed. 2d 846, 865 (1979).

307. *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).

308. *Carlson v. Green*, 446 U.S. 14, 18, 100 S. Ct. 1468, 1471, 64 L. Ed. 2d 15, 23 (1980).

309. See *Hernandez v. Mesa*, 140 S. Ct. 735, 742–734, 206 L. Ed. 2d 29, 40–42 (2020) (explaining that *Bivens* remedies are in tension with “the Constitution’s separation of legislative and judicial power”); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–1857, 198 L. Ed. 2d 290, 307–309 (2017) (describing *Bivens*, *Davis*, and *Carlson* as in tension with more recent case law and noting that it is a “disfavored judicial activity” to expand *Bivens* remedies to new contexts) (internal citation and quotation marks omitted).

310. To show that a federal official has acted in his individual capacity, it is generally necessary to show personal involvement. See, e.g., *Volpe v. Nassau County*, 915 F. Supp. 2d 284, 299 (E.D.N.Y. 2013) (noting that “the complaint [was] devoid of any reference to actions taken by [the defendant] in violation of the plaintiffs’ constitutional rights. . .”); *Caidor v. Tryon*, 11-CV-6379L, 2011 U.S. Dist. LEXIS 119539, at *6 (W.D.N.Y. Oct. 5, 2011) (*unpublished*) (noting that “to establish a *Bivens* claim, a plaintiff must allege facts showing that the individual defendants participated in the alleged constitutional violation.”); *Goldberg v. Rocky Hill*, 973 F.2d 70,

his *official* capacity.³¹¹ This is because “official capacity” suits are considered to be the same as suits against the government, and the federal government has “sovereign immunity,” meaning that they cannot be sued.³¹² You also cannot bring a *Bivens* action against a federal agency³¹³ or a private corporation that contracts with the federal government to operate prison facilities.³¹⁴ In *Corrections Services Corporation v. Malesko*, the Supreme Court held that it would be unfair to allow *Bivens* suits against private corporations and not federal agencies. Violations by these private corporations, the Court said, are best handled through tort remedies available to incarcerated people.³¹⁵ It is not yet clear whether *employees* of private corporations contracting with the federal prisons may be sued under *Bivens*. While some courts have found that *Malesko* excluded only private entities and not private individuals from *Bivens* actions,³¹⁶ others have found that neither private entities nor their employees can be sued.³¹⁷

5. What You Can Complain About: Will a Court Hear your *Bivens* Action?

Since the Supreme Court’s decision in *Ziglar*, federal courts will only be allowed to hear your *Bivens* action if it is the same context as one of the three cases mentioned in part E(3). The Supreme Court has said that if your case is different in a meaningful way from the previous *Bivens* cases they decided, then the context is new and you cannot bring a *Bivens* action. For example, if your case is based on a violation of your First Amendment rights, that would be considered a new context and you could not bring a *Bivens* action. However, even if your case also involves a Fourth, Fifth, or Eighth

73 (2d Cir. 1992) (noting that “to establish *personal* liability in a [Section] 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.”).

311. See *Tapia-Tapia v. Potter*, 322 F.3d 742, 746 (1st Cir. 2003) (holding that the Postmaster General cannot be sued in his official capacity under *Bivens*); *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999) (noting that *Bivens* “provides a cause of action only against government officers in their individual capacities.”); *Buford v. Runyon*, 160 F.3d 1199, 1203 (8th Cir. 1998) (holding that a *Bivens* claim cannot be brought against a federal official in his official capacity); *Randall v. United States*, 95 F.3d 339, 345 (4th Cir. 1996) (noting that *Bivens* actions must be brought against federal officials individually); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) (stating that a *Bivens* action “must be brought against the federal officers involved in their individual capacities.”).

312. See *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) (“Under the doctrine of sovereign immunity, an action for damages will not lie against the United States absent consent. Because an action against . . . federal officers in their official capacities is essentially a suit against the United States, such suits are also barred under the doctrine of sovereign immunity, unless such immunity is waived.”). See the discussion of state sovereign immunity under the 11th Amendment in Part C(3)(a) of this Chapter. The discussion generally applies to the federal government as well.

313. See *FDIC v. Meyer*, 510 U.S. 471, 486, 114 S. Ct. 996, 1006, 127 L. Ed. 2d 308, 323 (1994) (finding a damages remedy against federal agencies inappropriate and inconsistent with *Bivens* because of the “potentially enormous financial burden for the Federal Government”).

314. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63, 122 S. Ct. 515, 517, 151 L. Ed. 2d 456, 461 (2001) (refusing to extend *Bivens* to allow recovery against a private company operating a halfway house under contract with the Federal Bureau of Prisons).

315. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72–73, 122 S. Ct. 515, 522, 151 L. Ed. 2d 456, 466–467 (2001) (“Nor are we confronted with a situation in which claimants . . . lack effective remedies. . . . For example, federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in government facilities.”).

316. See *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 58–61 (D.R.I. 2003) (finding private prison guards to be federal actors under *Bivens* because they are considered state actors within the meaning of § 1983 and act under the color of federal law). But see *LaCedra v. Donald W. Wyatt Det. Facility*, 334 F. Supp. 2d 114, 141 (D.R.I. 2004) (holding that no *Bivens* action can be brought against employees of a public corporation because they are not federal agents and expressly disagreeing with the district court ruling in *Sarro*).

317. See *Holly v. Scott*, 434 F.3d 287, 296 (4th Cir. 2006) (dismissing *Bivens* lawsuit brought by prisoner in a privately run federal prison against prison officials because he could seek relief under state law); *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090, 1104–1105 (10th Cir. 2005) (finding *Bivens* actions are not available against private prison employees because other remedies, such as negligence actions, are available), *vacated in part by an equally divided court en banc*, 449 F.3d 1097 (10th Cir. 2006).

Amendment issue, it still might be considered a different context. For instance, if the rank of the officers you are suing is different from the officers in one the previous *Bivens* cases, that could be considered a meaningful difference.³¹⁸ Figure 3 below provides examples of *Bivens* actions that were denied because the context of each case was considered meaningfully different.

Case	Type of Law Suit
<i>Bush v. Lucas</i> , 462 U.S. 367, 390, 103 S. Ct. 2404, 2417, 76 L. Ed. 2d 648, 665 (1983)	First Amendment lawsuit against a federal employer
<i>Chappell v. Wallace</i> , 462 U.S. 296, 297, 305, 103 S. Ct. 2362, 2364, 2368, 76 L. Ed. 2d 586, 589, 594 (1983)	Race-discrimination lawsuit against military officers
<i>United States v. Stanley</i> , 483 U.S. 669, 684, 107 S. Ct. 3054, 3064, 97 L. Ed. 2d 550, 567 (1987)	Substantive due process lawsuit against military officers
<i>Schweiker v. Chilicky</i> , 487 U.S. 412, 414, 108 S. Ct. 2460, 2463, 101 L. Ed. 2d 370, 375 (1988)	Procedural due process lawsuit against Social Security officials
<i>FDIC v. Meyer</i> , 510 U.S. 471, 473–474, 114 S. Ct. 996, 999, 127 L. Ed. 2d 308, 315–316 (1994)	Wrongful Termination Suit against a Federal Agency
<i>Minnecci v. Pollard</i> , 565 U.S. 118, 120, 132 S. Ct. 617, 620, 181 L. Ed. 2d 606, 610 (2012)	Eighth Amendment Suit Against prison guards at a private prison.

Figure 3: Examples of *Bivens* actions that were denied.³¹⁹

Additionally, federal courts may refuse to hear *Bivens* complaints based on violations of the Fifth Amendment’s Due Process Clause³²⁰ that fall within the category of less serious harms (like removal of personal items).³²¹ For harms that are simple tort violations, you should sue using the Federal Tort Claims Act (“FTCA”),³²² rather than *Bivens* action. The FTCA is a statute that authorizes damages suits against the federal government for actions by federal employees who, within the scope of their employment, negligently or wrongfully inflict harm on people or their property.³²³ You begin a FTCA claim by submitting Form 95, “Claim for Damage, Injury, or Death,” and requesting money damages from the federal agency whose employee allegedly committed the harmful action.³²⁴ Many FTCA cases are resolved at the agency level through negotiation and eventual settlements. However, if your state FTCA claim is denied, you may file suit in federal court. But remember, the judge will dismiss your case if you go to federal court without exhausting the administrative remedy.³²⁵

318. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860, 198 L. Ed. 2d 290, 311–312 (2017).

319. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290, 308–309 (2017).

320. The 5th and 14th Amendments to the Constitution each contain a Due Process Clause. The 5th Amendment’s clause applies to the federal government; the 14th Amendment’s applies to states.

321. See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 525–526, 533, 104 S. Ct. 3194, 3200, 3204, 82 L. Ed. 2d 393, 402–403, 407 (1984) (holding that the 4th Amendment’s prohibition on unreasonable searches and seizures did not apply to searches of prison cells or seizures of prisoner property, and that such seizures did not violate the 14th Amendment’s Due Process Clause if a remedy was available after the seizure); *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 663, 88 L. Ed. 2d 662, 666 (1986) (holding that “the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.”).

322. Federal Tort Claims Act, 28 U.S.C. § 1346(b).

323. A person acts negligently when he fails to use the care that a reasonably prudent person would use in the same circumstance. *Negligent*, BLACK’S LAW DICTIONARY (11th ed. 2019). A person acts wrongfully when he commits an act that will damage another person’s rights—even if that action is not a crime. *Wrongful Conduct*, BLACK’S LAW DICTIONARY (11th ed. 2019).

324. You may obtain this form by writing to the clerk of the federal district court in which you plan to file your action. Form 95 is also available at http://www.justice.gov/civil/docs_forms/SF-95.pdf (last visited Aug. 22, 2020).

325. See *Deutsch v. Fed. Bureau of Prisons*, 737 F. Supp. 261, 266 (S.D.N.Y. 1990) (holding that failure to file an administrative claim will bar a plaintiff from suing under the Federal Tort Claims Act).

6. What You Should File

If you are suing for injunctive relief and money damages in a *Bivens* action, you must serve (provide) a copy of the summons and complaint to: (1) the named defendants, (2) the U.S. Attorney for the district in which you bring your suit, and (3) the Attorney General of the United States in Washington, D.C.³²⁶ If you are suing in a *Bivens* action for only money damages, you need to serve the summons and complaint to: (1) the U.S. Attorney for the district in which you bring your suit, (2) the Attorney General of the United States in Washington D.C., and (3) the officer or employee being sued.³²⁷ You must serve these papers using either registered or certified mail.³²⁸

7. Where to File

If you are seeking injunctive (an order from the court to the person you sued to do something or to stop doing something) or declaratory (a court statement of your rights) relief, you may file your lawsuit in the federal district where *any* defendant lives, where the events complained of occurred or are occurring, or where you currently live.³²⁹ If, however, you are suing for money damages only, you must file suit in the federal district where *all* the defendants live or the district where your claim arose (where the events you are complaining about occurred).³³⁰ As mentioned in Part C(5), you will also need to show that the court you are filing your case in has personal jurisdiction (power to make a valid judgement) over these defendants. Always make sure that you show that the court has personal jurisdiction over your case, because your case will be dismissed if a Judge does not believe their court has personal jurisdiction over your case.

F. Conclusion

If your constitutional rights have been violated you may be able to obtain relief by suing state and local officials under 42 U.S.C. Section 1983 or suing federal officials through a *Bivens* action. Through these suits, you may receive monetary relief, injunctive relief, and/or declaratory judgment. In a Section 1983 claim against state and local officials you can sue officials in their official capacities as representatives of the state. However, when suing federal officials based on a *Bivens* action you may only sue the federal officials in their individual capacity. (Refer to Part E of this chapter to review the special requirements for filing *Bivens* actions.) Appendix A of this chapter provides helpful examples of forms for making your claim, such as a summons form, a sample temporary restraining order, and a sample full complaint. Remember to read Chapter 14 of the *JLM* on the Prison Litigation Reform Act before starting your Section 1983 claim.

326. FED. R. CIV. P. 4(i)(1).

327. FED. R. CIV. P. 4(i)(3).

328. FED. R. CIV. P. 4(i)(1). (3). You can send certified mail by bringing the correspondence to the mail room staff fully prepared for mailing with the appropriate stamps. You must pay for the cost of postage. To determine the price, you can review the postal chart(s). You may follow similar procedures for sending registered mail. There are many ways to try to find the addresses for those being served. One way is to send a letter to the last known address with "Return Service Requested. Do Not Forward." written on the envelope. The letter will be returned to you with the new address if there is a new address on file. Another way is to ask the post office if there is a forwarding address available for the individual you wish to serve. If you are able to use the internet, you may conduct a basic internet search to find the phone number or address of the individual, or call information for this data. Or, you may use social media to find this information.

329. 28 U.S.C. § 1391(e)(1) ("A civil action in which a defendant is an officer or employee of the United States . . . may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.").

330. See *Stafford v. Briggs*, 444 U.S. 527, 544, 100 S. Ct. 774, 785, 63 L. Ed. 2d 1, 15 (1980) (finding that under 28 U.S.C. § 1391(b), "suits against private persons for money damages must be brought 'in the judicial district where all defendants reside, or in which the claim arose'").

APPENDIX A

Forms and Samples

This Appendix contains the following materials:

- A-1. Sample Summons Form
- A-2. Sample Section 1983 Complaint Form
- A-3. Form for an Affidavit
- A-4. Order to Show Cause and Temporary Restraining Order (“TRO”)
- A-5. *In Forma Pauperis* (“IFP”) Papers
 - a. Notice of Sample Motion to Proceed *In Forma Pauperis*
 - b. Declaration in Support of Request to Proceed *In Forma Pauperis*
- A-6. Application for Appointment of Counsel
- A-7. “Prisoner Authorization”
- A-8. Sample Language for Statement of Facts
- A-9. Sample Full Complaint

Remember, people incarcerated in federal prisons can also use the “Sample Section 1983 Complaint Form” for a *Bivens* action. Just cross out the reference to “42 U.S.C. § 1983” and replace it with “28 U.S.C. § 1331 (*Bivens* action).”

Parts B and C of this Chapter contain instructions on when and how to use each of the following forms. **DO NOT USE THESE FORMS UNTIL YOU HAVE READ PARTS B AND C OF THIS CHAPTER.**

You may obtain free model forms for Section 1983 complaints and supporting papers by writing to the clerk of the district court in which you plan to file your action. These model forms are designed to make your work less confusing, and will help the district court process your case. If for some reason you cannot obtain model forms, draft your own papers based on the samples in this section. The footnotes included with each sample form tell you how to fill in the necessary information. **DO NOT TEAR ANY OF THESE FORMS OUT OF THE *JLM*.**

If you are in New York and need to know the name or address of the court to which you should send these papers, consult Appendix I at the end of the *JLM* for the federal courts in New York and Appendix II for the state courts in New York.

For sample forms for *state* court *In Forma Pauperis* Motions and Declarations in Support of Request to Proceed *In Forma Pauperis*, see Appendix A of Chapter 9 of the *JLM*.

A-1. SAMPLE SUMMONS FORM³³¹

[This is based on the official form. You can get as many free copies as you need from the clerk of the U.S. district court for your district.]

United States District Court
for the

_____ ³³²

-----x
[*Name(s) of the Incarcerated Person(s)*])
[*Who Are Bringing the Suit*],)
Plaintiffs,)
)
v.)
)
[*Names and Titles of All the People*])
[*and Governments Whom*])
[*You Are Suing*], individually and)
in their official capacities,³³⁴)
Defendants.)
-----x

Civil Action No. _____ ³³³

SUMMONS IN A CIVIL ACTION

To: [*Defendant's name and address*]

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the

331. See Admin. Office of the U.S. Courts, *Form No. AO 440, Summons in a Civil Action*, available at <http://www.uscourts.gov/forms/notice-lawsuit-summons-subpoena/summons-civil-action> (last visited Aug. 22, 2020) (providing official form); see also *Self Representation, Resource Guide*, NAT'L CTR. FOR STATE CTS., available at <https://www.ncsc.org/topics/access-and-fairness/self-representation/resource-guide> (last visited Aug. 22, 2020) (listing helpful resources and state court websites with some state court forms); *Legal Forms*, WASHLAW, available at <http://www.washlaw.edu/legalforms/#fedcts> (last visited Aug. 22, 2020) (providing links to federal court forms, state court forms, and form databases).

332. Name of the federal district where the prison in which the alleged offense occurred is located, for example, "Southern District of New York" or "District of Colorado."

333. Leave this blank. This entry will be filled in by the clerk of the court where you file the form.

334. See Part C(2) of this Chapter for information on whom to name as proper defendants.

plaintiff or plaintiff's attorney, whose name and address are:

335

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF THE COURT

Date: _____
Signature of Clerk or Deputy Clerk

335. Your complete prison address.

A-2. SAMPLE SECTION 1983 COMPLAINT FORM³³⁶

In the United States District Court
for the _____³³⁷

[Name(s) of the Incarcerated Person(s)]	X	
	:	
	:	
Plaintiffs,	:	
	:	Complaint
v.	:	
	:	
[Names and Titles of All the People and Governments Whom You Are Suing], individually and in their official capacities ³³⁹ ,	:	Civil Action No. _____ ³³⁸
	:	
Defendants.	:	Jury Trial Demanded
	:	
	X	

I. Complaint

Plaintiff(s), [your name and the name of any other plaintiffs], pro se, for their complaint state as follows:

II. Parties, Jurisdiction and Venue

1. Plaintiff [your name] was confined³⁴⁰ in the [type of facility: municipal (city) jail, federal penitentiary, state correctional institution], located at [address of the facility] in the city of _____ in the state of _____ from [dates of confinement at that facility] to _____ of 20____. Plaintiff is currently confined at [your current address].
2. Plaintiff [your name] is, and was at all times mentioned herein, an adult citizen of the United States and a resident of the state of _____.
3. [If other incarcerated people are complaining, you should repeat paragraphs 1, 2, and 3 with their names and addresses].
4. Defendant [name of first defendant]³⁴¹ was at all relevant times herein mayor of the City of _____.³⁴²

336. John W. Witt et al., Section 1983 Litigation: Forms § 1.03 (2d ed. 2016 & Supp. 2020) (using sample complaint Forms 1-5 to 1-8 as a guide and source of sample language). See also U.S. Dist. Ct., EDNY, Civil Rights Complaint—Prisoner, _____ available at <https://img.nyed.uscourts.gov/files/forms/PRO%20SE%20CivilRightsCmpPrisoner120115.pdf> (last visited Jan. 28, 2019).

337. Name of the federal district where the prison in which the alleged offense occurred is located. For example, “Southern District of New York” or “District of Colorado.”

338. Leave this blank. This will be filled in by the clerk of the court where you file the form.

339. See Part C(2) of this Chapter for information on whom to name as proper defendants.

340. Add “as a pretrial detainee” if you had not yet gone to trial at the time of the incident about which you are complaining.

341. If you do not know the names of the defendants, you should refer to them as either John or Jane Doe. See Part C(2) of this Chapter for more information.

342. From paragraph 4 onward, use the descriptions and titles of defendants that are correct for your case.

5. Defendant [*name of second defendant*] was at all relevant times herein the commissioner of adult services for the City of ____, with responsibility for operating and maintaining detention, penal, and corrective institutions within the City of ____, including the city jail.³⁴³
6. Defendant [*name of third defendant*] is and was at all relevant times herein the warden or “superintendent” of the municipal prison for the City of _____. As Superintendent of the prison, Defendant manages its day-to-day operations and executes its policies.
7. Defendant [*name of fourth defendant*] is and was at all relevant times herein an employee of the prison.
8. Defendant _____ is employed as [*job of defendant, such as prison guard, mayor, warden or doctor*] at [*name of prison or other place that this defendant works*]. Defendant _____ is employed as [*job of defendant, such as prison guard, mayor, warden or doctor*] at [*name of prison or other place that this defendant works*].
9. Defendant City of ____ is and was at all relevant times herein a municipal corporation of the State of ____.
10. This action arises under and is brought pursuant to 42 U.S.C. Section 1983 to remedy the deprivation, under color of state law, of rights guaranteed by the Eighth and Fourteenth Amendments³⁴⁴ to the United States Constitution. This Court has jurisdiction over this action pursuant to 28 U.S.C. Sections 1331 and 1343.
11. Plaintiff’s claims for injunctive relief are authorized by Rule 65 of the Federal Rules of Civil Procedure.
12. This cause of action arose in the _____ District of _____.³⁴⁵ Therefore, venue is proper under 28 U.S.C. Section 1391(b).

III. Previous Lawsuits by Plaintiff

Use this paragraph if you have not filed any lawsuits relating to these facts before:

13. Plaintiff has filed no other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.

Use these paragraphs if you have filed a lawsuit relating to these facts before:

14. Plaintiff has filed other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.
15. [*Describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)*] The parties to the previous lawsuit were Plaintiffs [*names of all of the plaintiffs in that lawsuit*] and Defendants [*names of all of the defendants in that lawsuit*] in the [*if federal court, name the district; if state court, name the*

343. Include the type of prison about which you are complaining, such as “federal penitentiary” or “state correctional institute.”

344. Use the name of the part of the Constitution or federal statute that protects your rights.

345. Fill in the name of the district and state where you are filing, for example, “Southern District of New York” or “District of Colorado.”

county] Court, Docket Number __, under [name of judge to whom case was assigned]. The case was [disposition (outcome) of the cases: dismissed? appealed? still pending?]. The lawsuit was filed on ____, 20 __ and I learned of the outcome on ____, 20__.

IV. Exhaustion of Administrative Remedies³⁴⁶

16. *[Read Chapter 14 of the JLM, “The Prison Litigation Reform Act,” to determine whether you need to include any description here of how you exhausted your administrative remedies and in what detail. It may depend on your jurisdiction.]*

V. Statement of Claim

17. At all relevant times herein, defendants were “persons” for purposes of 42 U.S.C. Section 1983 and acted under color of law to deprive plaintiffs of their constitutional rights, as set forth more fully below.

VI. Statement of Facts

18. *[State here fully but as briefly as possible the facts of your case. Describe how each defendant is involved. The facts should be in clear, chronological order, like you are telling a story. Try to start out each paragraph with the date of the events you are describing. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes.³⁴⁷ If you intend to allege a number of related claims, number and give each claim a separate paragraph. Use as much space as you need. Attach extra sheet(s) if necessary. See the examples of language given for each kind of violation in Appendix A-8. You should also look at the full sample complaint in Appendix A-9.]*

VII. Prayer for Relief

[State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes. Examples of relief you might want to include are:

19. Plaintiffs request an order declaring that the defendants have acted in violation of the United States Constitution.
 20. Plaintiffs request an injunction³⁴⁸ compelling defendants to provide or stop ____.

346. Whether you will need to include this section and what you will need to include in it varies greatly depending on where you are filing your lawsuit. For an explanation of how to indicate to the court that you exhausted your administrative remedies, see Chapter 14 of the JLM, “The Prison Litigation Reform Act.” Pay particular attention to whether the courts in your jurisdiction require you to plead and prove in your complaint that you exhausted the administrative grievance procedures available to you. Depending on where you are, you may be able to omit this section entirely. However, in some circuits, such as the 6th Circuit, you will need to include quite a bit of information in this section.

347. You should try to write the facts in such a way that they satisfy the appropriate legal standard. See Appendix A-9 of this Chapter for a full sample complaint.

348. An order from the court forcing the defendants to do or stop doing something.

21. Plaintiffs request \$ ____ as compensatory damages.]

Signed this __day of _____, 20__.

[Name of Plaintiff]

I declare under penalty of perjury that the foregoing is true and correct.

PLAINTIFF'S NAME

DATE

A-3. FORM FOR AN AFFIDAVIT³⁴⁹

[This form is for plaintiffs, other incarcerated people, or anyone else who wants to make a sworn statement on behalf of plaintiffs.]

In the United States District Court
for the _____³⁵⁰

-----	x	
[Name of First Incarcerated Person in	:	
Complaint ³⁵¹], et al.,	:	
Plaintiffs,	:	
	:	Affidavit
v.	:	
	:	
[Name of First Defendant in	:	Civil Action No. _____ ³⁵²
Complaint ³⁵³], et al.	:	
Defendants.	:	
-----	x	

AFFIDAVIT OF [NAME OF PERSON MAKING STATEMENT]

I, [full name of incarcerated person or other person making the statement],
being duly sworn according to the law depose and say [that I am the Plaintiff in
the above entitled proceeding, if you or another plaintiff are making the
statement].

[Write statement here. Use numbered paragraphs.]

All of the information I have submitted [in support of my request, Plaintiff's
case, etc.] is true and correct.

Sign Here Before Notary Public

Sworn to before me this
____ day of _____, 20__.

[Print your name]

_____³⁵⁴
NOTARY PUBLIC

349. A sample affidavit can be found at <https://www.nycourts.gov/courts/nyc/smallclaims/forms/affidavitinsupport.pdf> (last visited Jan. 28, 2019).

350. Name of the federal district where the prison in which the alleged offense occurred is located, for example, "Southern District of New York" or "District of Colorado."

351. Your name.

352. Leave this blank.

353. The name of the first defendant against whom you are bringing suit.

354. Leave blank. You should have this affidavit notarized. The notary public will fill in the date here.

A-4. Order to Show Cause and Temporary Restraining Order (“TRO”)³⁵⁵

[Be sure to submit, along with this paper, an affidavit (Form A-3) stating how you will be hurt if you do not get temporary relief and how you tried to notify the defendants of your request for temporary relief.]

In the United States District Court
for the _____³⁵⁶

-----	X	
[Name of First Incarcerated Person in	:	
Complaint], et al.,	:	
Plaintiffs,	:	
	:	Order to Show Cause for
v.	:	Preliminary Injunction and
	:	Temporary Restraining Order
[Name of First Defendant in	:	
Complaint], et al.,	:	Civil Action No. ____
Defendants.	:	
-----	X	

Upon the complaint, supporting affidavits of plaintiffs sworn to the ____ day of ____, 20__, and the memorandum of law submitted herewith, it is:

ORDERED that the defendants [*names of defendants against whom you need immediate court action*] show cause in room ____ of the United States Courthouse, [*address*] on the ____ day of ____, 20__, at ____ o'clock,³⁵⁷ or as soon thereafter as counsel may be heard, why preliminary injunction should not issue pursuant to Rule 65(a) of the Federal Rules of Civil Procedure enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them, from [*a precise statement of the actions you want the preliminary injunction to cover*].

IT IS FURTHER ORDERED that effective immediately, and pending the hearing and determination of this order to show cause, the defendants [*names of defendants against whom you want temporary relief*] and each of their officers, agents, employees, and all persons acting in concert or participation with them, are restrained from [*statement of actions you want the preliminary injunction to cover*].

IT IS FURTHER ORDERED that personal service of a copy of this order and annexed affidavit upon the defendants or their counsel on or before [*date*], shall be deemed good and sufficient service thereof.

355. See, e.g., JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 4.02 (2d ed. 2016 & Supp. 2020) (using sample Form 4-2, “Temporary Relief Proceedings” as a guide and source of sample language); U.S. Dist. Ct., SDNY, *Order to Show Cause for Preliminary Injunction and T.R.O.*, available at <http://www.nysd.uscourts.gov/file/forms/order-to-show-cause-for-preliminary-injunction-and-tro> (last visited Jan. 28, 2019).

356. Name of the federal district where the prison in which the alleged offense occurred is located, for example, “Southern District of New York” or “District of Colorado.”

357. Leave these blank. The court clerk will fill these in.

[leave this space blank for judge's signature]

Dated: *[leave blank]*

United States District Judge

A-5. *IN FORMA PAUPERIS* (“IFP”) PAPERS³⁵⁸

[You should ask for this form from the district court clerk where you will be filing your complaint. They will also send you the paperwork that is required by the Prison Litigation Reform Act (Form A-7, “Prisoner Authorization,” below) for you to fill out regarding your prison account. *Each* incarcerated plaintiff must fill out IFP *and* Prisoner Authorization forms.]

In the United States District Court
for the _____³⁵⁹

-----	X	
[Name(s) of the Incarcerated Person(s)	:	
Who Are Bringing the Suit],	:	
Plaintiffs,	:	
	:	Notice of Motion to Proceed
v.	:	<i>In Forma Pauperis</i>
	:	
[Names and Titles of All the People	:	Civil Action No. _____ ³⁶⁰
and Other Entities Whom You Are	:	
Suing],	:	
Defendant.	:	
-----	X	

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury.

1. *If incarcerated.* I am being held at: _____
_____. [If you are employed there, or you have an
account in the institution, write.] I have attached to this document a statement
certified by the appropriate institutional officer showing all receipts,
expenditures, and balances during the last six months for any institutional

358. See, e.g., U.S. Dist. Ct., EDNY, *In Forma Pauperis—Prisoner*, available for download at <https://www.nyed.uscourts.gov/forms/forma-pauperis> (last visited Jan. 28, 2019); see also JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 7.02 (2d ed. 2016 & Supp. 2020) (using sample Form 7-1, “Application to Proceed *In Forma Pauperis*,” as a guide and source of sample language).

359. Name of the federal district where the prison in which the alleged offense occurred is located, for example, “Southern District of New York” or “District of Colorado.”

360. Leave this blank. This entry will be filled in by the clerk of the court where you file the form.

account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.³⁶¹

2. *If not incarcerated.* If I am employed, my employer's name and address are: _____. My gross pay or wages are: \$_____, and my take-home pay or wages are \$_____ per [*specify pay period*] _____.

3. *Other Income.* In the past 12 months, I have received income from the following sources [*check all that apply*]:

(a) Business, profession, or form of self-employment	YES	NO
(b) Rent payments, interest, or dividends	YES	NO
(c) Pensions, annuities, or life insurance payments	YES	NO
(d) Disability or worker's compensation payments	YES	NO
(e) Gifts or inheritances	YES	NO
(f) Any other sources	YES	NO

If you answered "Yes" to any questions above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

4. Amount of money that I have in cash or in a checking or savings account: \$ _____

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name [*describe the property and its approximate value*]:

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses [*describe and provide the amount of the monthly expense*]:

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:

8. Any debts or financial obligations [*describe the amounts owed and to whom they are payable*]:

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: _____

Applicant's signature

Printed Name

361. The Prison Litigation Reform Act ("PLRA") requires you to submit a certified copy of your prison account statement showing your balance for the last six months along with this declaration. For more information on complying with the PLRA, see Chapter 14 of the JLM, "The Prison Litigation Reform Act."

A-6. APPLICATION FOR APPOINTMENT OF COUNSEL³⁶²

In the United States District Court
for the _____³⁶³

<p>-----X</p> <p>[Name(s) of the Incarcerated Person(s) Who Are Bringing the Suit], Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>[Names and Titles of All the People and Other Entities Whom You Are Suing], Defendant.</p> <p>-----X</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>Application for the Court to Request Counsel</p> <p>Civil Action No. _____³⁶⁴</p>
---	--	--

(g) Name of applicant _____³⁶⁵

(h) [Explain why you feel you need a lawyer in this case.³⁶⁶]

(i) [Explain what steps you have taken to find an attorney and with what results. Use additional paper if necessary.]

(j) [If you need a lawyer who speaks in a language other than English, state what language you speak.]

(k) I understand that if a lawyer volunteers to represent me, and my lawyer learns that I can afford to pay for a lawyer, the lawyer may give this information to the Court.

(l) I understand that if my answers on my Application for the Court to Request Counsel are false, my case may be dismissed.

(m) I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

[Your Signature]

362. See, e.g., U.S. Dist. Ct., EDNY, *Application for Appointment of Counsel*, available at <https://www.nyed.uscourts.gov/sites/default/files/forms/PRO SE Application for counsel.pdf> (last visited Jan. 28, 2019); JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 7.04 (2d ed. 2016 & Supp. 2020) (using sample Form 7-3, “Motion for Appointment of Counsel,” as a guide and source of sample language).

363. Name of the federal district where the prison in which the alleged offense occurred is located, for example, “Southern District of New York” or “District of Colorado.”

364. Leave this blank. This entry will be filled in by the clerk of the court where you file the form.

365. Your name.

366. For example, you do not know the law well, you do not have access to the law library, you have a disability, your case is very complicated, etc. Use additional paper or include an affidavit supporting your application if necessary. The most common reason incarcerated people need legal representation is that Section 1983 claims involve complex legal issues that are difficult for non-lawyers to understand and litigate effectively.

A-7. PRISONER AUTHORIZATION³⁶⁷

[This is the form that should be sent to you after you submit your complaint to the district court. If you do not receive it within two weeks of submitting your complaint, you should copy the information found here and send it to the court so that your complaint is not dismissed because you did not comply with the Prison Litigation Reform Act.]

Mailed to the Plaintiff by the Court on this date:

Case Name: _____ v. _____

Docket No: No. _____ Civ. _____ ()

NOTICE IS HEREBY GIVEN THAT THIS ACTION WILL BE DISMISSED UNLESS PLAINTIFF COMPLETES AND RETURNS THIS AUTHORIZATION FORM TO THIS COURT WITHIN FORTY-FIVE DAYS FROM THE DATE OF THIS NOTICE.

The Prison Litigation Reform Act ("PLRA" or "Act") amended the *in forma pauperis* statute (28 U.S.C. § 1915) and applies to your case. Under the PLRA, you are required to pay the full filing fee when bringing a civil action if you are currently incarcerated or detained in any facility. If you do not have sufficient funds in your prison account at the time your action is filed, the Court must assess and collect payments until the entire filing fee of \$ _____³⁶⁸ has been paid, no matter what the outcome of the action.

SIGN AND DATE A COPY OF THE FOLLOWING AUTHORIZATION:

I, _____, request and authorize the agency holding me in custody to send to the Clerk of the United States District Court for the _____³⁶⁹ a certified copy of my prison account statement for the past six months. I further request and authorize the agency holding me in custody to calculate the amounts specified by 28 U.S.C. § 1915(b), to deduct those amounts from my prison trust fund account (or institutional equivalent), and to disburse those amounts to the United States District Court for the _____.³⁷⁰ This authorization shall apply to any agency into whose custody I may be transferred, and to any other district court to which my case may be transferred and by which my poor person application may be decided.

I UNDERSTAND THAT BY SIGNING AND RETURNING THIS NOTICE TO THE COURT, THE ENTIRE COURT FILING FEE OF \$ _____³⁷¹ WILL BE PAID IN INSTALLMENTS BY AUTOMATIC DEDUCTIONS FROM MY PRISON TRUST FUND ACCOUNT **EVEN IF MY CASE IS DISMISSED OR EVEN IF I VOLUNTARILY WITHDRAW THE CASE.**

Signature of Plaintiff

367. See, e.g., U.S. Dist. Ct., SDNY, *Prisoner Authorization*, available at <http://www.nysd.uscourts.gov/file/forms/prisoner-authorization> (last visited Jan. 28, 2019).

368. Filing fees may differ depending upon the federal district court in which you file your claim.

369. Fill in the district in which the court is located, such as "Southern District of New York" or "District of Colorado."

370. Once again, fill in the federal district in which the court is located.

371. Fill in the fee charged by the district court in which your case is filed.

Date Signed

Prisoner I.D. Number: _____

Name of current facility: _____

A-8. SAMPLE LANGUAGE FOR STATEMENT OF FACTS

[The following paragraphs are examples of how to explain different types of complaints that you may want to bring.³⁷² **DO NOT COPY ANY OF THESE** because your facts will be different than the examples.]

INADEQUATE AND UNSANITARY HOUSING³⁷³

1. Numerous insects, rats, mice, and other vermin were in the prison throughout the period of plaintiffs' confinement from November 2002 until the time of this complaint.
2. An exterminator did visit the prison in March of 2005, but only the common areas and guard areas were sprayed. Individual cells were never sprayed. When the common areas were sprayed, roaches and other vermin simply moved into the individual cells. Once the fumes disappeared, the vermin returned unharmed to again infest the entire prison.
3. The exterminator wore a mask and gloves, but incarcerated people remained in their cells and were not given masks or protective clothing.
4. There was no ventilation to prevent incarcerated people from inhaling the dangerous fumes. Plaintiff and fellow incarcerated person [*Plaintiff #2*], as well as several others, suffered severe headaches and nausea after the extermination.
5. Inadequate lighting in the cells made reading for more than a few minutes at a time extremely difficult and nearly impossible. Requests for lamps or stronger light bulbs were denied on [*insert date*] by [*name of person who denied the light bulb*].

INADEQUATE VISITATION AND TELEPHONE ACCESS³⁷⁴

6. Plaintiff attempted to telephone his attorney beginning in March 2005 because he wished to tell him about new evidence in his case. On or about March 3, 2005, plaintiff asked [*Defendant #1*] to allow plaintiff to make a telephone call to his attorney. Defendant refused.
7. Plaintiff continued to request telephone access throughout the month of March. On April 1, 2005, he was given access to the telephone, but only after 7:30 p.m. Because his attorney works only during business hours, plaintiff was unable to contact him that day.
8. The refusal of the prison staff to allow plaintiff access to telephone contradicted stated prison policy regarding telephone use for incarcerated people in the general population posted in the cafeteria. Plaintiff was a part of the general population for the entire time that he could not access a telephone.
9. The official prison policy regarding telephone use is also insufficient for purposes of contact with incarcerated people's attorneys. While confined in the prison, each incarcerated person was allowed to make only one five-minute call during the week and one ten-minute call on the weekend. The weekday phone calls were restricted to the daytime one week and the evening the next. Each incarcerated person was allowed only one long-distance telephone call per month, even if that was the only way to contact that incarcerated person's attorney.
10. On January 17, 2006, plaintiff [*Plaintiff #2*] met with his attorney in the common area. Despite numerous requests by plaintiff [*Plaintiff #2*] and plaintiff's attorney for privacy, defendants [*Defendants #2 and #4*] refused to keep other incarcerated people away from plaintiff and his attorney. In addition, defendants [*Defendants #2 and #4*] were also observed listening to plaintiff and attorney's private conversation.

372. These fact patterns are based in large part upon examples taken from the sample complaints in JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS (2d ed. 2016 & Supp. 2020).

373. See JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from sample Form 1-5, "Pretrial Detainee Complaint—Totality of Conditions," as an example).

374. See JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from sample Form 1-5, "Pretrial Detainee Complaint—Totality of Conditions," as an example).

11. The short amount of time allotted for the calls and the complete lack of privacy markedly decreased the quality of discussions between incarcerated people and their attorneys. The only phone was located in the common area. It was not only difficult to have a conversation over the noise of the guards and other prisoners, but also nearly impossible to have a private conversation. On numerous occasions incarcerated people complained that the guards were listening to their phone conversations.
12. The prison's attorney visitation policy was overly restrictive during the period of plaintiffs' confinement. Incarcerated people were forced to talk with their lawyer either in the common area, where other incarcerated people and guards could overhear conversations, or in a meeting room observed by guards through two-way mirrors. Since attorneys often felt uncomfortable conversing openly in the common area, surrounded by other incarcerated people, meetings frequently occurred under the watchful eye of the prison guards.

INADEQUATE MEDICAL CARE³⁷⁵

SPECIFIC INSTANCE

13. On August 23, 2004, plaintiff injured his ankle and foot while playing basketball with other incarcerated people. At approximately 2:00 p.m., he asked [*Defendant #1*] to be allowed to attend sick call at the infirmary. [*Defendant #1*] denied plaintiff's request, stating that sick call was at 8:30 a.m. and that plaintiff would have to wait until the following morning. Plaintiff then returned to his cell, his injury untreated.
14. In the early afternoon of August 23, 2004, plaintiff, still in his cell, saw [*Defendant #2*] making his rounds on plaintiff's floor. Plaintiff told [*Defendant #2*] about his foot injury and asked to see the prison nurse. [*Defendant #2*] replied that in order to see the nurse, his pain would have to be an emergency. Otherwise, plaintiff would have to wait until the next day for sick call. Plaintiff immediately told him it was an emergency. However, [*Defendant #2*] said that he did not think it was an emergency because plaintiff was not bleeding and told plaintiff to wait for sick call. [*Defendant #2*] then left to continue his rounds.
15. Later in the afternoon of August 23, 2004, plaintiff was in severe pain from his foot and noticed that it had swelled and become discolored. He called [*Defendant #4*], the shift supervisor at the time. He responded to plaintiff's call and asked him what was wrong. Plaintiff told him about his symptoms and asked to see the prison nurse. Instead, [*Defendant #4*] went to get some Advil for plaintiff.
16. On the evening of August 23, 2004, [*Defendant #3*] gave two Advil pills to plaintiff. Plaintiff took the Advil and told [*Defendant #3*] that his pain was so bad that he could not stand or walk. [*Defendant #3*] responded that he could only follow [*Defendant #4*]'s orders, and told plaintiff that sick call was at 8:30 a.m.
17. On the morning of August 24, 2004, prison staff members found plaintiff in his bed. He was unable to move his foot. Plaintiff was finally seen for the first time by the prison's staff nurse, at which time plaintiff was moved to _____ County Hospital. At _____ County Hospital, plaintiff's foot was examined and operated on. Plaintiff remained hospitalized for the next five days as a result of the prison's unprofessional and inappropriate neglect of his injury.
18. Plaintiff [*Plaintiff #2*] experienced earaches in both ears for the entire month of November 2002, and was unable to obtain medical attention.
19. Plaintiff [*Plaintiff #2*] also suffered severe migraines from approximately December 2, 2005, through February 14, 2005, that were completely draining. He was denied timely medical care by the prison. When [*Plaintiff #2*] was finally taken to the hospital on February 14, 2005, he was

375. See JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS §§ 1.03 (2d ed. 2016 & Supp. 2020) (using language from sample Form 1-5, "Pretrial Detainee Complaint—Totality of Conditions," and sample Form 1-8, "Prisoner Complaint—Inadequate Medical Treatment," as an example); see also Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

- diagnosed as suffering from cluster migraine headaches resulting from physical problems, namely, his ear infections.
20. Plaintiff [*Plaintiff #3*] suffered from severe neck pain as a result of a factory work accident prior to plaintiff's prison confinement. [*Plaintiff #3*] has been unable to get any medical attention for this physical ailment to date.
 21. Plaintiff [*Plaintiff #4*] had pieces of a broken knife lodged in his shoulder. While in the prison, the shards began causing him immense pain. Despite numerous complaints, [*Plaintiff #4*] has not received any medical attention to date.
 22. Plaintiff [*Plaintiff #5*] suffered from an open, infected sore four inches in diameter on his leg. Plaintiff [*Plaintiff #5*] showed this sore to defendants [*Defendants #1 and #2*] on January 12, 2005. Prison authorities did not provide him with treatment or medication until February 1, 2005.
 23. Plaintiff [*Plaintiff #6*] suffered severe migraine headaches resulting from stress and spiritual problems. He also had several stomach ulcers. He was unable to obtain adequate or timely medical care. Plaintiff reported these problems to defendant [*Defendant #3*] on December 1, December 15, and December 30, 2004. Defendant has not received any medical attention until the present time.
 24. Plaintiff [*Plaintiff #5*] suffered a head wound in a shootout a few years prior to his sentence in prison. When the wound became painful during [*Plaintiff #5*]'s stay at the prison, he asked defendants [*Defendants #2 and #5*] on January 25, 2005 for a medical exam. He did not receive any medical care until two months after his first request. As a consequence of the delay in treatment, [*Plaintiff #5*] underwent a complicated surgical procedure on April 15, 2005, and was hospitalized for two weeks.

IN GENERAL

25. In general, defendants showed deliberate indifference to the medical needs of incarcerated people, and particularly neglected those of the plaintiffs.
26. Medical care at the prison was inadequate and unprofessional. Medical records, vital in assessing a patient's potential for future sickness, were not used to assist diagnoses. Deficiencies were the norm, and plaintiffs were unable to obtain examinations or care upon request. Incarcerated people often had to submit grievances to receive medical care from a physician or hospital.
27. Sick call occurred only once each week, the screening process for determining whether a patient needed attention was inadequate, and in the meantime, plaintiffs would have to beg guards or other staff for basic medical attention.

INADEQUATE LAW LIBRARY AND FACILITIES³⁷⁶

28. Plaintiff [*Plaintiff #1*] filed a case in the district court on May 15, 2003, regarding injuries he received from a prison guard during a prison riot. Plaintiff's case was dismissed because he failed to use the Inmate Grievance Program prior to filing his case, as required by the Prison Litigation Reform Act ("PLRA").
29. Plaintiff was unable to file his lawsuit again because the statute of limitations in New York had passed by the time he received notice that his case had been dismissed.
30. Plaintiff did not know about the PLRA because the legal materials available to him in prison contained no cases or information regarding the state of the law after 1995.
31. The prison library was shockingly inadequate. The most recent case reporters in the library dated from 1994 and several volumes were missing, specifically all of the United States reporters from 1990 and 1992.

376. See JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from Form 1-5, "Pretrial Detainee Complaint—Totality of Conditions," as an example).

32. Plaintiffs, relying on these reporters, suffered actual injury because they could have succeeded under a different claim if they had access to current statutory and case law.
33. The incarcerated people on each block were supposed to have access to the law library at least three times a week. However, they were regularly called only once a week or less. Five incarcerated people at a time were sent to the library for a period of ninety minutes, not enough time to adequately conduct research and prepare legal documents. No books were allowed to be checked out of the library. As a result, it was extremely difficult for incarcerated people to get more than a small amount of work done each time they went to the library.

INADEQUATE MAIL FACILITIES (CORRESPONDENCE)³⁷⁷

34. The mail processing system at the prison was extremely inadequate. Mail was frequently lost or misplaced.
35. Plaintiff [*Plaintiff #2*] prepared a petition for a writ of habeas corpus. Three weeks after giving it to prison authorities to be mailed, plaintiff discovered it at the bottom of a three-foot stack of undelivered mail. In addition, the envelope was battered and dirty.
36. Plaintiff [*Plaintiff #3*] notified the mail clerk that he was expecting a letter and photographs from his wife and children. Three months later Plaintiff [*Plaintiff #3*] received a torn envelope with no photographs. The envelope was marked “Received” with the date of two months before stamped on it. Plaintiff [*Plaintiff #3*] suffered extreme emotional harm and depression due to this lack of expected correspondence with his family.
37. In addition, the prison did not have any secure place for incoming or outgoing mail to protect against the mail being stolen or lost.

INADEQUATE OPPORTUNITY TO PRACTICE RELIGION³⁷⁸

38. Plaintiffs were not permitted to meet or practice their religion. Even though numerous grievances were filed and the majority of the prisoners were Muslim, the prison did not allow any Muslim services.
39. Despite the fact that plaintiffs’ religion forbids eating pork and foods cooked with pork fat, the prison offered no halal, vegetarian or alternative diet plan.

UNSAFE ENVIRONMENT³⁷⁹

40. From approximately April 2005 through December 2005 plaintiff was mercilessly beaten and savagely raped by defendant [*Defendant #1*] and other fellow incarcerated people whose names are unknown to plaintiffs.
41. As a result of these assaults, plaintiff [*name*] suffered [*describe injuries such as: broken jaw, severe facial lacerations requiring stitches, anal bleeding, and severe anxiety*]. Defendant [*Defendant #2*] knew about the injuries; despite plaintiff’s request for hospitalization, defendant [*Defendant #2*] denied plaintiff access to medical care.
42. [*Specify other acts or omissions that defendants knowingly and negligently committed, which tended to cause the injuries received by plaintiff, such as: A number of prison guards knowingly and negligently opened the cell doors of _____ and allowed the intermingling of incarcerated people, and allowed different groups with known hostilities toward each other to intermingle in*

377. See JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from Form 1-5, “Pretrial Detainee Complaint–Totality of Conditions,” as an example).

378. See John W. Witt et al., Section 1983 Litigation: Forms § 1.03 (2d ed. 2016 & Supp. 2020) (using language from Form 1-5, “Pretrial Detainee Complaint–Totality of Conditions,” as an example).

379. See JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from Form 1-7.1, “Complaint Against Prison Officials, Employees, and Fellow Prisoners for Beating and Rape of Prisoners” as an example).

order to instigate violence. These guards were well aware of the severe danger to plaintiff. The prison guards failed to properly supervise the prison and provide for plaintiff's safety. They also purposely and recklessly failed to provide plaintiff with medical assistance, thereby depriving plaintiff of his civil rights, guaranteed by the Constitution and Laws of the United States and of the State of _____.].

43. Defendants [*Defendants #2, #3, and #4*]'s recklessness, failure to properly train and manage [*prison guards or medical doctor*] of the County of _____, State of _____, and failure to adequately supervise and protect plaintiffs from the acts complained of caused the deprivation of plaintiffs' rights.

A-9. SAMPLE FULL COMPLAINT

[The following is a sample full complaint. **DO NOT COPY THIS as your facts will be different than this example.** NOTE, you will want to DOUBLE SPACE the body of your complaint. This complaint is single-spaced to save space.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF STATE

-----	X	
	:	
Scott Martin,	:	
	:	
Plaintiff,	:	COMPLAINT
	:	
v.	:	Jury Trial Demanded
	:	
Captain Jack Williams,	:	
Sergeant John Doe, Acting	:	
Sergeant Joseph Franks,	:	No. 12345
Correctional Officer Steve Doe,	:	
Dr. Stanley Thomas, Correctional	:	
Officer Ronald C. Smith, and	:	
Warden Justin A. Kent, individually	:	
and in their official capacities.	:	
	:	
Defendants.	:	
-----	X	

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff Scott Martin for his second amended complaint against defendants Captain Jack Williams, Sergeant John Doe, Acting Sergeant Joseph Franks, Correctional Officer Steve Doe, Dr. Stanley Thomas, Correctional Officer Ronald C. Smith, and Warden Justin A. Kent, alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under 28 U.S.C. Sections 1331 and 1343(3) and (4). The matters in controversy arise under 42 U.S.C. Section 1983.
2. Venue properly lies in this District pursuant to 28 U.S.C. Section 1391(b)(2), because the events giving rise to this cause of action occurred at Plaineville Correctional Center ("Plaineville") in City, State, which is located within the Northern District of State.

PARTIES

3. Plaintiff Scott Martin is and was, at all times relevant hereto, an incarcerated person in the custody of the State Department of Corrections ("SDOC"). At the time of the events relevant hereto, Martin was incarcerated at Plaineville. Martin is currently incarcerated at the Smithville Correctional Center ("Smithville").
4. Defendant Jack Williams is an SDOC officer with the rank of Captain, who at all times relevant hereto was assigned to Plaineville.

5. Defendant Dr. Stanley Thomas was, at all times relevant hereto, a physician employed or retained by SDOC to provide medical services at Plaineville.

6. Defendant Sergeant John Doe is an SDOC officer with the rank of Sergeant, who at all times relevant hereto was assigned to Plaineville.

7. Defendant Acting Sergeant Joseph Franks was, at all times relevant hereto, a correctional officer at Plaineville, who at the time of the events described below was serving as an Acting Sergeant.

8. Defendant Officer Steve Doe was, at all times relevant hereto, a correctional officer at Plaineville.

9. Defendant Ronald C. Smith was, at all times relevant hereto, a correctional officer at Plaineville.

10. Defendant Justin A. Kent was, at all times relevant hereto, Warden of Plaineville. As Warden of the prison, Defendant manages its day-to-day operations and executes its policies.

PREVIOUS LAWSUITS BY PLAINTIFF

11. Plaintiff has filed no other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

[Read Chapter 14 of the JLM, "The Prison Litigation Reform Act."]

FACTS

12. On or about January 1, 2003, plaintiff was assigned to and resided in cell 1, Unit 1, at Plaineville with his cellmate, Mr. Joshua Nixon ("Nixon").

12. On several occasions prior to January 1, 2003, plaintiff informed defendant Williams that he feared for his personal health and safety due to serious conflicts he was having with Nixon, and plaintiff requested that one of them be transferred as soon as possible.

13. Prior to January 1, 2003, plaintiff wrote a letter to defendant Williams that again informed Williams of his fear for his personal health and safety due to the situation between plaintiff and Nixon and asked that plaintiff be transferred from the cell.

14. On January 1, 2003, Nixon also made a request to defendant Williams for a cell transfer due to conflicts between himself and plaintiff. Defendant Williams denied the request.

15. On January 1, 2003, plaintiff personally asked defendant Williams if he could be transferred from his cell because he feared for his personal health and safety due to conflicts between himself and Nixon. Defendant Williams refused plaintiff's request.

16. On January 1, 2003, Nixon asked Correctional Officer Washington whether he could be transferred from his cell to an adjoining cell occupied only by Charles Jones, because he and plaintiff were having serious problems living together. Officer Washington agreed to make such a transfer. However, without explanation, defendant Sergeant John Doe refused to permit Officer Washington to supervise the move.

17. Charles Jones also discussed with both Officer Washington and defendant Williams Nixon's request for a move into Jones's cell, and he notified Washington and Williams that he was not opposed to Nixon moving into his cell.

18. On January 1, 2003, the same day that plaintiff and Nixon repeatedly asked various correctional officers at Plaineville for a cell transfer, the two engaged in a verbal argument about the volume level of Nixon's radio. A few hours later, plaintiff was sleeping when he heard his cellmate making noise. Plaintiff awoke to see Nixon putting on his boots. After Nixon had put on his boots, he attacked plaintiff without provocation. Nixon struck plaintiff numerous times, causing injuries to his eyes, nose, mouth, and chest. Nixon also used various objects to strike plaintiff, including the radio and a property box. During the attack, Nixon stomped on plaintiff's bare feet with his heavy boots, causing injury to plaintiff's feet.

19. As Nixon beat him, plaintiff yelled for a "med tech" and summoned prison officials for assistance via a buzzer in his cell. When Acting Sergeant Franks and Correctional Officer Steve Doe arrived, they refused to open the cell door while plaintiff was being attacked. The two officers acknowledged to plaintiff that they saw that he was being attacked but failed to intervene until later.

20. Immediately following this assault, plaintiff was taken to the emergency room at Plaineville Hospital. Plaintiff suffered from cuts and lacerations on his body and his face, as well as multiple bruises and swelling on his face and body. Plaintiff was informed by medical personnel that a deep, 1.25 inch cut in his mouth required stitches. In addition, plaintiff was given an X-ray to determine whether or not his nose was broken, but the amount of blood in plaintiff's nose rendered the X-ray inconclusive.

21. Despite the severity of his injuries and the excruciating pain plaintiff suffered as a result of these injuries, only two Tylenol were administered to plaintiff after the attack. Plaintiff endured severe pain throughout the night from his extensive injuries. The next day, despite the serious pain, Dr. Thomas prescribed only Motrin for pain relief. Although plaintiff's pain was not alleviated, no stronger pain killer was administered.

22. Notwithstanding the opinion of other medical personnel that plaintiff required stitches, defendant Dr. Thomas refused to administer any stitches for the deep cut in plaintiff's mouth. He instead told a colleague that plaintiff was "a crybaby" and discharged him from any further care. Despite plaintiff's repeated requests, defendant Dr. Thomas refused to arrange for any follow-up care for his injuries.

23. At plaintiff's request, he was given a pass permitting him to return to the Hospital the following day for follow-up medical care, but he was never called to return to the Hospital. Plaintiff wrote to defendants Warden Kent and Dr. Thomas to tell them that he had not been taken back to the Hospital for follow-up treatment for his injuries and to request such treatment, but he never was sent back to the Hospital for follow-up care. The only further action any member of the prison staff took with respect to plaintiff's injuries was to advise plaintiff in the future to avoid going to sleep before resolving disagreements with a cellmate.

24. Following his visit to the emergency room, plaintiff continued to suffer from migraine headaches, dizziness, and general physical pain as a result of his injuries. He continued to bleed from the unstitched cut in his mouth for days afterwards, making it difficult or impossible to eat.

25. Soon after, plaintiff filed a grievance and a civil suit against the above-named defendants for their deliberate indifference to harm caused to him throughout the above-mentioned period.

26. After filing the civil suit, plaintiff was the target of harassment and retaliation from both defendant Williams and defendant Smith.

27. On January 14, 2004, plaintiff exited his cell and approached defendant Smith to ask him when lunch was being served. Defendant Smith stuck out his arm and threw plaintiff backwards, nearly causing him to fall. Plaintiff then approached defendant Williams, who witnessed the event, to ask him if he would let this act go without reprimand. Defendant Smith then threatened plaintiff by telling him that "next time, I will bust your head." To this, defendant Williams responded to plaintiff, "you know what you've got to do, take care of your business." On subsequent occasions, defendant Smith verbally harassed plaintiff for filing grievances and lawsuits.

28. Defendant Williams also harassed plaintiff in retaliation for grievances plaintiff had filed against Williams. For example, on February 1, 2004, during an alcohol "shake down," plaintiff and only two other prisoners were forced to submit to a strip search, even though plaintiff had never had an alcohol violation, nor had he ever failed any drug test administered by the prison.

29. Similarly, on March 12, 2004, defendant Williams loudly berated plaintiff from the gallery for accusing him of being a racist in one of the grievances plaintiff had filed against him. Defendant Williams then approached plaintiff's cell, opened the cell door, and told plaintiff that he does not harass prisoners and only tries to help and protect them. In doing so, Williams used the precise language that plaintiff had used in his grievance against Williams, thus emphasizing that he was acting in retaliation for the grievance.

COUNT ONE: BREACH OF DUTY TO PROTECT

31. Defendant Williams exercised deliberate indifference to plaintiff's health and safety by failing to protect him from a prison attack even though he had been informed of a threat to plaintiff's health and safety. Defendant Williams received repeated requests, oral and in writing, from both plaintiff and his cellmate, Nixon, for a cell transfer due to conflict between the two and refused to act upon them. Defendant Williams' deliberate indifference to plaintiff's health and safety was further demonstrated when he spoke to plaintiff the day after plaintiff had been attacked and laughed at plaintiff's injuries.

32. Defendant Acting Sergeant John Doe exercised deliberate indifference to plaintiff's health and safety by refusing, for no reason, to authorize a cell transfer of either plaintiff or Nixon to an available cell, when he knew that there were serious conflicts between plaintiff and Nixon and that plaintiff's health and safety were at risk.

33. Defendants Sergeant Franks and Correctional Officer Steve Doe exercised deliberate indifference to plaintiff's health and safety by failing immediately to protect plaintiff from an attack by his cellmate as soon as they knew it was occurring. Instead, these defendants merely acknowledged to plaintiff that they saw the attack and, despite seeing that plaintiff had suffered and was suffering serious injuries, the defendants failed to stop the attack immediately.

34. As a result of the deliberate indifference exercised by the aforementioned defendants, plaintiff suffered serious harm at the hands of his cellmate. Plaintiff sustained multiple physical injuries, including deep cuts in his mouth and upon his face, bruises upon his face and body, as well as migraine headaches and dizziness. Plaintiff also suffered extreme emotional distress from the incident.

COUNT TWO: FAILURE TO ADMINISTER ADEQUATE MEDICAL REMEDY

36. Defendant Dr. Thomas exercised deliberate indifference to plaintiff's health by failing to provide adequate medical care to him following the attack by Nixon. Defendant Dr. Thomas intentionally did not administer stitches to a deep cut in plaintiff's mouth and refused to fulfill any of plaintiff's requests for follow-up care. Instead, defendant Dr. Thomas mocked plaintiff in front of other medical personnel.

37. As a result of Dr. Thomas's deliberate indifference to plaintiff's condition, plaintiff suffered further pain and mental anguish. He continued to suffer from migraine headaches and general pain throughout his body, and Dr. Thomas refused to provide adequate pain medication for plaintiff. In addition, plaintiff was unable to eat properly for days after receiving care from defendant Dr. Thomas, because the unstitched cut in his mouth did not properly heal.

COUNT THREE: RETALIATORY TREATMENT FOR FILING SECTION 1983 CLAIM AND FOR FILING GRIEVANCES

39. Almost immediately after plaintiff filed grievances against him, defendant Williams repeatedly harassed and caused harm to plaintiff in retaliation for the grievances. Defendant Williams forced plaintiff to submit to a strip search, even though he had no reason to do so. Defendant Williams came on the gallery and loudly berated plaintiff for allegations he made in one of the grievances filed against Williams.

40. After plaintiff filed a civil rights action against defendant Williams, plaintiff suffered retaliation by defendants Williams and Smith. When plaintiff approached defendant Smith to speak with him, defendant Smith stuck his arm out straight and struck plaintiff, throwing him backward and nearly knocking him down. Defendant Williams looked on and failed to correct or chastise defendant Smith as a result of this battery, merely warning plaintiff that "you know what you've got to do, take care of your business."

41. A few months later, after plaintiff had filed a grievance against defendants Smith and Williams for the above incident, Officer Smith verbally harassed plaintiff in retaliation for plaintiff's filing of the grievance. Defendant Smith told plaintiff that he "was the type who liked to file grievances and that it didn't matter if [Plaintiff] filed a [lawsuit] because [Plaintiff] wasn't going to be getting any money and that nothing [was] going to be done."

42. These acts represent a pattern of events demonstrating intentional retaliation against plaintiff by defendants Williams and Smith for filing grievances and a civil rights action and have caused plaintiff further mental anguish as a result.

WHEREFORE, Plaintiff prays for judgment in his favor and damages in his favor against all defendants in an amount sufficient to compensate him for the pain and mental anguish suffered by him due to the deliberate indifference and intentional misconduct of defendants, but in no event less than \$300,000, together with his attorneys' fees and costs, and such additional relief as the Court may deem just and proper.

Respectfully submitted,

Plaintiff Name, Plaintiff³⁸⁰

380. You must sign your name in ink on the line here.

CHAPTER 17

THE STATE'S DUTY TO PROTECT YOU AND YOUR PROPERTY: TORT ACTIONS*

A. Introduction

This Chapter explains your rights to protect your body and your property while you are in prison. If you believe someone has violated those rights, this chapter provides you with the steps you can take. Part B of this Chapter will introduce you to the general law of personal injury which is called tort law. Tort law includes injuries caused by excessive force, the failure of prison officials to protect you from other incarcerated people, improper or inappropriate medical care, and poorly maintained facilities. Part B also covers damage to your personal property. Part C of this Chapter will help you determine whom you can sue, where to sue, and what kind of relief you can get. It also explains how to complete your institution's internal grievance procedures (meaning, how to exhaust your administrative remedies) before filing a case in court. Part D provides you with step by step instructions for how to file your case, from filing the right papers to obtaining evidence and appealing a decision. Part D is very important because if you wait too long to file a claim or file it in the wrong place, you could lose the claim for good. Keep in mind that incarcerated people face additional hurdles in bringing lawsuits for injuries suffered in prison.

At the end of this Chapter there is an Appendix with examples of forms you may need to fill out and submit at various stages of the court process. DO NOT TEAR THESE FORMS OUT OF THE *JLM*, as the forms are intended to be samples only.

JLM, Chapter 24, "Your Right to be Free from Assault," gives more information about excessive force by correction officers and their failure to protect incarcerated people from assault. If you believe you have been assaulted in prison, Chapter 24 will explain your rights and what actions you can take.

Please note that this Chapter details the procedures under New York State law. Therefore, incarcerated people outside of New York state should use this Chapter to learn about the basic concepts of tort law, in addition to doing careful research about their own state's laws. Chapter 2 of the *JLM*, "Introduction to Legal Research," will help you perform this task.

B. Know Your Rights: Tort Actions

The law recognizes that, in general, people have a duty not to injure (to harm) each other and not to damage or destroy each other's property. When someone breaks that duty, it is called a *tort*.¹ A tort can be either intentional or negligent. An intentional tort is when one person hurts another person (or their property) on purpose. A negligent tort, on the other hand, is often the result of failing to take proper precautions to protect other people and their property. The person who commits a tort, whether intentionally or through negligence, is called a "tortfeasor."²

If you think that you have suffered a tort, you must decide whether it was an intentional or negligent tort. This difference determines what you will have to prove in order to win your case.

1. Intentional Torts

For most intentional torts, you must prove: 1) that the tortfeasor hurt you or damaged your property, and 2) that he intended to do so. These two elements are sometimes called the "results prong" and the "intent prong." Some examples of intentional torts include assault, false arrest, false

* This Chapter was revised by Jonathan Gant, based on previous versions by Alison Fischer, Sandy Santana, Mathew Strada, Elizabeth Galani, Vanessa Armstrong, Deirdre Bialo-Padin, and members of the 1977 *Columbia Human Rights Law Review*. Special thanks to Lanny E. Walter, Esq. of Walter, Thayer & Mishler, P.C. for his valuable comments.

1. *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2. *Tortfeasor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

imprisonment, intentional infliction of emotional distress, libel³ (false, defamatory claims in written or printed form), and slander⁴ (false, defamatory claims in spoken form). Intentional torts against property include trespass⁵ (wrongful entry onto another's property) and conversion (taking something that does not belong to you and acting like it is yours).⁶

2. Negligent Torts

The biggest difference between intentional torts and negligent torts is the mental state (thought process) of the person causing the injury. Unlike an intentional tortfeasor, a negligent tortfeasor *does not intend* to cause damage or injury. Instead, a negligent tortfeasor creates an unreasonably unsafe situation by doing something a reasonable person would not do, or by failing to take some precaution he should have taken. When this unreasonable behavior causes injury or destruction of property, we call it a negligent tort.

To prove a negligent tort, you must first show that the tortfeasor had a responsibility to keep you from being injured, which is called a “duty of care.” Second, you must show that the tortfeasor violated (or breached) this duty of care by acting negligently, or failing to do what a reasonable person would have done under the circumstances.⁷ Third, you must show that your injury was foreseeable, meaning that a reasonable person would have known that the tortfeasor's behavior could cause the type of injury that you suffered.

(a) Duty and Breach

To prove a negligent tort, you need to demonstrate that the tortfeasor owed you a duty of care. Whether or not someone owes you a duty of care depends on the particular situation and your relationship to that person. For example, a supervisor in a job owes you a duty of care to maintain a safe workplace, and you can therefore sue him if he fails to do so. A coworker, however, does not owe you that duty, and you could not sue him, even if he gave you a piece of defective equipment and you got injured using it.⁸ To decide whether or not the person responsible for your injuries owed you a duty of care, you can look at what other courts have said about similar situations. The cases mentioned in the footnotes of this Chapter are a good place to start your research.

As an incarcerated person, the state and its employees will owe you a duty of care in most situations. But to make sure that the state or a specific state employee owed you a duty of care in your case, you will have to look for cases or laws that apply to your specific situation.

There may also be laws in your state that define which duties people owe each other in certain situations and what counts as a breach of those duties. If a statute or regulation says that a certain type of behavior constitutes negligence, then that behavior is called “*negligence per se*.”⁹ All you would need to show is that the tortfeasor engaged in the behavior described in the statute, and that you suffered injury as a result.¹⁰ The statute or regulation that you cite must be at least somewhat designed to prevent the injury you suffered.¹¹

3. *Libel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4. *Slander*, BLACK'S LAW DICTIONARY (11th ed. 2019).

5. *Trespass*, BLACK'S LAW DICTIONARY (11th ed. 2019).

6. *Conversion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

7. Negligence is defined as “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also Negligence Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a negligent tort).

8. *Burke v. Torres*, 120 A.D.2d 283, 284–286, 509 N.Y.S.2d 11, 12–13 (1st Dept. 1986) (finding that worker's compensation in a negligence case in an employment context is only exclusively available under the Worker's Compensation Law, and the statute makes the negligent co-worker immune from suit).

9. *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

10. *Dance v. Town of Southampton*, 95 A.D.2d 442, 445, 467 N.Y.S.2d 203, 206 (2d Dept. 1983).

11. *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 398, 2 L. Ed. 2d 382, 388 n.7 (1958) (stating the general tort doctrine where liability for violation of a statutory duty is imposed only where the injury is one in which the statute was designed to prevent).

(b) Reasonableness and Foreseeability

In court, ordinary words like “reasonable” and “foreseeable” have special legal meanings. You should look at cases with facts similar to yours to determine how courts would define those terms in your case.¹² As with a duty of care, certain written laws and statutes may define standards of reasonableness and foreseeability.

To determine whether your injury was foreseeable and whether the alleged tortfeasor acted responsibly, courts will examine the situation before you were injured. This is called an “*ex ante* perspective.” You must show that your injury was predictable even before you became injured; in other words, you cannot use the fact that you were injured to show that your injury was foreseeable.

(c) Checklist for General Tort Claims

Before filing a tort claim, make sure you can establish the following elements in your case:

- (1) In the case of an intentional tort:
 - (a) The person causing the injury meant to cause it, *and*
 - (b) The person causing the injury had no established right to do what he or she did.¹³
- (2) In the case of a negligent tort:
 - (a) The person causing the injury could have prevented the harm, and
 - (b) The person’s action or inaction directly and foreseeably caused your harm, and
 - (c) If the person causing the injury is a state or prison employee, he, in his official capacity, owed you a greater duty of care than you received.¹⁴
- (3) In both intentional and negligent torts, you must prove actual injury:
 - (a) It is not enough to show a prison official intended to harm you if you were not actually injured.
 - (b) You must show signs of injury to your body, or proof of loss or damage to your property. Medical records will be helpful in proving this element. While it is possible to show that emotional distress you have suffered is an actual injury, it is very difficult. You would have to show that the act that caused you to experience emotional distress was “extreme and outrageous.”¹⁵

3. Constitutional Torts

The violation of your constitutional rights is another type of tort. The state officers and employees you encounter have the same duty not to harm you and your property that other citizens have. However, because officers and employees are state actors, they also have a duty not to violate your federal or state constitutional rights. You should read *JLM*, Chapter 13, “Federal Habeas Corpus,” and Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law” if you believe your federal constitutional rights have been violated.

(a) Violation of State Constitutional Rights

12. *See* *Smith v. Nassau Cty.*, 34 N.Y.2d 18, 23, 311 N.E.2d 489, 492, 355 N.Y.S.2d 349, 353 (1974) (stating that reasonable cause will vary according to the circumstances and exigencies of each particular case); *Di Ponzio v. Riordan*, 224 A.D.2d 139, 141, 645 N.Y.S.2d 368, 369 (4th Dept. 1996) (holding that the question whether defendants fulfilled their duty of reasonable care presents a question best left to the trier of fact).

13. *See, e.g.*, N.Y. CORRECT. LAW § 137(5) (McKinney 2014) (“No inmate . . . shall be subjected to degrading treatment, and no officer or other employee . . . shall inflict any blows . . . upon any inmate, unless in self-defense, or to suppress a revolt or insurrection.”) Thus, if a guard hits you and was not acting in self-defense, the guard would be acting outside the scope of his authority.

14. *See, e.g.*, *Kagan v. State*, 221 A.D.2d 7, 11–12, 646 N.Y.S.2d 336, 339 (2d Dept. 1996) (finding the state liable for failure of prison employees to bring an incarcerated person to see nurse in a timely fashion, and of the nurse to refer the incarcerated person to a physician, when both actions were required by prison regulations).

15. *See, e.g.*, *Shenandoah v. Hill*, 9 Misc. 3d 548, 553, 799 N.Y.S.2d 892, 896–897 (Sup. Ct. N.Y. Madison County 2005) (citing *Howell v. New York Post Co.*, 81 N.Y.2d 115, 612 N.E. 699, 596 N.Y.S.2d 350 (1993)) (defining extreme and outrageous behavior as conduct “so outrageous of character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community”).

When the state government violates your rights under the state constitution, you may be able to sue the state for damages.¹⁶ Part C of this Chapter explains more about choosing the right court to file your claim. But if you wish to sue the State of New York, you must file your case in the New York Court of Claims.¹⁷ To prove a constitutional tort against the state, you must show that the state harmed you and that the state's actions violated specific rights listed in the state constitution. For example, you can sue the state government if the state discriminated against you because of your race or religion.¹⁸

The New York Court of Appeals¹⁹ established the right to bring claims for violations of the state constitution in the 1996 case *Brown v. State*.²⁰ However, *Brown* only addressed tort claims based on the equal protection clause and the search and seizure clause of the New York Constitution.²¹ The court did not decide whether individuals can sue for damages based on violations of other parts of the state constitution.²² So far, at least one New York court has allowed damages based on another part of the state constitution (the "cruel and unusual punishment" provision).²³

After *Brown*, New York courts have refused to award damages for state constitutional violations if other remedies are available.²⁴ This means that if you can bring a regular tort claim or a federal civil rights claim under 42 U.S.C. § 1983,²⁵ New York courts will not allow you to bring a state constitutional tort claim. However, you can still sue the state in the Court of Claims for violations of ordinary tort law. Since it is usually easier to prove a simple tort law claim than a constitutional claim, your chance of success is also higher under tort law (intentional and negligent torts, as above).

16. Not all states permit civil suits based on violations of the state constitution, but New York does. See *Brown v. State*, 89 N.Y.2d 172, 188, 674 N.E.2d 1129, 1138–1139, 652 N.Y.S.2d 223, 232–233 (1996).

17. See *Brown v. State*, 89 N.Y.2d 172, 183, 674 N.E.2d 1129, 1136, 652 N.Y.S.2d 223, 230 (1996) ("[D]amage claims against the state based upon violations of the State Constitution come within the jurisdiction of the Court of Claims.").

18. N.Y. CONST. art. I, § 11: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

19. The New York Court of Appeals is the highest court in the State of New York. The intermediate court is the New York Appellate Division, and the trial level court is called the New York Supreme Court.

20. See *Brown v. State*, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

21. See *Brown v. State*, 89 N.Y.2d 172, 188, 674 N.E.2d 1129, 1138–1139, 652 N.Y.S.2d 223, 232–233 (1996) ("[W]e conclude that a cause of action to recover damages may be asserted against the state for violation of the Equal Protection and Search and Seizure Clauses of the State Constitution."); see also N.Y. CONST. art. I, § 11 (equal protection clause); N.Y. CONST. art. I, § 12 (search and seizure clause); *Wahad v. FBI*, 994 F. Supp. 237, 239 (S.D.N.Y. 1998) (stating that *Brown* recognized a "narrow remedy" against the State of New York for violations of the equal protection and search and seizure guarantees of the New York State Constitution).

22. See *Augat v. State*, 244 A.D.2d 835, 837, 666 N.Y.S.2d 249, 251–252 (3d Dept. 1997) (stating that the availability of damages under New York's due process and freedom of association protections was "not specifically resolved in *Brown*").

23. See *De La Rosa v. State*, 173 Misc. 2d 1007, 1010–1011, 662 N.Y.S.2d 921, 924 (N.Y. Ct. Cl. 1997) (holding that a state's violation of the cruel and unusual punishment provision in Article I, § 5 of the New York Constitution can give rise to a civil rights cause of action under 42 U.S.C. § 1983, provided that injunctive and declaratory relief are inadequate and money damages would further the constitutional purpose).

24. See *Bin Wahad v. FBI*, 994 F. Supp. 237, 240 (S.D.N.Y. 1998) (refusing to find a cause of action for violation of the State Due Process Clause because plaintiffs had alternative remedies under 42 U.S.C. § 1983); see also *Augat v. New York*, 244 A.D.2d 835, 837–838, 666 N.Y.S.2d 249, 251–252 (3d Dept. 1997) (holding that plaintiff's constitutional tort claims were related to existing common-law torts for which there were adequate remedies); *Remley v. State*, 174 Misc. 2d 523, 527–528, 665 N.Y.S.2d 1005, 1009 (N.Y. Ct. Cl. 1997) (refusing to find a private right of action for violations of the State Due Process Clause under *Brown* analysis because plaintiff had alternative remedies under State tort law).

25. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," for more information on how to obtain relief for violations of federal law under 42 U.S.C. § 1983.

(b) Federal Constitutional Violations

If you want to recover damages for a violation of your rights under the U.S. Constitution, you must file a claim in either a federal district court or in the New York Supreme Court but not in the Court of Claims. See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law,” for more information about using Section 1983 to bring a claim for violations of federal constitutional rights. Remember that the New York State Constitution has similar provisions to the U.S. Constitution, so you may be able to use the same facts to sue in the Court of Claims by alleging violations of the state constitution, as described above.

4. Examples of Common Tort Actions

This Section describes five torts that can happen in prison and the elements you must prove to win damages (compensation) for these torts. Excessive force and failure to protect you from other incarcerated people are two types of actions that are not included in this Chapter, because they are covered in *JLM*, Chapter 24, “Your Right to be Free from Assault.” You should read that Chapter if you have been assaulted by a corrections officer or if you feel that the prison failed to protect you from assault by another incarcerated person. While the footnotes for this Section include citations to relevant cases, you should use these cases only as a starting point for your research. If you use the cases cited here, you should read the full text of those cases.

This Chapter only includes cases from New York and some federal cases. While courts in states other than New York are not required to follow the decisions of cases in New York, the tort law of most states is very similar to New York's. For that reason, the case summaries in this Chapter should serve as a useful starting point for determining the types of claims that other states' courts will hear. However, you should make sure to research the law in *your state* so that you know which cases to cite in your lawsuit.

There are many torts that happen in prison that can form the basis of a lawsuit and the following are just a few examples of those. Look for cases with similar facts to your situation where the incarcerated person won, and use those cases to support your claim.

(a) Injuries Relating to Work and Work-Release Programs

Injuries sustained during the course of work within the prison or while on work release are considered work injuries. Tort actions under this category include the state's failure to provide reasonably safe equipment, as well as the state's failure to warn incarcerated people of specific dangers they might face when using the equipment.²⁶

For example, one court awarded damages to an incarcerated person who lost his fingers working in an on-site prison sawmill because his wood chipping machine was missing a safety guard.²⁷ The state violated its duty to maintain safe machinery since it failed to provide a safety guard for the machine. Similarly, another court awarded damages to an incarcerated person who was injured in the course of repair work when the scaffolding beneath him collapsed.²⁸

Just as the state has a duty to maintain a safe workplace, you too have a responsibility to take proper care of yourself while working in the prison or work-release program. If the court finds that your carelessness played a role in your injury, it can reduce your damages by the amount for which it

26. See *Kandrach v. State*, 188 A.D.2d 910, 913, 591 N.Y.S.2d 868, 871 (3d Dept. 1992) (finding that when a prisoner participates in a prison work program, the State has a duty to provide reasonably safe equipment and warn prisoners of any potential dangers).

27. *Kandrach v. State*, 188 A.D.2d 910, 912–915, 591 N.Y.S.2d 868, 870–872 (3d Dept. 1992) (“[W]hen the State, through its correctional authorities, directs a prison inmate to participate in a work program during incarceration, it owes the inmate a duty to provide reasonably safe machinery and equipment with which to work and adequate warnings and instructions for the safe operation of such machinery and equipment.”).

28. *Shulenberg v. State*, 35 Misc. 2d 751, 751–752, 231 N.Y.S.2d 816, 817 (N.Y. Ct. Cl. 1962) (finding that the State failed to provide an incarcerated person with a safe place to work where the individual fell while working on a scaffolding because one of the planks of the scaffolding broke).

believes you were responsible, or even prevent you from receiving damages altogether. This is called “comparative negligence” or “contributory negligence.”²⁹

For example, in the wood chipping case above, the court only awarded half of the total damages to the incarcerated person, because the incarcerated person should not have climbed onto the chipping machine in the first place.³⁰ In another case, the court reduced damages because the incarcerated person did not follow safety instructions.³¹ However, if you were ordered to do the dangerous act by a prison employee that caused your injury, courts may not reduce your damages under a contributory negligence theory.³² This is because courts know that incarcerated people can be punished for disobeying instructions.³³

Furthermore, if the court believes that you behaved recklessly in a work-related setting, it can refuse to award you damages at all. Recklessness in this context means ignoring a known or obvious risk.³⁴ Whether the court considers that you were reckless depends partially on how knowledgeable you were about the field or area in which you were working. For instance, one court denied an incarcerated person damages for injuries suffered after touching a live wiring because his previous electrical training made him aware that touching wires was dangerous.³⁵ By contrast, an incarcerated person who had received only minimal training was not held responsible for his own injuries.³⁶

Note that you may be unable to recover from the state for the work-release injuries that do not occur on prison grounds, especially if the state was not the owner or contractor at the work site.³⁷ Also, the state cannot be sued for recommending an incarcerated person for a work-release program if the

29. *Contributory Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019). States that use a contributory negligence rule will not grant damages if the plaintiff was negligent in a way that contributed to his injury. *Comparative Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019) Comparative negligence systems are less harsh and allow the plaintiff to recover partial damages even if he shared in responsibility for the accident. New York and several other states employ comparative negligence systems. N.Y. C.P.L.R. 1411, 1413 (McKinney 2012); *see, e.g.*, ARIZ. REV. STAT. § 12-2505 (LexisNexis 2019) (Arizona), FLA. STAT. ANN. § 768.81(2) (LexisNexis 2019) (Florida), LA. CIV. CODE ANN. art. 2323 (2019) (Louisiana), MISS. CODE ANN. § 11-7-15 (2019) (Mississippi), WASH. REV. CODE ANN. § 4.22.005 (LexisNexis 2019) (Washington).

30. *Kandrach v. State*, 188 A.D.2d 910, 914–915, 591 N.Y.S.2d 868, 872 (3d Dept. 1992).

31. *Hicks v. State*, 124 A.D.2d 949, 949–950, 509 N.Y.S.2d 152, 152–153 (3d Dept. 1986) (upholding trial court's decision to reduce an incarcerated person's damages award by half where the incarcerated person was contributorily negligent since he failed to follow safety instructions).

32. *See Mariano v. State*, 31 Misc. 2d 241, 244, 222 N.Y.S.2d 968, 971 (N.Y. Ct. Cl. 1961) (holding that an incarcerated person who injured his hand while doing assigned work could not be found to be contributorily negligent, because he was following prison orders). *See also Lowe v. State*, 194 A.D.2d 898, 899, 599 N.Y.S.2d 639, 641 (3d Dept. 1993) (noting that the penalties which can be imposed for not following orders in prison made an incarcerated person's dangerous behavior not unreasonable, since he was ordered to do it, and thus declining to find him contributorily negligent).

33. *See Lowe v. State*, 194 A.D.2d 898, 899, 599 N.Y.S.2d 639, 641 (3d Dept. 1993) (noting that the penalties which can be imposed for not following orders in prison made an incarcerated person's dangerous behavior not unreasonable, since he was ordered to do it, and thus declining to find him contributorily negligent).

34. *Recklessness*, BLACK'S LAW DICTIONARY (11th ed. 2019).

35. *Martinez v. State*, 225 A.D.2d 877, 879, 639 N.Y.S.2d 145, 147 (3d Dept. 1996) (“The court also held that, even if claimant had not actually been qualified to perform this task, ‘there [was] virtually no question about the fact that he created the impression among State employees that he indeed was qualified’ and therefore, when asked to perform the electrical work, the State had every reason to believe that claimant was qualified to do so.”).

36. *See Kandrach v. State*, 188 A.D.2d 910, 910–911, 591 N.Y.S.2d 868, 869 (3d Dept. 1992) (upholding partial damages for an incarcerated person who had received only five minutes of training on how to operate a woodchipper, which the court found inadequate to fulfill the prison's “duty to provide sufficient warnings and instructions for the safe operation of such machinery and equipment.”).

37. *See Gress v. State*, 157 A.D.2d 479, 479, 549 N.Y.S.2d 666, 667 (1st Dept. 1990) (holding that an incarcerated person who fell from scaffolding while doing demolition work on a work release program did not have a claim against the State because the State was not the owner or contractor at the work site and the prisoner participating in the work release program was not a state employee but instead an employee of the private employer that he was placed with).

officers that made the recommendation had discretion (the authority) to do so under their job title.³⁸ Finally, the state has no duty to inspect possible work sites for work-release programs.³⁹

You may be able to determine whether the state is liable for your injury by researching New York State labor laws, which courts have found applicable to prison work.⁴⁰

(b) Medical Care Provided to Incarcerated People⁴¹

Claims relating to inadequate or inappropriate medical care are negligence claims. The state has a duty to provide incarcerated people with reasonable and adequate medical care in a timely manner.⁴² If you believe the state has violated this duty to you in a way that caused you actual harm, you may have a successful medical tort claim.

In order to pursue a tort claim for medical negligence, you will have to prove that the treatment the state gave you (or failed to give you) was not standard—that it was not within “accepted medical practice.”⁴³

Second, you will have to prove that the state’s action or inaction directly caused your injury and that the injury would not have happened otherwise. This is called “proximate cause.”⁴⁴ For example, even if you had to wait a long time for treatment, you would not be able to recover damages unless the waiting was what caused your injury or made it significantly worse.⁴⁵ In order to prove the cause of your injury, you will almost always need testimony from medical experts.⁴⁶ As with other negligence tort claims, you must also show that the injury you suffered was a foreseeable result of the improper treatment you received.⁴⁷

If you believe you have been injured due to improper or inadequate medical care, you can also seek damages under the theory of “ministerial neglect,” which means that when the state makes rules

38. See *Santangelo v. State*, 101 A.D.2d 20, 21, 474 N.Y.S.2d 995 (4th Dept. 1984) (“we hold that the actions of the Temporary Release Committee and the Superintendent were of a discretionary and quasi-judicial nature for which the State enjoys absolute immunity.”).

39. See *Gress v. State*, 157 A.D.2d 479, 479, 549 N.Y.S.2d 666, 667 (1st Dept. 1990) (“the State does not have any duty or obligation to inspect and ensure the safety of the possible jobsites for inmates in a temporary release program”).

40. See *Callahan v. State*, 19 A.D.2d 437, 438, 243 N.Y.S.2d 881, 882–883 (3d Dept. 1963) (holding that the Labor Law establishes a standard of care against which the state should be judged), *aff’d*, *Callahan v. State*, 14 N.Y.2d 665, 198 N.E.2d 903, 249 N.Y.S.2d 871 (1964).

41. For more information about inadequate medical care claims in federal court, see Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.”

42. See *Kagan v. State*, 221 A.D.2d 7, 11, 646 N.Y.S.2d 336, 339 (2d Dept. 1996) (citing *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (incarcerated people who rely on prison authorities to treat their medical needs have a fundamental right to reasonable and adequate medical care). Further, it is the state’s duty to give medical care “without undue delay”; when “delays in diagnosis and/or treatment [are] a proximate or aggravating cause of [a] claimed injury”, the State may be liable.” *Kagan v. State*, 221 A.D.2d 7, 11, 646 N.Y.S.2d 336, 339 (2d Dept. 1996).

43. See, e.g., *Larkin v. State*, 84 A.D.2d 438, 445–446, 446 N.Y.S.2d 818, 823 (4th Dept. 1982) (holding the state liable where a doctor failed to diagnose and treat an incarcerated person’s headaches, resulting in the incarcerated person’s death by aneurysm).

44. *Cause*, BLACK’S LAW DICTIONARY (11th ed. 2019).

45. See, e.g., *Brown v. State*, 192 A.D.2d 936, 938, 939, 596 N.Y.S.2d 882, 884–885 (3d Dept. 1993) (refusing to award damages for delay in treatment to an incarcerated person who had to have his larynx (voice box) removed because it was determined that by the time he complained the larynx would have had to be removed anyway).

46. See *Zi Guang v. State*, 263 A.D.2d 745, 747, 695 N.Y.S.2d 142, 145 (3d Dept. 1999) (finding that an incarcerated person failed to establish medical malpractice by prison officials in part because the incarcerated person’s medical expert at trial “often . . . appeared unfamiliar with [the incarcerated person’s] medical records”); *Duffen v. State*, 245 A.D.2d 653, 654, 665 N.Y.S.2d 978, 980 (3d Dept. 1997) (dismissing an incarcerated person’s claim against the state because medical expert’s testimony was too speculative to prove causation).

47. See *Levin v. State of N.Y.*, 32 A.D.3d 501, 502, 820 N.Y.S.2d 626, 628, 2006 NY Slip Op 6274, ¶ 2 (2d Dept. 2006) (stating that the state has a duty to provide for the health and care of incarcerated people, but the scope of that duty is limited to risks of harm that are reasonably foreseeable); *Kagan v. State*, 221 A.D.2d 7, 16–17, 646 N.Y.S.2d 336, 342–343 (2d Dept. 1996) (finding that an incarcerated person’s loss of hearing was foreseeable result of not treating the pain or bleeding in her ear).

describing its duty to provide medical care and then fails to follow those rules, it is liable for the resulting harm.⁴⁸ For example, if the prison has a formal process by which incarcerated people can see medical staff and fails to follow that process for you, then the prison may have automatically breached its duty to you.⁴⁹

The court may decide to eliminate or reduce damages if your actions or your failure to act contributed to your medical injury. For example, if you know that you have tuberculosis but do not tell prison officials of this fact, you might not receive damages if your condition goes untreated.⁵⁰ The court may also reduce any damages that you might receive if you failed to continue with the prescribed course of treatment after being released on bail.⁵¹

A court may also refuse to hold the state liable if your injuries were due to the negligence of a private physician not directly employed by the state.⁵² In this case, you may have to take legal action against the medical official or private hospital that treated you instead of the state. However, the state could potentially be held liable for the actions of a private physician if you reasonably believed the physician worked for the state and you had no reason to believe otherwise.⁵³

(c) Destruction or Loss of the Property of an Incarcerated Person

State employees have an obligation not to take, damage, or destroy your property without good cause⁵⁴ (a legally sufficient reason)—whether intentionally or through negligence. If they do, you may be able to sue the state in the Court of Claims.⁵⁵ Remember that before you can file a claim for damages in any court, you must first exhaust all of your prison's administrative remedies.⁵⁶ A full description of when you can access the courts and which courts you should use is in Part C below.

If your items were stolen from you, you may be able to hold the state responsible for failing to provide adequate security in the area from which your property was taken.⁵⁷ However, you also have a responsibility for securing your own belongings. If you fail to lock a footlocker or leave your valuables in an open space, the court may reduce your damages to the degree it thinks you were responsible, or

48. *See Kagan v. State*, 221 A.D.2d 7, 10–11, 646 N.Y.S.2d 336, 338–339 (2d Dept. 1996) (finding that there is “no governmental immunity for the negligent performance of . . . ministerial duties” and that “whenever delays in diagnosis and/or treatment are a proximate cause or aggravating cause of claimed injury, the State may be liable”); *see also Ogle v. State*, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (stating that the State’s failure to administer a tuberculosis treatment consistent with its policies made it liable for damages when surgery was ultimately necessary).

49. *See Kagan v. State*, 221 A.D.2d 7, 11–12, 17, 646 N.Y.S.2d 336, 339, 343 (2d Dept. 1996) (finding negligence where, contrary to policy, prison officials failed to allow an incarcerated person to make appointment for next available screening, to make her medical records available to the screening nurse, and to properly enter her complaints into the record).

50. *See Ogle v. State*, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (stating that it is “well established that culpable conduct, including the failure to reveal part of one’s medical history, may diminish a victim’s recovery in a medical malpractice case.”).

51. *See Ogle v. State*, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (holding that the formerly incarcerated person contributed to the development of his Potts disease by failing to continue with the prescribed course of INH therapy while he was released on bail).

52. *See Williams v. State*, 164 Misc. 2d 783, 785, 626 N.Y.S.2d 659, 661 (N.Y. Ct. Cl. 1995) (holding that the state was not liable for the negligence of a private dentist not working for the state).

53. *See Soltis v. State*, 172 A.D.2d 919, 920, 568 N.Y.S.2d 470, 471–472 (3d Dept. 1991) (refusing to dismiss case against state where the incarcerated person could reasonably have believed that the private physician was a state employee).

54. *Good Cause*, BLACK’S LAW DICTIONARY (11th ed. 2019).

55. *See Tigner v. New York*, 559 F.Supp. 25, 27 (W.D.N.Y. 1983), *aff’d*, *Tigner v. New York*, 742 F.2d 1432 (2d Cir. 1983) (holding that the Court of Claims provides a remedy for lost and damaged property claims that is sufficient to satisfy constitutional guarantees of due process).

56. *See* Part C below. N.Y. CT. CL. ACT § 10(9) (McKinney 2019) (also providing that such a claim must be filed within 120 days after the date in which the prison’s administrative remedies have been exhausted).

57. *See Foy v. State*, 182 A.D.2d 670, 671, 582 N.Y.S.2d 262, 263 (2d Dept. 1992) (holding that the state is not immune from liability in an incarcerated person’s claim for loss of personal property when the incarcerated person alleged that the state negligently failed to properly secure the area of his cell).

may prevent you from recovering damages at all.⁵⁸ If you believe that prison officials have intentionally taken or destroyed your property without authorization, refer to Part B(1) above (intentional torts). If you believe that your property was destroyed due to negligently maintained prison facilities, see Part B(4)(d) below.

(d) Negligently Maintained Prison Facilities

As with injuries in the workplace, the state is not responsible for preventing all injuries that could occur on its property.⁵⁹ The state is only responsible for maintaining facilities in a “reasonably safe condition.”⁶⁰ To determine what “reasonably safe” means, a court might consider how likely it was that an injury would occur, how serious that injury was likely to be, and how much it would have cost the state to prevent the injury.⁶¹

For example, a court refused to award damages to an incarcerated person who was injured in an icy exercise yard because prison staff had taken “reasonable precautions” to prevent such injuries. In this case, “reasonable precautions” meant checking the area daily and salting the yard when it was slippery.⁶² To receive money damages in that case, the incarcerated person would have had to show that the particular area of the track was abnormally dangerous, and that officials knew or should have known about the danger.⁶³

(e) False Arrest and False Imprisonment

False imprisonment applies to incarcerated people who are wrongfully held in special housing units or on keeplock.⁶⁴ For additional information on confinement to special housing units, refer to *JLM*, Chapter 18, “Your Rights at Prison Disciplinary Proceedings.”

A plaintiff making a false arrest claim must prove four elements: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was aware of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not authorized.⁶⁵ The elements for proving false imprisonment are basically the same as the elements for proving false arrest.⁶⁶

58. *See Pollard v. State*, 173 A.D.2d 906, 907–908, 569 N.Y.S.2d 770, 771 (3d Dept. 1991) (addressing the state’s contributory negligence defense, but deferring to findings of trial court that the incarcerated person had locked his locker and thus was not contributorily negligent).

59. *See, e.g., Killeen v. State*, 66 N.Y.2d 850, 851–852, 489 N.E.2d 245, 246, 498 N.Y.S.2d 358, 359 (1985) (holding that while the state “owes patients in its institutions a duty of reasonable care to protect them from injury, whatever the source,” that does not “render the state an insurer or require it to keep each patient under constant surveillance,” and finding the state not liable for injury that resulted when a patient in a state mental facility accidentally spilled hot water on himself (internal citation omitted)).

60. *See Basso v. Miller*, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976) (“A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances.”) (quoting *Smith v. Arbaugh’s Rest., Inc.*, 469 F.2d 97, 100, 152 U.S. App. D.C. 86, 89 (D.C. Cir. 1972)).

61. *Basso v. Miller*, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976) (quoting *Smith v. Arbaugh’s Rest., Inc.*, 469 F.2d 97, 100 (D.C. Cir. 1972)).

62. *Condon v. State*, 193 A.D.2d 874, 875, 597 N.Y.S.2d 531, 532 (3d Dept. 1993) (correction officer testified that area was checked daily and sand was applied if slippery or someone complained).

63. *Condon v. State*, 193 A.D.2d 874, 875, 597 N.Y.S.2d 531, 532 (3d Dept. 1993) (incarcerated person failed to show that the surface was abnormally dangerous or that the state should have had notice of a dangerous condition).

64. *See, e.g., Gittens v. State*, 132 Misc. 2d 399, 406–407, 504 N.Y.S.2d 969, 974 (N.Y. Ct. Cl. 1986) (finding that an incarcerated person held in keeplock nine days beyond the penalty imposed by a disciplinary hearing could sue the state for false imprisonment).

65. *See Broughton v. State*, 37 N.Y.2d 451, 456, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 93 (1975) (listing the elements of proving a false arrest claim). Note that in some jurisdictions, the plaintiff does not need to show that he was aware of the confinement. *See Scofield v. Critical Air Med., Inc.*, 52 Cal. Rptr. 2d 915, 923–924, 45 Cal. App. 4th 990, 1003–1007 (Cal. Ct. App. 1996) (harm may result even if victim is not aware at the time of the imprisonment or its wrongfulness).

66. *See Broughton v. State*, 37 N.Y.2d 451, 455–456, 335 N.E.2d 310, 313–314, 373 N.Y.S.2d 87, 92–93 (1975).

The Court of Appeals has found that when prison employees discipline incarcerated people, and that discipline is allowed either by statute or by regulation, both the employees and the state have absolute immunity from lawsuits.⁶⁷ “Absolute immunity” in this case means that the employees or state will not be considered criminally guilty for their actions. The court also will not order them to pay damages for their actions. Because of absolute immunity, even if you are placed on keeplock or in administrative segregation for charges that are eventually dismissed, you may not be able to recover damages.⁶⁸

Keep in mind that a judge is not a “state officer” as defined by the Court of Claims Act, so you cannot sue in the Court of Claims for a faulty decision by a judge.⁶⁹ A judge may only be found personally responsible for a faulty decision if he did not have the authority to make that particular decision.⁷⁰

(f) Excessive Force and Failure to Protect

One of the most common tort lawsuits by incarcerated people are lawsuits claiming that corrections officers used excessive force against them or failed to protect them from other incarcerated people. Lawsuits to recover for excessive force and failure to protect are covered in detail in *JLM*, Chapter 24, “Your Right to be Free from Assault by Prison Guards and Other Incarcerated People.”

C. Protecting Your Rights

This section provides an overview of the ways that you can seek relief for your tort claim. It covers both administrative remedies available through the prison and remedies available through the courts.

1. Facility Grievance Procedures

(a) Exhaustion

If you are filing a claim for money damages based on loss or damage to your personal property, you cannot file in the Court of Claims until you have exhausted the prison’s own administrative remedies for personal property claims.⁷¹ “Exhausting administrative remedies” means that you must use all Department of Corrections and Community Supervision Services (DOCCS) internal procedures for compensating incarcerated people before suing in the Court of Claims.

If DOCCS agrees to repay you for your lost or damaged property, then you will not be able to file a lawsuit in the Court of Claims.⁷² If DOCCS does not grant your requests for repayment, you are allowed to file and serve your claim in the Court of Claims. You must file and serve your claim within 120 days of completing all internal procedures.⁷³ Part D of this chapter describes how to file a claim in the Court of Claims.

67. See *Arteaga v. State*, 72 N.Y.2d 212, 217–221, 527 N.E.2d 1194, 1197–1199, 532 N.Y.S.2d 57, 60–62 (1988) (finding that acts by employees in compliance with regulations constitute discretionary conduct for which the State has absolute immunity); see also *Gittens v. State*, 132 Misc. 2d 399, 403, 504 N.Y.S.2d 969, 972 (N.Y. Ct. Cl. 1986) (finding prison employee’s disciplinary confinement of an incarcerated person to be in compliance with applicable regulations and thus not false imprisonment).

68. See *Arteaga v. State*, 72 N.Y.2d 212, 220–221, 527 N.E.2d 1194, 1198–1199, 532 N.Y.S.2d 57, 61–62 (1988) (finding the state and prison officers not liable for confinement of incarcerated people even though charges against the people who were incarcerated were later dismissed); see also *Gittens v. State*, 132 Misc. 2d 399, 403 n.5, 504 N.Y.S.2d 969, 972 n.5 (N.Y. Ct. Cl. 1986) (“[R]egardless of a disposition ultimately favorable to the inmate, [confinement during the period when the charges are pending] does not constitute an actionable deprivation.”).

69. See *Murph v. State*, 98 Misc. 2d 324, 326, 413 N.Y.S.2d 854, 856 (N.Y. Ct. Cl. 1979) (“it follows inescapably from this analysis that the State of New York can never be liable for the acts of its Judges”).

70. See *Koepp v. City of Hudson*, 276 A.D. 443, 446, 95 N.Y.S.2d 700, 703 (App. Div. 1950) (“when a judge acts he must be clothed with jurisdiction, and acting without this he is but an individual, falsely assuming an authority he does not possess.”).

71. N.Y. Ct. Cl. ACT § 10(9) (McKinney Supp. 2011).

72. In order to preserve your claim, it may be necessary to begin the filing process even though your DOCCS procedures are not yet completed.

73. N.Y. Ct. Cl. ACT § 10(9) (McKinney Supp. 2011). But note that, as a person who is incarcerated, you cannot use the late deadline extension available to other Court of Claims claimants. *McCann v. State*, 194 Misc.

(b) Administrative Remedies

DOCCS may pay you if (1) another incarcerated person has damaged or destroyed your personal property or (2) an employee of DOCCS has damaged or destroyed your personal property. According to Directive #2733, money awards are limited to \$350 if another incarcerated person caused the loss of property and \$5000 if a DOCCS employee is responsible for the loss or damage. You should ask prison officials for a copy of Directive #2733, which includes sample forms for applying for reimbursement.⁷⁴

2. Pursuing a Remedy in Court

(a) Choosing a Court

Where you file your lawsuit depends on the circumstances of your case, whom you want to sue, and what kind of remedy you are seeking. Generally, the Court of Claims hears lawsuits against the state, including people acting as representatives of the state, such as prison employees. The New York State Supreme Court hears lawsuits against people acting as individuals. If you want to sue individuals for violating your federal constitutional rights, you would sue in federal court.

(b) Filing in the Court of Claims

If you want to sue the State of New York (if, for example, you are a incarcerated person in a state prison and you believe the state's employees have harmed you), you must sue in the New York Court of Claims.⁷⁵ In fact, the State of New York, and certain public authorities, are the *only* defendants you can name in a suit before the Court of Claims.⁷⁶ If a state guard or other employee has harmed you in the course of his employment, you may sue the state for damages in the Court of Claims.⁷⁷

As long as the employee was acting in his official capacity (meaning that his actions were part of the responsibilities of his job), you may not sue him personally.⁷⁸ If the employee's actions (or lack of

2d 340, 341, 754 N.Y.S.2d 819, 820 (N.Y. Ct. Cl. 2002) (even if delay was excusable, the plain language of the Court of Claims Act § 10(9) prohibited late filings by prisoners).

74. N.Y. STATE FIN. LAW § 8(12), (12-a) (McKinney 2010); State of New York, Department of Corrections and Community Supervision, Directive No. 2733, Inmate Personal Property Claim III(B)(2) (2015) *available at* <http://www.doccs.ny.gov/Directives/2733.pdf> (last visited June 5, 2020) (establishing that (1) heads of state departments are authorized to pay out of a cash advance account up to \$250 at their own discretion through facility grievance procedures; (2) payments over \$250 must be submitted to the State comptroller; (3) payments over \$1000 must be approved by the State Attorney General; and (4) payments from internal grievance procedures cannot exceed \$5000).

75. N.Y. CT. CL. ACT § 9(2) (McKinney Supp. 2010) (giving the Court of Claims jurisdiction to hear cases against the state for damages).

76. N.Y. CT. CL. ACT § 9(2) (McKinney Supp. 2010); New York State Unified Court System, Court of Claims: Frequently Asked Questions, <http://www.nycourts.gov/courts/nyscourtofclaims/faq.shtml#who> (last visited Jan. 31, 2017) ("The Court of Claims has jurisdiction over the State of New York as well as certain authorities that are sued under their own name.").

77. N.Y. CORRECT. LAW § 24(2) (McKinney 2014) ("Any claim for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties of any officer or employee of the [D]epartment [of Correctional Services] shall be brought and maintained in the court of claims as a claim against the state."). Note that if you seek a remedy other than money damages, such as injunctive relief, you do not have to sue in the Court of Claims. Furthermore, the above requirement does not apply to § 1983 actions, which may be filed in any court of general jurisdiction. *Haywood v. Drown*, 556 U.S. 729, 733, 129 S. Ct. 2108, 2113, 173 L.Ed.2d 920 (2009).

78. N.Y. CORRECT. LAW § 24 (McKinney 2014). The test for whether an employee can be held personally liable, or whether the State must instead be sued for the employee's tortious acts, is "whether the act was done while the [employee] was doing [the State's] work, no matter how irregularly, or with what disregard of instructions." *See Riviello v. Waldron*, 47 N.Y.2d 297, 302, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 302 (1979) (considering employee to be within the scope of his employment so long as he is discharging his duties, "no matter how irregularly, or with what disregard of instructions") (quoting *Jones v. Weigand*, 134 A.D. 644, 645, 119 N.Y.S. 441, 443 (2d Dept. 1909)). However, this test is complicated. An employee is not personally liable for an act simply because he was not ordered to do that act. Rather, you may be able to find liability against New York State instead

action) are discretionary, which means they have a choice to act, they cannot be sued even if they have bad intentions.⁷⁹ If, however, an employee does something to you that is clearly outside of his responsibilities as an employee (for example, a criminal act unrelated to any part of the employee's duty), you may then sue that individual in the New York Supreme Court (New York's general trial court) or in federal court under Section 1983.⁸⁰ Remember that in federal prisons, officials are employed by the federal government rather than the state; you cannot bring a suit against a state for the actions of federal employees.⁸¹

Although there are some exceptions that will be discussed below, the Court of Claims can generally only award money damages. It cannot prevent the prison from using punishment that violates your constitutional rights, or fix unconstitutional conditions in the prison. In order to ask for general changes to the conditions in your prison, you must file either a Section 1983 proceeding or an Article 78 claim.⁸²

You also cannot bring a lawsuit in the Court of Claims to challenge your sentence or any decision made by prison or parole officials regarding your status. These complaints must be made under New York Civil Practice Law Article 78 (proceedings against body or officer) or Article 70 (state habeas corpus), or New York Criminal Procedure Law Article 440 (post-judgment motions).⁸³ You may,

of the individual employee if the tort can be explained as a necessary step to the employee's ordered task or responsibility. In deciding whether an employee's conduct falls within the definition of "employment," the New York Court of Appeals has listed the following factors for consideration:

- (1) The time, place, and occasion of the act;
- (2) The history of the relationship between employer and employee in actual practice;
- (3) Whether the act is one commonly done by such an employee;
- (4) The extent of the departure from normal methods of performance; and
- (5) Whether the employer could have "reasonably anticipated" the act.

Riviello v. Waldron, 47 N.Y.2d 297, 303, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 303 (1979). The Court of Appeals of New York has applied these factors liberally in a range of situations. *See, e.g., Riviello v. Waldron*, 47 N.Y.2d 297, 302, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 302 (1979) (considering employee to be within the scope of his employment so long as he is discharging his duties, "no matter how irregularly, or with what disregard of instructions."); *Cepeda v. Coughlin*, 128 A.D.2d 995, 996, 513 N.Y.S.2d 528, 530 (3d Dept. 1987) (finding that corrections officers' use of force when supervising movement of people who were incarcerated was within the scope of their employment), *appeal denied*, *Cepeda v. Coughlin*, 70 N.Y.2d 602, 512 N.E.2d 550, 518 N.Y.S.2d 1024 (1987). While these cases do not establish a clear point at which a state employee becomes personally liable, it is clear that the level of violence or disregard must be very high to satisfy the test. Courts have determined that custody and control of incarcerated people and the maintenance of safety and security in prisons are the main responsibilities of prison employees. *Cepeda v. Coughlin*, 128 A.D.2d 995, 997, 513 N.Y.S.2d 528, 530 (3d Dept. 1987). A New York Supreme Court has held that "it is entirely foreseeable that correction officers will be called upon to quell disturbances and subdue violence among inmates." *Mathis v. State*, 140 Misc. 2d 333, 340, 531 N.Y.S.2d 680, 684 (Sup. Ct. Albany County 1988). *But see Sharrow v. State*, 216 A.D.2d 844, 846, 628 N.Y.S.2d 878, 880 (3d Dept. 1995) (finding that no justification existed for correction officers to use force after they had already quelled a disturbance among people who were incarcerated because, at this point, the use of force was counter to the goal of maintaining order and discipline in the facility). The Court of Appeals of New York has found that even some intentional torts can be considered within the scope of an employee's job if they were foreseeable. *Riviello v. Waldron*, 47 N.Y.2d 297, 304, 391 N.E.2d 1278, 1282, 418 N.Y.S.2d 300, 304 (1979). This means that even if a prison employee means to harm or injure you, if the employee can prove that situations in the past led the employee to think that the act was necessary to keep control, the employee will not be found personally liable.

79. *See Tango v. Tulevech*, 61 N.Y.2d 34, 40, 459 N.E.2d 182, 185, 471 N.Y.S.2d 73, 76 (1983) ("when official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice").

80. For a discussion of how to sue state officials in federal court, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1982 to Obtain Relief from Violations of Federal Law."

81. *See* Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," for more information on how to sue federal prison officials if you are a federal prisoner.

82. *See JLM* Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for a discussion of Article 78 proceedings. For more information on injunctive relief in the Court of Claims, see Part C(2)(c)(i) of this Chapter.

83. *See JLM* Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your

however, challenge your conviction under the Court of Claims Act § 8-b, which allows a lawsuit for damages if the prosecutor used “improper means” to conviction you.⁸⁴ But, to win this suit, you must prove one of the following conditions by clear and convincing evidence:

- (1) that you have served all or any part of your sentence resulting from your felony or misdemeanor conviction(s);⁸⁵
- (2) that you have been pardoned of the crime;⁸⁶ or
- (3) that the judgment of conviction against you has been reversed or vacated and the document that accuses you of a crime has been dismissed.⁸⁷

You must also prove that you did not commit the charged acts or that your acts did not amount to a felony or misdemeanor,⁸⁸ and that you did not cause your conviction by your own conduct.⁸⁹

(i) Filing in the New York State Supreme Court

You can sue an individual state employee (for example, a prison employee) in the New York Supreme Court (the trial court) only if that employee (1) owes you a duty as an individual, and (2) was not acting in an official capacity in the exercise of governmental functions. If the employee does not owe you a duty as an individual or was acting in his official capacity when he injured you, you will have to sue the state in the Court of Claims.⁹⁰ You cannot sue the State of New York for money damages in the New York Supreme Court; as discussed above, those suits must be brought in the Court of Claims. However, if you are suing the state in order to receive something other than money damages, such as injunctive relief (a court order requiring the state to take or not take some particular action), you may sue in the New York Supreme Court.

(ii) Filing in Federal Court

If you want to sue an individual state employee for violating your federal constitutional rights, federal court is the correct place to file a lawsuit. In federal court, you may receive money damages and injunctive relief. For a full discussion of how to file a claim in federal court against a state employee for the violation of your federal rights, see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

(c) Pursuing Your Case in the Court of Claims

(i) Types of Relief

If you prove that you were the victim of a tort, whether intentional or negligent, the court will order the tortfeasor (the person responsible) to compensate you for the loss you suffered, most likely by paying you a sum of money. Such a court-ordered payment is called “damages.”⁹¹ A court may award you three kinds of damages: compensatory, punitive, and nominal.⁹²

Unfair Conviction or Illegal Sentence,” and Chapter 21, “State Habeas Corpus: Florida, New York, and Michigan,” for more information. In brief, you may challenge your sentence using Article 440, decisions made by prison officials using Article 78, and decisions made by parole officers using Article 78 or state habeas corpus.

84. See N.Y. CT. CL. ACT § 8-b(3)(b)(ii)(A) (McKinney 2019). § 8-b(3)(b)(ii)(A) states that a violation of N.Y. Crim. Proc. § 440.10(1)(b) (McKinney 2005) gives rise to a claim for damages. N.Y. CRIM. PROC. § 440.10(1)(b) (McKinney 2005) provides that a court can vacate a conviction if “the judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor.”

85. N.Y. CT. CL. ACT § 8-b(5)(a) (McKinney 2019).

86. N.Y. CT. CL. ACT § 8-b(5)(b)(i) (McKinney 2019).

87. N.Y. CT. CL. ACT § 8-b(5)(b)(ii) (McKinney 2019).

88. N.Y. CT. CL. ACT § 8-b(5)(c) (McKinney 2019).

89. N.Y. CT. CL. ACT § 8-b(5)(d) (McKinney 2019).

90. See *Morell v. Balasubramanian*, 70 N.Y.2d 297, 300, 514 N.E.2d 1101, 1102, 520 N.Y.S.2d 530, 531 (1987) (deeming “actions against State officers acting in their official capacity in the exercise of governmental functions” to be essentially “claims against the State, and, therefore, arguable only in the Court of Claims”).

91. *Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019).

92. See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law,” for

“Compensatory damages,” the most common form of damages, attempt to pay you the exact amount of your loss. For example, the court might order payments that are enough to replace your personal items that were destroyed (such as a watch), or to pay you the money you spent on medical bills after an injury.⁹³ The court can also order payments to make up for your pain and suffering,⁹⁴ which can include the time after the injury during which you are still suffering.

“Punitive damages” are court-ordered payments on top of the amount that would repay you for the loss or injury suffered. These extra damages are usually awarded when the tort was accompanied by violence, force, hatred, fraud, or vicious and evil actions on the part of the wrongdoer. Punitive damages are meant to punish the wrongdoer, rather than to compensate the injured party.⁹⁵ It is important to note that the Court of Claims will *not* order the state to award you punitive damages.⁹⁶

Nominal damages are very small amounts of money awarded by courts in order to recognize that a right has been violated, even if there is no big loss or injury requiring compensation.⁹⁷ The Court may also order nominal damages if it does find a real injury, but the evidence does not show what amount would be enough to compensate for that injury.

Aside from these money awards, the Court of Claims may force people or organizations to perform or stop performing specific acts. This is called an injunction.⁹⁸ The Court of Claims can only issue an injunction if an injunction is allowed by law or if it is part of a judgment to pay money awards.⁹⁹ Otherwise, if you are seeking an injunction, you must bring your suit in the New York Supreme Court or in federal court. As a result, you cannot bring a suit in the Court of Claims asking for general changes to the conditions in your prison because the Court of Claims cannot order the state to correct those conditions.¹⁰⁰

(ii) Settlements in the Court of Claims

There is no limit to the amount of money damages the Court of Claims may award. However, the court must approve the amount.¹⁰¹ It is also possible to settle your claim against the state out of court. When the state offers you a settlement, it is not always agreeing that it did something wrong, but is offering to pay you some amount of money instead of going to trial. When you reach a settlement with the state, you give up your right to ask the court for more damages. By contrast, if you go to trial and are given damages that you think are too low, you may then appeal to the Appellate Division of the Supreme Court of New York requesting more damages.

more information on damages.

93. *Calabrese v. Allright New York Parking, Inc.* 93 A.D.2d 973, 461 N.Y.S.2d 612 (4th Dept. 1983) (affirming the lower court’s decision in calculating compensatory damages to consider whether or not the plaintiff had provoked the defendant).

94. *Discretionary Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “discretionary damages” as damages “such as mental anguish or pain and suffering”).

95. *Punitive Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019). *See Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 316, 618 N.Y.S.2d 609 (1994).

96. *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 334, 437 N.E.2d 1104, 1105, 452 N.Y.S.2d 347, 348 (1982) (“The waiver of sovereign immunity effected by section 8 of the Court of Claims Act does not permit punitive damages to be assessed against the State or its political subdivisions”).

97. *Nominal Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019). *See Buchwald v. Waldron* 183 A.D.2d 1080, 1081, 583 N.Y.S.2d 682 (1992).

98. For more discussion of injunctive relief, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

99. *See Doe v. State*, 86 Misc. 2d 639, 641, 383 N.Y.S.2d 172, 174 (N.Y. Ct. Cl. 1976); *see also* N.Y. Ct. CL. ACT § 9, Notes of Decisions, n.7 (McKinney 1989 & Supp. 2006).

100. To request an injunction either (1) to prevent forms of punishment which violate your constitutional rights, or (2) to fix unconstitutional conditions in the prison, you must bring another kind of lawsuit. This lawsuit must either be in a §1983 proceeding or an Article 78 proceeding. *See JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

101. N.Y. Ct. CL. ACT § 20-a (McKinney Supp. 2010) (stating that settlements must be approved by the court); *see also* N.Y. Ct. CL. ACT § 20(6-a) (McKinney Supp. 2010) (“in any case where a judgment . . . is to be paid to an inmate . . . the comptroller shall give written notice, if required pursuant to subdivision two of [§ 632-a] of the executive law, to the office of victim services. . .”).

(iii) Filing Time Limits

If you want to file a claim because a state employee's negligent or intentional act physically injured your body, you have ninety days from the time of the injury or loss¹⁰² to either (1) file your claim, or (2) serve a Notice of Intention to File a Claim with the Attorney General.¹⁰³ To "serve" a legal document means to deliver it to the party you are suing. If you do not do either of these things, you may not be allowed to file at all.¹⁰⁴ Whether you are filing a claim or serving a Notice of Intention, the document must be *received* within the 90-day deadline. Part C(2)(c)(v) below explains how to make sure your document has been received within the deadline. *These time limits exist even if you are proceeding with other administrative remedies required by your institution.*

You must file a Notice of Intention to alert the state of your claim so it has a chance to respond to your complaint or prepare for its defense. See Appendix A-1 of this Chapter for a sample "Notice of Intention" form. If you are asking the court for permission to file a late claim, you need to tell the court why your late filing has not prevented the state from getting its defense ready.

Filing a Notice of Intention is not the same as beginning a lawsuit; it only gives you the right to file a lawsuit against the State in the future. Once you serve a Notice of Intention to File a Claim with the Attorney General, you have two years to file a claim for a negligent or unintentional tort, and one year to file a claim for an intentional tort.¹⁰⁵ These time limits start counting at the moment your claim "accrues" (when the injury is complete enough for the amount of damages to be determined).¹⁰⁶

If you are filing a claim for damage or loss of your personal property, the process is a little different. The time limit for filing is not ninety days after the injury (after the property is stolen), but 120 days after you have gone through all institutional administrative remedies. Within this 120-day period you must file *the claim itself*—NOT a Notice of Intention.¹⁰⁷

102. For more information on the time of injury or loss and the discovery of injury or loss, see N.Y. Ct. CL. ACT § 10 (McKinney Supp. 2012). Note that if you are assaulted by a corrections officer, for example, but the full extent of the injuries does not become apparent immediately, the 90 days begin when the assault happens, not when the injuries become apparent. The court has been very hesitant to extend a filing deadline to 90 days from the point at which an injury was realized. *Augat v. State*, 244 A.D.2d 835, 836, 666 N.Y.S.2d 249, 251 (3d Dept. 1997), *appeal denied*, *Augat v. State*, 91 N.Y.2d 814, 698 N.E.2d 956, 676 N.Y.S.2d 127 (1998). Therefore, you should be very careful not to delay filing.

103. N.Y. Ct. CL. ACT § 10(3) (McKinney Supp. 2012). See Appendix A-1 of this Chapter for a sample Notice of Intention.

104. The claim itself should state the time and place where such claim arose, the nature of the claim, the damage or injuries claimed to have been sustained, and the total sum claimed. In your Notice of Intention to File a Claim, you should state the same matters, except that you do not have to state the items of damage or the total sum claimed. N.Y. Ct. CL. ACT § 11 (McKinney 2019). Therefore, you do not have to know the extent and severity of your injuries in order to file a Notice of Intention. *Atterbury v. State*, 26 Misc. 2d 422, 424, 210 N.Y.S.2d 460, 463 (N.Y. Ct. Cl. 1961) (explaining that claimant could have filed a notice of intention prior to being referred to a specialist because neither the severity of the injuries nor the sum claimed must be included in the notice and visiting a physician in the first instance shows she knew she had some injuries).

105. N.Y. Ct. CL. ACT § 10(3) (McKinney 2019).

106. N.Y. Ct. CL. ACT § 10(3) (McKinney 2019). *See also* *Bronxville Palmer, Ltd. v. State*, 36 A.D.2d 647, 647–648, 318 N.Y.S.2d 412, 413 (3d Dept. 1971) (holding that, "where a continuing injury or other circumstance prevents an evaluation of damages at the time of the occurrence of the wrong, the time for filing a claim does not begin to run until such an evaluation can be made."); *see also* *Mahoney v. Temp. Comm'n of Investigation of N.Y.*, 165 A.D.2d 233, 240–241, 565 N.Y.S.2d 870, 874–875 (3d Dept. 1991) (holding that causes of action were not limited to conduct that occurred within 90-day period before filing because the violations were ongoing and interrelated and evaluation of damages could not be made within that period).

107. N.Y. Ct. CL. ACT § 10(9) (McKinney 2019); *see also* *Wright v. State*, 195 Misc. 2d 597, 598, 760 N.Y.S.2d 634, 635 (N.Y. Ct. Cl. 2003) ("claims for property losses by inmates are no longer measured from the date of loss, but rather within a 120-day period commencing upon exhaustion of institutional remedies." [internal citation omitted]), *appeal dismissed*, *Wright v. State*, 11 A.D.3d 1000, 782 N.Y.S.2d 209 (4th Dept. 2004).

Courts are very strict about the time limits on filing a claim and serving the Notice of Intention to File a Claim.¹⁰⁸ The Court of Claims will not allow late filing of claims related to loss of property.¹⁰⁹ However, there are some situations in which the Court may permit late claims.¹¹⁰ Section 10(6) of the New York Court of Claims Act lists factors that the Court may consider when deciding whether to allow a late filing. The Court does not need to find that each of these factors is satisfied in order to allow you to file your claim late.¹¹¹ The factors listed are:

- (1) Whether there are any excuses for the delay in filing;
- (2) Whether the state knew about the facts of the claim;
- (3) Whether the state had a chance to investigate the situations of the claim;
- (4) Whether the claim appears to be meritorious;¹¹²
- (5) Whether the failure to file a timely claim or Notice of Intention resulted in substantial prejudice to the state, meaning whether late filing significantly hurts the state's defense;
- (6) Whether the person has any other available remedy; and
- (7) Any other relevant factors.¹¹³

The court can choose to allow you to file your claim late if you have a good reason for the delay, even if you haven't satisfied any of the factors.¹¹⁴ For the first factor, some courts will excuse a delay that was caused by the claimant's (the person filing the lawsuit) treatment for physical or mental disabilities that result from the injuries alleged in the lawsuit.¹¹⁵ In addition, Section 10(5) of the New

108. See *Conquest v. State*, 58 Misc. 2d 121, 121, 294 N.Y.S.2d 892, 893 (N.Y. Ct. Cl. 1968) (holding that, where notice of intention to file claim was filed on the 92nd day after claim arose, the claim itself was not filed within statutory period and court did not have jurisdiction to hear the case). *But see* *Killeen v. State*, 12 Misc. 2d 89, 92, 174 N.Y.S.2d 1000, 1002–1003 (N.Y. Ct. Cl. 1958) (excusing minor lateness per N.Y. Ct. Cl. ACT § 10(5), where there was a slight error in attorney's computation of time, the state was not prejudiced, and the claimant moved for permission to file late).

109. See *Roberts v. State*, 11 A.D.3d 1000, 1001, 783 N.Y.S.2d 190, 191–192 (4th Dept. 2004) (holding that, because § 10(6) of the Court of Claims Act only allows a court discretion to permit the late claims mentioned in §§ 10(1)–(4), and loss of property claims are addressed § 10(9), the court may not allow late claims for loss of property). *But see* *Wright v. State*, 195 Misc. 2d 597, 602, 760 N.Y.S.2d 634, 638 (N.Y. Ct. Cl. 2003) (holding that it was within the spirit of the Court of Claims Act to allow the court discretion over late claims for loss of property). A subsequent Court of Claims case disagreed with *Wright* and read the 90-day time limit strictly. *Murray v. State*, 5 Misc. 3d 398, 403–404, 781 N.Y.S.2d 724, 728–729 (N.Y. Ct. Cl. 2004) (strictly adhering to the 90-day filing period and dismissing § 10(9) claim that was filed late).

110. N.Y. Ct. Cl. ACT § 10(6) (McKinney 2019); see also *Gavigan v. State*, 176 A.D.2d 1117, 1119, 575 N.Y.S.2d 217, 218 (3d Dept. 1991) (upholding Court of Claims' broad discretion under N.Y. Ct. Cl. ACT § 10(6) to grant permission to file a late Notice of Claim where an employee of the State Office of General Services knew of an accident and, therefore, the state could not be said to have been prejudiced by the lateness). *But see* *Jerrett v. State*, 166 A.D.2d 907, 907, 560 N.Y.S.2d 568, 568 (4th Dept. 1990) (holding that Court of Claims abused its discretion in granting motion to serve a late claim where there was no valid excuse for claimant's delay in filing the claim, the state did not have timely notice of the essential facts constituting the claim nor the opportunity to investigate the circumstances underlying the claim, and the three other factors in N.Y. Ct. Cl. ACT § 10(6) did not weigh heavily in claimant's favor).

111. See *Butler v. State*, 81 A.D.2d 834, 834, 438 N.Y.S.2d 834, 834 (2d Dept. 1981) (explaining that there is no requirement that claimant comply with all six requirements of §10(6) for the Court of Claims to grant permission to file a late notice).

112. *Meritorious*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "meritorious" as "worthy of legal victory; having enough legal value to prevail in a dispute").

113. N.Y. Ct. Cl. ACT § 10(6) (McKinney 2019).

114. See *De Olden v. State*, 91 A.D.2d 1057, 458 N.Y.S.2d 666, 666 (2d Dept. 1983) (acknowledging a reasonable excuse for delay in filing a claim where the claimant's extensive physical therapy and extreme psychological trauma after amputation of his leg seriously affected his ability to function after being discharged from the hospital); *Schweickert v. State*, 64 A.D.2d 1026, 1026–1027, 409 N.Y.S.2d 308, 309 (4th Dept. 1978) (holding that the amendment to the Court of Claims Act contained in §10(6), which grounds and lengthens the time limits for allowing late claims, makes the failure to show a reasonable excuse for the delay no longer fatal to a claim for late filing); *Cole v. State*, 64 A.D.2d 1023, 1024, 409 N.Y.S.2d 306, 307–308 (4th Dept. 1978) (finding excuse to be reasonable when claimant was completely immobilized by his injuries and heavily medicated).

115. See *De Olden v. State*, 91 A.D.2d 1057, 458 N.Y.S.2d 666, 666 (2d Dept. 1983) (acknowledging a reasonable excuse for delay in filing a claim where the claimant's extensive physical therapy and extreme

York Court of Claims Act allows late filing where the claimant has a legal disability, such as insanity or infancy (childhood).¹¹⁶ In these situations, the claim must be made within two years after the disability is no longer an issue (although, as explained below in this Section, you will not get to use all of this two-year extension because of the statute of limitations on injury claims).¹¹⁷ Being in prison is not itself a legal disability. Incarceration and lack of knowledge of the filing requirements of the New York Court of Claims Act do not excuse you if you file late. However, since incarcerated people have a right to hire counsel and the right to sue the state, if you are not given a chance to contact a lawyer or are not allowed in the prison's law library to learn your rights, you may have an excuse for filing late.¹¹⁸

In addition, if you filed a Notice of Intention within the time limit but then failed to file the claim on time, you may apply to the court for permission to treat the Notice of Intention as a claim.¹¹⁹ The court may approve your application to treat the Notice of Intention as a claim if:

- (1) The application meets certain time limits in article two of the Civil Practice Law and Rules;
- (2) The Notice of Intention was served and filed on time, and has enough facts to make up a claim; and
- (3) Granting the application would not prejudice the state, meaning it would not damage the state's legal rights or ability to defend itself.¹²⁰

The Court of Claims will *not* allow you to file a negligence tort claim more than three years after an injury,¹²¹ or more than one year after the injury in the case of an intentional tort claim (for example, assault and battery).¹²² Furthermore, even if the Court of Claims has the power to allow late claims in some cases, it cannot violate the New York "statutes of limitations" (meaning, time limits for certain types of claims) for the claims you are filing. For example, the statute of limitations for personal injury actions is three years after the incident.¹²³ The statute of limitations for medical malpractice claims is two years and six months.¹²⁴

psychological trauma after amputation of his leg seriously affected his ability to function after being discharged from the hospital); *see also* *Cole v. State*, 64 A.D.2d 1023, 1024, 409 N.Y.S.2d 306, 307–308 (4th Dept. 1978) (finding excuse to be reasonable when claimant was completely immobilized by his injuries and heavily medicated).

116. N.Y. CT. CL. ACT § 10(5) (McKinney 2019).

117. N.Y. CT. CL. ACT § 10(5) (McKinney 2019); N.Y. C.P.L.R. 208 (McKinney 2003); *see Vitello v. State*, 66 Misc. 2d 582, 585, 321 N.Y.S.2d 787, 790 (N.Y. Ct. Cl. 1971) ("Infancy, along with incompetency, habitual drunkenness, and the like, are legal disabilities (internal citations omitted).") For an application of insanity to the tolling of statutes of limitations, *see McCarthy v. Volkswagen of Am., Inc.*, 78 A.D.2d 849, 849, 432 N.Y.S.2d 722, 722–723 (2d Dept. 1980) (finding plaintiff's claim to be time-barred because plaintiff's college attendance and participation in athletic activities showed that he was not suffering from a temporary mental incapacity which prevented him from understanding or protecting his legal rights), *aff'd*, *McCarthy v. Volkswagen of Am., Inc.*, 55 N.Y.2d 543, 450 N.Y.S.2d 457, 435 N.E.2d 1072 (1982).

118. *See Plate v. State*, 92 Misc. 2d 1033, 1037–1042, 402 N.Y.S.2d 126, 128–131 (N.Y. Ct. Cl. 1978) (stating that denial of claimant's access to attorney and the law library for a substantial part of the 90-day period could constitute an excuse for not filing on time).

119. N.Y. CT. CL. ACT § 10(8)(a) (McKinney 2019). Section 10(8)(a) provides a claimant who timely serves and files a Notice of Intention, but who fails to timely serve or file a claim, may apply for permission to treat the Notice of Intention as a claim. *See Wright v. State*, 195 Misc. 2d 597, 602–603, 760 N.Y.S.2d 634, 638 (N.Y. Ct. Cl. 2003) (clarifying debate in previous cases over § 10(8)(a) and affirming that courts do have the discretion to treat a Notice of Intention as a claim). *But see Murray v. State*, 5 Misc. 3d 398, 401–402, 781 N.Y.S.2d 724, 726–727 (N.Y. Ct. Cl. 2004) (construing subdivision literally, as opposed to more broadly, thus implying there should be no discretion to treat Notice of Intention as a claim).

120. N.Y. CT. CL. ACT § 10(8)(a) (McKinney 2019); Prejudice is defined as "[d]amage or detriment to one's legal rights or claims." *Prejudice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

121. N.Y. C.P.L.R. § 214 (McKinney 2019).

122. N.Y. C.P.L.R. § 215(3) (McKinney 2019). In addition, property claims have shorter deadlines for filing—they must be filed within 120 days of the administrative decision on the claim (that is, after the Directive #2377 decision). N.Y. CT. CL. ACT § 10(9) (McKinney 2019).

123. N.Y. C.P.L.R. § 214 (McKinney 2019).

124. N.Y. C.P.L.R. § 214-a (McKinney 2019).

(iv) Filing Fees

All individuals must pay a fifty-dollar filing fee whenever they bring a claim in the New York State Court of Claims.¹²⁵ If you cannot afford the fee, you can ask the court to reduce or waive it. However, if a court waives your fee, that amount (even if it was reduced by the court first) will be held against you later as an outstanding payment obligation to the state, and will be collected by your institution from you.¹²⁶ Incarcerated people follow the same steps as everyone else to ask for reduced or excused filing fees.¹²⁷

To get the reduced filing fee, you must submit an affidavit to the court explaining why you cannot afford the full filing fee.¹²⁸ You should include in your affidavit detailed information about your financial situation, including the amount of money in your prison account, any income you receive from a prison job or work release program, and any property you own.¹²⁹ Tell the court if you are unable to work because you are physically or mentally ill, or because you are living in protective custody due to personal danger. In addition, you must write whether any other person has an interest in the money award you may win (for example, if a lawyer is representing you in return for a percentage of any money awarded). You should also list any financial obligations you have, especially court-ordered obligations such as child support or restitution.¹³⁰ If your case has already begun, you will have to tell the State, including the county attorney, that you have filed this motion.¹³¹

See Appendix A-5 for a sample affidavit requesting a reduced filing fee. If the court denies your request for the reduced filing fee, it will let you know. You will then have 120 days to pay the full fee or else your case will be dismissed.¹³²

If you win your case, the court will refund any filing fee that you paid.¹³³

(v) Where and How to File

If you are filing a Notice of Intention, you must “serve” the Attorney General with the Notice of Intention (meaning, giving personally or sending to the Attorney General by certified mail with return receipt requested).¹³⁴ *This is very important—if your case goes to trial, you must show that the Notice of Intention was served on the Attorney General.* You do not need to file your Notice of Intention in the Court of Claims.

Your claim, by contrast, must be filed at the office of the Clerk of the Court of Claims in Albany.¹³⁵ You must also serve your claim to the State of New York by serving the Attorney General. After you serve the Attorney General, you must file proof of service with the Clerk of the Court of Claims within ten days. You can do this by filing an Affidavit of Service describing the service.¹³⁶ Filing is accomplished by delivering the necessary papers to:

Clerk of the Court of Claims
P.O. Box 7344
Capitol Station
Albany, New York 12224

125. The fee requirements can be found in N.Y. CT. CL. ACT § 11-a (1) (McKinney 2019).

126. N.Y. C.P.L.R. § 1101(f)(2) (McKinney 2012).

127. N.Y. C.P.L.R. § 1101(d), (f) (McKinney 2012).

128. N.Y. C.P.L.R. § 1101(d) (McKinney 2012).

129. N.Y. C.P.L.R. § 1101(a) (McKinney 2012).

130. N.Y. C.P.L.R. § 1101(a) (McKinney 2012).

131. N.Y. C.P.L.R. § 1101(c) (McKinney 2012).

132. N.Y. C.P.L.R. § 1101(d) (McKinney 2012).

133. N.Y. CT. CL. ACT § 11-a (2) (McKinney 2019) (“The court shall award to a prevailing claimant as a taxable disbursement the actual amount of any fee paid to file the claim.”).

134. N.Y. CT. CL. ACT § 11(a)(i) (McKinney 2019).

135. N.Y. CT. CL. ACT § 11(a)(i) (McKinney 2019).

136. N.Y. COMP. CODES R. & REGS. TIT. 22, § 206.5(a) (2019). “Service” means you have delivered copies of the legal complaint to the person or government entity you are suing. In the Court of Claims, service is accomplished by sending a copy of the claim to the State Attorney General.

When you file the original claim, you must also file two copies of each document with the Clerk's office. One copy of each must also be served on the Attorney General. The address is:

Office of the Attorney General
Department of Law
Capitol Building
Albany, New York 12224

Keep at least one copy of each document related to your suit for your own records. There are sample claim and notice forms in Appendix A at the end of this Chapter.

When filing your papers with the court clerk's office and the Attorney General, you can either personally deliver the papers or send them by certified mail with return receipt requested.¹³⁷ "Return receipt requested" means that the postal service will mail you a receipt to prove that the documents were delivered. Do not lose this receipt, because it is the only way to prove that you completed service. If you do not receive a return receipt from both the Court of Claims and the Attorney General's Office within a period of time, you should send a follow-up letter to one or both of these offices asking if they have received your claim.¹³⁸

Service on the state is not complete until both the clerk's office and the Attorney General's Office have received your papers either personally or by certified mail, with return receipt requested.¹³⁹ Remember, mailing your papers is NOT the same as filing them. You must mail your papers early so that they are *received* within the time limits mentioned earlier. Allow enough time for delays in the mail. Do not forget: your claim may be dismissed if you fail to serve the state in the manner and time the law requires.¹⁴⁰

(vi) What Documents to File

In Appendix A of this Chapter, you will find sample copies of papers that you may need to file, including sample claims and Notices of Intention.

Your claim must be clearly typed or printed on 8½-by-11 inch paper. You should include:

- (1) Your name and address;
- (2) Where the incident happened;
- (3) When the incident happened;
- (4) The way in which New York State (through its employees' actions) negligently or intentionally caused your injury;
- (5) A description of the incident (include the names of the individuals responsible, if you know);
- (6) A detailed description of your injuries that resulted from this incident;
- (7) The date and place you served your Notice of Intention to File a Claim (if you served a Notice of Intention);
- (8) A statement that you are filing this claim within the time limits in the Court of Claims Act; and

137. N.Y. CT. CL. ACT § 11(a)(i) (McKinney 2019).

138. The Court of Claims sends a letter of acknowledgment once a claim has been received. The Attorney General's Office does not. Therefore, if your claim was served in person, make sure that you get an affidavit that the claim was served. If the claim was sent Return Receipt Requested, keep the green card.

139. N.Y. CT. CL. ACT § 11(a) (McKinney 2019); *see also* Aetna Cas. & Sur. Co. v. State, 92 Misc. 2d 249, 252–253, 400 N.Y.S.2d 469, 471 (N.Y. Ct. Cl. 1977) (dismissing claim that was mailed 88 days after accident but not received by the Court of Claims clerk until the 93rd day).

140. *See* Mingues v. State, 146 Misc. 2d 412, 413, 550 N.Y.S.2d 802, 803 (N.Y. Ct. Cl. 1990) (dismissing claim when notice of intention and claim were sent by regular mail). *But see* Colon v. State, 146 Misc. 2d 1034, 1035–1036, 553 N.Y.S.2d 979, 980–981 (N.Y. Ct. Cl. 1990) (holding that the court can choose to allow a claim to proceed even if the claimant did not use the proper method of service required by § 11 of the Court of Claims Act).

(9) A list of the damages you are claiming.¹⁴¹

If you are filing a claim initially, rather than filing a Notice of Intention to File a Claim, you do not need to include step (7), and step (8) should state that your claim is being filed within the ninety-day statutory limit. At the bottom of your claim form, you must include and sign a verification, which states that all of the information included in your claim is true.¹⁴² You must sign this verification in the presence of a notary public, who then must sign his name. The prison librarian may be a notary public or may be able to direct you to the person who provides that service within the prison.

If you are filing a motion for permission to file a late claim, your motion should describe the facts that will convince the Court of Claims that it should permit you to file late and, among other things, that the State will not be substantially prejudiced by the delay, which means that the State will not have a harder time defending itself because you filed late.¹⁴³

See Figure 1, below, to determine how many copies you need to file of each document.

	Clerk of Court	N.Y. Attorney General	Self	Total number of Copies You Will Need
Notice of Intention to File Claim	0 copies	1 copy	1 copy	2 copies
Claim and Any Supporting Affidavits	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies
Motion for Permission to File Late Claim	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies
Affidavit in Support of Reduction of Fees	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies

Figure 1: Copies needed when filing notices, claims, motions, or affidavits.

(vii) How to Obtain Help from a Lawyer

Since a tort claim filed against New York State is not a criminal action, you do not have the right to be assigned a lawyer. While the court may, at its discretion, require an attorney to represent poor people without charge, it is not likely to do so.¹⁴⁴

It is often difficult to find a lawyer who will take your case. If it seems likely that you will win a large amount of money from the State, you may be able to find a private attorney to represent you on a contingency fee basis, which means the attorney only charges you if you win the case. If you win, the attorney takes his fee (usually a percentage of the money you won), and any additional costs of representing you, from your money award. You may be able to find the phone number of an attorney through the New York State Bar Association. If you cannot find a lawyer, you can file the claim yourself (*pro se*) in the Court of Claims and even appeal its decision to the Appellate Division of the New York Supreme Court.

141. N.Y. CT. CL. ACT §11(b) (McKinney 2019) (“The claim shall state the time when and place where such claim arose, the nature of the same, [that a negligent or intentional action by a state employee has injured you or your property], and the items of damage or injuries claimed to have been sustained and . . . the total sum claimed.”).

142. N.Y. CT. CL. ACT §11(b) (McKinney 2019); N.Y. C.P.L.R. 3020, 3021 (McKinney 2010). For a sample Verification, see Appendix A-2 of this Chapter.

143. N.Y. CT. CL. ACT §10(6) (McKinney 2019).

144. See *Stephens v. State*, 93 Misc. 2d 273, 274, 404 N.Y.S.2d 536, 537 (N.Y. Ct. Cl. 1978) (refusing to assign counsel in an incarcerated person’s civil case unless at some point in the future, the state of New York decides to start paying for them); see also *Menin v. Menin*, 79 Misc. 2d 285, 293, 359 N.Y.S.2d 721, 729 (Sup. Ct. Westchester County 1974) (refusing to assign counsel to represent a poor person who was incarcerated in a civil case for damages from State for injuries allegedly received during confinement because there was no way to pay the attorney and attorneys are not required to accept free cases), *aff’d mem.*, *Menin v. Menin*, 48 A.D.2d 904, 372 N.Y.S.2d 985 (2d Dept. 1975).

(viii) Examinations Before Trial: Obtaining Testimony from Witnesses

Like other civil cases, you are allowed to carry out some forms of pretrial discovery. Chapter 8 of the *JLM*, “Obtaining Information to Prepare Your Case: The Process of Discovery,” discusses the processes of discovery for federal and New York State trials. Chapter 8 will help you decide if you need to take discovery in your case. Discovery may include any of the following ways of obtaining evidence to support your claim before trial: interviewing witnesses, requesting documents, and demanding physical and mental examinations.¹⁴⁵ The state must follow the same discovery rules as individuals.¹⁴⁶

You must pay any fees and expenses required in obtaining testimony that is taken on commission (for example, if an expert requires payment to testify).¹⁴⁷ Poor person status does not permit you to avoid paying these costs.

(ix) Reopening Trial Before Decision

If you discover new evidence that benefits you after you have closed your case in the Court of Claims but before the court has made a decision, you can submit a Notice of Motion to Reopen a Claim. Use a Notice of Motion to Reopen a Claim only if you have discovered important and relevant evidence that could make a difference in the court's decision.

(x) Appeal from a Judgment

You can appeal the court's decision because you think they were wrong about the law, the facts, or both. You can also appeal if the amount awarded was too high or low. When you make an appeal, the Appellate Division may affirm, reverse, or modify the judgment; dismiss the appeal; grant a new trial; or send the case back to a lower court for further proceedings.¹⁴⁸

Once the Court of Claims makes a decision in your original case, that decision will be entered with the Clerk of the Court of Claims, and then the Attorney General will serve you with a notice that the judgment has been entered. *You must file a Notice of Appeal within thirty days of the date that the Attorney General mails you the notice that your judgment has been entered.*¹⁴⁹ Because you may not be receiving mail timely in prison, be sure to check the date on the envelope when you receive the notice.

You must serve both the Attorney General and the Clerk of the Court of Claims with a written Notice of Appeal. The Notice of Appeal should briefly state your reasons for appealing.¹⁵⁰ You must obtain a Notice of Appeal form available at the Court of Claims or on the Court of Claims' official website. The Notice of Appeal form typically contains:

- (1) The name of the case and index or docket number, as written at the top of all the court papers;
- (2) Your name;
- (3) The order or judgment you are appealing;
- (4) The date of the order or judgment;
- (5) The name of the court that made the order and entered the judgment; and
- (6) The name of the court that you are appealing to.

You can serve the Notice of Appeal to the Attorney General by mail. Then the person who served the papers must fill out an Affidavit of Service. Note that you can serve the papers yourself only if the Judge has granted you permission to do so. Otherwise, anyone above 18 years old can serve the papers on your behalf. However, the person serving the papers is not allowed to serve more than five papers each year. Then, the Notice of Appeal and the Affidavit of Service must be filed with the court by serving the Clerk of the Court of Claims. There is a court fee to file a Notice of Appeal. The fee is

145. N.Y. C.P.L.R. 3102(a) (McKinney 2018).

146. N.Y. C.P.L.R. 3102(f) (McKinney 2018).

147. N.Y. CT. CL. ACT § 18 (McKinney 2019).

148. N.Y. CT. CL. ACT § 24 (McKinney 2019).

149. N.Y. CT. CL. ACT § 25 (McKinney 2019).

150. N.Y. CT. CL. ACT § 25 (McKinney 2019). See Appendix A-10 for a sample Notice of Appeal.

different for different courts, so you should check with the clerk to see what the fee is. If you can't pay the court fees, you can ask the court for a fee waiver. You should ask the clerk for a fee waiver form.¹⁵¹

You will need a transcript of your trial in the Court of Claims. If you were allowed to go through the case as a poor person, you may have a right to a free copy of this transcript.¹⁵² If you have not filed for permission as a poor person, you may wish to apply for the status as a poor person at this point. For information on the procedure for applying for status as a poor person, see Part C(2)(b)(iv) above.

(xi) Final Process

If you win at trial, you will be paid the amount of the judgment, unless either you or the state appeals. The Comptroller of the State of New York will mail you a check once you submit the following:

- (1) A copy of the judgment certified by the Clerk of the Court of Claims;
- (2) A certificate from the Attorney General stating that the state has not and will not take an appeal from the judgment; and
- (3) A release signed by your attorney (if you have one) that he has given up any fee for services provided to you.¹⁵³

Note that this is only a waiver of attorney's fees in the eyes of New York State, which makes it more like a formality. In reality, the state will make out the check to both you and your attorney and will probably mail it to your attorney's office. You and your attorney will most likely have already decided what percentage of any award the attorney will keep. Typically, attorneys will take the costs of trying your case from the total award, then keep one-third of what remains. Thus, you will receive two-thirds of the damages awarded to you, minus expenses.

D. Checklist for Filing with the Court of Claims

1. Does your claim include violations of your constitutional rights?

(a) If Yes

If yes, you may bring suit in federal district court under 42 U.S.C. § 1983 or in State Supreme Court. See *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law." Remember that you may also file New York State constitutional claims with the Court of Claims. New York's state constitution protects many of the same rights as the Bill of Rights.

(b) If No

If no, then you may sue under the state statute that allows for claims such as yours; in New York, you may bring suit against the state in the Court of Claims.

Note: You must use the Department of Correctional Services' internal procedure to address issues with loss/damage to property, which allows for incarcerated person compensation before bringing your claim to the Court of Claims. See Part C(1) of this Chapter.

Note: If you wish to sue the federal government for a tort, and none of your constitutional rights have been violated, you must sue under the Federal Tort Claims Act.¹⁵⁴

Note: The Court of Claims has no jurisdiction over lawsuits involving county, town, city or village governments, agencies or employees. These governmental bodies, such as Rikers Island Jail, are all distinct from the State, and litigation against them is governed by provisions of the General Municipal law.

151. You can also find forms for the New York Court of Claims, including the form for a fee waiver, on the Court of Claims' website, NEW YORK STATE COURT OF CLAIMS, *available at* <https://www.nycourts.gov/COURTS/nyscourtofclaims/forms.shtml> (last visited Feb. 11, 2020).

152. N.Y. C.P.L.R. 1102(b) (McKinney 2012).

153. N.Y. Ct. CL. ACT § 20(6) (McKinney 2019).

154. Federal Tort Claims Act provisions are found in 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671–80 (2012).

2. If you are bringing a suit in the New York Court of Claims:

(a) File a claim or Notice of Intention

Be sure to serve a claim or Notice of Intention to File a Claim with return receipt requested to the Attorney General's Office within ninety days of the accident or injury. If you are serving a claim instead of a Notice of Intention, it must be filed within ninety days of the accident or injury at the clerk's office in Albany. You can serve the Notice of Intention even if you are not certain that you will end up filing the claim. That way, you may still have the chance to file a claim later if you decide to do so. Remember: the papers must be *received* within ninety days.

(b) File the original document and two copies of each document

For every document you include in your claim, file the original document and two copies of each with the clerk's office when you file your claim. Be sure to:

- (1) Include all required information in your claim,
- (2) Serve one copy of each document on the Attorney General,
- (3) Keep one copy of every document for your own records,
- (4) File proof of service on the Attorney General (the representative of the defendant, the State) at the clerk's office in Albany within ten days of such service, and
- (5) Include a notarized verification with your claim.

3. If you are appealing a judgment:

Serve both the Attorney General and the Clerk of the Court of Claims with a written Notice of Appeal. The Notice should include the basic reason for your appeal, and must be filed within 30 days of when you receive notice that a judgment was entered in your case.

E. Conclusion

You should think about several things before you bring a tort claim. First, you should find out what kind of tort claim you want to bring and whether you can prove that you have had an actual injury. If you feel confident that you have a strong claim, check to see whether you must go through other procedures in prison before you think about the court in which you will file a claim and the kind of award you will seek. Meet all deadlines for filing documents (especially the strict ninety-day time window for filing your claim or Notice of Intention with the Court of Claims), make sure you file the right documents in the right places, and pay the proper fees. Review the checklists provided in this Chapter and the sample documents in the Appendix when filing your tort claims. Last but not least, always hold on to photocopies of all the documents you file.

APPENDIX A

SAMPLE TORT CLAIM AND SUPPORTING PAPERS

This Appendix contains the following materials:

- A-1. Sample Notice of Intention to File a Tort Claim A-2.
Sample Verification
- A-3. Sample Assault and Battery Tort Claim A-4.
Sample Negligence Tort Claim
- A-5. Sample Affidavit in Support of Application for a Reduction of Fees
- A-6. Sample Affidavit in Support of Motion for Permission to File a Late Claim A-7.
Affidavit of Service
- A-8. Sample Demand for Bill of Particulars A-9.
Sample Claimant's Bill of Particulars A-10.
Sample Notice of Appeal

Parts A, B, and C of this Chapter tell you how to use each of these papers. Do not use these forms until you have read this entire Chapter.

These papers are examples of the types of documents that you must file in the Court of Claims for various purposes. You should use the basic form of these papers where appropriate, but you must be careful to substitute the information that applies to your case for the general information in these samples. When these sample forms give details on a particular event, make sure you substitute your own details.

There are endnotes following the sample documents, which give you instructions on how to fill in the necessary information. These are only samples. **DO NOT TEAR THESE FORMS OUT OF THE JLM.** Many of the following forms can also be found in the New York Consolidated Laws Service Vol. 43 (1987). In addition, the form for applying for a reduction of filing fees can be obtained from the Chief Clerk's Office in Albany.

A-1. Sample Notice of Intention to File a Tort Claim

State of New York Court of Claims

_____X

:

_____i

:

:

:

:

- against -

:

:

The State of New York

:

:

_____X

Notice of Intention
to File Claim**TO THE ATTORNEY GENERAL OF THE STATE OF NEW YORK:**PLEASE TAKE NOTICE, that the undersigned _____, ⁱⁱ intends to file a claim
against the State of New York, pursuant to Sections 10 and 11 of the Court of Claims Act.

The post office address of the claimant herein is: _____

_____ⁱⁱⁱ.

For the time being I am representing myself.

The time when and the place where such claim arose and the nature of my claim are as follows:

_____^{iv}._____
Claimant, pro se^vDated: _____^{vi}

A-2. Sample Verification

STATE OF NEW YORK)
)ss:
COUNTY OF _____^{vii})
_____,^{viii} being duly sworn, says:

I am the claimant above named; I have read the foregoing claim^{ix} against the State of New York and know its contents; the same is true to my knowledge, except as to the matter therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

_____^x
Claimant

Sworn to before me this _____ day
of _____, 20____.

Notary Public^{xi}

A-3. Sample Assault and Battery Tort Claim^{xii}

State of New York Court of Claims

_____X
:
_____xiii. :
:
:
:
- against - : Claim No. _____xiv
:
:
The State of New York. :
_____X

Claimant, _____, ^{xv} appearing pro se, complaining of defendant, the State of New York, alleges the following:

1. The post office address of the claimant herein is _____.^{xvi}
2. This claim is for assault and battery of the State committed by its employee _____^{xvii} for injuring the claimant while acting within the scope of his/her employment and in the discharge of his/her duties, on _____^{xviii} at _____^{xix}
3. *[On September 10, 1999, at approximately 6:00pm, Correction Officer Smith at XYZ Correctional Facility told the claimant [name] to leave the day room where claimant was mopping the floor.*
4. *Claimant responded that he had been told to remain there by another officer, whose name he could not remember.*
5. *Correction Officer Smith then told claimant to leave immediately or he would receive an infraction.*
6. *Claimant, pursuant to Correction Officer Smith's order, began to leave when, without just cause or provocation, the defendant Correction Officer Smith willfully and maliciously grabbed the mop from claimant and hit him across the chest and head with the handle, causing the claimant to sustain serious injury.*
7. *The actions of Correction Officer Smith were intentional and unwarranted.*^{xx}
8. *As a result of this assault and battery, claimant was hospitalized for two weeks and received 26 stitches on his chest and head.*
9. *As a result of this incident, claimant suffered severe physical and mental pain and anguish.*
10. *Claimant's hearing has been permanently impaired as a result of a blow on the head by Correction Officer Smith.]*

11. The particulars of claimant's damages are as follows.^{xxi}

a) Medical expenses^{xxii}

b) Lost earnings^{xxiii}

[Claimant having been a musician prior to his incarceration, claimant having anticipated returning to that profession upon his release, claimant's hearing having been impaired as a result of this incident so as to render him unable to be gainfully employed as a musician, claimant seeks \$ in damages for lost potential earnings.]

c) Pain and suffering^{xxiv}

 d) Mental anguish^{xxv}

 e) Permanent disability

 12. Attached hereto as part of the claim is a sketch of the place of the above-described incident.^{xxvi}

13. Notice of intention to file this claim was served in the Office of the Clerk of the Court of Claims, on the ____ day of _____, 20____, and in the office of the Attorney General on the ____ day of 20____.^{xxvii}

14. This claim is filed within years after the claim accrued, as required by law.^{xxviii}

15. This action is filed pursuant to Sections 10 and 11 of the Court of Claims Act.

WHEREFORE, claimant respectfully requests judgment against the defendant in the sum of _____ dollars (\$____).^{xxix}

 xxx

Claimant, pro se

Dated: _____^{xxxxi}

A-4. Sample Negligence Tort Claim^{xxxii}

State of New York Court of Claims

	X	
	:	
^{xxxiii}	:	
	:	Claim No. ^{xxxiv}
	:	
- against -	:	
	:	
	:	
The State of New York.	:	
	X	

Claimant, _____, ^{xxxv} appearing pro se, complaining of defendant, the State of New York, alleges the following:

1. The post office address of the claimant herein is _____, ^{xxxvi}
2. This claim is for negligence of the State [for failure to adequately maintain the ceiling of the day room of] ^{xxxvii} _____ ^{xxxviii} on the ____ day of _____, 20_, so as to cause serious injury to the claimant, _____, ^{xxxix}
3. It was the duty of the defendant State of New York [to maintain in a safe and proper condition the ceilings and walls in the correctional facilities of the State of New York, and more particularly the ceiling in the day room on Tier 3^{xl} at XYZ Correctional Facility.^{xli}
4. *On and prior to the 5th day of May, 2000, the defendant disregarded its duty by negligently and carelessly permitting the ceiling at Tier 3 at XYZ Correctional Facility to be improperly and dangerously maintained in an unsafe condition in that the plaster had disintegrated so that large portions had become loosened and not properly held in place.*
5. *On the 5th day of May, 2000, at approximately 1:00pm, claimant [name] was sitting in the day room of Tier 3 at XYZ Correctional Facility reading a newspaper when a large portion of plaster fell from the ceiling striking claimant on the head, shoulder, arm, and leg and causing him to sustain serious injuries.*
6. *On the 5th day of May, 2000, and for three months prior, the defendant had actual knowledge and notice of the defective and dangerous condition of the ceiling of the day room as claimant had filed a grievance requesting the repair of the ceiling with the Superintendent of XYZ Correctional Facility on February 5, 2000.^{xlii}*
7. *As a result of this incident, claimant received a broken arm, a broken leg, and injuries to the shoulder and head, including recurring headaches.*
8. *As a result of this incident, claimant suffered severe physical and mental pain and anguish.*
9. *As a result of this incident, claimant has suffered permanent disabilities including chronic headaches, lameness, and the loss of the full use of his arm.]^{xliii}*
10. Attached hereto as part of the claim is a sketch of the place of the above-described incident. ^{xliv}
11. The particulars of claimant's damages are as follows: ^{xlv}
 - a) Medical expenses ^{xlvi}

b) Lost earnings ^{xlvii}

[Claimant was a carpenter prior to his incarceration and anticipated returning to that profession upon his release. As a result of this incident, Claimant lost the full use of his arm and is now unable to be gainfully employed as a carpenter. Consequently, Claimant seeks \$

____ *in damages for lost potential earnings.*]

c) Pain and suffering^{xlvi}

 _____.

d) Mental anguish^{xli}

 _____.

e) Permanent disability

 _____.

12. Notice of intention to file this claim was served in the Office of the Clerk of the Court of Claims, on the ____ day of _____, 20____, and in the office of the Attorney General on the ____ day of 20____.¹

13. This claim is filed within years after the claim accrued, as required by law.^{li}

14. This action is filed pursuant to Sections 10 and 11 of the Court of Claims Act.

WHEREFORE, claimant respectfully requests judgment against the defendant in the sum of _____ dollars (\$____).^{lii}

 lii

Claimant, pro se

Dated: _____^{liv}

A-5. Sample Affidavit in Support of Application for a Reduction of Fees

State of New York Court of Claims

_____X

:

_____lv

:

DIN No._____,^{lvi}

:

Application Pursuant to
N.Y. C.P.L.R. 1101(f)

:

- against -

:

Claim No._____^{lvii}

:

The State of New York,

:

_____X

STATE OF NEW YORK

COUNTY OF _____^{lviii}

I, _____,^{lix} being duly sworn, hereby declare as follows:

1) I am the claimant in the above-entitled proceeding, I am a prisoner in a [federal, state, or local] correctional facility, _____,^{lx} and I submit this affidavit in support of my application for a reduction of the filing fee pursuant to C.P.L.R. 1101(f).

2) During the past six months:^{lxi}

☐ I was not incarcerated at any other correctional facility.

☐ I was incarcerated at the following correctional facilities in addition to the one in which

I _____ am _____ currently _____ incarcerated:

3) I currently receive income from the following sources, exclusive of correctional facility wages:

4) I own the following valuable property (other than miscellaneous personal property):^{lxii}

Property: _____ Value: _____

5) I have no savings, property, assets, or income other than as set forth herein.

6) I am unable to pay the filing fee necessary to prosecute this proceeding.

7) No other person able to pay the filing fee has a beneficial interest in the result of this proceeding.

8) The facts of my case are described in my claim and other papers filed with the court.

9) I have made no prior request for this relief in this case.

_____^{lxiii}

Sworn to before me this _____

day of _____, 20____.

Notary Public^{lxiv}

AUTHORIZATION^{lxv}

I, _____,^{lxvi} inmate number _____,^{lxvii} request and authorize the agency holding me in custody to send to the Clerk of the Court of Claims certified copies of my

correctional facility trust fund account statements (or the institutional equivalent) for the past six months.

In the event that my application for poor person status in the above-captioned case is granted by the Court, I further request and authorize the agency holding me in custody to deduct the filing fee (or other outstanding obligation reported by the Court pursuant to N.Y. C.P.L.R. 1101(f)(2)) from my correctional facility trust fund account (or the institutional equivalent) and to disburse those amounts as instructed by the Court of Claims. This authorization is furnished in connection with the above entitled case and shall apply to any agency into whose custody I may be transferred.

I UNDERSTAND THAT THE FULL AMOUNT OF THE OUTSTANDING OBLIGATION REFERRED TO HEREIN WILL BE PAID BY AUTOMATIC DEDUCTION FROM MY CORRECTIONAL FACILITY TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.

lxviii

lxix

A-6. Sample Affidavit in Support of Motion for Permission to File a Late Claim^{lxx}

State of New York Court of Claims^{lxxi}

_____	X	:	
		:	
_____	lxxii	:	
		:	
- against -		:	Motion For Permission To
		:	File A Late Claim
		:	
		:	Claim No. _____
		:	lxxiii
		:	
The State of New York		:	
_____	X		

TO THE CLERK OF THE COURT OF CLAIMS: TO
THE ATTORNEY GENERAL OF THE STATE OF NEW YORK:

The undersigned claimant, _____, ^{lxxiv} hereby deposes and swears under penalty of perjury that the following is true.

Claimant requests the permission of the Court to file the attached claim against the State of New York, pursuant to the provisions of Section 10(6) of the Court of Claims Act for filing late claims. In support of my motion for permission to file this claim, I respectfully submit that:

1. The incident underlying this claim occurred on _____.^{lxxv} Under the provisions of Article Two of the Civil Practice Law and Rules, I would not be barred from asserting a like claim against a citizen of the State.

2. The delay in filing this claim is excusable because: *[I am not a lawyer and I had no access to professional legal counsel or to the prison law library during the statutory period for filing because of the illness caused by the incident underlying this claim.]*^{lxxvi}

3. *The State had notice of the essential facts constituting the claim in that medical personnel in the prison dispensary were aware of my illness during my stay in the prison dispensary, and the State also had opportunity to investigate the cause of this illness, which is the subject of this claim, by simply questioning the guards and other persons who were present in the machine shop at the time of my injury.]*^{lxxvii}

4. I have no other available remedy for the injury and suffering I sustained because of the State's negligence.

lxxviii

Claimant, pro se

Dated: _____, 20____^{lxxix}

A-7. Affidavit of Service^{lxxx}

State of New York Court of Claims

_____X

:

_____lxxxi

:

:

- against -

:

Affidavit of Service

:

:

Claim No. _____lxxxii

:

The State of New York

:

_____X

STATE OF NEW YORK

COUNTY OF _____lxxxiii

_____,^{lxxxiv} being duly sworn, deposes and says:I am over the age of 18 and reside at _____^{lxxxv}.On _____^{lxxxvi} I served the within _____^{lxxxvii} upon
the Attorney General of the State of New York by certified mailNo. _____^{lxxxviii}, return receipt requested at the following address:Department of Law Capitol
Building Albany, NY 12224,said address being the address designated by the Attorney General for that purpose, by
depositing a true copy of the within in a postpaid properly addressed wrapper in an official
depository under the exclusive care and custody of the United States Postal Service within the State
of New York._____
lxxxix

Claimant, pro se

Sworn to before me this _____

day of _____, 20____.

Notary Public^{xc}

A-8. Sample Demand for Bill of Particulars^{xcii}

State of New York Court of Claims

_____	X	
	:	
_____, ^{xcii}	:	
	:	Demand for
	:	Bill of Particulars
- against -	:	
	:	Claim No. _____ ^{xciii}
	:	
The State of New York,	:	
	:	
_____	X	

SIR:

PLEASE TAKE NOTICE that you are hereby required to serve upon the defendants within 30 days after service of a copy of this notice, a verified bill of particulars, setting forth in detail:

- (a) The date and time of the occurrence.
- (b) The exact location of the occurrence.
- (c) A general statement of the acts or omissions constituting the negligence claimed.
- (d) Whether actual or constructive notice is claimed.^{xciv}
- (e) If actual notice is claimed, the name of the person served with notice.
- (f) Statement of the injuries and description of any that are claimed to be permanent.
- (g) Length of time confined to bed and to house.
- (h) Length of time incapacitated from employment, and the nature of such employment.
- (i) Total amounts claimed as special damages for (1) physicians' services and medical supplies; (2) loss of earnings, with name and address of the employer; (3) hospital expenses, with names of hospitals; (4) nurses' services.
- (j) Address and maiden name of claimant (if applicable).
- (k) List of statutes, ordinances, rules, and regulations that were allegedly violated by defendant.

Hon. _____^{xcv}
 Attorney General of the State of New York
 Department of Law
 Albany, NY 12224

By: _____^{xcvi}
 Assistant Attorney General

A-9. Sample Claimant's Bill of Particulars^{xcvii}

State of New York Court of Claims

_____X
 :
 _____, ^{xcviii} :
 :
 :
 - against - :
 :
 :
 The State of New York, :
 :
 _____X

Bill of Particulars

Claim No. _____ ^{xcix}

Claimant, pursuant to the demand of the defendant, submits the following for his/her bill of particulars:

1. The occurrence took place on [*May 5, 2000 at approximately 1:00 p.m.*].
2. The occurrence took place in the [*day room of Tier 3 at XYZ Correctional Facility*].
3. The negligence of the defendants consisted of those acts alleged in paragraphs [*4, 5, and 6*] of the claim; specifically, [*the failure to maintain in a safe and proper condition the ceilings and walls of the day room of Tier 3 at XYZ Correctional Facility*].
4. Actual notice claimed.
5. Actual notice was given by the filing of a grievance with the Superintendent of [*XYZ Correctional Facility requesting the repair of the ceiling on February 5, 2000*].
6. As a result of this incident claimant received [*a broken arm, a broken leg, injuries to the shoulder and head, including recurring headaches, and severe physical and mental pain and anguish*]. Permanent disabilities include [*chronic headaches, lameness, and the loss of full use of the arm*].
7. *Claimant was confined in the hospital for three weeks, in the prison infirmary for ten weeks and was bedridden for an additional five months.*
8. Claimant lost employment wages [*as law library clerk within the prison of \$0.75 an hour for eight months*]. Claimant's injuries also render him unable to be gainfully employed [*as a construction worker*] (his employment prior to incarceration) upon his release from prison, which will be no later than [*May, 2004, the date of release based upon the serving of the maximum sentence*].
9. Special damages for:
 - (a) physicians' services and medical supplies—not applicable;^c
 - (b) loss of earnings—not applicable except as set forth in paragraph 8;
 - (c) hospital expenses—not applicable;
 - (d) nurses' services—not applicable.
10. Claimant's address currently is: _____ ^{ci}
11. Claimant claims that defendant violated _____ ^{cii}

ciii

Claimant, pro se

Hon. _____ ^{cv}
 Attorney General of the State of New York
 Department of Law
 Albany, NY 12224

A-10. Sample Notice of Appeal^{cv i}

State of New York Court of Claims

_____	X	
	:	
_____ ^{cvii}	:	
	:	
	:	
- against -	:	Notice of Appeal
	:	
	:	Claim No. _____ ^{cvi i i i}
The State of New York	:	
	:	
_____	X	

SIRS:

PLEASE TAKE NOTICE, that the undersigned _____, ^{cix} hereby appeals to the Appellate Division of the New York Supreme Court in and for the ___ ^{cx} Department, from a judgment entered in the above entitled action in favor of the above named defendant, the State of New York, against the above named claimant _____, ^{cx i} entered in the office of the Clerk of the County of _____ ^{cxii} on the ___ day of _____, 20 _____, ^{cxiii} and this appeal is taken from each and every part of said judgment as well as the whole thereof.

Dated: _____ ^{cxiv}
 _____ ^{cxv}

 Claimant, pro se

To: _____ ^{cxvi}
 Clerk of the County of _____ ^{cxvii}

Hon. _____ ^{cxviii}
 Attorney General of the State of New York Department of
 Law
 Albany, New York 12224

Fill in the forms shown in Appendix A as follows:

-
- i. Your name.
 - ii. Your name.
 - iii. Your complete address.
 - iv. Give clear, detailed information about the basis for your complaint: who did what, where, and when. Include the date of the incident and the facility in which it occurred.
 - v. Your signature.
 - vi. The date on which you sign the notice and your address. Attach a Verification. See Appendix A2 for a sample Verification.
 - vii. The name of the county in which you signed the affidavit.
 - viii. Your name.
 - ix. Your tort claim. See Appendices A-3 and A-4 for sample tort claims.
 - x. Your signature. Sign this only in the presence of a notary public, as the next footnote explains.
 - xi. This is where the notary public notarizes the Verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another incarcerated person witness your signature and cross out "Notary Public." (But only do this if it is impossible for you to find a notary public.) If another incarcerated person is your witness, you should add the following paragraph at the bottom of the certification:

I declare that I have not been able to have this [insert claim, or Notice of Intent to file a claim, etc.] notarized according to law because [explain here your efforts to get the claim, etc. notarized]. I therefore declare under penalty of perjury that all of the statements made in this [claim, or Notice of Intent, etc.] are true of my own knowledge, and I pray leave of the Court to allow this [claim, or Notice of Intent, etc.] to be filed without notarization.

(Your signature)

xii. This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. Assault and battery are intentional torts, in other words torts that were committed purposefully and not by accident. In a claim for assault and battery, as in all claims for intentional torts, you must allege the following:

- (1) The facts of the assault and battery (the intentional tort). You should not simply say that assault and battery was committed by the defendant; rather, you should give the basic facts of what happened. However, remember that not only must you be able to prove all of the allegations set forth in your claim at trial, but that any inconsistencies between the allegations set forth in your claim and the proof you present at trial will make it more difficult for you to win at trial.
- (2) Intent. You must state that the defendant's actions were not accidental but rather were intentional.
- (3) Injury. You must indicate that you were injured as a result of the defendant's

- actions. You also must include a description of the injuries you received.
- (4) That the person who injured you was working for the State of New York and injured you while acting within the scope of his/her employment and in the discharge of his/her duties.
 - (5) That you served the claim or the Notice of Intention to File a Claim upon the Attorney General within 90 days of the incident about which you are complaining.
 - (6) That your claim is filed pursuant to §§ 10 and 11 of the Court of Claims Act.
- xiii. Your name.
 - xiv. Leave this blank. This will be filled in by the clerk of the Court of Claims.
 - xv. Your name.
 - xvi. Your prison address, including the name of your prison and the county where it is located.
 - xvii. Name of the state official who is responsible for your injury.
 - xviii. Insert the date (day, month, and year) when your injury or property damage occurred.

xviii. Insert the name of the correctional facility where your injury or property damage occurred.

xix. Describe in detail how your injury happened, including names and dates. Each point should be in its own paragraph with its own number.

xx. You should only include the following factors that apply to your case for determining damages.

xxi. If applicable, list the medical expenses you have had to pay for or that you can show a high probability of having to pay for in the future. You cannot obtain damages for any money spent on your care while in prison because the State pays those bills. However, in seeking damages, you might consider such factors as the long-term effects of your injury after your release, including whether there is a high probability that you may require hospitalization, specialist care, or the purchase and maintenance of medical or therapeutic equipment such as, in this sample claim, the cost and maintenance of a hearing aid.

xxii. List below any current or future lost earnings.

xxiii. You should be specific in detailing the location, length, and severity of the pain and suffering you have experienced.

xxiv. Examples of factors that demonstrate mental anguish are nightmares, loss of sleep, heightened anxiety, and depression.

xxv. This paragraph is optional.

xxvi. Include the day, the month, and the year when you filed the Notice of Intention with the Clerk for the Court of Claims and the Attorney General, respectively. Do not include this paragraph if you did not serve a Notice of Intention.

xxvii. Paragraphs 13 and 14 will depend upon whether you served a Notice of Intention to File Claim. N.Y. Ct. Cl. Act § 10 (McKinney Supp. 2012). If you did not serve a Notice of Intention, do not include paragraph 13. Paragraph 14 should now read: "13. This claim is filed within ninety days after the claim accrued as required by law." If you are filing a late motion, add: "I am filing this motion pursuant to the late motion that the Court of Claims granted on [date]."

xxviii. Insert total amount of money you are claiming as damages.

xxix. Your signature.

xxx. The date on which you sign the petition. Also write your mailing address in this space and attach at the end of your claim a Verification exactly like the one illustrated at Appendix A-2.

xxxi. This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. An action for personal injury due to negligence, unlike assault and battery, does not require that you plead or prove intent. However, you must show that your injuries were foreseeable—that your injuries were a likely result of the defendant's action or failure to act. You must also show that the negligence of the State employee's actions or failure to act when under a duty to do so was the major cause of the accident. Also, where appropriate, you should plead that the defendant knew or should have known of the defective condition causing the accident.

xxxii. Your name.

xxxiii. Insert claim number.

xxxiv. Your name.

xxxv. Your prison address, including the name of your prison and the county where it is located.

xxxvi. Insert the type of the negligence tort you are claiming. For example, you may claim failure to protect, negligent destruction of property, or inadequate medical care. These claims may be stated as follows:

Sample Failure to Protect Claim:

This claim is for negligence of the State for the failure of its employee [insert name of the state/prison official responsible for not protecting you] to protect claimant from the reasonably foreseeable assault by [insert the incarcerated person's name who attacked you] while acting within the scope of his/her employment and in the discharge of his/her duties, on [insert the date when the attack occurred], at [insert the name of the facility where the attack occurred], so as to cause serious injury to the claimant, [insert your name].

Sample Destruction of Property Claim:

This claim is for negligence of the State committed by its employee [insert the name of the state or prison official responsible for the damage to your property, if known] for the destruction of claimant's property while acting within the scope of his/her employment and in the discharge of his/her duties, on [insert the date when the destruction of your property occurred, if known], at [insert the name of the facility where the destruction of your property occurred].

Sample Inadequate Medical Care Claim:

This claim is for negligence of the State committed by its employee for failure of its employee [insert name of the state/prison official responsible for not treating you] to provide adequate medical care following accepted medical standards on [insert the date when you requested medical care that you did not receive or the date when you received inappropriate medical care] while acting within the scope of his/her employment and in the discharge of his/her duties, on [insert the date when the denial of medical care occurred], at [insert the name of the facility where the denial of medical care occurred], so as to cause serious injury to the claimant, [insert your name].

xxxvii. Insert the name of the facility where the injury occurred.

xxxviii. Insert your name.

xl. Insert the duty of reasonable care that the State has violated. Examples of duty of care include: medical care following accepted professional standards, protection from reasonably foreseeable attacks by corrections officers or other incarcerated people, and other dangers that a reasonable official knew or should have known about. If the duty that an official owes you is defined by a statute or regulation, you may be able to make a claim of negligence per se.

xli. Insert the name of the facility where your injury occurred.

xl.ii. In the preceding paragraphs you should describe in detail how your injury happened, including names and dates. Each point should be in its own paragraph with its own number.

xl.iii. In the preceding paragraphs you should describe your injury in detail. Each point should be in its own paragraph with its own number.

xl.iv. This paragraph is optional.

xl.v. You should only include the following factors that apply to your case for determining damages.

xl.vi. If applicable, list below the medical expenses you have had to pay for or those you can show a high probability of having to pay for in the future. You cannot obtain damages for the money spent on your care while you were incarcerated, as the State has assumed this cost. However, in seeking damages, you might consider such factors as the long-term effects of your injury after your release, including whether there is a high probability that you may require hospitalization, specialist care, or the purchase and maintenance of therapeutic devices.

xl.vii. List below any current or future lost earnings.

xl.viii. You should be specific in detailing the location, length, and severity of the pain and suffering you have experienced.

xl.ix. Examples of factors that demonstrate mental anguish are nightmares, loss of sleep, heightened anxiety, and depression.

l. Include the day, the month, and the year when you filed the Notice of Intention with the Clerk for the Court of Claims and the Attorney General, respectively. Do not include this paragraph if you did not serve a Notice of Intention.

li. Paragraphs 12 and 13 will depend upon whether you served a Notice of Intention to File Claim.

N.Y. CT. CL. ACT § 10 (McKinney Supp. 2012). If you did not serve a Notice of Intention, do not include paragraph 12. Paragraph 13 should now read: "12. This claim is filed within ninety days after the claim accrued as required by law." If you are filing a late motion, add: "I am filing this motion pursuant to the late motion which the Court of Claims granted on (date)."

lii. Insert total amount of money you are claiming as damages. liii. Your signature.

liv. The date on which you sign the petition. Also write your mailing address in this space and attach a Verification at the end of your claim, illustrated at Appendix A-2.

lv. Your name.

lvi. Your inmate number.

lvii. Insert claim number.

lviii. The name of the county in which you signed the affidavit. lix. Your name.

lx. Name and address of your correctional facility. lxi. Check one of the boxes below.

lxii. If you do not own any property of value, write "NONE." Otherwise, list each item of property and how much it is worth in the spaces below.

lxiii. Your signature. [Note: Do not sign this until you are in front of a notary public.]

lxiv. This is where the notary public notarizes the verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another incarcerated person witness your signature and cross out "Notary Public." (Use this technique only as a last resort.) If another incarcerated person is your witness, you should add the following paragraph at the bottom of the certification:

I declare that I have not been able to have this application notarized according to law because [explain here your efforts to get the claim, etc. notarized]. I therefore declare under penalty of perjury that all of the statements made in this application are true of my own knowledge, and I pray leave of the Court to allow this application to be filed without notarization.

(Your signature)

lxv. By signing this section, you give permission for your facility to send the Court copies of your trust fund account statement. You also authorize the facility to withdraw the filing fee from your account and to send it to the Court. The entire filing fee will be withdrawn automatically from your account even if your case is dismissed.

lxvi. Your name.

lxvii. Your inmate number.

lxviii. Your signature.

lxix. Your name.

lxx. When submitting this form, you will also need to include a Notice of Motion form. See N.Y. Ct. Rules § 206.8, which includes a copy of the form.

lxxi. When filing this motion you must attach the proposed claim itself so the court knows what the motion refers to. The court will not consider this copy of your claim as being filed, however. After you receive permission to file a late claim, you must send your claim to the court along with the order granting you permission to file a late claim.

lxxii. Your name.

lxxiii. Insert claim number.

-
- lxxiv. Your name.
- lxxv. The date on which the actions upon which you are basing your claim occurred.
- lxxvi. These are only sample reasons; do not copy them unless they apply to you. The reasons you give here for your failure to file your claim in a timely manner must be persuasive. See Part C(1)(b) of the Chapter for a list of factors that the court considers in ruling on your application for permission to file a late claim.
- lxxvii. These are examples of the types of justification that you must offer to the court to persuade it to grant your application; do not copy them unless they apply to you.
- lxxviii. Your signature.
- lxxix. The date and your address.
- lxxx. You must complete this form and submit it to the court within 10 days after serving your Notice of Intention to File a Tort Claim or Claim on the Attorney General. N.Y. COMP. CODES R. & REGS. tit. 22, § 206.5. This form is adapted from “Using the Court of Claims: A Guide for New York State Prisoners,” a manual by the Prisoners’ Rights Project of The Legal Aid Society.
- lxxxi. Your name.
- lxxxii. Insert claim number.
- lxxxiii. Insert the name of the county in which you signed the affidavit.
- lxxxiv. Your name.
- lxxxv. Insert the name and address of the correctional facility where you are incarcerated.
- lxxxvi. Insert the date on which you mailed the Notice of Intention or Claim to the Attorney General.
- lxxxvii. Insert either “Notice of Intention to file a Claim” if you filed a Notice of Intention, or “Claim” if you filed a Claim.
- lxxxviii. Include the tracking number from the green “return receipt requested” card.
- lxxxix. Your signature. [Note: Do not sign until you are in front of the notary public.]
- xc. This is where the notary public notarizes the verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another incarcerated person witness your signature and delete “Notary Public.” (Use this technique only as a last resort.) If another incarcerated person is your witness, you should add the following paragraph at the bottom of the certification:

I declare that I have not been able to have this affidavit of service notarized according to law because [explain here your efforts to get the claim, etc. notarized]. I therefore declare under penalty of perjury that all of the statements made in this affidavit of service are true of my own knowledge, and I pray leave of the Court to allow this affidavit of service to be filed without notarization.

(Your signature)

xc. If you do not answer or object to a demand for a Bill of Particulars within 30 days after receiving it, the Court may stop you (preclude you) from introducing evidence at trial of the facts asked for in the demand. See N.Y. C.P.L.R. 3042, 3126 (McKinney Supp. 2004). This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. This is a sample of a demand that the State may serve on you. Appendix A-9 is a sample response.

xcii. Your name.

xciii. Insert claim number.

xciv. This means whether you claim the defendant actually knew of the condition that caused your injury ("actual notice") or just that they should have known ("constructive notice").

xcv. The name of the New York State Attorney General.

xcvi. The name of the New York State Assistant Attorney General.

xcvii. This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. This is not a form you will prepare, but is a form that can be served on you by the State. This response to the Request for a Bill of Particulars (see Appendix A-9) is loosely based upon the facts set forth in the Sample Tort Claim in Appendix A4 personal injury due to negligence. Please refer to this Claim to see how closely the Bill of Particulars follows it.

xcviii. Your name.

xcix. Insert claim number.

c. This is because DOCS typically pays for medical expenses (unless you request, and pay for, a private doctor).

ci. Your address.

cii. Insert statutes, ordinances, rules, or regulations the state officials violated.

ciii. Your signature.

civ. Your address.

cv. The name of the New York State Attorney General.

cvi. If you would like to appeal the decision of the Court of Claims to the Appellate Division of the New York Supreme Court, you must file a Notice of Appeal within 30 days after the judgment. See N.Y. CT. CL. ACT § 24 (McKinney 1989). This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society.

cvii. Your name.

cviii. Insert the claim number.

cix. Your name.

cx. The Appellate Division is divided into four departments. Each department has a fixed geographic jurisdiction hearing cases from specific counties. You can determine which department your appeal should be taken to by checking the list of counties served by each Appellate Division, which can be found in Appendix II of the JLM.

cxi. Your name.

cxii. The county in which your case was heard.

- cxiii. Insert the date the judgment was filed in the Clerk's office.
- cxiv. The date on which you sign the notice.
- cxv. Your signature.
- cxvi. Insert the name of the Clerk (if known) in whose office the judgment was filed.
- cxvii. The county in which your case was heard.
- cxviii. The name of the New York State Attorney General.

CHAPTER 18

YOUR RIGHTS AT PRISON DISCIPLINARY PROCEEDINGS*

A. Introduction

This Chapter is meant to help incarcerated people who are facing disciplinary action for breaking prison rules. It talks about what disciplinary proceedings must include under federal law, especially New York State disciplinary proceedings. If you are in prison outside New York, you should look up the rules and regulations for disciplinary proceedings in your state before you get ready for your defense.¹

This Chapter starts with your constitutional rights during prison disciplinary proceedings. Part B explains “due process of law” in disciplinary proceedings. Part C explains due process in prisons by talking about the U.S. Supreme Court case *Sandin v. Conner*. Part D explains your rights in disciplinary proceedings. Part E explains disciplinary proceedings in New York State and what prison officials must do before putting you in disciplinary segregation. Finally, Part F explains what officials in New York State must do before putting you in administrative segregation, as well as what federal prisons must do.

Prison officials have power to punish incarcerated people who break the law or who break prison rules and regulations. They also have power to put incarcerated people in administrative segregation if they threaten prison safety and security. Prison officials have a lot of discretion in disciplinary and administrative matters, and courts will usually agree with the officials’ decisions. However, there are limits to what they can do. To protect you from unfair abuses of power, federal and state laws make officials follow procedural requirements (guidelines) when they punish you or put you in administrative segregation. If officials do not follow these guidelines, and you suffer “atypical and significant hardship” because of that (more on this below), you can claim that your rights under the Due Process Clause of the U.S. Constitution have been violated.

This Chapter describes rights related to how you are confined. To protect these rights, you must first use your institution’s administrative grievance procedure. Chapter 15 of the *JLM* has more on inmate grievance procedures. If using the prisoner grievance procedures did not work, you can bring an action under 42 U.S.C. § 1983 (in some cases) or file a tort action in state court. If you are in New York, you can bring a tort action in the Court of Claims, or file an Article 78 petition in state court. You can find more information on these types of cases in *JLM* Chapter 5, “Choosing a Court and Lawsuit,” *JLM* Chapter 14, “The Prison Litigation Reform Act,” *JLM* Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law,” *JLM* Chapter 17, “The State’s Duty to Protect You and Your Property: Tort Actions,” and *JLM* Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules.” If you decide to bring a claim in federal court, read Chapter 14 of the *JLM* on the Prison Litigation Reform Act (PLRA). If you do not follow PLRA requirements, you could lose your good-time credit and you would have to pay the full filing fee for future claims in federal court.

B. Definition of “Due Process”

The Constitution’s Fifth and Fourteenth Amendments keep the government from taking your life, liberty, or property without “due process of law.” The Fifth Amendment limits the power of the federal government, which includes federal prison officials. The Fourteenth Amendment limits the power of state prison officials the same way. Both federal and state courts have authority to review the actions

* This Chapter was written by Miranda Berge based in part on previous versions by Rachel Wilgoren, Marjorie A. Adams, Jennifer L. Hurt, Ivan A. Sacks, and James A. Skarzynski. Special thanks to Kenneth Stephens of The Legal Aid Society, Prisoners’ Rights Project for his assistance in the revision of this Chapter.

1. See Chapter 2 of the *JLM*, “Introduction to Legal Research,” for information on how to conduct legal research in prison.

of prison officials to make sure they followed due process requirements.² Therefore, the Due Process Clause of the Fourteenth Amendment keeps the government from treating you unfairly. It gives you two kinds of rights: substantive and procedural. Substantive rights include basic rights to “life, liberty, and property,” and the specific guarantees in the Bill of Rights, like freedom of speech and religion. Substantive due process means the government must treat people with “fundamental fairness.”³ The government cannot interfere with these rights unless it is absolutely necessary for a more important public need.

If the government restricts your substantive rights, procedural due process means they must follow certain procedures (rules). Procedural rights include the right to know about a hearing before it happens (advance notice) and the opportunity to be heard. The government must follow different rules in different cases. Courts decide which rules to follow by comparing your interests to the government’s interests.

C. Due Process in Prison

Due process means something different in prison than outside prison. The Constitution only gives you a right to due process when the government tries to take away your “life, liberty, or property.” So a court must decide that you have a “liberty interest” at stake before it considers the required “due process” in your disciplinary hearing.⁴ In other words, Fourteenth Amendment due process requirements only apply when prison officials try to take away this recognized interest.

The Supreme Court’s decision in *Sandin v. Conner*⁵ changed the law. During the 1960s and ‘70s, the Supreme Court had extended constitutional rights to incarcerated people without limiting them. Sadly, the *Conner* decision changed things by limiting when incarcerated people may petition the courts for these constitutional rights. *Sandin v. Conner* is important because it sets the minimum standard that all other federal and state courts must follow. Setting the minimum standard means that states can give incarcerated people more rights than those in *Sandin v. Conner*, but they cannot give fewer.

In *Sandin v. Conner*, an incarcerated person in Hawaii had a disciplinary proceeding because he used “abusive or obscene language” when trying to stop prison employees from strip searching him.⁶ The prison disciplinary committee did not let the incarcerated person present witnesses at the hearing, stating that all witnesses were unavailable.⁷ They sentenced him to a thirty-day disciplinary segregation in the Special Holding Unit (SHU)⁸ and he sought administrative review of the decision. Administrators later dropped the charge, deciding there was no proof.⁹ In the meantime, however, he filed a Section 1983 claim, arguing that his civil rights had been violated.

According to the Supreme Court, even if you have a major, negative change in your confinement, this does not necessarily hurt a liberty interest protected by due process rights (rights dealing with

2. Article III of the Constitution grants federal courts jurisdiction to hear cases “arising under this Constitution.” State courts have “concurrent jurisdiction,” which means that they are as able as federal courts to decide cases involving the U.S. Constitution. U.S. CONST. art. III.

3. *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791, 794 (1935) (“[I]n safeguarding the liberty of the citizen against deprivation through the action of the state, [due process] embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.”).

4. This “liberty interest” refers to the liberty described in the 5th and 14th Amendments. Individuals cannot be deprived of liberty (including being imprisoned) without due process of law.

5. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that due process liberty interests created by prison regulations will generally be limited to freedom from restraints that impose an atypical and significant hardship on the incarcerated person in relation to the ordinary incidents of prison life).

6. *Sandin v. Conner*, 515 U.S. 472, 475, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 424 (1995).

7. *Sandin v. Conner*, 515 U.S. 472, 475, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 424 (1995).

8. Please note that the SHU acronym is used throughout this chapter to describe different names for solitary confinement units.

9. *Sandin v. Conner*, 515 U.S. 472, 476, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 425 (1995).

fairness of procedures).¹⁰ If the new conditions are “within the normal limits or range of custody which the conviction has authorized the State to impose,” the Due Process Clause will not apply.¹¹ However, you could still use the Due Process Clause in certain circumstances. The Supreme Court has held that if states try to avoid a certain type of confinement, that can create a protected liberty interest. For that to work in your state, your state must have made a law or regulation that makes prison officials follow certain procedures before changing your prison conditions.¹²

Even then, laws that avoid types of confinement create a protected liberty interest. In *Conner*, the Supreme Court held that such laws and regulations only invoke the Due Process Clause when the new conditions impose “atypical [uncommon] and significant [major] hardship” compared to normal life in prison.¹³ To determine this, a court will generally compare ordinary prison conditions with a fact-based analysis of the length and extent of your hardship. In *Conner*, the Supreme Court decided that, “[b]ased on a comparison between inmates inside and outside disciplinary segregation, the state’s actions in placing him there for thirty days did not work a major disruption in his environment.”¹⁴ The court concluded that his thirty-day disciplinary segregation was not the “atypical, significant deprivation [(hardship)]” where a state may have created a liberty interest.¹⁵ Because he did not have a protected liberty interest, the prison officials leading the disciplinary proceeding did not have to follow the constitutional due process requirements or state regulations about disciplinary procedures.

In sum, if you wish to make a claim that your due process rights were violated by a problem with the procedures that confined you in the SHU, you must show that:

- (1) The confinement was an “atypical and significant hardship” compared with the conditions experienced in the general population; and
- (2) The state, through language in a statute, created a protected liberty interest by avoiding that form of confinement.

Unfortunately, the Court’s opinion in *Conner* sets a very high bar for showing that the prison’s procedures actually violated your right to due process, and you can usually only make this claim after confinement. However, even if you cannot prove a due process violation with the *Conner* standard, there are other options. You may still use other protections against state actions that unfairly make your confinement worse. You may either:

- (1) Use internal prison grievance procedures¹⁶ and state judicial review (review by state courts under state laws or state constitutional protections) where available; or
- (2) Make a claim under the Eighth Amendment of the Constitution, which protects against cruel and unusual punishment.¹⁷

Since the Supreme Court decided *Conner*, different courts around the country have applied the *Conner* test differently when deciding what makes an “atypical and significant hardship” protected by state regulation. This Chapter looks at when courts (especially in New York) have said regulations are

10. *Meachum v. Fano*, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (holding that the transfer of an incarcerated person to another prison with harsher conditions does not necessarily violate a liberty interest protected by the Due Process Clause of the 14th Amendment).

11. *Meachum v. Fano*, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976); *see also Montanye v. Haymes*, 427 U.S. 236, 242–243, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466, 471–472 (1976) (holding that no Due Process Clause liberty interest is infringed when an incarcerated person is transferred from one prison to another within the State, unless there is some right or expectation that can be derived from state law that an incarcerated person will not be transferred except for misbehavior or upon the occurrence of other “specified events”).

12. *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–430 (1995) (citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)).

13. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

14. *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995).

15. *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995).

16. See Chapter 15 of the *JLM*, “Inmate Grievance Procedures,” for more information.

17. See Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law,” for more information.

mandatory (and therefore create a liberty interest) and how they applied *Conner* to disciplinary and administrative segregation, transfers, good-time credits, and work release programs.

The rest of this Part will look at which prison practices make an “atypical and significant hardship.” Remember that this only matters if the state has a statute creating a protected liberty interest.

1. Disciplinary and Administrative Segregation

Prison officials in New York may put an incarcerated person in a Segregated Housing/Holding Unit (SHU)¹⁸ for a set period of time if they find that the incarcerated person broke a rule.¹⁹ Before the superintendent’s hearing and during investigation, the incarcerated person may be placed in administrative segregation.²⁰ Prison officials may also hold an incarcerated person in administrative segregation in a SHU if the individual threatens the safety or security of the prison.²¹ Disciplinary segregation, or segregation for the purpose of punishment, must be based on a finding—after a formal hearing—that the individual violated the New York State Department of Corrections and Community Supervision (DOCCS) Standards of Prisoner Behaviors.²² However, administrative segregation is based on a decision after an informal hearing that a incarcerated person’s presence in the general prison population threatens prison safety and security. Disciplinary segregation takes place for a set time period. In contrast, administrative segregation is not considered punishment and can continue until the superintendent finds that the threat is over.²³ For more on the procedural requirements for disciplinary and administrative segregation in New York prisons, see Parts E and F of this Chapter.

Courts in New York State and the Second Circuit look at both disciplinary and administrative detention proceedings under the *Conner* test above. The court reviews complaints against both kinds of segregation to decide if:

- (1) There are procedures explicitly required of prison officials, and
- (2) An “atypical and significant hardship” exists.²⁴

This Section will first help you figure out if the procedures that put you in disciplinary or administrative detention met requirement (1). Then, it will look at how courts judge an incarcerated person’s confinement in the SHU under requirement (2). This Section focuses specifically on the law for courts in the Second Circuit (federal courts in New York, Vermont, and Connecticut). Analysis by courts in other jurisdictions may be different. Unfortunately, some courts outside of the Second Circuit have held that no liberty interests may arise from administrative detention.²⁵ If you live

18. Subsequent uses of “SHU” will refer to how it is used in New York.

19. See N.Y. COMP. CODES R. & REGS. tit. 7, §§ 254.7(a)(1)(v), 301.2(a) (2019).

20. See N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(d)(2) or 301.4(d)(3) (2019).

21. See N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(b) (2019).

22. See N.Y. COMP. CODES R. & REGS. tit. 7, §§ 254.7(a)(1), 301.2(a) (2019).

23. See N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(e) (2019).

24. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 210, 125 S. Ct. 2284, 2387 (2005) (quoting *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995)) (“Such an interest may arise from state policies or regulations, subject to the important limitations set forth in *Sandin*, which requires a determination whether [Ohio State Penitentiary] assignment ‘imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.’”); see also *Palmer v. Richards*, 364 F.3d 60, 66 (2d Cir. 2004) (holding that the conditions of the incarcerated person’s confinement in the SHU, coupled with the duration of time in the SHU, might constitute “atypical and significant hardship”).

25. See *Crowder v. True*, 74 F.3d 812, 815 (7th Cir. 1996) (holding administrative detention does not give rise to a protected liberty interest); *Moore v. Ham*, No. 92-3305, 1993 U.S. App. LEXIS 826, at *5 (10th Cir. Jan. 13, 1993) (*unpublished*) (quoting *Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990)) (“If ‘segregation is non-punitive in nature and is done for administrative or supervisory reasons, the inmate has no due process rights prior to administrative confinement unless prison regulations provide him with a liberty interest.”); *Awalt v. Whalen*, 809 F. Supp. 414, 416 (E.D. Va. 1992) (holding regulations providing for staff procedures and time frames, but not mandating release upon a hearing and specific findings, do not create a liberty interest in release from administrative detention). But see *Muhammad v. Carlson*, 845 F.2d 175, 177 (8th Cir. 1988) (explaining that a

outside the area of the Second Circuit (the Second Circuit includes New York, Vermont, and Connecticut), you should look up how courts in your area interpret your prison's rules and if they consider administrative detention a protected liberty interest. See Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on how to look up your area's law.

(a) The State-Created Liberty Interest Requirement

Even if your segregation was "atypical and significant," courts will not find a due process violation if you cannot show you had a constitutional or state-created liberty interest in avoiding the segregation. The Second Circuit and New York district courts hold that New York state regulations for disciplinary confinement²⁶ and administrative segregation²⁷ give incarcerated people a liberty interest that protects them from certain prison conditions and that the Due Process Clause of the U.S. Constitution protects these rights. The Second Circuit finds that an incarcerated person only has a federal due process claim if, upon careful analysis, specific state statutes and regulations create protected liberty interests. Where these interests have been created, the prison must also regularly uphold these protected interests.²⁸ It is important to remember that courts outside of New York State do not always find that state statutes and regulations create a liberty interest that protects incarcerated people from disciplinary and administrative segregation.

(b) The "Atypical and Significant Hardship" Requirement

In determining whether your confinement in the SHU involves a protected liberty interest, a court will analyze disciplinary segregation the same way it analyzes administrative segregation. The court looks at whether the facts of your confinement in a segregated facility reach an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."²⁹ A court will look at the

liberty interest may be created by prison regulations if those regulations impose substantive criteria limiting or guiding prison officials' discretion); *Maclean v. Secor*, 876 F. Supp. 695, 701–702 (E.D. Pa. 1995) (holding regulations limiting prison officials' discretion in administrative detention decisions created a liberty interest).

26. See, e.g., *Nicholas v. Tucker*, No. 95 Civ. 9705, 2000 U.S. Dist. LEXIS 749, at *19 (S.D.N.Y. Jan. 27, 2000) (*unpublished*) (finding New York State regulations grant incarcerated people a protected liberty interest in freedom from disciplinary confinement); *Wright v. Miller*, 973 F. Supp. 390, 395 (S.D.N.Y. 1997) (finding a state-created liberty interest in being free from disciplinary confinement); *Gonzalez v. Coughlin*, 969 F. Supp. 256, 257–258 (S.D.N.Y. 1997) (holding state regulations on disciplinary segregation create a liberty interest in freedom from disciplinary confinement).

27. See, e.g., *Wright v. Smith*, 21 F. 3d 496, 500 (2d Cir. 1994) (holding that New York State regulation providing for mandatory reevaluation of administration segregation after an incarcerated person has been in the SHU for 14 days created a liberty interest). *Gonzalez v. Coughlin*, 969 F. Supp. 256, 257–258 (S.D.N.Y. 1997) (concluding that New York State rules regarding administrative confinement create a liberty interest).

28. See *Houston v. Cotter*, 7 F. Supp. 3d 283, 295 (E.D.N.Y. 2014) (noting that "[s]tate statutes and regulations also confer liberty interests on prisoners"); *Sealey v. Giltner*, 197 F.3d 578, 583–584 (2d Cir. 1999) (explaining that "New York has established substantial factual predicates for many instances of administrative confinement" which create a protected liberty interest); *Welch v. Bartlett*, 196 F.3d 389, 392 (2d Cir. 1999) (stating that an incarcerated person who brings a due process claim premised upon a state law liberty interest, has the burden to establish that the law does, in fact, create such a liberty interest). The Second Circuit's method of analysis is based on the Supreme Court's opinion in *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), which held that because of Pennsylvania statutes setting forth procedures for placing incarcerated people in administrative confinement, incarcerated people had a liberty interest in remaining in the general prison population. Later, however, the Supreme Court explicitly rejected the *Helms* analysis as the primary means of determining the existence of a due process claim, finding that state regulations for administrative or disciplinary segregation did not themselves create a liberty interest—rather, incarcerated people needed to additionally show "atypical and significant hardship" arising from the segregation. *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2299–2300, 132 L. Ed. 2d 418, 430 (1995). Despite the Supreme Court's ruling in *Sandin*, the Second Circuit held that, in combination with *Sandin's* "atypical and significant hardship" test, the procedure established by the Second Circuit in *Sealey* and *Welch* is still an appropriate way to determine whether a legitimate due process claim is present.

29. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

facts of your confinement in its analysis.³⁰ There is no clear way to decide if a given SHU confinement is an “atypical and significant hardship,” but courts will look at two main things in their analysis: (1) the length of your confinement and (2) the difference between your segregation conditions and normal prison conditions.³¹ The court will look at both factors “since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical.”³²

(i) Actual Length of Your Confinement

If you are filing a claim within the Second Circuit, the length of your confinement is the actual time that you were detained in the SHU. A prison official may only be responsible for violating your due process rights during this period. Therefore, when you file your claim, you will state how long you actually spent in detention (not how long you could have spent).³³ You should count the total number of days that you spent in the SHU before, during, and after the disciplinary or administrative hearing.³⁴ If they move you from one SHU directly to another SHU in a different prison facility, count the total number of days that you were detained in both facilities. Your transfer does not restart the duration of confinement for the court.³⁵

Courts have not strictly defined specifically what makes an “atypical and significant” period of SHU confinement, but the Second Circuit has indicated general rules for such claims. The Second Circuit recently suggested that SHU confinement of approximately 305 days or more probably involves a protected liberty interest.³⁶ Periods of less than 305 days but more than 101 days may involve a protected liberty interest.³⁷ Whether your confinement involves a protected liberty interest heavily

30. *Miller v. Selsky*, 111 F.3d 7, 9 (2d Cir. 1997) (holding that *Conner* did not create a blanket rule and that “courts must examine the circumstances of a confinement to determine whether that confinement affected a liberty interest”).

31. *See Ruggiero v. Prack*, 168 F. Supp. 3d 495, 519 (W.D.N.Y. 2016) (listing factors the court may consider to determine atypical and significant hardship as: “(1) the duration of the deprivation; (2) the extent of the deprivation; (3) the availability of other out of cell activities; (4) the opportunity for in-cell exercise; and (5) the justification for the deprivation”); *Davis v. Barrett*, 576 F.3d 129, 133 (2d Cir. 2009) (citing *Palmer v. Richards*, 364 F.3d 60, 64 (2d Cir. 2004)) (“Factors relevant to determining whether the plaintiff endured an ‘atypical and significant hardship’ include ‘the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions’ and ‘the duration of the disciplinary segregation imposed compared to discretionary confinement.’”).

32. *See Samuels v. Fischer*, 168 F. Supp. 3d 625, 642 (S.D.N.Y. 2016) (citing *Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999)) (holding that a sentence of 30 months in SHU prevents a court from granting a motion to dismiss for failure to state a due process claim).

33. *See Paul v. Selsky*, No. 02-CV-6347-CJS, 2012 U.S. Dist. LEXIS 90939, at *18 (W.D.N.Y. Jun. 29, 2012) (*unpublished*) (“In assessing atypicality under *Conner*, a court must look to the ‘actual punishment’ imposed.” (citing *Scott v. Albury*, 156 F.3d 283, 287 (2d Cir. 1998))).

34. *See Nieves v. Prack*, 172 F. Supp. 3d 647, 651–652 (W.D.N.Y. 2016) (discussing ranges of days in SHU that could implicate due process rights and holding that 90–101 days can be within the range of typical SHU confinement).

35. *See Fludd v. Fischer*, 568 F. App’x 70, 73 (2d Cir. 2014) (*unpublished*) (noting that, “[f]or the purpose of establishing a liberty interest, a district court should consider the entire ‘sustained period of confinement.’” (citing *Giano v. Selsky*, 238 F.3d 223, 226 (2d Cir. 2001)); *see also Sims v. Artuz*, 230 F.3d 14, 23–24 (2d Cir. 2000) (suggesting that “some or all” of a series of separate SHU sentences “should be aggregated for purposes of the *Conner* inquiry” when they are imposed within a period of days or hours of each other and add up to a sustained period of confinement)).

36. *See Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000) (holding that confinement in a SHU for 305 days under “normal conditions” is a departure from standard prison life, which warrants due process protection under *Conner*).

37. *See Gonzalez v. Hasty*, 802 F.3d 112, 223 (2d Cir. 2015) (declaring that “[a] period of confinement under typical SHU conditions lasting longer than 305 days . . . triggers a protected liberty interest, whereas a period of confinement lasting between 101 and 305 days may trigger a protected liberty interest, depending on the specific conditions of confinement.”); *see also Palmer v. Richards*, 364 F.3d 60, 64–65 (2d Cir. 2004) (“Instead, our cases

depends on the extent of your deprivation (discussed more in Part C(1)(b)(ii) below).³⁸ Confinement for less than 101 days probably does not involve a *Conner* liberty interest unless you experienced unusually severe conditions in the SHU.³⁹ Finally, confinement under typical SHU conditions for less than thirty days will probably not result in a successful due process claim.⁴⁰

In addition to weighing the length of your confinement and the extent of your deprivation, courts also look at how often incarcerated people endure similar periods of non-disciplinary SHU confinement to decide if a particular period of segregation is “atypical.” In other words, courts may compare your period of confinement with “periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration” for non-disciplinary reasons.⁴¹

establish the following guidelines for use by district courts in determining whether a prisoner's liberty interest was infringed. Where the plaintiff was confined for an intermediate duration—between 101 and 305 days—‘development of a detailed record’ of the conditions of the confinement relative to ordinary prison conditions is required.” (citing *Colon v. Howard*, 215 F.3d 227, 232 (2d Cir. 2000)).

38. *See Davis v. Barrett*, 576 F.3d 129, 133 (2d Cir. 2009) (explaining that when courts determine the extent of deprivation, they will look at “the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions’ and ‘the duration of the disciplinary segregation imposed compared to discretionary confinement.’” (citing *Palmer v. Richards*, 364 F.3d 60, 64 (2d Cir. 2004)); *see also Houston v. Cotter*, 7 F. Supp. 3d 283, 296 (E.D.N.Y. 2014) (“When an inmate is placed in conditions more restrictive than those in the general prison population, whether through protective segregation like suicide watch or discretionary administrative segregation, his liberty is affected only if the more restrictive conditions are particularly harsh compared to ordinary prison life or if he remains subject to those conditions for a significantly long time.”) (citing *Earl v. Racine Cnty. Jail*, 718 F.3d 689, 691 (7th Cir. 2013)); *Beckford v. Portuondo*, 151 F. Supp. 2d 204, 219 (N.D.N.Y. 2001) (holding plaintiff's confinement, which lasted less than a week, was not sufficiently atypical to implicate a protected liberty interest, even though it included restrictions on his diet and water and placement behind a cell shield); *Jones v. Kelly*, 937 F. Supp. 200, 202–203 (W.D.N.Y. 1996) (concluding that 191 days in segregated confinement did not impose an atypical and significant hardship, but that “[t]he length of SHU confinement is not necessarily dispositive of whether a liberty interest is implicated.”); *Carter v. Carriero*, 905 F. Supp. 99, 104 (W.D.N.Y. 1995) (finding that 270 days in a SHU did not violate a protected liberty interest, because the nature of the deprivation did not impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”).

39. *See Ortiz v. McBride*, 380 F.3d 649, 654 (2d Cir. 2009) (“under abnormal or unusual SHU conditions, periods of confinement of less than 101 days may implicate a liberty interest.”); *see also Sealey v. Giltner*, 197 F.3d 578, 589–590 (2d Cir. 1999) (holding that 101 days of confinement under standard SHU conditions did not constitute an “atypical and significant” deprivation under *Sandin*). *But see Holmes v. Grant*, 03 Civ. 3426 (RJH) (RLE), 2006 U.S. Dist. LEXIS 15743, at *59 (S.D.N.Y. Mar. 31, 2006) (*unpublished*) (recognizing that the facility's 24-hour solitary confinement policy during a 13-day stay in SHU could be considered an atypical deprivation); *Colon v. Howard*, 215 F.3d 227, 232 n.5 (2d Cir. 2000) (noting that confinement for periods of 101 days or less “could be shown on a record more fully developed than the one in *Sealey* to constitute an atypical and severe hardship under *Sandin*.”); *Welch v. Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999) (holding 90 days of confinement in a SHU may be “atypical and significant” if the deprivation that the prison suffered “was more serious than typically endured by prisoners as an ordinary incident of prison life.”).

40. *See, e.g., Houston v. Cotter*, 7 F. Supp. 3d 283, 298 (E.D.N.Y. 2014) (“Absent a detailed factual record, courts typically affirm dismissals of due process claims where the period of time spent in SHU was short—e.g., thirty days—and there was no indication of unusual conditions”); *Benton v. Keane*, 921 F. Supp. 1078, 1079 (S.D.N.Y. 1996) (noting that thirty days of confinement does not implicate liberty interest); *Hendricks v. Centanni*, No. 92 Civ. 5353, 1996 U.S. Dist. LEXIS 1662, at *8–9 (S.D.N.Y. Feb. 16, 1996) (*unpublished*) (noting that thirty days of confinement does not implicate liberty interest); *Martin v. Mitchell*, No. 92–CV–716, 1995 U.S. Dist. LEXIS 19006, at *9 (N.D.N.Y. Nov. 24, 1995) (*unpublished*) (noting that thirty days of confinement does not implicate liberty interest).

41. *Scott v. Coughlin*, 78 F. Supp. 2d 299, 307 (S.D.N.Y. 2000) (citing *Welch v. Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999)) (noting that “[a]long with duration, the Court must examine the frequency with which inmates are confined to the SHU in the ordinary course of the prison administration.”); *see also Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000) (holding that 305 days in SHU confinement is atypical under *Conner*, because the government could not show that a 305-day confinement was comparable with that “typically endured by other prisoners in the ordinary course of prison administration.”) (citing *Welch v. Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999)); *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997) (holding that, while New York prison regulations allow

(ii) Extent of the Deprivation Compared to “Ordinary Incidents of Prison Life”

Courts will compare how much hardship you suffered in disciplinary or administrative segregation to the “ordinary incidents of prison life.”⁴² The Supreme Court says that, under *Conner*, an incarcerated person in disciplinary or administrative segregation does not have a due process claim if other incarcerated people have about the same hardship under ordinary prison administration.⁴³ There is some dispute in the courts about the meaning of “ordinary incidents of prison life.”⁴⁴ Courts will let you compare what you experienced in the SHU to what the general population experiences at your prison.⁴⁵ Thus, to be an “atypical and substantial deprivation,” your hardships in the SHU must be “substantially more grave” than what you would ordinarily experience in the general prison population.⁴⁶

Like the length of your confinement, courts have no strict rule for what makes your deprivations in SHU “substantially grave” enough to be “atypical and significant.” Rather, the court will look at many different factors to decide whether your deprivation violates the Due Process Clause. For example, in a case from the Western District of New York, *Giano v. Kelly*, the court noted significant differences between conditions in the SHU and in the general population, including:

- (1) Significantly greater isolation;
- (2) No organized, meaningful activity, such as job assignments, vocational training, or classroom instruction; and

for lengthy administrative confinement, these regulations do not necessarily mean that lengthy disciplinary confinement is compatible with due process, and that after *Conner*, “a court must examine the specific circumstances of the punishment.”)

42. See *Wilkinson v. Austin*, 545 U.S. 209, 223, 125 S. Ct. 2384, 2394, 162 L. Ed. 2d 174, 190 (2005) (“After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves ‘in relation to the ordinary incidents of prison life.’” (citing *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995))).

43. *Wilkinson v. Austin*, 545 U.S. 209, 222–223, 125 S. Ct. 2384, 2394, 162 L. Ed. 2d 174, 190 (2005) (citing the standard of “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life” outlined in *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995)).

44. See *Sealey v. Giltner*, 197 F.3d 578, 588–589 (2d Cir. 1999) (noting unresolved questions about: (1) whether the “ordinary incidents of prison life” requirement asks courts to compare SHU conditions to the conditions within administrative confinement or to the conditions within the general population, and (2) whether the “ordinary incidents of prison life” requirement asks courts to compare SHU conditions to those conditions within the particular prison, to prison conditions across the state, or to prison conditions nationwide).

45. See *Ortiz v. McBride*, 380 F.3d 649, 655 (2d Cir. 2009) (recognizing that an incarcerated person could successfully prove a due process violation if he “could establish conditions in SHU ‘far inferior’ to those prevailing in the prison in general.”) (citing *Palmer v. Richards*, 364 F.3d 60, 66 (2d Cir. 2004)); See also, e.g., *Sealey v. Giltner*, 197 F.3d 578, 589 (2d Cir. 1999) (finding on appeal that the incarcerated person’s trial evidence was sufficient when he only compared the conditions of his SHU confinement to the conditions among the general population within his particular prison); *Welch v. Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999) (comparing the conditions of an incarcerated person’s SHU segregation to the deprivation that other incarcerated people endure in the ordinary course of prison administration); *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *17 (W.D.N.Y. May 16, 2000) (*unpublished*) (comparing the conditions that the incarcerated person faced in administrative segregation to the typical conditions that the prison’s general population endured).

46. *Welch v. Bartlett*, 196 F.3d 389, 392 (2d Cir. 1999) (finding that, after *Conner*, an incarcerated person who experiences a deprivation under mandatory state regulations does not have a federal due process claim if other incarcerated people in the prison’s general population typically experience approximately the same deprivation in the ordinary administration of the prison); see also *Frazier v. Coughlin*, 81 F.3d 313, 317–318 (2d Cir. 1996) (holding that when an incarcerated person was confined in the SHU for 12 days while awaiting the disposition of disciplinary proceedings, his due process rights were not violated, despite the fact that he was denied certain privileges, because the conditions of his confinement were not prohibited by law).

- (3) No social and recreational activity, such as drug and alcohol counseling, religious services, group meals, or group exercise.⁴⁷

The *Giano* court also found more distinctions. Incarcerated people in SHU were confined to their cells for twenty-three hours per day. They only had one hour of daily exercise in a separate, slightly larger cell with no equipment. Plus, people in SHU only got two showers per week, one non-legal visit per week, and no telephone calls (except in an emergency or with permission).⁴⁸ Finally, the individual's cell was ten feet by ten feet, often dirty, and usually dark, with covered windows to prevent eye contact with other incarcerated people.⁴⁹

Even if incarcerated people in the general population sometimes experience similar deprivations, you could still have a due process claim.⁵⁰ The *Giano* court said that, while people incarcerated in the general population under “lock-down” have conditions similar to those in the SHU, the duration and extent of SHU “inactivity or cell confinement, long-term isolation and idleness are far less typical outside of SHU.”⁵¹ This analysis, which looks at the manner of your confinement and how long you spend in the SHU, seems typical of recent Second Circuit cases.⁵²

Remember that the length of time you are in administrative or disciplinary segregation is one of two factors the court will look at when comparing your detention to the ordinary incidents of prison life. Thus, if you claim that your due process rights were violated when you were confined in administrative or disciplinary segregation for less than 305 days, you should present any and all available evidence of SHU conditions, any evidence of psychological effects of prolonged confinement in isolated conditions, and the exact number of times you were placed in SHU confinements of different lengths of time.⁵³

47. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *18–20 (W.D.N.Y. May 16, 2000) (*unpublished*).

48. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *18–20 (W.D.N.Y. May 16, 2000) (*unpublished*).

49. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *18–21 (W.D.N.Y. May 16, 2000) (*unpublished*).

50. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *24–25 (W.D.N.Y. May 16, 2000) (*unpublished*).

51. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *21 (W.D.N.Y. May 16, 2000) (*unpublished*).

52. *See, e.g., Gonzalez v. Hasty*, 802 F.3d 212, 223 (2d Cir. 2015) (“A period of confinement under typical SHU conditions lasting longer than 305 days . . . triggers a protected liberty interest, whereas a period of confinement lasting between 101 and 305 days may trigger a protected liberty interest, depending on the specific conditions of confinement.”); *J.S. v. T’Kach*, 714 F.3d 99, 106 (2d Cir. 2013) (recognizing that “[i]n the absence of factual findings to the contrary, confinement of 188 days is a significant enough hardship to trigger *Conner*.”); *Palmer v. Richards*, 364 F.3d 60, 64–66 (2d Cir. 2004) (articulating duration guidelines and noting that dismissal of a due process claim is appropriate only when an incarcerated person spent fewer than 30 days in SHU); *LaBounty v. Kinkhabwala*, 2 F. App’x 197, 201 (2d Cir. 2001) (*unpublished*) (instructing the district court to compare both the specific conditions of the incarcerated person’s disciplinary segregation and the duration to the conditions of other categories of confinement); *Vaughan v. Erno*, 8 F. App’x 145, 146 (2d Cir. 2001) (*unpublished*) (finding no due process violation where the incarcerated person did not allege any adverse conditions of the confinement other than its duration); *Sealey v. Giltner*, 197 F.3d 578, 589–590 (2d Cir. 1999) (finding that plaintiff’s 101-day confinement in the SHU did not impair a protected liberty interest since the duration and conditions of the confinement did not meet the *Conner* atypicality standard); *Welch v. Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999) (holding that the relevant comparison concerning duration is between the period of deprivation endured by the plaintiff and periods of similar deprivation typically endured by other incarcerated people in ordinary prison administration); *Nicholas v. Tucker*, 95 Civ. 9705, 2000 U.S. Dist. LEXIS 749, at *13–14 (S.D.N.Y. Jan. 27, 2000) (*unpublished*) (holding that in determining whether a confinement constitutes an atypical and significant hardship, courts should consider the effect of the segregation on the length of the plaintiff’s prison confinement, the extent to which conditions differ from other prison conditions, and the duration of the disciplinary confinement compared to the potential duration of discretionary confinement).

53. *See, e.g., Colon v. Howard*, 215 F.3d 227, 232 (2d Cir. 1999) (recommending to the district courts that this information would be helpful in evaluating on appeal whether segregation is atypical and significant); *see*

In addition to your own words, you should also get and submit other evidence about your detention conditions. This evidence should be independent. For example, if you complained of unsanitary conditions or other unmet medical needs, you should try to get records of these complaints.⁵⁴

2. Transfers

You can get due process analysis when you move to a different prison. The Supreme Court says you do not have a protected liberty interest in staying at a certain prison.⁵⁵ But you might have a claim if the move was because you exercised your constitutional rights such as exercising your right to free speech.⁵⁶

You do not have a protected liberty interest in staying in a certain prison even if the new prison has a different security level.⁵⁷ For example, an optional transfer from a minimum security prison to a medium security prison is not considered worse than the “ordinary disruptions of prison life.”⁵⁸ Also, moves from the general population to maximum security can be “within the normal limits or range of

also Taylor v. Rodriguez, 238 F.3d 188, 195 (2d Cir. 2001) (reinforcing the finding in *Colon* that a “fully developed record” along with the length of confinement would be helpful in determining atypicality); Sealey v. Giltner, 197 F.3d 578, 589 (2d Cir. 1999) (noting evidence of “conditions of administrative confinement at other New York prisons, as well as the frequency and duration of confinements imposing significant hardships, might well be relevant to [an incarcerated person’s] liberty claim”); Edwards v. Mejia, No. 11 Civ. 9134 (ALC), 2013 U.S. Dist. LEXIS 37006, at *6–7 (S.D.N.Y. Mar. 15, 2013) (*unpublished*) (finding claim of difficulty breathing because of adequate air ventilation and physical and psychological anguish was sufficient to plead atypical and significant hardship); Brown v. Doe, No. 13 CIV. 8409 (ER), 2014 U.S. Dist. LEXIS 152925, at *16–17 (S.D.N.Y. Oct. 28, 2014) (*unpublished*) (finding complaint deficient because, although plaintiff claimed he was unable to sleep, he did not point to a specific condition of confinement that caused emotional harm).

54. *See* Davis v. Barrett, 576 F.3d 129 (2d Cir. 2009) (rejecting the district court’s determination that Plaintiff’s claim of unhygienic conditions was insufficient because of lack of evidence of complaints); Wheeler v. Butler, 209 F. App’x 14, 16 (2d Cir. 2006) (*unpublished*) (finding that plaintiff’s denied requests for his hearing aids while in SHU were relevant to determination of whether he was subjected to atypical conditions).

55. *See* Meachum v. Fano, 427 U.S. 215, 224–225, 96 S. Ct. 2532, 2538–2539, 49 L. Ed. 2d 451, 459–460 (1976) (holding that the “Due Process Clause [does not] in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system,” such that a transfer within a state is within the normal range of custody), *rehearing denied*, Meachum v. Fano, 429 U.S. 873, 97 S. Ct. 191, 50 L. Ed. 2d 155 (1976); Olim v. Wakinekona, 461 U.S. 238, 247, 103 S. Ct. 1741, 1746, 75 L. Ed. 2d 813, 821 (1983) (transfer for confinement in another state is within the normal range of custody). *But see* Vitek v. Jones, 445 U.S. 480, 493–494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 555–556 (1980) (finding that transfer to a mental hospital is not within the normal range of custody).

56. *See* Merriweather v. Coughlin, 879 F.2d 1037, 1046 (2d Cir. 1989) (holding that a jury could reasonably conclude that incarcerated people were transferred solely because they exercised their 1st Amendment rights, and thus had a valid claim, where the incarcerated people were transferred after critiquing the prison administration); Hill v. Laird, No. 06-CV-0126 (JS) (ARL), 2014 U.S. Dist. LEXIS 43994, at *22 (E.D.N.Y. Mar. 31, 2014) (*unpublished*) (citing authority).

57. *See* Meachum v. Fano, 427 U.S. 215, 224–225, 96 S. Ct. 2532, 2538–39, 49 L. Ed. 2d 451, 459–460 (1976) *rehearing denied*, Meachum v. Fano, 429 U.S. 873, 97 S. Ct. 191, 50 L. Ed. 2d 155 (1976); Moorman v. Thalacker, 83 F.3d 970, 973 (8th Cir. 1996) (holding that discretionary transfer of incarcerated person from minimum to medium security prison, as a result of disciplinary action, was not a disruption exceeding ordinary incidents of prison life and, thus, did not implicate a due process liberty interest); Keenan v. Hall, 83 F.3d 1083, 1089, 96 Cal. Daily Op. Service 3261, 96 Daily Journal DAR 5331 (9th Cir. 1996) (noting the standard for determining whether an incarcerated person had a protected liberty interest in prison transfer depends on whether conditions at the facility to which the individual an incarcerated person was transferred imposed significant and atypical hardship).

58. *See* Moorman v. Thalacker, 83 F.3d 970, 973 (8th Cir. 1996) (“[S]uch assignments are discretionary, so long as they are not done for prohibited or invidious reasons.”).

custody which the conviction" allows. This is true even when maximum security conditions are much worse.⁵⁹ How often you move between prisons does not matter.⁶⁰

The courts use this same reasoning for deportation. You do not have a protected liberty interest in moving to a prison in your home country. This is true even if conditions in the United States are worse than in your home country.⁶¹

3. Good-Time Credits

Having good-time credits does not always mean that you have a constitutionally protected liberty interest.⁶² You can only claim a liberty interest if your state has created one.⁶³ For example, in one case, a Nevada law let incarcerated people get good-time credits "unless the inmate ha[d] committed serious misbehavior."⁶⁴ The court found that this law offered a "right of 'real substance'" by giving good-time credits. The court said that this created a liberty interest under the due process analysis.⁶⁵ Finding that if an incarcerated person was found guilty of "serious misbehavior" that individual would lose good-time credits. This means that Nevada prisons must tell incarcerated people the charges against them. The prisons must also give them a chance to be heard. Both things must happen before they find that an incarcerated person is guilty of "serious misbehavior."⁶⁶

The chance to earn good-time credits is not a protected liberty interest by itself.⁶⁷ For example, in one case, the incarcerated person was put in administrative segregation.⁶⁸ This meant that the incarcerated person could not receive more good-time credits that would have helped him get parole. The court still found no liberty interest. Instead, the court said that the "loss of opportunity to earn

59. *Meachum v. Fano*, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538–2539, 49 L. Ed. 2d 451, 459 (1976) (concluding transfer to prison with more severe rules does not in itself signify a 14th Amendment liberty interest violation) *rehearing denied*, *Meachum v. Fano*, 429 U.S. 873, 97 S. Ct. 191, 50 L. Ed. 2d 155 (1976).

60. *See Maguire v. Coughlin*, 901 F. Supp. 101, 106 (N.D.N.Y. 1995) (asserting that a transfer of an incarcerated between four different correctional facilities in the span of three weeks did not implicate a protected liberty interest).

61. *See Wong v. Warden, FCI Raybrook*, 999 F. Supp. 287, 290 (N.D.N.Y. 1998), *aff'd*, *Wong v. Warden, FCI Raybrook*, 171 F.3d 148 (2d Cir. 1999) (stating that an incarcerated alien did not have a liberty interest in being transferred to his home country, unless the denial of transfer was discriminatory based on race or national origin); *Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) ("The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another."); *see also* *Marshall v. Reno*, 915 F. Supp. 426, 431–432 (D.D.C. 1996) (finding no due process claim where Canadian plaintiff was not transferred to Canadian prison according to his sentencing judge's recommendation, because the Bureau of Prisons determines prison locations and the Attorney General determines whether to transfer inmates pursuant to treaty).

62. *See Wolff v. McDonnell*, 418 U.S. 539, 557–559, 94 S. Ct. 2963, 2975–2976, 41 L. Ed. 2d 935, 951–953 (1974) (holding actual restoration of good-time credits could not be handled in a civil rights suit—habeas corpus was the proper remedy—but declaratory judgment regarding good-time withdrawal procedures, as a predicate to a damage award, was not barred).

63. *See Wolff v. McDonnell*, 418 U.S. 539, 557–559, 94 S. Ct. 2963, 2975–2976, 41 L. Ed. 2d 935, 951–953 (1974); *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429 (1995) (stating that "we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause" in reference to *Wolff*); *see also* *Leacock v. DuBois*, 937 F. Supp. 81, 83–84 (D. Mass. 1996) (holding an incarcerated person may not be divested of a state-created right to good-time credit without a minimum of due process, including written notice of claimed violations, qualified right to call witnesses and present evidence, and written statement of fact-finders as to evidence relied upon and reasons for action).

64. *Reynolds v. Wolff*, 916 F. Supp. 1018, 1023 (D. Nev. 1996).

65. *Reynolds v. Wolff*, 916 F. Supp. 1018, 1023 (D. Nev. 1996). District courts in New York are divided about whether the loss of good time credits implicates a protected liberty interest under the due process clause. *See Duamutef v. O'Keefe*, No. 94-CV-470, 1996 U.S. Dist. LEXIS 22055, at *12–14 (N.D.N.Y. Jan. 30, 1996) (*unpublished*) (citing cases).

66. *See Reynolds v. Wolff*, 916 F. Supp. 1018, 1023 (D. Nev. 1996).

67. *See Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995).

68. *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995).

good-time credits . . . [is a] consequence[] of prison administrative decisions [that] do not create constitutionally protected liberty interests.”⁶⁹ In another case, losing a prison job did not automatically involve a liberty interest. This was true even though the incarcerated person could no longer automatically get good-time credits through that job.⁷⁰

The Supreme Court case of *Edwards v. Balisok* is very important for claims about losing good-time credits.⁷¹ According to that case, you must have a disciplinary hearing about good-time credit issues reversed in state court before you can bring a federal Section 1983 claim about the results (not the procedures) of the hearing.⁷² This standard is applied in a variety of ways. The Second Circuit only applies it to good-time credit cases.⁷³ The Seventh Circuit and some district courts have read the case differently. They read it as requiring an administrative or court reversal in all disciplinary or administrative segregation cases before an incarcerated person can sue for damages.⁷⁴ See *JLM* Chapter 35, “Getting Out Early: Conditional & Early Release,” for more information about good-time credits.

4. Work Release Programs

The Supreme Court has held that an incarcerated person had a liberty interest in his pre-parole release program. This was because the program was very similar to parole.⁷⁵ The standard is similar for work release programs.⁷⁶ Courts consider whether your program gives you “substantial freedom.” They also consider whether you have been “released from incarceration.”⁷⁷ You have “substantial freedom” if your work release program is more like release from prison. The court will probably not find that you have a liberty interest if your situation is still like institutional life.⁷⁸

69. *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995) (alterations in original).

70. *Bulger v. U.S. Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995); *see also* *Rivera v. Coughlin*, No. 92 CIV 3404 (DLC), 1996 U.S. Dist. LEXIS 560, at *17–19 (S.D.N.Y. Jan. 22, 1996) (*unpublished*) (holding no protected liberty interest existed where loss of good-time credit under New York regulations was a recommendation and, therefore, only tentative).

71. *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997).

72. *Edwards v. Balisok*, 520 U.S. 641, 647–648, 117 S. Ct. 1584, 1588–1589, 137 L. Ed. 2d 906, 914–915 (1997);

73. *See* *Jackson v. Johnson*, 15 F. Supp. 2d 341, 360 (S.D.N.Y. 1998) (holding that were an incarcerated person had not lost good-time credits and was not otherwise challenging the fact or duration of his confinement, he could use a Section 1983 suit rather than habeas corpus to make a due process challenge to a disciplinary hearing); *see also* *Brown v. Plaut*, 131 F.3d 163, 166 (D.C. Cir. 1997) (finding that a former incarcerated person who brought a Section 1983 action seeking damages for being placed in administrative segregation without due process was not required to raise the claim via writ of habeas corpus).

74. *See* *Stone-Bey v. Barnes*, 120 F.3d 718, 722 (7th Cir. 1997) (holding that incarcerated person’s Section 1983 claim that disciplinary segregation violated due process was barred because disciplinary judgment had not been overturned and claim would necessarily imply its invalidity).

75. *See* *Young v. Harper*, 520 U.S. 143, 152–153, 137 L. Ed. 2d 270, 280, 117 S. Ct. 1148, 1154 (1997) (finding that the Oklahoma “pre-parole conditional supervision program” was sufficiently like parole to invoke the procedural protections outlined in *Morrissey v. Brewer*, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)); *see also* *White v. Steuben County*, No. 1:11-CV-019, 2011 U.S. Dist. LEXIS 110404, at *23 (N.D. Ind. Sept. 27, 2011) (*unpublished*) (stating that “the Supreme Court has found protected liberty interests inherent in the Due Process Clause after an inmate is released from institutional confinement”).

76. *See* *Young Ah Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999) (finding final phase of work release, where plaintiff lived at home, worked at a job, and reported to prison was “virtually indistinguishable from either traditional parole or the Oklahoma program considered in *Young*”); *Nelson v. Skrobecki*, No. 4:14CV3010, 2014 U.S. Dist. LEXIS 83481, at *7–8 (D. Neb. June 18, 2014) (*unpublished*) (citing cases that found a liberty interest in revocation of conditional release programs).

77. *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 668 (8th Cir. 1996) (stating that the Due Process Clause gives rise to a liberty interest when the incarcerated person is given substantial freedom and that the trigger is if the incarcerated person has been “release[d] from incarceration”).

78. *See* *Young Ah Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999) (finding that work release where plaintiff lived at home was “virtually indistinguishable” from parole); *Callender v. Sioux City Residential*

The key factor for a court determining whether you have been “release[d] from institutional life altogether” is where you live.⁷⁹ In one case, the court found that a work release program participant had a protected liberty interest because he no longer lived in an institution.⁸⁰ However, in another case the court found no inherent liberty interest in staying in a work release program.⁸¹ In that case, the participant was on “5” and “2” status (spent five nights a week at home and two at the institution).⁸² The court found that the incarcerated person did enjoy some liberty while in the program.⁸³ However, he had not been fully released from institutional life, and so did not have a liberty interest according to the court.⁸⁴ In a different case, the participant in the pre-parole program lived in his home at all times, and the Supreme Court found that this situation was enough to be considered “released from institutional life altogether.”⁸⁵ Courts also consider any other restrictions that the program puts on your life.⁸⁶

Treatment Facility, 88 F.3d 666, 668 (8th Cir. 1996) (finding the work release program in question “did not provide the sort of substantial freedom that gives rise to a liberty interest” because it “was more analogous to institutional life than it was to probation or parole”); *see also* Bock v. Gold, 408 F. App’x 461, 463–464 (2d Cir. 2011) (conditional release did not clearly establish liberty interest because of restraints on plaintiff’s ability to be with family and friends); *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 887–888, 890 (1st Cir. 2010) (finding conditional release created liberty interest where plaintiffs had to remain at home unless at a job or school and had to wear an electronic tracking device).

79. *Weller v. Lawson*, 75 F. Supp. 2d 927, 934 (N.D. Ind. 1999) (quoting *Harper v. Young*, 64 F.3d 563 (10th Cir. 1995) (finding that “the dispositive characteristic that marks the point at which the Due Process Clause itself implies a liberty interest. . . is the fact of release from incarceration.”); *see* *Haley v. Kintock Group*, 587 F. App’x 1, 3 (3d Cir. 2014) (*unpublished*) (finding parolee’s release to halfway home did not create protected liberty interest because “the conditions of parole [] determine the liberty interest”).

80. *Edwards v. Lockhart*, 908 F.2d 299, 302 (8th Cir. 1990); *see also* *U.S. v. Stephenson*, 928 F.2d 728, 732 (6th Cir. 1991) (finding an inherent liberty interest in continued placement in supervised release program allowing convicts to live in society); *Young Ah Kim v. Hurston*, 182 F.3d 113, 118, (2d Cir. N.Y. 1999) (finding that the defendant had a liberty interest in continued placement in a work release program, the loss of which “imposed a sufficiently serious hardship to require compliance with at least minimal procedural due process,” because the defendant worked, lived at home, and regularly reported to a facility).

81. *Roucchio v. Coughlin*, 923 F. Supp. 360, 370 (E.D.N.Y. 1996).

82. *Roucchio v. Coughlin*, 923 F. Supp. 360, 369 (E.D.N.Y. 1996) (acknowledging that the defendant held a full-time job, lived at home with his mother, and reported twice a week to the institution to sleep over and meet with his counselor).

83. *Roucchio v. Coughlin*, 923 F. Supp. 360, 375 (E.D.N.Y. 1996).

84. *Roucchio v. Coughlin*, 923 F. Supp. 360, 369 (E.D.N.Y. 1996) (quoting *Whitehorn v. Harrelson*, 758 F.2d 1416, 1421 (11th Cir. 1985)).

85. *Young v. Harper*, 520 U.S. 143, 148–149, 137 L. Ed. 2d 270, 278, 117 S. Ct. 1148, 1152 (1997) (finding that pre-parolee’s life was similar to a parolee’s and therefore he had a protected liberty interest in remaining on pre-parole).

86. *White v. Steuben County*, No. 1:11-CV-019, 2011 U.S. Dist. LEXIS 110404, at *25, (N.D. Ind. Sept. 27, 2011) (*unpublished*); *see* *Haley v. Kintock Group*, 587 F. App’x 1, 3–4 (3d Cir. 2014) (*unpublished*) (noting that parolee had to remain at halfway house unless he received permission to leave, had to stand count several times a day, had curfew, was monitored, and could not see friends and family without visitation privileges); *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 887–888 (1st Cir. 2010) (considering restrictions placed on incarcerated people on conditional release, including wearing unremovable electronic tracking anklet and submitting list of restrictions on alcohol and substance abuse).

You do not have a state-created right to be put in a work release program.⁸⁷ However, you might have a state-created interest once you are put in a work release program.⁸⁸ In some states, removal from a work release program is considered an “atypical and significant hardship” under the *Conner* analysis.⁸⁹ New York is one state that creates this liberty interest.⁹⁰ In New York, the following process must be followed before you can be removed from temporary work release:⁹¹

- (1) Written notice must be given to you of your removal and the alleged violation of the program’s rules or conditions,
- (2) A statement of the actual reason for consideration of your removal from work release,
- (3) A report or summary of the evidence against you,
- (4) An opportunity to be heard and to present evidence,
- (5) Advance notice of a temporary release committee hearing,

87. *See Roucchio v. Coughlin*, 923 F. Supp. 360, 371 n.3 (E.D.N.Y. 1996) (stating that “a New York prisoner has no state-created liberty interest in the initial determination” about participation in a work release program); *see also Greenholtz v. Prisoners of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 9, 99 S. Ct. 2100, 2105, 60 L. Ed. 2d 668, 676 (1979) (“There is a crucial distinction between being deprived of a liberty one has. . .and being denied a conditional liberty that one desires.”); *Lee v. Governor of the State of N.Y.*, 87 F.3d 55, 58 (2d Cir. 1996) (holding that since incarcerated people had not previously participated in work release program, new rules rendering him ineligible for such programs did not impose an “atypical and significant hardship[,]” and therefore did not give rise to a liberty interest); *Whitehorn v. Harrelson*, 758 F.2d 1416, 1422 (11th Cir. 1985) (stating that the determination of initial placement in work release program, and removal of incarcerated person from such program, present different inquiries).

88. *See Roucchio v. Coughlin*, 923 F. Supp. 360, 368–377 (E.D.N.Y. 1996) (finding that there was no liberty interest under the due process clause, but that there was a state-created liberty interest in work release program); *see also Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (finding that the focus should be on the nature of the deprivation and whether the disciplinary action is the “type of atypical, significant deprivation in which a State might conceivably create a liberty interest”); *Hamilton v. Peters*, 919 F. Supp. 1168, 1172 (N.D. Ill. 1996) (stating that under *Conner*, courts should “look to the nature of the deprivation suffered by an incarcerated person, not to the language of prison regulations, to determine if a liberty interest exists”).

89. *See Roucchio v. Coughlin*, 923 F. Supp. 360, 374–375 (E.D.N.Y. 1996) (finding that where an incarcerated person was removed from a work release program after 15 months, the “revocation of [his] conditional freedom” gave rise to a liberty interest, even though there was no liberty interest that was created by the Constitution itself). *But see Dominique v. Weld*, 73 F.3d 1156, 1160 (1st Cir. 1996) (finding no liberty interest implicated when an prisoner was removed from the work release program in which he participated for almost four years and that although his “return from the quasi-freedom of work release to the regimentation of life within four walls” may have been a significant deprivation, it was not atypical, because his confinement was an “ordinary incident of prison life”); *Asquith v. Volunteers of Am.*, 1 F. Supp. 2d 405, 418 (D.N.J. 1998) (finding that there was no state-created liberty interest in a work release program under *Conner* because removal is not an atypical hardship, and because the New Jersey law isn’t written in a way that gives an incarcerated person the right not to be removed); *Hamilton v. Peters*, 919 F. Supp. 1168, 1172 (N.D. Ill. 1996) (finding no liberty interest under *Conner* when incarcerated person was removed from work release in a disciplinary transfer).

90. *Quartararo v. Catterson*, 917 F. Supp. 919, 940 (E.D.N.Y. 1996) (affirming the “continued vitality of *Tracy v. Salamack* in light of *Conner*”); *Friedl v. City of New York*, 210 F.3d 79, 84 (2d Cir. 2000) (stating that incarcerated people on work release have a liberty interest in continued participation in such programs, that under *Conner*, the Due Process Clause protects incarcerated people against “atypical and significant” deprivation of liberty, and that therefore incarcerated people are entitled to procedural due process before they are removed from work release); *Tracy v. Salamack*, 572 F.2d 393, 396 (2d Cir. 1978) (holding that in the State of New York, an incarcerated person can’t be removed from a work release program without an individualized due process hearing). In *Anderson v. Recore*, 317 F.3d 194 (2d Cir. 2003), the Second Circuit concluded that the Supreme Court in *Conner* implicitly affirmed *Tracy v. Salamack*, 572 F.2d 393 (2d Cir. 1978) by affirming the validity of *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and *Meachum v. Fano*, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976), because *Tracy* explicitly rests upon *Morrissey* and *Meachum*. *But see Duffy v. Selsky*, No. 95 CIV 0474 (LBS), 1996 U.S. Dist. LEXIS 10069, at *40–41 (S.D.N.Y. Jul. 18, 1996) (*unpublished*) (holding no liberty interest in admission to the Temporary Release Program).

91. *See Anderson v. Recore*, 446 F.3d 324, 329 (2d Cir. 2006) (stating that “an inmate’s significant liberty interest in continuing in a temporary release program requires a pre-deprivation hearing that includes protections similar to those set forth in *Morrissey*”).

- (6) The right to confront and cross-examine witnesses testifying against you,
- (7) A TRC (temporary release committee) composed of neutral decision makers, and
- (8) A post-hearing written account of the actual reason for removal and a summary of the evidence supporting that reason.⁹²
- (9) Additionally, removal from a temporary work release program does not meet due process requirements “unless the findings of the [temporary release committee] are supported by some evidence in the record.”⁹³

You should remember if you have been removed from temporary work release and any of these steps were not followed. You may have a valid claim that you were deprived of your liberty interest in staying in the program without due process if not all of these steps are followed.⁹⁴

5. Parole

The mere opportunity to obtain parole does not necessarily grant you a liberty interest in obtaining parole.⁹⁵ However, you may have a state-created interest even if you don't have a liberty interest. If a state statute creates an “expectation of parole,” then it also creates a liberty interest in getting parole.⁹⁶ This varies from state to state and depends on the language in the statute.⁹⁷ If a parole law uses “mandatory language,” then it might create a liberty interest. For example, if the statute says that the

92. *Tracy v. Salamack*, 572 F.2d 393, 396–397 (2d Cir. 1978) (defining the circumstances under which removal would be proper after a due process hearing).

93. *See Anderson v. Recore*, 446 F.3d 324, 328–329 (2d Cir. 2006) (citing *Friedl v. City of New York*, 210 F.3d 79, 84–85 (2d Cir. 2000) and *Young Ah Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999)).

94. *Friedl v. City of New York*, 210 F.3d 79, 85 (2d Cir. 2000) (quoting *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356, 364 (1985)).

95. *See Bd. of Pardons v. Allen*, 482 U.S. 369, 373, 107 S. Ct. 2415, 2418, 96 L. Ed. 2d 303, 309–310 (1987) (citing *Greenholtz v. Prisoners of Neb. Penal and Corr. Complex*, 442 U.S. 1, 11, 99 S. Ct. 2100, 2106, 60 L. Ed. 2d 668, 677–678 (1979)) (stating that “the presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release.”); *see also Bowser v. Vose*, 968 F.2d 105, 106 (1st Cir. 1992) (holding that there is no liberty interest in continuing to participate in furlough).

96. *See Bd. of Pardons v. Allen*, 482 U.S. 369, 376–378, 107 S. Ct. 2415, 2420–2421, 96 L. Ed. 2d 303, 311–313 (1987) (finding the Montana statute, which includes mandatory language, “creates a liberty interest in parole release”). This remains true even under *Conner*. *See Wilson v. Kelkhoff*, 86 F.3d 1438, 1446 n.9 (7th Cir. 1996) (“It appears that the Court [in *Conner*] intended to leave undisturbed the cases holding that a protectable liberty interest exists in parole statutes that create an ‘expectancy of release.’”); *Ellis v. Dist. of Columbia*, 84 F.3d 1413, 1417–1418 (D.C. Cir. 1996) (noting that *Conner* did not overrule *Greenholtz v. Prisoners of Neb. Penal and Corr. Complex* or *Board of Pardons v. Allen*, and holding that liberty interest in parole stems from state parole statutes); *Robles v. Dennison*, 745 F. Supp. 2d 244, 261 (W.D.N.Y. 2010) (“Although there is no constitutional right to parole, a state may create a liberty interest in parole by means of its statutes and regulations governing the parole decision-making process.”).

97. *See, e.g., Robles v. Dennison*, 745 F. Supp. 2d 244, 263–265, 271–274 (W.D.N.Y. 2010) (analyzing the language of New York's prior parole statute and New York's current parole statute to determine whether a protectable liberty interest remained); *Watson v. DiSabato*, 933 F. Supp. 390, 394 (D.N.J. 1996) (holding that New Jersey's parole statute creates a sufficient expectation of parole eligibility to give rise to a liberty interest); *Watley v. Robertson*, No. 10-3726 (SDW), 2011 U.S. Dist. LEXIS 116910, at *19 (D.N.J. Oct. 6, 2011) (*unpublished*) (holding the same); *Crump v. Lafler*, 657 F.3d 393, 401–404, (6th Cir. 2011) (comparing Michigan's parole statute with the statutes at issue in *Allen* and *Greenholtz* to determine whether the Michigan statute creates protectable liberty interest); *Haggard v. Curry*, 631 F.3d 931, 936 (9th Cir. 2010) (noting that California's parole law creates a protectable liberty interest which encompasses California's requirement that parole decisions be supported by a “some evidence” standard); *Thompson v. Veach*, 501 F.3d 832, 836–837 (7th Cir. 2007) (stating that the District of Columbia's parole statute does not create a protectable liberty interest); *Harper v. Young*, 64 F.3d 563, 564–565 (10th Cir. 1995), *aff'd*, *Young v. Harper*, 520 U.S. 143, 117 S. Ct. 1148, 137 L. Ed. 2d 270 (1997) (declining to address whether a state-created liberty interest remained in Oklahoma parole revocation proceedings after *Conner*, but holding that “program participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself.”).

parole board “shall” release an incarcerated person on parole “unless” certain conditions aren’t met, the statute creates an expectation of parole. Therefore, the statute creates your liberty interest.⁹⁸

Generally, confinement in administrative or disciplinary segregation that affects your parole opportunities does not create a protected liberty interest under *Conner*.⁹⁹ Therefore, even if your release date has been postponed because you have spent time in segregation, you still do not have a liberty interest at stake when you are initially charged with a violation.

Once you obtain parole, you do have certain rights if your parole is being revoked.¹⁰⁰ In *Morrissey*, the Supreme Court outlined the procedural rights that you have before your parole can be revoked.¹⁰¹ When you are first arrested or charged with a violation, you have a right to a preliminary hearing.¹⁰² The purpose of the hearing is to make sure there are facts that support the alleged violation.¹⁰³ This hearing should be conducted near where you were arrested or where the violation took place, and as soon after your arrest or violation as possible.¹⁰⁴ The hearing should be held by someone who is not directly involved in your case.¹⁰⁵ You should receive notification of the preliminary hearing before it takes place, including information about why the hearing is happening and the allegations against

98. See *Bd. of Pardons v. Allen*, 482 U.S. 369, 377–378, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987) (finding that “the Montana statute. . . uses mandatory language (‘shall’) to ‘creat[e] a presumption that parole release will be granted’ when the designated findings are made.” (quoting *Greenholtz v. Prisoners of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12, 99 S. Ct. 2100, 2106, 60 L. Ed. 2d 668, 678 (1979)); *Wilson v. Kelkhoff*, 86 F.3d 1438, 1447 n.9 (7th Cir. 1996) (“It appears that the Court intended to leave undisturbed the cases holding that a protectable liberty interest exists in parole statutes that create an ‘expectancy of relief.’”); *Crump v. Lafler*, 657 F.3d 393, 399 (6th Cir. 2011) (asking whether there is mandatory language “that creates a presumption of release” in the statutes, regulations, or policy statements of prison or parole officials); *Moor v. Palmer*, 603 F.3d 658, 661–662 (9th Cir. 2010) (stating that a statute creates a protectable liberty interest as long as the statute has mandatory language and limits discretion of parole decision-makers, and that Nevada’s statute does not: “Nevada’s statutory parole scheme, however, expressly disclaims any intent to create a liberty interest. SEE NEV. REV. STAT. § 213.10705 (legislative declaration that “the release or continuation of a person on parole or probation is an act of grace of the State. . . and it is not intended that the establishment of standards relating thereto create any such right or interest in liberty or property. . . .”). The statute does not use mandatory language; instead, it provides that “the Board may release on parole a prisoner who is otherwise eligible for parole” and lists factors to be considered in exercising that discretion. NEV. REV. STAT. § 213.1099(1), (2) (emphasis added). *Moor v. Palmer*, 603 F.3d 658, 661–662 (9th Cir. 2010)).

99. See *Meachum v. Fano*, 427 U.S. 215, 229 n.8, 96 S. Ct. 2532, 2540 n.8, 49 L. Ed. 2d 451, 462 n.8 (1976) (noting that a possible effect on a parole decision does not create a liberty interest); *Haff v. Cooke*, 923 F. Supp. 1104, 1119 (E.D. Wis. 1996) (citing *Sandin v. Conner*, 515 U.S. 472, 486–487, 115 S. Ct. 2293, 2301–2302, 132 L. Ed. 2d 418, 431–432 (1995)) (noting that a disciplinary violation that may “later affect a parole decision [does] not implicate a liberty interest because a prisoner’s disciplinary record [is] only one of many criteria used to determine parole.”); *Newell v. Unknown Borgen*, No. 2:14-cv-172, 2015 U.S. Dist. LEXIS 12171, at *6–7 (W.D. Mich. Feb. 3, 2015) (*unpublished*) (stating that administrative segregation generally does not implicate a protected liberty interest because it is not an atypical and significant hardship); *Labat v. Williams*, No. 08-4041 SECTION “N”(4), 2010 U.S. Dist. LEXIS 83260, at *64–69 (E.D. La. Jul. 8, 2010) (*unpublished*) (finding that an incarcerated person’s placement in segregation that caused delay in pursuing parole opportunities did not violate a liberty interest).

100. See *Green v. McCall*, 822 F.2d 284, 289–290 (2d Cir. 1987) (stating that even parole grantees who have not yet been paroled have a protectable liberty interest).

101. See *Morrissey v. Brewer*, 408 U.S. 471, 485–488, 92 S. Ct. 2593, 2602–2604, 33 L. Ed. 2d 484, 496–498 (1972) (holding that minimum due process requirements for parole revocation include a preliminary hearing to determine probable cause “as promptly as convenient after arrest,” as well as revocation hearing).

102. *Morrissey v. Brewer*, 408 U.S. 471, 484, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496 (1972).

103. *Morrissey v. Brewer*, 408 U.S. 471, 484, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496 (1972).

104. *Morrissey v. Brewer*, 408 U.S. 471, 485, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496 (1972) (noting the need for timeliness and proximity so that “information is fresh and sources are available.”).

105. *Morrissey v. Brewer*, 408 U.S. 471, 485–486, 92 S. Ct. 2593, 2602–2603, 33 L. Ed. 2d 484, 497 (1972) (stating that due process requires someone other than the supervising parole officer or caseworker, such as a judicial officer or independent officer appointed by the State).

you.¹⁰⁶ You can present information and question anyone testifying against you at the hearing. After the preliminary hearing, there will be a parole revocation hearing.¹⁰⁷ You have the right to:

- (1) a parole hearing reasonably soon after your arrest;
- (2) receive written notice of the claims against you;
- (3) receive information about the evidence against you;
- (4) speak at your hearing and present witnesses and evidence;
- (5) question witnesses testifying against you (unless the hearing officer specifically finds that there is good cause (a good reason) for not allowing this);
- (6) a “neutral and detached” hearing body, such as a traditional parole board; and
- (7) a written statement by the fact finders explaining the evidence against you and the reasons for revoking parole.¹⁰⁸

You may have a claim if you are a parolee and there is a violation of any of the seven rights or procedures listed above. You may also have a claim if you are an incarcerated person granted parole but not yet on parole. Depending on your state’s parole statute, you may also have a liberty interest in obtaining parole.

D. Incarcerated Person’s Basic Rights in Disciplinary Procedures

In *Wolff v. McDonnell*,¹⁰⁹ the Supreme Court described how prison disciplinary procedures should be conducted in order to comply with constitutional Due Process requirements. If you have been placed in administrative segregation, this Part may not apply to you. Go to Part F of this chapter to learn more about your rights if you have been placed in administrative segregation. This Part applies if you have been deprived of a recognized liberty interest, such as a loss of good-time credits or something else very severe. This Part explains the *Wolff* due process rights you can use to defend yourself at your disciplinary proceeding or to challenge your punishment on appeal in court.¹¹⁰ First, you need to establish that a disciplinary action was an atypical and significant hardship affecting a protected liberty interest. In other words, the court needs to find that you have due process rights. Then, the court asks “whether the deprivation of that liberty interest occurred without due process of law,”¹¹¹ or whether the required processes were followed by the institution. If your punishment isn’t severe enough to give you a due process right, you may have other options. Your prison regulations may state that certain disciplinary procedures must be followed. Prison officials must follow their own rules.¹¹² So, even if you can’t fight the outcome in federal court, you may still be able to file an administrative appeal within the prison system. Either way, you will have a better chance at success if you know what

106. *Morrissey v. Brewer*, 408 U.S. 471, 486–487, 92 S. Ct. 2593, 2603, 33 L. Ed. 2d 484, 497–498 (1972).

107. *Morrissey v. Brewer*, 408 U.S. 471, 485–488, 92 S. Ct. 2593, 2602–2604, 33 L. Ed. 2d 484, 496–499 (1972).

108. *Morrissey v. Brewer*, 408 U.S. 471, 488–489, 92 S. Ct. 2593, 2603–2604, 33 L. Ed. 2d 484, 498–499 (1972).

109. *See Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

110. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974) (finding that once the State created the right to good-time credits and recognized that taking away good-time credits can only be done based on major misconduct, the incarcerated person’s interest in good-time credits “has real substance and is sufficiently embraced within Fourteenth Amendment ‘liberty’ to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.”).

111. *Sealey v. Giltner*, 116 F.3d 47, 51–52 (2d Cir. 1997) (quoting *Bedoya v. Coughlin*, 91 F.3d 349, 351–352 (2d Cir. 1996)) (finding that the plaintiff must be given opportunity to develop facts relevant to establishing a liberty interest because the plaintiff had no notice that the lower court intended to consider dismissal of his complaint based on the absence of a liberty interest).

112. *See Uzzell v. Scully*, 893 F. Supp. 259, 263 n.10 (S.D.N.Y. 1995) (finding that though an incarcerated person’s treatment did not amount to a deprivation of his right to due process, the incarcerated person remained free to raise a claim of procedural error on the ground that the State failed to adhere to its own rule requiring an incarcerated person to be given 24-hour notice of charges filed against him that resulted in his administrative segregation).

procedures the officials in your prison must follow. That way, you can take advantage of the procedures at your disciplinary hearing.

1. The Prison Must Publish Rules Governing Your Conduct

You have a basic right not to be punished for an act that your prison rules do not prohibit (unless you break the law). For example, in *Richardson v. Coughlin*,¹¹³ prison officials disciplined an incarcerated person for circulating a petition without permission. The incarcerated person won the case because the prison rules didn't require incarcerated people to get permission before handing out petitions.¹¹⁴ Therefore, it was unfair to punish the incarcerated person for an activity that he reasonably believed the prison allowed. The Supreme Court described this principle of fairness in *Grayned v. City of Rockford*,¹¹⁵ stating that "because we assume that [a] man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."¹¹⁶ In other words, you need to be given a fair chance to follow the rules and should only be punished for breaking those rules or for breaking the law.

You also have a right not to be punished based on a vague (unclear) regulation.¹¹⁷ For example, a federal court in Ohio struck down as unconstitutionally vague a regulation that prohibited "objectionable" conduct between an incarcerated person and his visitor.¹¹⁸ The word "objectionable" was considered vague because it can mean different things to different people. A regulation can also be found vague when applied to your particular case. In *Rios v. Lane*,¹¹⁹ the court found a regulation prohibiting "engaging or pressuring others to engage in gang activities" unconstitutionally vague when

113. *Richardson v. Coughlin*, 763 F. Supp. 1228 (S.D.N.Y. 1991) (holding that because an incarcerated person's punishment was based on the violation of a non-existent rule, prison officials deprived him of due process of law).

114. *Richardson v. Coughlin*, 763 F. Supp. 1228, 1235 (S.D.N.Y. 1991). For more examples, see *Wallace v. Nash*, 311 F.3d 140, 143–145 (2d Cir. 2002) (finding that an incarcerated person had a valid claim that he was improperly disciplined because the cited prohibition was for possession of a weapon and he was punished for use of a pool cue as a weapon); *Coffman v. Trickey*, 884 F.2d 1057, 1060–1061 (8th Cir. 1989) (finding an incarcerated person's due process rights were violated where he was punished for an unspecified prison rule); *Hayes v. Fla. Dept. of Children & Families*, No. 4:10cv541-MP/CAS, 2012 U.S. Dist. LEXIS 95698, at *13–15 (N.D. Fla. May 11, 2012) (*unpublished*) (citing authority holding that incarcerated people must have notice of prison rules before being punished for violating those rules).

115. *Grayned v. City of Rockford*, 408 U.S. 104, 121, 92 S. Ct. 2294, 2306, 33 L. Ed. 2d 222, 235 (1972) (holding that an anti-noise ordinance was not unconstitutionally vague or overbroad).

116. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298–2299, 33 L. Ed. 2d 222, 227 (1972) (concluding that an anti-noise ordinance was not impermissibly vague because it was written specifically for its context, enabling the impact of prohibited disturbances to be easily measured; however, an anti-picketing ordinance was found unconstitutional on equal protection grounds).

117. See *Grayned v. City of Rockford*, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 2298–2299, 33 L. Ed. 2d 222, 227–228 (1972) (stating that a regulation is void for vagueness if it is not clear what it prohibits. That vagueness is a violation of due process).

118. See *Taylor v. Perini*, 413 F. Supp. 189, 233–234 (N.D. Ohio 1976) (finding that a rule barring a visitor from further visits due to "objectionable" conduct between the incarcerated person and the visitor was too vague to justify such severe sanctions); see also *Jenkins v. Werger*, 564 F. Supp. 806, 807 (D. Wyo. 1983) (invalidating a rule against "unruly or disorderly" conduct for vagueness); *Laaman v. Helgemoe*, 437 F. Supp. 269, 321–322 (D.N.H. 1977) (invalidating a prison rule forbidding "poor conduct" for vagueness, because it didn't inform incarcerated people of what conduct was prohibited). But see *El-Amin v. Tirey*, 817 F. Supp. 694, 701–703 (W.D. Tenn. 1993) (holding that while due process requires certain minimum standards of specificity in prison regulations, it does not require the same degree of specificity that is required in criminal laws or in statutes that apply outside of prison), *aff'd*, *El-Amin v. Tirey*, 35 F.3d 565 (6th Cir. 1994) (*unpublished*).

119. *Rios v. Lane*, 812 F.2d 1032, 1037–1039 (7th Cir. 1987); see also *Adams v. Gunnell*, 729 F.2d 362, 368–370 (5th Cir. 1984) (finding a regulation that prohibited "conduct which disrupts the orderly running of the institution" was unconstitutionally vague when used to punish an incarcerated person for writing and circulating a petition).

it was applied to an incarcerated person who allegedly shared information about Spanish-language political radio stations. In other words, a regulation that is clear when you read it may be considered vague in your particular situation if it is used to punish you for an activity that is typically considered lawful.

No matter what, you are presumed (assumed) to have knowledge of the penal law (criminal statutes). Therefore, you cannot claim that your rights have been violated just because you aren't given copies of your state's penal law.¹²⁰ As one court stated, "the law presumes that everyone knows the law, and ignorance of the law is not an excuse for its violation."¹²¹ You are also presumed to know statewide prison rules of misbehavior if you have previously served time in another prison in New York and were provided with a copy of the statewide rules at that time.¹²²

Unlike the presumption of knowledge about the penal law, you must be given an opportunity to learn the rules of your prison. Although you cannot be punished for violating a prison regulation that is temporarily posted on a bulletin board,¹²³ you can be punished if the regulation is posted permanently.¹²⁴ New York law requires that you be given a personal copy of the prison rules.¹²⁵ Some prisons also require you to affirm in writing that you received the prison disciplinary handbook.¹²⁶ All regulations must be printed in both English and Spanish,¹²⁷ and the possible punishments for each type of violation must be clearly noted.¹²⁸

If you do not have a copy of your prison's regulations, ask prison officials to give you one. If you do not understand English, or if you read Spanish better than English, ask for a copy of the regulations in Spanish.¹²⁹ If you are brought before a prison disciplinary board, remember that you usually cannot be punished for violating a rule that is not published in the prison regulations. You also can't be punished if you have not been given a copy of the regulations at some point.

120. See *McFadden v. United States*, 135 S. Ct. 2298 (2015) (holding that in a drug prosecution, "The knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed. Take, for example, a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules, 21 C.F.R. §1308.11 (2014). Because ignorance of the law is typically no defense to criminal prosecution . . . this defendant would also be guilty of knowingly distributing 'a controlled substance' (internal citations omitted)." *McFadden v. United States*, 135 S. Ct. 2298, 2304, 192 L.Ed.2d 260, 269 (2015). See also *Bryan v. United States*, 524 U.S. 184 (1998) (holding that except for a limited number of exceptionally complex statutes, a statute's willfulness requirement "does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required." *Bryan v. United States*, 524 U.S. 184, 196, 118 S. Ct. 1939, 1947, 141 L.Ed.2d 197, 208 (1998)).

121. *McRae v. State*, 157 S.E.2d 646, 648, 116 Ga. App. 407, 410 (Ga. Ct. App. 1967).

122. See *Johnson v. Coughlin*, 205 A.D.2d 537, 539, 613 N.Y.S.2d 192, 193 (2d Dept. 1994) (holding that an incarcerated person's due process rights were not violated by officials' failure to provide him with a "inmate rule book" in a timely manner where the individual had previously been incarcerated and received various manuals governing conduct of people incarcerated at another facility).

123. See *Taylor v. Perini*, 413 F. Supp. 189, 235 (N.D. Ohio 1976) (finding that an "inmate manual" did not adequately inform incarcerated people of prohibited conduct since the temporary posting of regulations on a bulletin board did not constitute fair notice).

124. See *Forbes v. Trigg*, 976 F.2d 308, 314–315 (7th Cir. 1992) (finding that an incarcerated person had fair notice of a prison rule requiring urine tests since the posting of the rule was not temporary).

125. N.Y. CORRECT. LAW § 138(2) (McKinney 2014).

126. N.Y. COMP. CODES R. & REGS. tit. 9, § 7002.9(d) (1989).

127. N.Y. CORRECT. LAW § 138(1) (McKinney 2014); see also *Burgos v. Kuhlmann*, 137 Misc. 2d 1039, 1040–1041, 523 N.Y.S.2d 367, 368 (Sup. Ct. Sullivan County 1987) (holding that disciplinary charges must be dismissed and the incarcerated person's record cleared on the ground that the Spanish-speaking incarcerated person did not have meaningful notice of prison rules where he was only provided with the English version of the rules).

128. N.Y. CORRECT. LAW § 138(3) (McKinney 2014).

129. If you are incarcerated outside New York, the prison may not be required to provide you with a copy of the prison regulations. Copies may also be available in Spanish. Research the rules and regulations of your state to see if this is the case where you are incarcerated. See Chapter 2 of the *JLM*, "Introduction to Legal Research," for information on conducting legal research.

2. Written Notice Requirement

Under *Wolff v. McDonnell*, the Supreme Court held that you have the right to receive notice of (know about) the charges against you at least twenty-four hours before your disciplinary hearing is scheduled to begin.¹³⁰ An oral (spoken) explanation of the charges is not enough.¹³¹ The charges must be in writing, and they must be clear enough to allow you to prepare your defense.¹³² One court has found that an incarcerated person was denied due process because, although he was given notice of his charges twenty-four hours in advance, he was only allowed to review the actual written charges five hours before his hearing.¹³³ With only five hours to study the twelve charges against him, the incarcerated person had to rely mainly on his memory to gather evidence and prepare his defense. This put him at a huge disadvantage.¹³⁴ The purpose of the twenty-four-hour notice requirement is to give you a fair chance to prepare your defense by informing you of the specific nature of the charges.¹³⁵

New York law gives you even more rights than you have under *Wolff*. In New York, you still have the right to receive written notice of your charges at least twenty-four hours before the hearing.¹³⁶ Unlike *Wolff*, which does not require that the notice include any particular information,¹³⁷ New York law says that the notice has to contain the date, time, place, and nature of the charge (including information about what you did and what rule you violated).¹³⁸ If more than one incarcerated person was involved in the incident, the specific role played by each incarcerated person must be included.¹³⁹

130. *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

131. *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 955–956 (1974).

132. *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 955–956 (1974); *see also* *Spellmon-Bey v. Lynaugh*, 778 F. Supp. 338, 341–342 (E.D. Tex. 1991) (holding that notice was inadequate where the charged was given in writing, but the specific acts that gave rise to the charge were unclear and consequently it was impossible to prepare an adequate defense as he did not know what conduct gave rise to the charge).

133. *See Benitez v. Wolff*, 985 F.2d 662, 665 (2d Cir. 1993) (“Although *Wolff v. McDonnell* did not state expressly that the inmate must be allowed to retain for 24 hours the written notice given him, we think this requirement is fairly inferred from the requirements that there be advance notice, that it be in writing, and that it be given to the inmate at least 24 hours in advance.”).

134. *Benitez v. Wolff*, 985 F.2d 662, 665 (2d Cir. 1993).

135. *See Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2978, 41 L. Ed. 2d 955, 955 (1974) (holding that advance written notice “of the charges against him” is required by due process but failing to state what content or details or required for notice to satisfy due process and that “[p]art of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact.”); *see also* *McKinnon v. Patterson*, 568 F.2d 930, 940 n.11 (2d Cir. 1977), *cert. denied*, *Patterson v. McKinnon*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978) (explaining that the notice requirement requires “inform[ing] the inmate of what he allegedly has done so that he can prepare a defense, if he chooses, to the specific charges set forth, based on whatever evidence he can muster, given the limited time available and the lack of an opportunity to interview or call witnesses.”); *Hameed v. Mann*, 849 F. Supp. 169, 172 (N.D.N.Y. 1994) (holding that notice received by an incarcerated person prior to disciplinary hearing was sufficient, but acknowledging that “a notice lacking the required specifics which fail to apprise the accused party of the charges brought against him must be found to be unconstitutional because then, the accused party cannot adequately prepare a defense”).

136. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.6(a) (2017).

137. *Wolff v. McDonnell*, 418 U.S. 539, 563–565, 94 S. Ct. 2963, 2978–2979, 41 L. Ed. 2d 955, 956 (1974) (holding that advance written notice “of the charges against him” is required by due process, but failing to state what content or details are required for said notice to satisfy due process). Some federal courts have created certain minimum standards. For example, in *Spellmon-Bey v. Lynaugh*, the court held that notice must contain at least a description of the specific acts upon which the charges are based, as well as the times that these acts allegedly occurred, unless it is an exceptional situation where the threat to prison security interests outweighs the incarcerated person’s interests. *Spellmon-Bey v. Lynaugh*, 778 F. Supp. 338, 342–343 (E.D. Tex. 1991).

138. N.Y. COMP. CODES R. & REGS. tit. 7, § 251–3.1(c) (2017).

139. N.Y. COMP. CODES R. & REGS. tit. 7, § 251–3.1(c) (2017); *see also* *Howard v. Coughlin*, 190 A.D.2d 1090, 1090, 593 N.Y.S.2d 707, 708–709 (4th Dept. 1993) (finding notice insufficient when it provided the wrong date for when the alleged misconduct occurred); *McCleary v. LeFevre*, 98 A.D.2d 866, 868, 470 N.Y.S.2d 841, 843–844 (3d Dept. 1983) (finding notice was insufficient when it failed to inform incarcerated people of facts upon which charges were based). *But see* *Vogelsang v. Coombe*, 105 A.D.2d 913, 914, 482 N.Y.S.2d 348, 350 (3d Dept. 1984),

If you do not speak English, you have the right to translations of the notice of the charges and statements of evidence.¹⁴⁰ You are also entitled to have a translator present at your disciplinary hearing.¹⁴¹ If you are deaf or hard of hearing, you have similar rights.¹⁴²

Prison staff should bring you a copy of the written charges or “ticket.” Since you may not know exactly when the proceedings will be held, you should start preparing your defense right away. This process is outlined below.

3. “Substitute Counsel” (Employee Assistant)

In *Baxter v. Palmigiano*, the Supreme Court held that incarcerated people do not have a right to counsel at disciplinary proceedings.¹⁴³ The *Wolff* Court did, however, recognize two circumstances in which you are entitled to (have a right to have) a “counsel-substitute.” Your “counsel-substitute” can either be a prison employee (“employee assistant”) or a fellow incarcerated person who assists you in the preparation of your case. You are entitled (have the right) to a counsel-substitute if you are illiterate (have difficulty reading and writing)¹⁴⁴ or if your case is really complicated, although the Court did not define what “complicated” means.¹⁴⁵ Therefore, it is unclear how complicated the facts involved must be before you can demand help from an employee assistant. If you face some clear personal barrier to preparing your defense (for example: illiteracy, language, mental illness, or restrictive confinement), you should tell prison officials about it. These barriers will make your claim for assistance stronger.

When you receive notice of the charges against you, you will be given a list of employees who serve as employee assistants.¹⁴⁶ You are entitled to choose an employee assistant from the list, but you might not get your first choice. If you are given someone whom you do not want as an employee assistant, tell that person that you object to (or disagree with) the assignment. If you are still not happy with your employee assistant at the time of your hearing, tell the hearing officer that you object. It is important to realize that if you do not pick an employee assistant from the available list, you may waive (give up) the right to any assistance.¹⁴⁷

The New York law is broader than the *Wolff* standard. New York regulations specifically guarantee an employee assistant for certain incarcerated people, including:

- (1) Non-English-speaking incarcerated people;
- (2) Illiterate incarcerated people;

aff’d, *Vogelsang v. Coombe*, 66 N.Y.2d 835, 489 N.E.2d 251, 489 N.Y.S.2d 364 (1985) (holding notice to be sufficient where the written notice referred to the disciplinary problem in question as the “incident” but also contained references to a “readily identifiable” event: a four-day riot, rules violations, and incarcerated person’s offensive conduct).

140. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (2017); *see also* *Reyes v. Henderson*, 121 Misc. 2d 970, 971–972, 469 N.Y.S.2d 520, 521 (Sup. Ct. Albany County 1983) (holding that a Spanish-speaking incarcerated person was denied procedural due process where he was given notice of the charges against him in English only).

141. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (2017).

142. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (2017).

143. *See Baxter v. Palmigiano*, 425 U.S. 308, 315, 96 S. Ct. 1551, 1556–1567, 47 L. Ed. 2d 810, 819–820 (1976) (“We see no reason to alter our conclusion so recently made in *Wolff* that inmates do not have a right to either retained or appointed counsel in disciplinary hearings.”) (internal citations omitted).

144. *Wolff v. McDonnell*, 418 U.S. 539, 570, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974).

145. *Wolff v. McDonnell*, 418 U.S. 539, 570, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974) (stating that all incarcerated people should be provided with assistance when “the complexity of the issue makes it unlikely that the [incarcerated person] will be able to collect and present the evidence necessary for an adequate comprehension of the case”).

146. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-4.1(a) (2017); *see also* *Jones v. Coughlin*, 112 Misc. 2d 232, 234, 446 N.Y.S.2d 849, 850–851 (Sup. Ct. Albany County 1982) (finding that an incarcerated person’s due process rights were violated when prison designated employee assistant other than one incarcerated person had selected, despite incarcerated person’s oral and written objections).

147. *See Walker v. Coughlin*, 202 A.D.2d 1034, 1034, 609 N.Y.S.2d 471, 471 (4th Dept. 1994) (holding that incarcerated person waived his right to employee assistant by refusing to sign employee assistant selection form).

- (3) Incarcerated people who are deaf or hard of hearing (who may be provided with sign language interpreters);
- (4) Incarcerated people who are charged with drug use as a result of urinalysis tests; and
- (5) Incarcerated people confined to a special housing unit (SHU) while waiting for a superintendent's hearing.¹⁴⁸

In the case of non-English speaking incarcerated people, a court held that an incarcerated person who spoke only Spanish had the right to meet with a Spanish-speaking assistant at least twenty-four hours before his disciplinary hearing.¹⁴⁹ In the case of segregated incarcerated people, a court ruled that an incarcerated person who cannot adequately prepare his defense because of his segregation or transfer has a due process right to assistance.¹⁵⁰ In these situations, correction officers must perform the investigatory tasks that the incarcerated person would perform if he was able to do it himself.¹⁵¹ However, be aware that assistants are only required to answer questions you specifically ask, and to perform tasks you specifically request.¹⁵² Finally, if you are entitled to an assistant, New York law says that your hearing can take place twenty-four hours after your first meeting with that assistant.¹⁵³

The employee assistant should help you prepare for your hearing by explaining the charges to you, interviewing witnesses, and helping you obtain documentary evidence or written statements.¹⁵⁴ However, do not expect the employee assistant to do anything that you do not specifically ask him or her to do.¹⁵⁵ You must ask for assistance. If you do not actively make a request, you waive or lose your right to assistance. For example, in *Newman v. Coughlin*, the incarcerated person made a general request for assistance from the law library staff, but did not specifically request that the employee assistant help him prepare his case.¹⁵⁶ As a result, the incarcerated person was responsible for his own lack of representation.

The assistant does not need to act as your advocate in the way a lawyer would, or even be present at your hearing.¹⁵⁷ However, due process does require that your assigned assistant act as your surrogate and carry out basic and reasonable requests in good faith.¹⁵⁸ For example, one court held

148. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-4.1(a) (2017).

149. *Rivera v. Smith*, 110 A.D.2d 1043, 1043-1044, 489 N.Y.S.2d 131, 131 (4th Dept. 1985). *But see* *Valles v. Smith*, 116 A.D.2d 1002, 1002-1003, 498 N.Y.S.2d 623, 624 (4th Dept. 1986), *rev'd on other grounds sub nom.* *Davidson v. Smith*, 69 N.Y.2d 677, 504 N.E.2d 380, 512 N.Y.S.2d 13 (1986) (finding that a Spanish-speaking incarcerated person was not entitled to have employee assistant translate for him at disciplinary proceeding because translation assistance from a Spanish-speaking incarcerated person was enough).

150. *See Eng v. Coughlin*, 858 F.2d 889, 891 (2d Cir. 1988) (holding that an incarcerated person segregated from the general prison population has a due process right of assistance in preparing a defense).

151. *See Eng v. Coughlin*, 858 F.2d 889, 898 (2d Cir. 1988) (describing the role of the employee assistant as corresponding to "those actions that an inmate facing disciplinary charges can undertake himself" when not separated from others).

152. *See Serrano v. Coughlin*, 152 A.D.2d 790, 792-793, 543 N.Y.S.2d 571, 573 (3d Dept. 1989) (holding that incarcerated person was not denied meaningful employee assistance when he did not specify the documents he wanted produced).

153. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.6(a) (2017).

154. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-4.2 (2017).

155. *See Horne v. Coughlin*, 155 F.3d 26, 29, 31 (2d Cir. 1998), *amended by* *Horne v. Coughlin*, 191 F.3d 244 (2d Cir. 1999). In *Horne*, an incarcerated person with an intellectual disability was sentenced to six months in the SHU and six months recommended loss of good time. The incarcerated person argued that his employee assistant should not have merely followed his instructions but should also have developed a defense strategy. The court disagreed, saying that the assistant was not required to do anything besides follow the specific instructions of the incarcerated person, because a counsel substitute acts as a surrogate for the incarcerated person, not as an attorney.

156. *Newman v. Coughlin*, 110 A.D.2d 981, 981, 488 N.Y.S.2d 273, 274 (3d Dept. 1985).

157. *See Gunn v. Ward*, 71 A.D.2d 856, 856, 419 N.Y.S.2d 182, 183 (2d Dept. 1979), *affirmed*, *Gunn v. Ward*, 52 N.Y.2d 1017, 420 N.E.2d 100, 438 N.Y.S.2d 302 (1981) (holding failure of employee assistant to appear at superintendent's proceeding violates neither New York law nor a incarcerated person's right to due process).

158. *See Silva v. Casey*, 992 F.2d 20, 22 (2d Cir. 1993) (discussing the duties of employee assistants and

that an employee assistant's refusal to collect necessary and available evidence violated the incarcerated person's due process rights.¹⁵⁹ Another court held that an employee assistant, who did not report back to the incarcerated person with the results of his investigation and witness interviews, deprived the incarcerated person of his right to defend himself.¹⁶⁰

You may or may not want to give your employee assistant "your side of the story." The advantage is that it might help the employee assistant find good witnesses, as described in the next Section. However, one disadvantage is that if the story you tell your employee assistant is different from the testimony you give at your hearing, it may make you look untruthful and give prison officials an excuse to discredit your testimony.

4. Witnesses

In *Wolff v. McDonnell*, the Supreme Court stated the limits of your constitutional right to call witnesses during disciplinary hearings.¹⁶¹ The Court pointed out that an incarcerated person in a disciplinary proceeding "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."¹⁶² In other words, you can call witnesses unless prison officials decide that allowing you to do so would have a bad impact on the safety of the prison or their ability to operate the prison. Prison officials do not have to allow every witness you ask for to testify at your disciplinary hearing; they can decide whether a potential witness can testify or not.¹⁶³ This generally means that the official can choose not to call witnesses whose testimony they believe would not be important (immaterial)¹⁶⁴ or repetitive and unnecessary (unduly redundant).¹⁶⁵

An incarcerated person's right to call witnesses (to have them testify) at disciplinary hearings was made clear in a 1980 court case, *Powell v. Ward* (also known as *Powell II*).¹⁶⁶ Before that case, a prison rule had said that witnesses could not be present to testify at a disciplinary hearing. In the *Powell* case, the court said that "witnesses must be allowed to be present at disciplinary proceedings, unless the appropriate officials determine that [their presence] would jeopardize institutional safety or

holding that assistant had no obligation to go beyond bounds of incarcerated person's specific instructions in interviewing incarcerated people and gathering evidence). See also *Kelemen v. Coughlin*, 100 A.D.2d 732, 732–733, 473 N.Y.S.2d 618, 619 (4th Dept. 1984) (finding that assistant's failure to investigate incarcerated person's reasonable factual claim violates due process); *Hilton v. Dalsheim*, 81 A.D.2d 887, 887–888, 439 N.Y.S.2d 157, 158 (2d. Dept. 1981) (finding that assistant's failure to interview witnesses as requested by incarcerated person violates the incarcerated person's rights under New York law).

159. See *Giano v. Sullivan*, 709 F. Supp. 1209, 1215 (S.D.N.Y. 1989) (holding that the incarcerated person was denied his constitutional right to assistance in a disciplinary hearing when the employee assistant refused to obtain documentary evidence for the incarcerated person, and the hearing officer then proceeded with the hearing despite the incarcerated person's protest that he was not prepared).

160. See *Brooks v. Scully*, 132 Misc. 2d 517, 519, 504 N.Y.S.2d 387, 389 (Sup. Ct. Dutchess County 1986) (holding that the failure of the employee assistant to inform the incarcerated person of investigation results and interviews with witnesses deprived the incarcerated person of meaningful and effective assistance in preparation for a disciplinary hearing).

161. *Wolff v. McDonnell*, 418 U.S. 539, 566–567, 94 S. Ct. 2963, 2979–2980, 41 L. Ed. 2d 935, 956–957 (1974).

162. *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

163. *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 956–957 (1974) (A prison official may exercise his "discretion to keep the hearing within reasonable limits").

164. See *Dawkins v. Gonyea*, 646 F.Supp.2d 594, 611 (S.D.N.Y. 2009) (finding hearing officers are not required to call witnesses whose testimony is not necessary) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 956–597 (1974)).

165. See *Russell v. Selsky*, 35 F.3d 55, 59 (2d Cir. 1994) (finding that disciplinary hearing officer did not violate any of the incarcerated person's rights in excluding certain witness testimony as "cumulative" (redundant), where the officer had already heard substantially identical testimony from earlier witnesses).

166. *Powell v. Ward*, 487 F. Supp. 917 (S.D.N.Y. 1980), *affirmed and modified*, *Powell v. Ward*, 643 F.2d 924 (2d Cir. 1981).

correctional goals.”¹⁶⁷ This means that witnesses have to be allowed at disciplinary hearings unless officials decide there is a safety concern or a concern that prison goals would be harmed because of a witness being present. If a witness is not going to be allowed at a disciplinary hearing, you must be told the reason why they will not be allowed to appear.¹⁶⁸ If the court decides that a witness will not be allowed, that witness may be interviewed and tape-recorded without you being there for the interview.¹⁶⁹ The tape or a transcript of the interview must be available for you to have before the hearing or at the hearing, unless the hearing officer decides that the same concerns exist that there would be if the witness appeared.¹⁷⁰

Under New York rules, when you receive a notice before your disciplinary hearing, it has to tell you that you have the right to call witnesses.¹⁷¹ If you want to request a witness you should tell your employee assistant or hearing officer before the hearing or during the hearing.¹⁷² You have the right to ask your employee assistant to interview your witnesses while your claim is being investigated.¹⁷³ If you are not present during the interview, you have the right to get a tape or transcript of the interview.¹⁷⁴ If you are not given a tape or transcript, you have the right to be told before the hearing why it was denied.¹⁷⁵

If you are an incarcerated person in New York State and you are not allowed to call a witness for a disciplinary hearing, you should receive a written statement from the hearing officer that explains why.¹⁷⁶ This statement should tell you the specific reason, which is either a safety concern or a concern that prison goals could be harmed.¹⁷⁷ Courts have said that simply telling you that, “[it] does not meet with Security Procedure or Correctional goals for you to be present during those interviews” is not a proper explanation.¹⁷⁸ But it might be unclear what counts as a proper explanation. You could be told that a witness’ testimony is “redundant” (meaning it repeats evidence available from other sources).¹⁷⁹ On one hand, there are limits that stop a prison official from saying that all witness testimony is

167. *Powell v. Ward*, 487 F. Supp. 917, 929 (S.D.N.Y. 1980).

168. *Powell v. Ward*, 487 F. Supp. 917, 929 (S.D.N.Y. 1980). *But see* *Ponte v. Real*, 471 U.S. 491, 492, 105 S. Ct. 2192, 2193–2194, 85 L. Ed. 2d 553, 556 (1985) (stating that although due process requires that prison officials state their reasons for refusing to call witnesses, such reasons do not have to be in writing or made part of the administrative record).

169. *Powell v. Ward*, 487 F. Supp. 917, 929 (S.D.N.Y. 1980).

170. *Powell v. Ward*, 487 F. Supp. 917, 929 (S.D.N.Y. 1980).

171. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(d)(2) (2017).

172. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.5(c) (2017); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5(c) (2017).

173. *See* *Burke v. Coughlin*, 97 A.D.2d 862, 863, 469 N.Y.S.2d 240, 242 (3d Dept. 1983) (stating that New York State regulations give incarcerated people the right to have a chosen employee interview any witnesses requested in investigating the incarcerated person’s reasonable factual claims and submit a written report including witness statements).

174. *See* *Burke v. Coughlin*, 97 A.D.2d 862, 863, 469 N.Y.S.2d 240, 242 (3d Dept. 1983).

175. *See* *Burke v. Coughlin*, 97 A.D.2d 862, 863, 469 N.Y.S.2d 240, 242 (3d Dept. 1983) (stating that the constitutional right of due process requires an incarcerated person to either be present when a witness is interviewed, to be provided a tape or transcript of the interview, or to be given an explanation of the denial).

176. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.5(a) (2017), N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5(a) (2017); *see* *Moye v. Selsky*, 826 F. Supp. 712, 716–717 (S.D.N.Y. 1993) (explaining that prison officials may have to give incarcerated people an explanation for exclusion of witnesses from disciplinary hearing).

177. N.Y. COMP. CODES R. & REGS. Tit. 7, § 253.5(a) (2017), N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5(a) (2017); *see* *Moye v. Selsky*, 826 F. Supp. 712, 716–717 (S.D.N.Y. 1993) (explaining that prison officials may have to give incarcerated people an explanation for exclusion of witnesses from disciplinary hearing).

178. *See* *People ex rel. Selcov v. Coughlin*, 98 A.D.2d 733, 735, 469 N.Y.S.2d 148, 151 (2d Dept. 1983) (internal quotations omitted) (holding that without evidence that incarcerated person’s presence would create any threat to prison security or correctional goals, incarcerated person’s due process rights were violated when hearing officer did not allow incarcerated person to be present when officer interviewed witnesses).

179. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.5(a) (2017), N.Y. COMP. CODES R. & REGS. Tit. 7, § 254.5(a) (2017).

repetitive.¹⁸⁰ But on the other hand, courts do not require the explanations why testimony is redundant to be very detailed. Instead, the court “must accord due deference to the decision of the [prison] administrator.”¹⁸¹ This means that the court must take the prison administrator’s decision seriously. The court will still uphold the refusal to allow a witness even if the witness could have provided testimony that is helpful to you.¹⁸² If the reason prison officials are denying your witness is for security concerns, courts will tend to find that acceptable.¹⁸³

5. Confronting and Cross-Examining Witnesses

You generally have the right to call witnesses whose testimony is beneficial to you. However, the Supreme Court has stated that you do not have a constitutional right to confront and cross-examine the other side’s witnesses. This means that you might not be able to ask them questions. The Supreme Court explained that the right to ask questions of the other side’s witnesses would create “considerable potential for havoc [or problems] inside prison walls.”¹⁸⁴ The Supreme Court was worried that that confronting and cross-examining the other side’s witnesses could lead to a security concern inside prison. One court suggested that this security concern could be retaliation (trying to get revenge) against adverse witnesses (witnesses against you) and informants (people testifying unfavorably or against you).¹⁸⁵ The same court also suggested that confronting and cross-examining opposing witnesses could be a cause for “potential for breakdown in authority.”¹⁸⁶ Because of the importance of keeping the prison safe, the courts tell us that your right to confront and cross-examine opposing witnesses is not as strong as your right to call your own witnesses. The decision of whether or not to

180. See *Fox v. Coughlin*, 893 F.2d 475, 477–478 (2d Cir. 1990) (holding that officials did not deprive an incarcerated person of clearly established statutory or constitutional rights where they called only some of the witnesses he requested, but emphasizing that, failing to provide an incarcerated person assistance in interviewing requested witnesses without a valid reason may in the future provide a sufficient basis for a viable Section 1983 action); *Wong v. Coughlin*, 137 A.D.2d 272, 273–274, 529 N.Y.S.2d 45, 46 (3d Dept. 1988) (removing disciplinary violation from incarcerated person’s record where hearing officer’s basis for refusing to allow officer who had prepared misbehavior report to testify was based only on guessing or predicting that his testimony would be redundant); *Fox v. Dalsheim*, 112 A.D.2d 368, 369, 491 N.Y.S.2d 820, 821 (2d Dept. 1985) (holding that hearing officer abused his discretion when he refused to call two witnesses requested by an incarcerated person due to “redundancy of the testimony” based on prediction that the two witnesses’ testimony would only repeat what was in misbehavior report. The court said that “[a]lthough the revised superintendent’s hearing rules and regulations. . . permit exclusion of a witness’s testimony when it is redundant or immaterial, this provision does not afford the hearing officer the unlimited right to exclude testimony relevant to an inmate’s defense.”).

181. *Zamakshari v. Dvoskin*, 899 F. Supp. 1097, 1107 (S.D.N.Y. 1995) (internal quotations omitted) (“The Supreme Court and the Second Circuit have repeatedly concluded that in determining whether a prison disciplinary committee properly excluded a witness from a hearing, a reviewing court must accord due deference to the decision of the [prison] administrator.”).

182. *Zamakshari v. Dvoskin*, 899 F. Supp. 1097, 1107 (S.D.N.Y. 1995).

183. See, e.g., *Laureano v. Kuhlmann*, 75 N.Y.2d 141, 146, 550 N.E.2d 437, 439–440, 551 N.Y.S.2d 184, 186–187 (1990) (upholding denial of right to call witness where hearing officer informed incarcerated person that victim of assault feared retaliation and officer showed incarcerated person form where witness indicated desire not to testify); *Cortez v. Coughlin*, 67 N.Y.2d 907, 909, 492 N.E.2d 1225, 1225, 501 N.Y.S.2d 809, 809 (1986) (upholding exclusion of incarcerated person from his disciplinary hearing during witness testimony on basis of institutional safety and disciplinary reports documenting violent behavior when incarcerated person was allowed to listen to taped testimony instead).

184. *Wolff v. McDonnell*, 418 U.S. 539, 567, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 957 (1974).

185. *Smith v. Farley*, 858 F. Supp. 806, 816–819, 822 (N.D. Ind. 1994) (finding violation of incarcerated person’s due process rights where incarcerated person was denied admittance of letter that could potentially clear his name without valid security concerns being provided for denial) (citing *Young v. Kann*, 926 F.2d 1396, 1400–1402 (3d Cir. 1991)), *aff’d*, *Wolff v. McDonnell*, 418 U.S. 539, 562, 94 S. Ct. 2963, 2978, 41 L. Ed. 2d 935, 954 (1974).

186. *Smith v. Farley*, 858 F. Supp. 806, 819 (N.D. Ind. 1994) (quoting *Young v. Kann*, 926 F.2d 1396, 1400 (3d Cir. 1991)).

allow you to confront and cross-examine witnesses is left up to the prison officials.¹⁸⁷ Prison officers are not required to give you a written report explaining why you are not allowed to confront your accusers or to cross-examine witnesses.¹⁸⁸

In New York, courts have stated that incarcerated people do not have the right to be present when opposing witnesses testify (when the witness is called by the Hearing Officer).¹⁸⁹ However, prison officials do have to give you some objective evidence (evidence that is not biased) that supports their decision to not allow you to attend the interviewing of witnesses.¹⁹⁰ They may also be required to give you a tape or transcript of the testimony, if doing so does not create a safety concern. In one example from a New York court case, a disciplinary ruling was dismissed because the state would not provide the incarcerated person with a tape or transcript of a witness' testimony, and the state also did not give a reason why.¹⁹¹ A hearing officer is also not allowed to consider information that is confidential (secret), and that the incarcerated person does not know, without giving some reason for keeping the information confidential.¹⁹²

Although there are limits to your questioning of opposing witnesses, you can always ask the hearing officer to question adverse witnesses for you. You should be aware that prison officials are not required to guarantee that informants are telling the absolute truth. Prison officials are only required to judge the reliability of confidential informants (to try to tell if the information is accurate) in situations where this right (to have the reliability of the informants examined) has been established.¹⁹³ If your version of the event is different from the witness' version, point this difference out to the hearing officer and comment on the evidence presented at the hearing.

187. See *Sanchez v. Roth*, 891 F. Supp. 452, 456–458 (N.D. Ill. 1995) (After affirming that the right to call witness is limited, subject to the discretion of prison officials, and considerations of safety, but that the discretion of officials is not unlimited and the decision cannot be arbitrary, the court held that where a incarcerated person did not follow proper procedure for requesting witnesses, prison officials' refusal to allow witnesses to testify at disciplinary proceeding was a valid excuse and did not violate incarcerated person's due process rights).

188. See *Ponte v. Real*, 471 U.S. 491, 496–497, 105 S. Ct. 2192, 2195–2196, 85 L. Ed. 2d 553, 557 (1985) (establishing that prison officials can state the reason for denying an incarcerated person's witness request either in the administrative record or later in court testimony when there is a dispute over the refusal to call a witness). But see *Scarpa v. Ponte*, 638 F. Supp. 1019, 1023 n.4 (D. Mass. 1986) (distinguishing *Ponte v. Real* because in that case, prison officials failing to provide reasons in administrative record had an explanation related to safety or correctional goals, in contrast to the clear absence of threat to prison security in *Scarpa v. Ponte*).

189. See *Graham v. N.Y. State Dept. of Corr. Servs.*, 178 A.D.2d 870, 870, 577 N.Y.S.2d 728, 729 (3d Dept. 1991) (holding that an incarcerated person did not have right to be present during testimony of witness called by Hearing Officer because "the right to be present applies only when an inmate calls a witness"); *Honoret v. Coughlin*, 160 A.D.2d 1093, 1094, 533 N.Y.S.2d 573, 575 (3d Dept. 1990) (dismissing incarcerated person's claim that his due process rights were violated when he was not allowed to be present at testimony of witness called by Hearing Officer because "[o]nly when an inmate calls a witness on his behalf does he have any right to be present").

190. See *Burnell v. Smith*, 122 Misc. 2d 342, 347, 471 N.Y.S.2d 493, 497 (Sup. Ct. Wyoming County 1984) (removing disciplinary violation from incarcerated person's record where no substantive reason was given for refusal to allow incarcerated person to be present during witness' testimony).

191. *Matter of Martin v. Coughlin*, 139 A.D.2d 650, 651, 526 N.Y.S.2d 1018, 1018 (2d Dept. 1988).

192. See *Boyd v. Coughlin*, 105 A.D.2d 532, 533, 481 N.Y.S.2d 769, 770 (3d Dept. 1984) (holding that "it is fundamental that the hearing officer must, at the time of the hearing, inform the inmate that he will consider certain information which will remain confidential and articulate some reason for keeping the information confidential"); see also *Freeman v. Coughlin*, 138 A.D.2d 824, 825–826, 525 N.Y.S.2d 744, 745 (3d Dept. 1988) (applying the *Boyd* rule to find the hearing officer's decision to keep information confidential without informing the incarcerated person was not a harmless error, resulting in a new hearing for the incarcerated person). But see *Laureano v. Kuhlman*, 75 N.Y.2d 141, 147, 550 N.E.2d 437, 440, 551 N.Y.S.2d 184, 187 (N.Y. 1990) ("[A] disciplinary determination cannot stand when a denial of the inmate's request to call a witness, or to be present when his witness testifies, is wholly unexplained, but will not be set aside if the record discloses the basis for the denial.").

193. See *Gomez v. Kaplan*, 964 F. Supp. 830, 835 (S.D.N.Y. 1997) (finding that because the informant did not have qualified immunity, the hearing officer violated the incarcerated person's rights by not judging the informant's reliability).

6. “Impartial” Hearing Officer

According to *Wolff v. McDonnell*, you have the right to have an unbiased hearing officer conduct your disciplinary proceeding.¹⁹⁴ The hearing officer does not have to meet the very high standard of impartiality that applies to judges.¹⁹⁵ However, the officer cannot be so biased against you that they create a “hazard of arbitrary decisionmaking . . . violative of due process.”¹⁹⁶ To prove that the hearing officer is biased against you, you must provide “evidence that the [hearing officer] has actually prejudged the case or [had a] direct personal involvement in the underlying charge.”¹⁹⁷ For example, one court found proof that a hearing officer was possibly biased when the hearing officer refused to look at the evidence in support of the incarcerated person’s claim.¹⁹⁸ The court explained that “where a hearing officer indicates on the record that, without considering the evidence, he finds a prisoner’s factual defense inconceivable, we cannot conclude that the prisoner had a full and fair opportunity to litigate the issue.”¹⁹⁹ In another case, the court dismissed a disciplinary hearing decision because what the hearing officer did (saying “Okay now. You have to convince me that you’re not guilty”) suggested that he was biased against the incarcerated person.²⁰⁰

The New York regulations touch on the issue of impartiality, but they do not guarantee that you will have an impartial hearing officer. There are different rules for disciplinary hearings and for superintendent hearings. An officer of the rank of lieutenant or above may preside over a disciplinary hearing.²⁰¹ In a disciplinary hearing, the regulations do not allow the hearing officer to be someone who has (1) participated in the investigation; or (2) prepared or ordered the preparation of the misbehavior report.²⁰² Generally, a superintendent’s hearing will be conducted by the superintendent, deputy superintendent, captain, or commissioner’s hearing officer. In superintendent hearings, the regulations do not allow the use of a hearing officer who: (1) actually witnessed the event; (2) was directly involved in the incident; (3) is a review officer who reviewed the misbehavior report; or (4) has

194. *Wolff v. McDonnell*, 418 U.S. 539, 592, 94 S. Ct. 2963, 2992, 41 L. Ed. 2d 935, 972 (1974) (Marshall, J. concurring in part and dissenting in part); *Sira v. Morton*, 380 F.3d 57, 69 (2d Cir. 2004) (citing *Wolff v. McDonnell*, 418 U.S. 539, 563–567, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)).

195. *Moore v. Selsky*, 900 F. Supp. 670, 676 (S.D.N.Y. 1995) (finding that a hearing officer may be allowed to have a biased view that a scientific test for evidence is reliable, so long as the hearing officer would be willing to consider whether he may be mistaken in his view impartially); *Sloane v. Borawski*, 64 F. Supp.3d 473, 487 (W.D.N.Y. 2014) (“A hearing officer may satisfy the standard of impartiality if there is some evidence in the record to support the findings of the hearing.”) (internal quotations omitted); *Allen v. Cuomo*, 100 F.3d 253, 259 (2d Cir. 1996) (“The degree of impartiality required of prison officials does not rise to the level of that required of judges generally. It is well recognized that prison disciplinary hearing officers are not held to the same standard of neutrality as adjudicators in other contexts.”).

196. *Wolff v. McDonnell*, 418 U.S. 539, 571, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959–960 (1974).

197. *Wade v. Farley*, 869 F. Supp. 1365, 1376 (N.D. Ind. 1994) (citing *Underwood v. Chrans*, No. 90 C 6713, 1992 U.S. Dist. LEXIS 12616, at *10 (N.D. Ill. Aug. 20, 1992) (*unpublished*)) (holding that although hearing officer had been involved in incarcerated person’s previous disciplinary proceeding, he was impartial with respect to the present proceeding); *see, e.g., Francis v. Coughlin*, 891 F.2d 43, 46 (2d Cir. 1989) (noting that a prison disciplinary hearing in which the result is arbitrarily and adversely predetermined violates an incarcerated person’s right to due process); *Washington v. Afify*, 968 F. Supp.2d 532, 542 (W.D.N.Y. 2013) (allegations that a hearing officer called the incarcerated person a “little monkey” and that there was “more retaliation on the way” is sufficient to support a finding of bias in a motion to dismiss).

198. *See Colon v. Coughlin*, 58 F.3d 865, 871 (2d Cir. 1995) (holding that where a hearing officer “indicates on the record that, without considering the evidence, he finds a prisoner’s factual defense inconceivable,” the incarcerated person did not have “a full and fair opportunity to litigate the issue”).

199. *Colon v. Coughlin*, 58 F.3d 865, 871 (2d Cir. 1995).

200. *Tumminia v. Kuhlmann*, 139 Misc. 2d 394, 397, 527 N.Y.S.2d 673, 675 (Sup. Ct. Sullivan County 1988).

201. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.1(A) (2018).

202. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.1(B) (2018).

investigated the incident.²⁰³ Note that the superintendent may permit other correctional facility employees to act as hearing officers in a superintendent's or disciplinary hearing.²⁰⁴

If you think your hearing officer might be biased, you should consider making an objection. You should also consider objecting if your hearing officer is closely connected to prison security or is known to have a strong dislike for incarcerated people. Remember that it is usually to your advantage to make any possible objections at your hearing so that you create a strong "record" for future appeals.

7. "Use" Immunity

Most violations of prison regulations are punished only through disciplinary proceedings within the prison. But sometimes a violation of a prison rule will also be a violation of a criminal law. To take an extreme example, stabbing a guard is certainly a severe violation of prison regulations. More importantly, it is also a criminal offense for which an incarcerated person can be tried and convicted in court.

A situation like the one described above raises special problems. You might want to testify at the disciplinary proceeding in order to avoid a potentially severe punishment. On the other hand, you may worry that something you say at your hearing could get you in trouble in a later criminal trial.

To avoid this problem, incarcerated people often seek "use" immunity in disciplinary hearings. "Use" immunity does not protect you from prosecution, but it prevents any statements you make at your disciplinary hearing from being used against you in the criminal case.²⁰⁵ Immunity in criminal proceedings comes from the U.S. Constitution's Fifth Amendment privilege against self-incrimination.²⁰⁶ An individual accused of a crime has the right to remain silent.²⁰⁷ When the state demands that you testify, the state must grant "use" immunity.²⁰⁸ If you choose not to testify in your disciplinary hearing and your silence is used as evidence of your guilt, you must also be granted "use" immunity.²⁰⁹ If that was not the case, the state would be punishing you for exercising your Fifth Amendment right.

The Supreme Court faced this problem in *Baxter v. Palmigiano*,²¹⁰ which involved an incarcerated person facing disciplinary action for violations of prison regulations that were also crimes under state law. The *Baxter* Court held that while an incarcerated person's silence can be considered evidence of guilt in a disciplinary proceeding,²¹¹ silence alone is not enough. Other evidence must be produced in order to establish guilt.²¹²

If an incarcerated person chooses to testify in cases where he is not required or compelled to testify, according to *Baxter*, anything he says at the disciplinary hearings can be used against him in criminal proceedings later.²¹³ Therefore, an incarcerated person does not have a constitutional right to

203. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.1 (2018). See Part E of this Chapter for an explanation of "superintendent's," "disciplinary," and "violation" hearings, which are the three types of hearings in New York State.

204. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.1(A) (2018); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.1 (2018).

205. See 18 U.S.C. § 6002 (granting immunity from the use of compelled testimony and evidence derived from it); *Kastigar v. U.S.* 406 U.S. 441, 452–453, 92 S. Ct. 1653, 1661, 32 L. Ed. 2d 212, 221 (1972) (holding that immunity from use and derivative use follows the scope of the privilege against self-incrimination).

206. U.S. CONST. amend. V.

207. U.S. CONST. amend. V.; see also *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 294 (1966) (holding that individuals being taken into custody must be informed of their right to remain silent or else their privilege against self-incrimination would be violated)

208. 18 U.S.C. § 6002.

209. See 18 U.S.C. § 6002.

210. *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

211. *Baxter v. Palmigiano*, 425 U.S. 308, 317–318, 96 S. Ct. 1551, 1557–1558, 47 L. Ed. 2d 810, 821 (1976).

212. *Baxter v. Palmigiano*, 425 U.S. 308, 317–318, 96 S. Ct. 1551, 1557–1558, 47 L. Ed. 2d 810, 821 (1976).

213. *Baxter v. Palmigiano*, 425 U.S. 308, 316, 96, S. Ct. 1551, 1557, 47 L. Ed. 2d 810, 820 (1976); see *Fantone v. Latini*, 780 F.3d 184, 192 (3d Cir. 2015) ("[A]n inmate does have [the right to remain silent] when the alleged prison misconduct include[s] criminal acts").

immunity in those cases. When the incarcerated person must testify, however, “use” immunity must be granted to protect his Fifth Amendment right to remain silent.²¹⁴ In reality, it is unlikely that after *Baxter*, prison officials will make an incarcerated person testify since: (1) unfavorable inferences, or conclusions, may be drawn from an incarcerated person’s silence; and (2) the problem of whether to grant immunity can be avoided if the official does not compel testimony.²¹⁵

New York state currently grants incarcerated persons “use” immunity at all disciplinary proceedings.²¹⁶ The City of New York requires that at the start of a disciplinary proceeding, incarcerated people be informed of their right to remain silent.²¹⁷ You have the right to “use” immunity even if criminal charges have not been filed against you. You must be told of your right in the following language: “You are hereby advised that no statement made by you in response to the charge, or information derived therefrom may be used against you in a criminal proceeding.”²¹⁸ This warning will appear in the notice of charges, which must be given to you at least twenty-four hours before the proceeding. Because the legal interaction between disciplinary proceedings and criminal trials is so complicated, you should consult with your criminal attorney, if you have one, before you make any formal or informal statements in regard to the events in question.

8. The Ruling and the Requirement of a Written Record

At the end of the hearing, the hearing officer may, at his discretion, do one of several things: he may affirm all the charges, he may dismiss all the charges, or he may affirm some charges and dismiss others.²¹⁹ The only requirement is that some evidence supports the hearing officer’s final decision. This standard is very low. It does not require the hearing officer to produce “substantial evidence” or a “preponderance of evidence” against you. Generally, if any evidence exists at all, the court will uphold the hearing officer’s conclusion. Also, the fact finder (here, the hearing officer) is not required to make a decision only using the evidence presented at the hearing. In *Baxter v. Palmigiano*, the Supreme Court explained that, in the unique prison environment, facts that may not come to light until after the formal hearing should not be excluded in determining what happened, since they may help officials understand the incident.²²⁰ The Court also clarified that the fact finder must provide a written statement of the evidence that he relied on and of the reasons why the disciplinary action was taken.²²¹

Often, the only or primary evidence against an incarcerated person is the misbehavior report itself. New York’s regulations require that misbehavior reports present a detailed written account of the alleged incident. Therefore, the report alone may provide enough evidence to support a disciplinary ruling.²²² However, in one case, the reports that were used as evidence merely restated that all of the

214. *Baxter v. Palmigiano*, 425 U.S. 308, 316, 96 S. Ct. 1551, 1557, 47 L. Ed. 2d 810, 820 (1976). “Use” immunity must be granted where a defendant is forced to give up his right to remain silent, but immunity need not be granted where no right to remain silent exists. If you are incarcerated outside of New York, you should research your state’s rules and regulations governing disciplinary proceedings to find out whether you can get some form of immunity at your disciplinary proceeding. See Chapter 2 of the *JLM*, “Introduction to Legal Research,” for more information on how to conduct legal research.

215. *Baxter v. Palmigiano*, 425 U.S. 308, 318–20, 96 S. Ct. 1551, 1558–1559, 47 L. Ed. 2d 810, 821 (1976).

216. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(D)(1) (2018).

217. City of New York, Department of Corrections, Directive No. 6500R-E, Inmate Disciplinary Due Process (III)(D)(10)(b) (2016) (*as revised* Jan. 23, 2016), *available at* <https://www1.nyc.gov/assets/doc/downloads/directives/6500R-E.pdf> (last visited Nov. 23, 2020).

218. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(D)(1) (2018).

219. *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455–456, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985) (stating that due process requirements are satisfied if there is evidence in the record that could support the board’s conclusion in order to prove that the prison disciplinary board’s decision was justified).

220. *Baxter v. Palmigiano*, 425 U.S. 308, 322 n.5, 96 S. Ct. 1551, 1560 n.5, 47 L. Ed. 2d 810, 824 n.5 (1976).

221. *Baxter v. Palmigiano*, 425 U.S. 308, 322 n.5, 96 S. Ct. 1551, 1560 n.5, 47 L. Ed. 2d 810, 824 n.5 (1976).

222. *See* *Tuitt v. Martuscello*, 106 A.D.3d 1355, 1356, 965 N.Y.S.2d 669, 670 (3d Dept. 2013) (holding that the “detailed misbehavior report provides substantial evidence supporting the determination of guilt.”); *Walker v. Bezio*, 96 A.D.3d 1268, 1268, 946 N.Y.S.2d 905, 906 (3d Dept. 2012) (same); *James v. Strack*, 214 A.D.2d 674,

incarcerated people in the mess hall were part of a disturbance, without describing their specific misbehavior. The evidence was found to be insufficient to support a disciplinary finding against the incarcerated persons.²²³

With certain exceptions, *Wolff v. McDonnell* guarantees your constitutional right to receive, from the hearing officer, a written statement of the evidence being used against you and a statement of the reasons for the decision.²²⁴ This requirement prevents the hearing officer from simply stating that you were found guilty of a particular offense without providing enough detail. The hearing record must include reasons for the decision, copies of any reports relied on, and summaries of any interviews conducted.²²⁵ In addition, New York regulations provide that you must receive the written statement as soon as possible, and no later than twenty-four hours after the end of the hearing.²²⁶

Constitutional and New York standards allow the hearing officer to exclude (keep out) pieces of evidence from the written statement that, if presented, would threaten “personal or institutional safety.” For example, in *Laureano v. Kuhlmann*, New York’s highest court ruled that a hearing officer does not have to disclose to the incarcerated person the details of a confidential informant’s testimony or circumstances that might reveal the informant’s identity.²²⁷ Instead, the officer may provide a summary of essential points of the testimony.²²⁸ If evidence has been excluded, the written statement you receive informing you of the decision must disclose this fact.²²⁹

The written statement and the tape recording of the hearing will be important parts of your disciplinary hearing “record.” This record is very important because the court will examine it if you seek judicial review of an unfavorable disciplinary hearing decision in state or federal court.²³⁰

E. New York Disciplinary Proceedings and Appeal Procedures

1. Types of Disciplinary Proceedings

New York regulations create a three-tier (level) hearing system for disciplinary actions that is based on how severe (bad) the offense is.²³¹ Violation hearings, which are used for minor offenses, make

675, 625 N.Y.S.2d 265, 266 (2d Dept. 1995) (holding that the misbehavior report was “sufficiently detailed, relevant and probative to constitute substantial evidence supporting the Hearing Officer’s finding of guilt”); *Nelson v. Coughlin*, 209 A.D.2d 621, 621, 619 N.Y.S.2d 298, 299 (2d Dept. 1994) (holding that the misbehavior report provided sufficient evidence that the incarcerated person violated rule prohibiting incarcerated people from making or possessing alcoholic beverages and that officials were not required to chemically test beverage for presence of alcohol).

223. *See Bryant v. Coughlin*, 77 N.Y.2d 642, 649–650, 572 N.E.2d 23, 26–27, 569 N.Y.S.2d 582, 585–586 (1991) (concluding that misbehavior reports, which did not specify the particulars of the incarcerated person’s misconduct and only alleged a mass incident, were insufficient).

224. *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

225. *See McQueen v. Vincent*, 53 A.D.2d 630, 631, 384 N.Y.S.2d 475, 476–477 (2d Dept. 1976) (remanding case to determine whether due process requirements were met in light of incomplete hearing record); *see also Tolliver v. Fischer*, 125 A.D.3d 1023, 1023–1024, 2 N.Y.S.3d 694, 695 (3d Dept. 2015) (granting incarcerated person’s petition due to an out of order transcript, portions of missing witness questionings, and a cut off petitioner statement); *People ex rel. Lloyd v. Smith*, 115 A.D.2d 254, 255, 496 N.Y.S.2d 716, 717 (4th Dept. 1985) (holding that failure to include superintendent’s proceeding minutes in the record made adequate review impossible, resulting in remand for review of minutes).

226. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(5) (2018); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(5) (2018).

227. *Laureano v. Kuhlmann*, 75 N.Y.2d 141, 148, 550 N.E.2d 437, 441, 551 N.Y.S.2d 184, 188 (1990); *see also Moye v. Fischer*, 93 A.D.3d 1006, 1007, 940 N.Y.S.2d 356, 357 (3d Dept. 2012) (overturning an incarcerated person’s disciplinary conviction because no reasons had been given for his witnesses’ refusal to testify).

228. *Laureano v. Kuhlmann*, 75 N.Y.2d 141, 148, 550 N.E.2d 437, 441, 551 N.Y.S.2d 184, 188 (1990); *see also Moye v. Fischer*, 93 A.D.3d 1006, 1007, 940 N.Y.S.2d 356, 357 (3d Dept. 2012).

229. *Wolff v. McDonnell*, 418 U.S. 539, 565, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

230. *See, e.g., Roseboro v. Gillespie*, 791 F. Supp.2d 353, 366 (S.D.N.Y. 2011).

231. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3(a) (2018).

up the first tier.²³² Disciplinary hearings, which are used for serious offenses, make up the second tier.²³³ Finally, superintendent's hearings, which are for the most serious offenses, make up the third tier.²³⁴ The nature of the offense of which you are accused determines both the type of hearing that you face and the type of punishment you can receive.

Sandin v. Conner drastically affected New York's three-tier system. Under that case, incarcerated people are entitled to due process only when the punishment they receive constitutes an "atypical and significant hardship. . . in relation to the ordinary incidents of prison life."²³⁵ In other words, if the court does not think the punishment you are given is especially, or unusually, severe, there is no requirement to hold a hearing beforehand. Whether a punishment is severe is based on the specific facts of your case.²³⁶ The punishments imposed after violation and disciplinary hearings, such as loss of privileges and placement in disciplinary segregation, do not satisfy *Conner's* "atypical and significant hardship" test. Only more severe punishments imposed after superintendent's hearings, such as loss of good-time credits or segregated confinement for lengthy periods, can trigger due process protection under *Conner*.²³⁷

Accordingly, New York is not constitutionally *required* to conduct violation and disciplinary hearings at all under *Conner*. The regulations, however, still provide for all three types of hearings, and prison officials are required to follow their own rules.²³⁸ For example, if a prison official decided to revoke your visiting privileges or to place you in a SHU for no reason without giving you a hearing, you could file an appeal within the prison system. In a case like this, however, you could not seek relief in federal court. This is because, according to *Conner*, you no longer have a constitutional right to be free from all arbitrary and unfair punishment; you only have a right to be free from "atypical and significant" punishment.²³⁹ It is still unclear whether you could appeal your case successfully in a New York state court.²⁴⁰ New York must follow the minimum due process rules set out in *Conner*. This means it has to comply with due process of law before it can subject an incarcerated person to an "atypical and significant hardship," but otherwise does not have to even give incarcerated people

232. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3(a)(1) (2018); N.Y. COMP. CODES R. & REGS. tit. 7, § 252 (2018).

233. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3(a)(2) (2018); N.Y. COMP. CODES R. & REGS. tit. 7, § 253 (2018).

234. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3(a)(3) (2018); N.Y. COMP. CODES R. & REGS. tit. 7, § 254 (2018).

235. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed 2d 418, 430 (1995).

236. *Miller v. Selsky*, 111 F.3d 7, 9 (2d Cir. 1997) ("*Conner* did not create a per se blanket rule that disciplinary confinement may never implicate a liberty interest."); *Davis v. Barrett*, 576 F.3d 129, 134 (2d Cir. 2009) ("[T]he decision in *Conner* entailed careful examination of the actual conditions of the challenged punishment compared with ordinary prison conditions. [The] court must examine the specific circumstances of the punishment.") (quoting *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 635 (S.D.N.Y. 1998) (arguing *Conner* "did not say that segregated confinement could never constitute an atypical and significant hardship").

237. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed 2d 418, 430 (1995).

238. *See Uzzell v. Scully*, 893 F. Supp. 259, 263 n.10 (S.D.N.Y. 1995) (stating that, because prison officials must adhere to their own rules, incarcerated people may administratively challenge their keeplock confinement by raising procedural error claims).

239. *See Kalican v. Dzurenda*, 583 F. App'x 21, 22 (2d Cir. 2014) (*unpublished*) ("Grievance procedures, which are creatures of state law, are not interests independently protected by the Constitution because the failure to investigate a grievance does not increase an incarcerated person's sentence or impose an 'atypical and significant hardship.'"); *Cliff v. De Celle*, 260 A.D.2d 812, 814, 687 N.Y.S.2d 834, 835 (3d Dept. 1999), *app. denied*, *Cliff v. De Celle*, 93 N.Y.2d 814, 719 N.E.2d 922, 697 N.Y.S.2d 561 (1999) (holding that because the maximum penalty that could be imposed would be loss of privileges and/or confinement of no longer than 30 days, the punishment is not "atypical" or "significant").

240. *See, e.g., Edwards v. Mejia*, No. 11 Civ. 9134(ALC), 2013 U.S. Dist. LEXIS 37006, at *6 (S.D.N.Y. March 15, 2013) (*unpublished*) ("Confiscation of property based on his guilty disposition does not constitute a constitutional violation or suffice to state a liberty interest.").

violation or disciplinary hearings if the particular prison's rules do not call for it.²⁴¹ New York can choose to give incarcerated people more rights than federal law requires, but it cannot provide fewer rights. Therefore, when reviewing the rest of this Section, keep in mind that if prison officials violate these rules, the federal courts will not be able to remedy the situation unless your case involves a severe punishment that violates a right protected by federal law, such as revocation of good-time credits or some similarly severe punishment.

Under New York's regulations, both disciplinary and superintendent's hearings may result in loss of one or more specified privileges for a specific period of time.²⁴² Where the incarcerated person has been involved in improper conduct related to correspondence or visiting privileges with a particular person, a superintendent's hearing may result in loss of those privileges with that person.²⁴³ Disciplinary hearings may not result in loss of correspondence privileges and cannot lead to the loss of visiting privileges for more than thirty days.²⁴⁴ Both types of hearings may result in confinement in your cell (keeplock) or in a SHU, but disciplinary hearings may only result in such confinement for up to thirty days.²⁴⁵ Restitution (the payment of money) may be required for loss or intentional damage to property at both hearings.²⁴⁶ A superintendent's hearing may result in a restricted diet²⁴⁷ and loss of a specific period of good time.²⁴⁸ Both types of hearings may allow for a delay before any penalty is imposed.²⁴⁹

The punishments that violation officers may impose after violation hearings are less severe than the punishments listed above. If the violation officer finds you guilty of committing an offense, he can order any two of the following penalties to be served within a thirteen-day period:²⁵⁰

- (1) Loss of all or part of recreation (for example, game room, day room, television, movies, yard, gym, special events) for up to thirteen days;²⁵¹
- (2) Loss of at most two of the following privileges: one commissary purchase (excluding items related to your health and sanitary needs), withholding of radio for up to thirteen days, withholding of packages for up to thirteen days (excluding perishables that cannot be returned);²⁵²

241. *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed 2d 418, 430 (1995).

242. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(1)(ii) (2018) (period specified for loss of privileges as a result of disciplinary hearings is “up to 30 days”); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1) (2018).

243. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(ii)–(iii) (2018).

244. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(1)(ii) (2018). New York procedures for the suspension of visitation rights are contained within a consent decree issued in *Kozlowski v. Coughlin*, 539 F. Supp. 852 (S.D.N.Y. 1982), *den. of modif. aff'd*, *Kozlowski v. Coughlin*, 871 F.2d 241 (2d Cir. 1989).

245. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(1)(iii) (2018); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(iii)(d)(v) (2018).

246. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(1)(iv) (2018) (stating that, at disciplinary hearings, restitution is limited to \$100) N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(iii)(d)(vii) (2018).

247. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(iii)(d)(vi) (2018). The diet must at all times contain a “sufficient quantity of wholesome and nutritious food.” N.Y. COMP. CODES R. & REGS. tit. 7, § 304.2(e) (2018). It is possible that at some point, the diet provided may be so unhealthy as to amount to “cruel and unusual punishment” in violation of the 8th Amendment. *See, e.g., Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002) (“As suggested by our prior opinion, the alleged treatment—that prison officials deprived Phelps of a nutritionally adequate diet for fourteen straight days—is not as a matter of law insufficiently serious to meet the objective requirement. By alleging that prison officials knew that the diet was inadequate and likely to inflict pain and suffering, Phelps has also sufficiently pleaded the subjective element.”) (citation omitted). For a discussion of the 8th Amendment, see *JLM* Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law.”

248. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(iii)(d)(ix) (2018).

249. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(4) (2018); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(4) (2018). The specified time period for suspensions is up to 180 days from a superintendent's hearing and up to 90 days from a disciplinary hearing.

250. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a) (2018).

251. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a)(1) (2018).

252. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a)(2) (2018).

- (3) Requiring one work task per day, other than a regular work assignment, for a maximum of seven days (excluding Sundays and public holidays), to be performed on your housing unit or other designated area (must be not more than eight hours per day including the regular work assignment); and²⁵³
- (4) Counsel and/or reprimand.²⁵⁴

The violation officer may choose to suspend these punishments for thirteen days.²⁵⁵

A review officer can order any one of the three types of hearings to be held (violation, disciplinary, or superintendent's hearings). The choice will depend on the seriousness of the reported offense.²⁵⁶ If a guard, or any other prison employee, believes that you have committed a violation that creates a "danger to life, health, security or property," he must file a formal report of your conduct (commonly referred to by incarcerated people as a "ticket") "as soon as practicable" (possible) with the review officer.²⁵⁷ The staff person who observed the alleged violation (or who got the facts) must report in writing the nature, date, time, and place of its occurrence.²⁵⁸ Minor infractions or other violations "that do not involve danger to life, health, security or property" do not need to be reported.²⁵⁹ The misbehavior report becomes the basis for the review of an officer's choice of the type of hearing to be held.

An officer will place you in a SHU if he believes you present an "immediate threat to the safety, security or order of the facility or [a]n immediate danger to other persons or to property."²⁶⁰ You cannot be confined to your cell or elsewhere for more than seven days without a hearing, unless a delay is authorized by the commissioner.²⁶¹ Such a hearing must be completed within fourteen days after the misbehavior report is written, or within seven days if the hearing is a violation hearing, unless a delay is authorized.²⁶² If you are placed in keeplock or a SHU solely because of the charges against you, your hearing must begin within seven days of being confined, unless special circumstances exist.²⁶³ An officer may also confine you to your cell or room for your own protection, but can do so for only seventy-two hours and, within that time period, you must be transferred to another housing unit, scheduled for transfer to another facility, released from confinement, or placed in protective custody.²⁶⁴

The validity of the rules stated above is questionable in light of *Sandin v. Conner*.²⁶⁵ A federal court in New York has suggested that *Conner* calls into question New York regulations that grant incarcerated people liberty interests in remaining free from administrative and disciplinary segregation.²⁶⁶ As a result, in federal court you will not be able to argue successfully that you have a constitutionally protected right to remain free from administrative and disciplinary segregation. However, you may still be able to assert such rights under New York regulations within the prison system or in New York state court.

253. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a)(3) (2018).

254. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a)(4) (2018).

255. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a) (2018).

256. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-2.2(b) (2018).

257. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(a) (2018).

258. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(b)–(c) (2018).

259. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-1.5(a) (2018).

260. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-1.6(a) (2018).

261. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 251-5.1(a)–(c) (2018).

262. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(b)–(c) (2018).

263. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(a) (2018).

264. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-1.6(b) (2018).

265. *Sandin v. Conner*, 515 U.S. 472, 487, 115 S. Ct. 2293, 2302, 132 L. Ed. 2d 418, 431–432 (1995) (holding that there was no liberty interest in remaining free from disciplinary segregation).

266. *See Rodriguez v. Phillips*, 66 F.3d 470, 479–481 (2d Cir. 1995) (holding that prison officials' belief that the incarcerated person's three-day administrative confinement, without opportunity to be heard, did not violate the incarcerated person's 14th Amendment due process rights was reasonable).

2. Important Exceptions at Violation Hearings

At violation hearings, you are not entitled to all of the rights you have at disciplinary or superintendent's hearings. For example, you must receive written notice about a disciplinary or superintendent's hearing, but not for violation hearings. Therefore, you may not have enough time to prepare your defense.

However, once the misbehavior report is written against you, the violation hearing must be held within seven days.²⁶⁷ The regulations grant you the right to be present at your violation hearing.²⁶⁸ This right gives you a chance to defend yourself by explaining your version of the events to the violation officer, presenting documentary evidence (for example, a time card showing your presence at your work-station rather than at the scene of the alleged incident), or submitting a written statement on your own behalf.²⁶⁹ You do not, however, have the right to call witnesses at violation hearings,²⁷⁰ which might make it difficult for you to prove your version of the events. If you believe you have been accused of an offense you did not commit, request the violation officer to investigate further before issuing a decision.

The differences among the three types of disciplinary proceedings can be confusing. To simplify matters, the differences in the rights you have are illustrated in Figure I:

Disciplinary/Superintendent's Hearing	Violation Hearing
Right to a written notice of proceeding at least twenty-four hours before the hearing. ²⁷¹	Right to a copy of the misbehavior report at the hearing. ²⁷²
Right to a hearing that must be completed within fourteen days after report, unless authorized by the commissioner. ²⁷³	Right to a hearing that must be completed within seven days of the writing of the misbehavior report. ²⁷⁴
Limited right to substitute counsel. ²⁷⁵	No right to substitute counsel.
Limited right to appear before the hearing officer. ²⁷⁶	Limited right to appear before the violation officer. ²⁷⁷

267. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(c) (2018).

268. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(2) (2018).

269. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(3) (2018).

270. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(3) (2018).

271. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.6(a) (2018) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(a)(1) (2018) (rule governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974) (holding that notice is required for hearings where rights are at stake such as a disciplinary-action hearings or superintendent hearings).

272. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(1) (2018).

273. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(b) (2018).

274. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(c) (2018).

275. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.4 (2018) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.4 (2018) (rule governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 566–570, 94 S. Ct. 2963, 2979–2982, 41 L. Ed. 2d 935, 956–959 (1974) (holding that incarcerated people do not have a right to an attorney but can collect documents and have a fellow incarcerated person assist them when they are illiterate or unlikely to understand the charges against them so long as these rights will not create a “risk of reprisal or undermine authority”).

276. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.6(b) (2018) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(a)(2) (2018) (rule governing superintendent hearings).

277. N.Y. COMP. CODES R. & REGS. tit. 7 § 252.3(a)(2) (2018).

Disciplinary/Superintendent's Hearing	Violation Hearing
Limited right to call witnesses. ²⁷⁸	No right to call witnesses. ²⁷⁹
Right to “use” immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.) ²⁸⁰	Right to “use” immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.) ²⁸¹
Right to an impartial hearing officer. ²⁸²	No declared right to an impartial violation officer.
Right to receive a copy of a written record of the disposition. ²⁸³	Right to receive a copy of a written record of the disposition. ²⁸⁴
Disposition of hearing may be made part of incarcerated person's institutional records.	Disposition of violation hearing not made part of incarcerated person's institutional records. ²⁸⁵
Right to an assistant. ²⁸⁶	No right to an assistant. But, you do have a right to a translator or accommodations if you are hard of hearing. ²⁸⁷

Figure I: Comparison of the Rights of Incarcerated People at Disciplinary or Superintendent's Hearings and Violation Hearings in New York²⁸⁸

Once you receive written charges, you know that a disciplinary proceeding will take place in the near future. If you are in solitary confinement because of the charges, the disciplinary or superintendent's hearing must begin within seven days of your confinement.²⁸⁹ If you are not confined, the hearing must be completed within fourteen days from the time the written charges were made against you.²⁹⁰ The Commissioner of Correctional Services or a person designated to act for the Commissioner can, however, authorize a delay beyond these time limits.²⁹¹

278. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.5 (2018) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5 (2018) (rule governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974) (holding that an incarcerated person should be permitted to call witnesses “when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals”).

279. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(3) (2018).

280. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(d)(1) (2018).

281. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(d)(1) (2018).

282. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.1(b) (2018) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.1 (2018) (rule governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 571, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974) (holding that a committee made up of wardens, superintendents, and facility directors that conducted disciplinary hearings was sufficiently impartial to satisfy due process).

283. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(5) (2018) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(5) (2018) (detailing rules governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

284. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(b) (2018).

285. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(d) (2018).

286. N.Y. COMP. CODES R. & REGS. tit. 7 § 253.4 (2018) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7 § 254.4 (2018) (rule governing superintendent hearings).

287. N.Y. COMP. CODES R. & REGS. tit. 7 § 252.4 (2018).

288. See Part E(1) of this Chapter for more information on the different levels of disciplinary proceedings.

289. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(a) (2018).

290. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(b) (2018).

291. N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(a)–(b) (2018).

3. Appeal Procedures

In New York, incarcerated people have an absolute right to make an administrative appeal to another prison official.²⁹² You must pursue this administrative appeal process in order to preserve your right to pursue further appeals in the courts (your right to judicial review).²⁹³ This means that in order to have a court hear your case at a later stage, you must make an administrative appeal first. Most other states also provide appeal procedures. If you are incarcerated elsewhere, you should research the rules and regulations governing disciplinary proceedings in your state. The appeal procedures differ for disciplinary hearings, superintendent's hearings, and violation hearings. For this reason, they are discussed separately below.

(a) Disciplinary Hearings

You can begin the review process by writing to the superintendent of your facility and requesting that he review the decision made at your disciplinary hearing. You must submit your request no later than seventy-two hours (three days) after you receive your hearing disposition (the decision).²⁹⁴ If you submit your written request after the seventy-two hour deadline, you may lose your right to have your hearing reviewed.²⁹⁵ After receiving your appeal, the superintendent or a person designated to act for the superintendent must review your case and issue a decision within fifteen days.²⁹⁶ New York state regulations do not specify whether an appeal can result in an increased sentence, but New York City does not allow for such an increase.²⁹⁷

When appealing a disciplinary hearing, you should also consider writing to the superintendent. A superintendent has the power to reduce your penalty at any time an imposed penalty is in effect.²⁹⁸

(b) Superintendent's Hearings

The process for appealing a superintendent's decision is similar to the appeal procedure for disciplinary hearings discussed above. The significant differences are (1) the person you write to, (2) the number of days you have to submit your written appeal, and (3) an appeal of a superintendent's decision can never result in a harsher penalty.

After you have received the superintendent's decision following a superintendent's hearing, you have thirty days to submit your written appeal.²⁹⁹ You should submit your appeal in writing to the Commissioner of Correctional Services, not to the superintendent.³⁰⁰ Address your appeal to:

292. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.8 (2018) (detailing rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2018) (detailing rule governing superintendent hearings).

293. To institute a New York Article 78 proceeding or a federal Section 1983 claim, you must first exhaust your administrative appeal possibilities. *See, e.g.,* *Julicher v. Town of Tonawanda*, 61 A.D.3d 1384, 1385, 876 N.Y.S.2d 807, 808 (4th Dept. 2009) (dismissing an employment termination petition for failing to exhaust the union's administrative process). For more information, see *JLM* Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," *JLM* Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law," and *JLM* Chapter 14, "The Prison Litigation Reform Act."

294. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.8 (2018).

295. *See Lane v. Hanberry*, 593 F.2d 648, 649 (5th Cir. 1979) (holding that when an incarcerated person is advised of his right to an administrative appeal, constitutional due process does not require that he also be advised that if he chooses not to make an administrative appeal, he will not be allowed to challenge the disciplinary hearing in a court of law); *Lopez v. Matthews*, No. 90-3174-R, 1990 WL 94312 (D. Kan. July 2, 1990) (*unpublished*) (holding that an incarcerated person held in confinement who had failed to use the administrative remedy process was not allowed to challenge his confinement in a court of law).

296. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.8 (2018).

297. City of New York Department of Correction, Directive No. 6500R-E, Inmate Disciplinary Due Process § (III)(G)(4) (*as revised* Jan. 23, 2016), available at <https://www1.nyc.gov/assets/doc/downloads/directives/6500R-E.pdf> (last visited Nov. 24, 2020).

298. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.9 (2018).

299. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2018).

300. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2018).

Commissioner _____
New York State Department of Correctional Services
State Office Campus, Building 2
1220 Washington Avenue
Albany, New York 12226

The Commissioner, or person designated to act for him or her, must issue a decision within sixty days of receiving your appeal.³⁰¹ Under no circumstances can appealing a superintendent's hearing result in a harsher penalty.³⁰²

In addition to officially appealing a superintendent's hearing to the Commissioner, you should also consider writing to the superintendent. Writing to your superintendent may be particularly worthwhile if he or she did not preside over your hearing. Even where the superintendent did preside over your hearing, there is always a chance that you can change his or her mind. A superintendent has the authority to reduce a penalty imposed at the superintendent's hearing at any time during which an imposed penalty is in effect.³⁰³ The superintendent can reduce your penalty even if the Commissioner decides not to reverse or modify the decision made at your superintendent's hearing.

(c) Violation Hearings

To appeal the decision in your violation hearing, you must write to your superintendent within twenty-four hours of receiving notification of the decision and request that he or she review your case.³⁰⁴ The superintendent or the person designated to act for the superintendent must then issue a decision within seven days.³⁰⁵ The superintendent may reduce the penalty imposed at your hearing.³⁰⁶

Keep in mind that you can still appeal an unfavorable decision to a court of law, especially after a superintendent's hearing.³⁰⁷ However, after *Sandin v. Conner*,³⁰⁸ it is not likely that you would be able to successfully appeal an unfavorable decision from a violation hearing or disciplinary hearing. Remember, an appeal in court can only be successful where the punishment is extreme and implicates a liberty interest.³⁰⁹ If the penalty imposed at your violation hearing is relatively minor, filing an appeal may not be worth the trouble. Moreover, violation hearings cannot be made part of an incarcerated person's institutional records.³¹⁰ The minor infraction dealt with through a violation hearing cannot be held against you at a later date.

F. Administrative Segregation Proceedings

Similar to disciplinary confinement, a court must find that the laws or regulations that apply to your prison create a protected liberty interest for you to receive procedural protections.³¹¹ This means that unless your state has a law or regulation that gives you the right to avoid segregation from the

301. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2018).

302. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8(d) (2018).

303. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.9 (2018).

304. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.6 (2018).

305. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.6 (2018).

306. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.7 (2018).

307. Remember that you must exhaust your administrative remedies before petitioning the courts. You should review Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more information on Article 78 appeals in New York State court.

308. *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

309. See Part E(1).

310. N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(d) (2018).

311. See *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that an incarcerated person has a liberty interest protected by the Constitution's Due Process Clause only when his administrative segregation reaches levels of atypical and significant hardship); *Hewitt v. Helms*, 459 U.S. 460, 472, 103 S. Ct. 864, 871–72, 74 L. Ed. 2d 675, 688–689 (1983) (holding that the proceeding involving an informal non-adversarial review of evidence provided to an incarcerated person who was placed in administrative segregation satisfied the due process requirements for continued confinement).

general prison population, you do not have a right to a formal hearing before being confined in administrative or protective custody. Not all jurisdictions have found a protected liberty interest when it comes to administrative segregation. But courts in the Second Circuit, which covers New York, have decided that some state and federal regulations regarding administrative segregation create a protected liberty interest.³¹² This Part will first discuss the minimum administrative segregation procedures that all prisons must follow before and during your administrative detention. Then, this section will cover the procedures that officials in New York must follow before and after your administrative detention. Finally, this section will describe procedures that federal prisons within the Second Circuit must follow before and after your administrative detention.

There are some minimum administrative segregation procedures that all prisons must follow before and during your administrative detention. The due process protections for disciplinary action discussed in the Sections above do not apply to administrative segregation. This means that the requirements of *Wolff v. McDonnell*³¹³ do not apply to administrative segregation. Instead, the key case for understanding the basic requirements for administrative segregation is *Hewitt v. Helms*.³¹⁴ In the *Helms* case, an incarcerated person was placed in administrative segregation after a riot in a state prison. The next day, the incarcerated person was given notice of a misconduct charge against him. After five days of confinement, a hearing committee reviewed the evidence against him, including a report of his version of the events. The committee did not reach a decision about the incarcerated person's guilt, but decided that he posed a threat to the safety of other incarcerated people and prison officials. The committee decided that his confinement in administrative segregation should be continued. The Supreme Court concluded that the prison officials' review process was acceptable and that the review process did not violate the incarcerated person's due process rights.³¹⁵

The Supreme Court created a standard for hearings to determine if an incarcerated person represents a security threat, or if he should be confined to administrative segregation while awaiting the results of an investigation into misconduct charges.³¹⁶ The Court stated that an informal, non-adversarial (which here means not focused on the dispute or conflict) review of the evidence would satisfy the due process requirements of the Fourteenth Amendment.³¹⁷ Based on the previous decisions of the Supreme Court, for administrative segregation hearings, the procedural safeguards you are entitled to in any prison are:

- (1) Some notice of the charges against you,
- (2) An opportunity to present your views orally or in writing to the prison officer who will decide whether to transfer you to (or keep you in) administrative segregation,
- (3) An informal proceeding held within a reasonable time after your transfer to administrative segregation, and
- (4) Periodic review of the charges and available evidence by the decision-maker.³¹⁸

These are the minimum procedural requirements prison officials must follow. Other state or federal regulations that govern your prison may set out additional, specific guidelines.

312. See *Tellier v. Fields*, 280 F.3d 69, 83 (2d Cir. 2000) (holding that federal rule 28 C.F.R. § 541.22 “contains mandatory language that gives rise to” a liberty interest); *Gonzalez v. Coughlin*, 969 F. Supp. 256, 257–258 (S.D.N.Y. 1997) (concluding that New York rules regarding administrative confinement create a protected liberty interest); *Brooks v. Chappius*, 450 F. Supp. 2d 220, 223–224 (W.D.N.Y. 2006) (denial of food during containment gives rise to a liberty interest).

313. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

314. *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

315. *Hewitt v. Helms*, 459 U.S. 460, 476, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 691 (1983).

316. *Hewitt v. Helms*, 459 U.S. 460, 474–475, 103 S. Ct. 864, 873, 74 L. Ed. 2d 675, 691 (1983).

317. *Hewitt v. Helms*, 459 U.S. 460, 476, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 691 (1983).

318. See *Hewitt v. Helms*, 459 U.S. 460, 476–477, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 691–692 (1983). Please note that *Helms* has been overturned in part on other grounds by *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L. Ed. 2d 418 (1995), but remains good law on this matter. See, e.g., *Toevs v. Reid*, 685 F.3d 903, 912 (10th Cir. 2012).

New York State prisons have additional, specific guidelines. In New York State prisons, you may be placed in administrative segregation only if prison officials find that your presence in the general prison population poses a threat to the general safety and security of the facility.³¹⁹ You are entitled to give prison officials a written statement responding to the charges against you. Prison officials may, if they choose, let you make your case in person. You are not entitled to be present at each review hearing. But, you are entitled to a report of the results of the review hearings and a chance to respond to those findings.³²⁰ You are also entitled to have a committee review your status of confinement in administrative segregation every sixty days.³²¹ A three-member committee, including a representative of the facility executive staff, a security supervisor, and a member of the guidance and counseling staff, will examine your record and prepare and submit a report to the superintendent.³²² The report must state:

- (1) Reasons why you were initially placed in administrative segregation,
- (2) Information on your later behavior and attitude, and
- (3) Any other factors that favor keeping you in or releasing you from administrative segregation.³²³

The law that applies to incarcerated people in federal prison is slightly different. If you are placed in administrative detention in SHU in a federal prison, you are entitled to a copy of the “Administrative Detention Order” which tells you the reasons for your detention. You will usually receive the Administrative Detention Order within twenty-four hours of your placement.³²⁴ But, you will not receive an administrative detention order if you were placed in administrative detention while waiting for classification or while in holdover status.³²⁵ A Segregation Review Official must conduct an initial review to evaluate the merits of the segregation within three days of your placement in SHU, not counting the day you were admitted, weekends, and holidays.³²⁶ A Segregation Review Official must formally review your status at a hearing that you can attend within seven days of continuous placement in SHU.³²⁷ After that, the Segregation Review Official will review your records without you there—once every seven calendar days of continuous placement.³²⁸ After every thirty days of continuous placement in SHU, the Segregation Review Official will formally review your status at a hearing that you can attend.³²⁹

In federal prisons, federal laws do require some formal hearings. This means that if you are in a federal prison, you have the right to appear and present your opinion at those hearings about your detention status. After every thirty days of continuous placement, mental health staff will examine you. This examination will include a personal interview.³³⁰ If the reasons for your confinement no longer exist, you must be released from administrative detention.³³¹ However, courts have ruled that the warden’s original decision to place you in administrative detention is in the warden’s judgment,

319. N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(b).

320. See *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *50–51 (W.D.N.Y. May 16, 2000) (*unpublished*) (suggesting that in some circumstances, prisons can constitute sufficient notice and opportunity to respond to charges by informing an incarcerated person of the dates and results of his reviews, of how long he can expect to be confined and what he might do to change his status, and give him a real opportunity to present information in his defense that he was no longer a threat to the facility).

321. N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(d) (2018).

322. N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(d)(1) (2018).

323. N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(d)(1) (2018).

324. 28 C.F.R. § 541.25(a) (2019).

325. 28 C.F.R. § 541.25(a) (2019).

326. 28 C.F.R. § 541.26(a) (2019).

327. 28 C.F.R. § 541.26(b) (2019).

328. 28 C.F.R. § 541.26(b) (2019).

329. 28 C.F.R. § 541.26(c) (2019).

330. 28 C.F.R. § 541.32(b) (2019).

331. 28 C.F.R. § 541.33(a) (2019).

and courts will generally respect and uphold the warden's decision if certain procedural requirements are met.³³²

Some rules apply only to federal and state prisons that are in the area covered by the Second Circuit (which includes New York State). Other circuits might have different rules, so be sure to check for relevant case law if you are in a prison that is somewhere other than the Second Circuit. If you are in either a federal or state prison in the Second Circuit, there must be compelling reasons for placing you in confinement and continuing your confinement in administrative segregation upon periodic review.³³³ The reason given at a later review hearing may be the same as the original reason, but it must be deemed compelling, and it must take into account all the evidence available at the time of each review.³³⁴ If new, relevant information arises after your first hearing, the committee must consider the new evidence in deciding whether you still pose a threat to the safety or security of the prison. If a review of all the available evidence does not indicate that you pose a threat, prison officials cannot keep you in administrative segregation.³³⁵ If the reason for your confinement in administrative segregation changes, you have the right to know the new reason and to respond to it.³³⁶

There must be a record of those meetings showing that there was actually "meaningful consideration" of the reasons for the segregation status.³³⁷ In *Giano v. Kelly*, a federal district court in New York found that the committee did not conduct "meaningful" reviews of a New York State incarcerated person's segregation status and therefore violated the incarcerated person's due process rights.³³⁸ There were two main reasons for this conclusion. First, records of the committee meetings did not show that there was a consideration of the evidence available after he was first confined.³³⁹ Second, the records of the reviews contained no conclusions reached by the committee on the specific question of whether the incarcerated person continued to pose a threat to the safety or security of the

332. See *Tellier v. Fields*, 280 F.3d 69, 82 (2d Cir. 2000) (stating that although a warden's decision to place a incarcerated person in administrative detention is discretionary, this discretion is not "boundless and continuing").

333. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *48 (W.D.N.Y. May 16, 2000) (*unpublished*) (holding that confinement in administrative segregation must be based on a compelling reason, and upon review the decision-maker must determine if that reason is still valid); *Ramsey v. Squires*, 879 F. Supp. 270, 296 (W.D.N.Y.), *aff'd*, *Ramsey v. Squires*, 71 F.3d 405 (2d Cir. 1995) (noting periodic review requirement and holding that officials must demonstrate a compelling government interest in the restriction and the purpose of the measure is not solely punishment); *McClary v. Coughlin*, 87 F. Supp. 2d 205, 212 (W.D.N.Y. 2000), *aff'd sub nom. McClary v. Kelly*, 237 F.3d 185 (2d Cir. 2001) (stating that the need to maintain the inmate in restricted housing must be subject to meaningful "periodic review" by prison officials).

334. *Giano v. Kelly*, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *48–49 (W.D.N.Y. May 16, 2000) (*unpublished*); see *Hewitt v. Helms*, 459 U.S. 460, 476, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 691 (1983).

335. See *Giano v. Kelly*, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *49 (W.D.N.Y. May 16, 2000) (*unpublished*) (noting periodic review hearings must consider all evidence available at the time of the review hearing).

336. See *Giano v. Kelly*, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *48–49 (W.D.N.Y. May 16, 2000) (*unpublished*) (noting that prisons may not use a pretext to keep an incarcerated person in segregated housing when he no longer presents a threat to the facility).

337. See *Taylor v. Rodriguez*, 238 F.3d 188, 193 (2d Cir. 2001) (stating that a hearing for placement in administrative segregation "is not 'meaningful' if a prisoner is given inadequate information about the basis of the charges against him"); *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *49–55 (W.D.N.Y. May 16, 2000) (*unpublished*) (holding that an administrative segregation committee did not give meaningful consideration to a incarcerated person's confinement in part because the incarcerated person was neither permitted to appear before, nor submit information to the committee, and did not regularly receive information regarding the committee's recommendations); see also *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 33 (1976) (establishing that the kind of meaningful consideration that satisfies due process is not satisfied by a standard set of procedures, but depends on the context in which the hearing is held).

338. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138 (W.D.N.Y. May 16, (2000) (*unpublished*).

339. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *49 (W.D.N.Y. May 16, (2000) (*unpublished*).

prison.³⁴⁰ Reviewing courts will generally defer to prison officials' reasons and decisions. But the court in *Giano v. Kelly* did conclude the reason for the plaintiff's initial confinement was no longer an adequate reason for his continued confinement.³⁴¹ The decision about what is a threat to the security of the prison does not need to be based on any single decisive factor, and there does not need to be a finding that the incarcerated person committed some sort of misconduct.³⁴² In making the decision, the committee may consider the character of the people confined in the particular facility, as well as recent and long-standing relations among incarcerated people and between those who are incarcerated and the guards.³⁴³

In *Taylor v. Rodriguez*, the Second Circuit addressed what constitutes meaningful review for administrative segregation in the context of gang affiliation.³⁴⁴ In that case, an incarcerated person in a Connecticut prison was placed in administrative segregation because of "recent tension in B-Unit involving gang activity" and "statements by independent confidential informants."³⁴⁵ The incarcerated person's request for specific factual accusations was denied. The Second Circuit concluded that this notice was not enough to allow the incarcerated person to prepare his defense adequately.³⁴⁶ This means that if there are accusations that you are currently involved in a gang, prison officials have to tell you the specific facts that are supporting those accusations.³⁴⁷ Unclear statements or statements of fact without evidence are not enough. Prison officials cannot just accuse you of being affiliated with a gang—they must have a reason for making that accusation, and they must tell you what it is.

In *Taylor*, the Second Circuit also ruled that the review of evidence at the incarcerated person's hearing did not meet due process requirements. To satisfy due process, "the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board."³⁴⁸ The report of the hearing provided no details to support the decision to segregate the incarcerated person in administrative housing. The report referred to the attached statements of confidential informants, but they were not actually attached for the court to review.³⁴⁹ Prison officials do not have to reveal the identity of confidential informants or have those informants testify at the hearing. But prison officials must make an independent assessment of confidential informants' credibility.³⁵⁰ In *Taylor*, the record did not contain an assessment of the confidential informant's

340. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *58–60 (W.D.N.Y. May 16, (2000) (*unpublished*).

341. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *53–54 (W.D.N.Y. May 16, 2000) (*unpublished*) (concluding that since his attacker was now at a different facility, the incarcerated person could no longer pose a security risk).

342. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *47 (W.D.N.Y. May 16, 2000).

343. *See Hewitt v. Helms*, 459 U.S. 460, 474, 103 S. Ct. 864, 872, 74 L. Ed. 2d 675, 689–690 (1983).

344. *Taylor v. Rodriguez*, 238 F.3d 188, 192–193 (2d Cir. 2001) (holding notice given to an incarcerated person was too vague to allow him to prepare a defense, and a decision-maker must assess the reliability of a confidential informant if relying on the informant's testimony). *See JLM* Chapter 31, "Security Classification and Gang Validation," for more information.

345. *Taylor v. Rodriguez*, 238 F.3d 188, 193 (2d Cir. 2001).

346. *Taylor v. Rodriguez*, 238 F.3d 188, 193 (2d Cir. 2001).

347. *Taylor v. Rodriguez*, 238 F.3d 188, 193 (2d Cir. 2001).

348. *Superintendent v. Hill*, 472 U.S. 445, 455–456, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985) (holding due process is satisfied if some evidence supports a prison disciplinary board's decision to reverse good-time credits); *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S. Ct. 1584, 1589, 137 L. Ed.2d 906, 915 (1997) (citing *Superintendent v. Hill*, 472 U.S. 445, 455–456, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985)); *McLean v. Holder*, 550 Fed. Appx. 49, 49 (2d Cir. 2014).

349. *Taylor v. Rodriguez*, 238 F.3d 188, 194 (2d Cir. 2001).

350. *Taylor v. Rodriguez*, 238 F.3d 188, 193–194 (2d Cir. 2001) (citing *Giakoumelos v. Coughlin*, 88 F.3d 56, 61–62 (2d Cir. 1996)) (reasoning that confidential informant's identity in prison disciplinary hearing need not be disclosed because the "requirements of prison security are unique"). *See also* *Giakoumelos v. Coughlin*, 88 F.3d 56, 61 (2d Cir. 1996) (stating that a confidential informant's testimony is sufficient to support a prison disciplinary finding as long as there has been some examination of the informant's credibility); *Russell v. Scully*, 15 F.3d 219,

credibility around the time of the hearing. Instead, the record contained only an official statement by a prison officer submitted two years after the hearing. The court found that this official statement was insufficient to place an incarcerated person in administrative detention.

G. Conclusion

If prison officials have changed the conditions of your confinement for the worse, and you believe they acted unfairly (for example, by not allowing you to present evidence on your behalf), you may be able to bring a due process challenge in federal court. This will depend on whether your state has made a law or regulation creating a protected liberty interest, and whether the change in your confinement taking away that liberty is “atypical and significant.”³⁵¹ Even if the change in your confinement does not meet this standard, you still may be able to challenge it through the prison administrative process or in state court.³⁵² Prison officials must follow their own rules, and you can challenge the change in your confinement if these rules have not been followed.³⁵³ In all cases, your first step is to go through your prison’s administrative process.³⁵⁴ You should learn what steps you need to take to do so. Sometimes, your prison must provide you with help in bringing your case, but you must ask for this help.³⁵⁵ And remember, you only have so much time to file an appeal, whether it is within the prison’s administrative process or in the courts. If you wait too long, you may lose your ability to do so.³⁵⁶

220 (2d Cir. 1993) (holding that the incarcerated person had not been deprived of a protected liberty interest because he was only subjected to administrative confinement pending his hearing and appeal and thus the question of whether he had a clearly established right to an independent examination of the confidential informants’ credibility did not need to be decided).

351. *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); *see also* Part E(1).

352. *See* Part C.

353. *See Uzzell v. Scully*, 893 F. Supp. 259, 263 n.10 (S.D.N.Y. 1995) (stating that, because prison officials must adhere to their own rules, incarcerated people may administratively challenge their keeplock confinement by raising procedural error claims); *see also* Part E(3).

354. *See* Part E.

355. *See* Part D(3).

356. *See* Part E(3).

CHAPTER 19

YOUR RIGHT TO COMMUNICATE WITH THE OUTSIDE WORLD*

A. Introduction

Prison administrators often restrict your right to communicate with courts, attorneys, family, friends, and the news media. They may also limit the types and sources of materials that you may read. Prison authorities do not, however, have absolute power to limit your right to communicate. The U.S. Constitution, state constitutions, and federal, state, and city regulations limit prison authorities' power to restrict your access to the outside world. Upon imprisonment, you keep some constitutional rights, including some of your First Amendment protections of speech, press, and association.² Within prisons, however, these rights can be limited under certain circumstances to accommodate the prison's "legitimate penological interests."³

This Part of the chapter addresses constitutional protections that apply to all incarcerated people in the United States and outlines the protections that state and federal regulations add to your right to correspond with the general public. Part B discusses your rights to communicate with the general public (friends, relatives, etc.). This Chapter focuses on New York State and federal law. Your own state's law may be different from the New York laws and may provide you with additional protections. See Chapter 2 of the *JLM*, "Appealing Your Conviction", for information on how to conduct thorough legal research.

Part C addresses your right to correspond with courts, public officials, and attorneys. Part D discusses your right to communicate over the Internet, both directly and through third parties. Part E provides a general outline of your right to receive publications such as magazines and books, and includes a discussion of your right to receive sexually explicit materials. Part F examines your right to communicate with the news media, and Part G discusses your right to receive visitors. Finally, Part H discusses telephone access.

The legality of a prison's restrictions on all of these rights are determined by a four-part test. Courts ask whether: (1) the prison regulation is rationally related to a legitimate government interest, (2) there is an alternative way for the incarcerated person or outside communicator to exercise the right even with the restriction in place, (3) the burden or cost to the prison is too great if the right is accommodated, (4) there are no readily available alternative options that the prison could put in place.⁴ This Chapter refers to this test as the "*Turner* reasonableness standard" (or sometimes just the

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2. U.S. CONST. amend. I; *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) (explaining that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison"). Courts generally avoid deciding to what extent rights survive incarceration and instead determine whether the restriction is reasonable regardless of whether the right survives. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131–132, 123 S. Ct. 2162, 2167, 156 L. Ed. 2d 162, 169–170 (2003) (declining to "explore or define" a an incarcerated person's right to associate upon finding that the restriction was rationally related to a "legitimate penological interest").

3. *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987)) (noting that the warden may only reject communication if it is "determined [to be] detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.").

4. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987); *see also Thornburgh v. Abbott*, 490 U.S. 401, 414–416, 109 S. Ct. 1874, 1882–1883, 104 L. Ed. 2d 459, 473–475 (1989) (applying *Turner* test to incoming mail); *Overton v. Bazzetta*, 539 U.S. 126, 131–132, 123 S. Ct. 2162, 2167–2168, 156 L. Ed. 2d 162, 170 (2003) (applying *Turner* test to visitation restrictions); *Beard v. Banks*, 548 U.S. 521, 530–533, 126 S. Ct. 2572, 2578–2580, 165 L. Ed. 2d 697, 705–708 (2006) (applying *Turner* test to denial of publications and photographs).

“*Turner* standard”) because of the Supreme Court case that announced the test.⁵ Restrictions on legal mail, outgoing general correspondence, and the practice of your religion are not considered under this test. For instance, prison officials may not restrict your right to communicate without a reason, but they may legally do so in situations where exercising that right might endanger the security or order of the prison, or the rehabilitation of incarcerated people. To determine the legality of a prison’s restrictions on your religious practice, courts ask whether the restriction places a substantial burden on your ability to practice your religion.⁶

Another important term that this Chapter will use is “discretion.” As you will learn, although the courts will independently examine all four of the *Turner* factors, they often give a lot of weight to the prison officials’ reasoning for the decision to restrict your right to communicate. One definition for discretion is: “An individual’s power to make decisions without anyone else’s advice or consent.”⁷ This means that the courts will allow the prison officials to decide (prison officials have the *discretion* to decide) whether or not to restrict your right to communicate based on their understanding of the effect that the exercise of the particular right would have on the prison’s interests. As long as their decision does not violate the Constitution. The reasoning is that prison officials understand the prison conditions better than judges and are therefore better able to determine how certain acts will affect the prison.

The rights this Chapter describes are about the conditions of your confinement, and are subject to the Prison Litigation Reform Act. Because of this, if you believe your right to communicate has been improperly denied, you *must* first raise the problem through your institution’s administrative grievance procedure, if there is one, before you can file a federal claim. See Chapter 15 of the *JLM*, “Inmate Grievance Procedures”, for further information on inmate grievance procedures. If you are unsuccessful or do not receive a satisfactory result through the inmate grievance procedure, you can bring a case under a federal law, 42 U.S.C. § 1983, in federal or state court. You could choose instead to file a tort action in state court (in the Court of Claims if you are in New York), or to file an Article 78 petition in state court if you are in New York. More information on all of these types of cases can be found in Chapter 5 (on choosing a court and a lawsuit), Chapter 14 (on the Prison Litigation Reform Act), Chapter 16 (42 U.S.C. § 1983 and *Bivens* Actions), Chapter 17 (Tort Actions), and Chapter 22 (New York’s Article 78) of the *JLM*.

If you decide to pursue a claim in federal court, you need to read *JLM*, Chapter 14, on the Prison Litigation Reform Act (“PLRA”). Failure to follow the PLRA’s requirements can lead, among other things, to the loss of good time credits and the loss of your right to bring future claims in federal court without paying the full filing fee.

B. The Right to General (Non-Legal) Correspondence

If you are incarcerated in a state facility, your right to communicate with the outside world is protected by the U.S. Constitution, and the constitution, statutes, and regulations of the state in which you are imprisoned. If you are incarcerated in a federal facility, your rights are protected by the U.S. Constitution and federal statutes and regulations. If your mail is coming from state or federal courts, attorneys, or certain public officials, your mail is considered “legal mail.” For more information on your rights regarding legal mail, see Section C of this chapter of the *JLM*. This Section B talks about your rights regarding general or non-legal correspondence.

1. Federal Constitutional Protections

The First Amendment to the U.S. Constitution creates a minimum level of protection of your right to communicate with the outside world. No government body may pass laws or regulations falling below this level of protection. Some states may also provide more protection through state constitutions and statutes. The following is a discussion of the U.S. Constitution’s minimum

5. *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

6. 42 U.S.C. § 2000cc-1 (2020).

7. *Discretion*, BLACK’S LAW DICTIONARY (11th ed. 2019).

guarantees of your right to communicate. While reading the information below, it is important to keep in mind that courts distinguish between incoming and outgoing mail.

Originally, the case of *Procunier v. Martinez* provided a standard to determine the legality of prison regulations on both incoming and outgoing mail. In that case, the U.S. Supreme Court held that unless the regulation was implemented to support the substantial government interests of security concerns, order, or rehabilitation, arbitrary censorship of both incoming and outgoing general prison correspondence (regulations preventing you from sending or receiving all or part of your mail) violates the First Amendment right to free speech of both incarcerated people and their correspondents.⁸ The Court also held that when some censorship was justified, the censorship could not be greater than necessary to serve valid government interests.⁹ This case applied to both incoming and outgoing mail. Later, the case *Thornburgh v. Abbott*, the Supreme Court partially overruled *Martinez* by specifying that the *Martinez* standard applies only to outgoing correspondence, which is correspondence sent by an incarcerated person to someone outside the prison.¹⁰

Restrictions on incoming mail are greater than on outgoing mail because incoming mail can pose a greater security threat. For incoming correspondence (correspondence received by an incarcerated person from the outside), a different standard applies. This standard comes from *Turner v. Safley*, and states that restrictions on incoming mail are valid if they are “reasonably related to legitimate penological interests.”¹¹ A penological interest is an interest of the prison system related to the management of incarcerated people, such as maintaining security or rehabilitation. Four factors must be considered in determining whether a limitation on your incoming mail meets this standard:

- (1) the rational connection between the mail restriction and the prison’s penological interest,
- (2) alternatives available to incarcerated people to exercise their rights,
- (3) the burden of accommodating rights, and
- (4) the lack of alternatives available to prisons in satisfying their interests.¹²

The reason the *Abbott* Court gave for treating incoming and outgoing mail differently was that mail containing contraband that comes into the prison is more of a security threat than mail that leaves the prison.¹³

Although the *Turner* standard may appear to be similar to the *Martinez* standard, there is a significant difference between the two. To satisfy the *Turner* standard (for incoming correspondence), prison officials must simply show the regulation could potentially achieve a legitimate goal. To meet the *Martinez* standard (for outgoing correspondence), officials must demonstrate that the restriction actually achieves an important goal. There are two main differences between the two standards: (1) the purposes that restrictions on outgoing mail are meant to serve must be important and not just legitimate, and (2) restrictions on outgoing mail must be shown to be more effective than restrictions on incoming mail need to be. As a result, it is easier to convince a judge that restrictions on outgoing mail are unconstitutional than it is to show that restrictions on incoming mail are unconstitutional. The standards for incoming and outgoing correspondence are explained further below with the help of examples to indicate how courts have interpreted them.

8. *Procunier v. Martinez*, 416 U.S. 396, 412–414, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 239–240 (1974).

9. *Procunier v. Martinez*, 416 U.S. 396, 412–414, 94 S. Ct. 1800, 1811–1812, 40 L. Ed. 2d 224, 239–240 (1974). Note that the Supreme Court has severely limited the force of this requirement by refusing to interpret it as imposing a “least restrictive means” test. This means that lower courts will not invalidate a regulation simply because a less restrictive alternative is proposed. See *Thornburgh v. Abbott*, 490 U.S. 401, 411, 109 S. Ct. 1874, 1883, 104 L. Ed. 2d 459, 474 (1989), partially overturning *Procunier*.

10. *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989).

11. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79 (1987). *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989) (finding that outgoing materials are less likely to cause disorder than incoming materials and determining that incoming mail should be held to a higher standard of inspection than outgoing mail).

12. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987).

13. *Thornburgh v. Abbott*, 490 U.S. 401, 412–414, 109 S. Ct. 1874, 1881–1882, 104 L. Ed. 2d 459, 472–473 (1989).

(a) Outgoing Correspondence

Restrictions on outgoing, non-legal mail must further an important governmental objective, and the restriction must not be greater than necessary.¹⁴ Courts have generally upheld four important types of regulations on outgoing mail under this standard: (1) regulations banning letter kiting (including mail to a third party in your letter to someone else), (2) setting postage limits, (3) banning inmate-to-inmate correspondence, and (4) requiring approved correspondence lists.¹⁵

Under New York State regulations, when the prison authorities have a reason to suspect that an incarcerated person is kiting mail, they may open that person's outgoing mail.¹⁶ Kiting is when you send a message to one person, and inside that letter, include another message that will be sent to someone else. The authorities must have proof that the officials reasonably believed the incarcerated person was kiting mail.¹⁷ Receiving incoming kited mail is also prohibited, though it is permissible for someone to send you the writing of a child within an adult's correspondence.¹⁸

Courts have also held that prison authorities are permitted to limit the amount of postage you can spend on outgoing mail.¹⁹ Similarly, courts have generally allowed prison policies that limit receiving postage in the mail and providing free postage.²⁰ These restrictions must relate to the legitimate interest of prison security. Examples of legitimate interests of security could be concerns of increased theft and unregulated transactions when stamps are used as currency, or because drugs can be smuggled on stamps.²¹

Many prisons completely ban inmate-to-inmate correspondence, and these restrictions have generally been upheld as reasonably relating to prison security.²² As inmate-to-inmate correspondence

14. *Procunier v. Martinez*, 416 U.S. 396, 413–414, 94 S. Ct. 1800, 1811–1812, 40 L. Ed. 2d 224, 240 (1974); *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989) (limiting the *Martinez* test to outgoing mail).

15. *See, e.g., United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998) (holding that interception of mail sent in violation of anti-kiting regulations [regulations banning communicating to a third party through someone else] was not unconstitutional, because the government had evidence from letters written by incarcerated defendant that the defendant attempted to send mail for the purposes of recruiting for membership of his gang and planning to commit further crimes). *See, e.g., Davidson v. Mann*, 129 F.3d 700, 702 (2d Cir. 1997) (holding that limiting the number of stamps incarcerated people could purchase was not unconstitutional). *See, e.g., Purnell v. Lord*, 952 F.2d 679, 683 (2d Cir. 1992) (holding that banning correspondence between two specific incarcerated people for security reasons did not violate the First Amendment). *See, e.g., Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970) (holding that a requirement for an approved addressee list was not a constitutional violation so long as “the criteria used to create lists are rationally related to purposes of confinement and security” of the prison facility).

16. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(p) (2020); *see United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998) (upholding restrictions on kiting).

17. *See Ode v. Kelly*, 159 A.D.2d 1000, 1000, 552 N.Y.S.2d 475, 476 (4th Dept. 1990) (finding inspection of an incarcerated person's outgoing mail violated his rights where the superintendent had no reason to suspect an incarcerated person was kiting mail). *But see Minigan v. Irvin*, 977 F. Supp. 607, 609–610 (W.D.N.Y. 1997) (permitting screening of an incarcerated person's outgoing mail provided there is “good cause pursuant to legitimate prison regulations and directives.”).

18. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, HANDBOOK FOR THE FAMILIES AND FRIENDS OF NEW YORK STATE DOCCS INMATES 6 (2019), *available at* <https://doccs.ny.gov/system/files/documents/2020/01/family-handbook-english-final-12.2019-002.pdf> (last visited May 22, 2020).

19. *See Gittens v. Sullivan*, 670 F. Supp. 119, 123 (S.D.N.Y. 1987) (finding “\$1.10 per week for stamps and an additional advance of \$36 for legal mailings satisfie[d] the constitutional minimum for access to the courts”); *see also Davidson v. Mann*, 129 F.3d 700, 702 (2d Cir. 1997) (upholding limits on an incarcerated person's access to stamps for non-legal mail).

20. *See Johnson v. Goord*, 445 F.3d 532, 534 (2d Cir. 2006) (holding that an incarcerated person has no “constitutional right to unlimited free postage for non-legal mail”).

21. *Johnson v. Goord*, 445 F.3d 532, 535 (2d Cir. 2006).

22. *See, e.g., Purnell v. Lord*, 952 F.2d 679, 683 (2d Cir. 1992) (finding restriction on correspondence between specific incarcerated people at different facilities reasonably related to security interests); *Farrell v. Peters*, 951 F.2d 862, 863 (7th Cir. 1992) (finding prevention of correspondence between two incarcerated people

involves both outgoing and incoming correspondence, it presents different circumstances from purely outgoing mail to a person that is not incarcerated. Inmate-to-inmate correspondence was at issue in *Turner v. Safley*, in which the Supreme Court announced the reasonable relation standard that is applied in all incoming correspondence cases and in many outgoing correspondence cases.²³ In addition, courts have also found restrictions barring correspondence between current and former inmates to be constitutional because they are rationally related to security interests such as preventing escapes and violent acts.²⁴

It is unclear whether “approved correspondence lists” for outgoing non-legal mail are constitutional. In *Milburn v. McNiff*, a New York court found unconstitutional a policy requiring incarcerated people who wanted to communicate with people not on their “approved correspondence lists” to submit a “request to correspond form” to the addressee.²⁵ On the other hand, various federal district courts have found this kind of regulation to be “a reasonable method of maintaining prison security without undue restriction on the First Amendment rights of prisoners.”²⁶ Such lists, of course, must pass *Martinez* and have only been upheld when a substantial penological interest in security or rehabilitation is involved.²⁷ In New York, state courts might follow *McNiff* and prohibit the use of this type of list all together. But, in other states or in federal court, the lists may be upheld, provided they are legitimately used to further prison security or rehabilitation.²⁸

In addition to the above, if you have already been sentenced and are in a minimum or low security level prison, you generally must provide a complete return address on all outgoing mail, otherwise it may be opened by prison staff.²⁹

Finally, courts do not allow prison officials to censor and discipline incarcerated people based on statements in mail that are intended to insult prison personnel, even if such statements would be

who claimed to be common-law spouses was reasonably related to security where they had been criminal accomplices prior to their incarceration).

23. See generally *Turner v. Safley*, 482 U.S. 78, 91–93, 107 S. Ct. 2254, 2262–2264, 96 L. Ed. 2d 64, 80–82 (1987) (upholding regulation barring inmate-to-inmate correspondence because prison had legitimate interest in stopping plans to escape or plans to commit violent acts shared in correspondence).

24. See *Nasir v. Morgan*, 350 F.3d 366, 371–372 (3d Cir. 2003).

25. *Milburn v. McNiff*, 81 A.D.2d 587, 589, 437 N.Y.S.2d 445, 448 (2d Dept. 1981) (further finding that there was no substantial government interest in restricting an incarcerated person’s ability to send letters to a local newspaper).

26. *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970) (holding that the approved correspondence lists were constitutional, but striking other mail surveillance on First Amendment grounds); see also *George v. Smith*, No. 05-C-403-C, 2005 U.S. Dist. LEXIS 16139, at *20 (W.D. Wis. Aug. 2, 2005) (*unpublished*) (“In the interest of maintaining prison security, prison officials may lawfully limit an inmate to corresponding with individuals on a pre-approved list.”); *Collins v. Schoonfield*, 344 F. Supp. 257, 276 (D. Md. 1972) (disagreeing with the broad prohibition on reading inmate mail under *Palmigiano v. Travisono* and discussing potential legitimacy of prisons reading some outgoing mail). But see *Guajardo v. Estelle*, 580 F.2d 748, 755 (5th Cir. 1978) (finding unconstitutional a policy limiting letters sent by incarcerated people to family and an approved list of ten individuals, excluding immediate family members, religious leaders, special correspondents, attorneys or media correspondents, because it is not essential to further legitimate security interests and is often abused as applied); *Finney v. Arkansas Bd. of Corr.*, 505 F.2d 194, 211–212 (8th Cir. 1974) (rejecting an approved correspondence list procedure because the following justifications were not enough under *Martinez*: prospectively investigating potential visitors, universally prohibiting correspondence with former incarcerated people, and assuring that no unwanted mail was received by unapproved recipients).

27. See *Finney v. Arkansas Bd. of Corr.*, 505 F.2d 194, 211 (8th Cir. 1974) (finding an approved correspondence list unconstitutional where the prison justified it as pre-screening potential visitors and protecting those who might not want to receive mail from incarcerated people).

28. Cf. *United States v. Felipe*, 148 F.3d 101, 110–111 (2d Cir. 1998) (upholding as serving security interests the unique, severe restrictions on mail and visitation to a court-approved list for gang member convicted of racketeering).

29. See, e.g., 28 C.F.R. § 540.14(c)(1)(iv) (2020) (staff at a minimum or low security federal prison may open the incarcerated person’s outgoing mail if the incarcerated person has not filled out the return address properly); N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(i) (2020) (requiring New York State incarcerated people to include their return addresses on outgoing mail).

prohibited if made verbally.³⁰ Courts have also allowed regulations that call for the routine inspection of all non-legal outgoing mail.³¹ They have distinguished between censorship and inspection for security reasons.³² One court has even upheld the censorship of outgoing mail under the *Martinez* standard, although the incarcerated plaintiff in the case was held in a mental institution, rather than a jail or prison.³³

When the regulation at issue involves both incoming and outgoing correspondence, courts have applied the *Turner* standard.³⁴ A few courts have even departed entirely from the *Martinez* standard, instead applying the *Turner* reasonableness standard to outgoing mail as well. In general, courts are increasingly accepting of prison officials' reasons for placing restrictions on outgoing correspondence.³⁵

(b) Incoming Correspondence

Regarding the restriction of incoming correspondence (mail and publications sent to you), the Court in *Thornburgh v. Abbott* held that the proper standard of review was the one stated in *Turner v. Safley*.³⁶ In *Thornburgh*, the Court held that “[w]here the regulations at issue concern the entry of materials into the prison, . . . a regulation that gives prison authorities broad discretion is

30. Cases where incarcerated people are not certain if their defamatory (insulting) comments will be read are treated differently than cases involving defamatory comments directed at prison officials (for example, if someone wrote threats to a guard in a letter so that the guard reading the letter would see them). See *Loggins v. Delo*, 999 F.2d 364, 367 (8th Cir. 1993) (finding that prison official violated incarcerated people's 1st Amendment rights by disciplining an incarcerated person after reading an incarcerated person's letter to his brother that commented about prison guards where the letter did not raise a security risk and was not directed towards staff); *Brooks v. Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987) (finding no government interest in censorship); *Hall v. Curran*, 818 F.2d 1040, 1044–1045 (2d Cir. 1987) (finding the district court should not have granted summary judgment to prison administrator against an incarcerated person's 1st Amendment claim for censorship of his statements critical of prison administration). But see *Leonard v. Nix*, 55 F.3d 370, 376 (8th Cir. 1995) (finding that incarcerated people cannot use supposed personal communication to send letters that are extremely offensive to prison personnel if their purpose is only to defame (insult) prison personnel and not to communicate).

31. *Bell-Bey v. Williams*, 87 F.3d 832, 837–838 (6th Cir. 1996) (holding that a mail inspection procedure did not violate an incarcerated person's 1st Amendment rights because the procedure was limited to protecting the legitimate government interest of managing limited prison resources and satisfied the *Martinez* rule); *Stow v. Grimaldi*, 993 F.2d 1002, 1004 (1st Cir. 1993) (finding that inspection procedures requiring outgoing mail to be submitted for inspection in unsealed envelope served the legitimate government interest of safety).

32. *Altizer v. Deeds*, 191 F.3d 540, 549 (4th Cir. 1999) (holding that inspection of an incarcerated person's outgoing mail for contraband was not a constitutional violation since there is a substantial government interest in security and the incarcerated person had previously tried to mail a homemade knife).

33. *Martyr v. Mazur-Hart*, 789 F. Supp. 1081, 1086–1087 (D. Or. 1992) (upholding a mental institution's refusal to send letters written by an incarcerated person because the censorship furthered the important governmental interest of rehabilitation; the writing hindered the incarcerated person's progress).

34. See *Duamutef v. Hollins*, 297 F.3d 108, 113 (2d Cir. 2002) (upholding mail watch on all incoming and outgoing mail based on *Turner* standard as furthering the government interest of security where inflammatory material had previously circulated through the mail); *Sisneros v. Nix*, 884 F. Supp. 1313, 1331–1333 (S.D. Iowa 1995) (upholding under the *Turner* standard a regulation that prohibited the delivery to or from an incarcerated person of letters written in a language other than English, unless that language was the only one an incarcerated person spoke); *Martin v. Rison*, 741 F. Supp. 1406, 1413–1417 (N.D. Cal. 1990) (upholding a regulation that prohibited incarcerated people from acting as reporters for newspapers published outside the prison; the court based its decision in part on the fact that the article, although published outside the prison, was read within the prison and caused agitation amongst incarcerated people resulting in a need for security adjustment, and meriting application of the *Turner* standard to the regulation).

35. *Perry v. Secretary, Florida Dept. of Corr.*, 664 F.3d 1359, 1365 (11th Cir. 2011) (citing *Turner* standard as basis for reviewing incarcerated people's solicitation of pen pals); *Butti v. Unger*, No. 04-5381, 2005 U.S. Dist. LEXIS 14408, at *9 (S.D.N.Y. July 15, 2005) (*unpublished*) (citing *Turner* standard as basis for surveillance of an incarcerated person's outgoing mail when officials had “a reasonable suspicion of his continuing criminal activity, and [the surveillance] was reasonably related to legitimate penological interests”).

36. *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79 (1987)).

appropriate.”³⁷ Under the *Turner* standard, restrictions are valid if they are reasonably related to a legitimate penological interest (for example, security, order, or rehabilitation of incarcerated people). This “reasonably related” standard is more general than the *Martinez* standard and less protective of your right to communicate.

The Court has identified four factors for determining whether a restriction meets the reasonably related standard. The first and most important factor is whether the regulation is both neutral and rationally related to the alleged legitimate government interest.³⁸ This factor can be broken down into three subparts:

- (1) Whether the government interest or goal is legitimate,
- (2) Whether the regulation is rationally related to that interest or goal, and
- (3) Whether the regulation is neutral.³⁹

Subpart (1), government interest in restricting mail, is usually either maintenance of prison security or screening for contraband. Courts almost always hold these two interests legitimate.⁴⁰ For subpart (2), under the *Turner* standard, the relationship between a mail restriction and the stated government interest does not need to be very close. Prisons do not need to prove the restrictions will actually promote security or screen contraband in all cases; they only need to convince the court that the restriction *might* achieve these goals. Courts usually find the government’s argument to be valid.⁴¹ Nevertheless, when a court does invalidate a mail restriction, it usually does so because there is no rational relationship between the restriction and the government interest.⁴² Finally, for subpart (3), regulations are considered neutral when the government interest is unrelated to suppressing expression. In other words, the restriction is neutral as long as the purpose of the restriction is something other than to stop you from expressing yourself.⁴³

The second factor of the reasonably related standard is whether the regulation leaves you, the incarcerated person, with another way to exercise the asserted right.⁴⁴ Courts usually define the right broadly, which makes it easier to find some way for you to still exercise that right. For example, the regulation in *Thornburgh v. Abbott* prohibited publications containing sexually explicit material. Instead of defining the right in question as the right to receive sexually explicit materials, the court

37. *Thornburgh v. Abbott*, 490 U.S. 401, 416, 109 S. Ct. 1874, 1883, 104 L. Ed. 2d 459, 475 (1989).

38. *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987).

39. *Thornburgh v. Abbott*, 490 U.S. 401, 414, 109 S. Ct. 1874, 1882, 104 L. Ed. 2d 459, 473 (1989).

40. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401, 407–408, 109 S. Ct. 1874, 1878–1879, 104 L. Ed. 2d 459, 469 (1989) (“Acknowledging the expertise of [prison] officials and that the judiciary is ‘ill equipped’ to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world”); *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (emphasizing that courts should defer to prison administrators’ judgment regarding the danger of contraband being introduced into prisons); *Pell v. Procunier*, 417 U.S. 817, 823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 502 (1974) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.”).

41. *E.g., Avery v. Powell*, 806 F. Supp. 7, 10 (D.N.H. 1992) (finding a regulation that prohibited incarcerated people from receiving blank greeting cards from anyone other than the vendor to be rationally connected to the interests of promoting security and screening for contraband; the court noted that cards are often multipart, contained within envelopes, or decorated with metals or flammable substances, so cards received from non-vendors would necessitate time-consuming searches). *See also Turner v. Safley*, 482 U.S. 78, 93, S. Ct. 2254, 2264, 96 L. Ed. 2d 64, 82 (1987) (holding constitutional a regulation restricting correspondence between incarcerated people); *Giano v. Senkowski*, 54 F.3d 1050, 1056 (2d Cir. 1995) (affirming constitutionality of policy prohibiting incarcerated people from possessing sexually explicit photographs).

42. *See, e.g., Crofton v. Roe*, 170 F.3d 957, 960–961 (9th Cir. 1999) (invalidating a regulation that limited the publications incarcerated people can receive to those ordered and paid for directly by the incarcerated person because the court found no rational relation between the regulation and the asserted interests of screening for contraband, minimizing fire hazards, or preventing overcrowding).

43. *See Thornburgh v. Abbott*, 490 U.S. 401, 415–416, 109 S. Ct. 1874, 1882–1883, 104 L. Ed. 2d 459, 474 (1989).

44. *See Thornburgh v. Abbott*, 490 U.S. 401, 417, 109 S. Ct. 1874, 1883, 104 L. Ed. 2d 459, 475–476 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987)).

defined the right more broadly as the right to expression, which it held could be exercised through the many other publications that were not prohibited.⁴⁵

The third and fourth factors are usually interrelated. The third factor is the impact that accommodating the right will have on other incarcerated people, guards, and prison resources. The fourth factor is whether there are any ready alternatives to the proposed regulation.⁴⁶ Because the accommodation of a right will usually require alternatives to the regulation, these two factors are often combined. For example, accommodating an incarcerated person's right to receive blank greeting cards from non-vendors would require extensive searches of more incoming mail. Such searches may be considered both an unacceptable impact of the accommodation of the right and an unacceptable alternative to the regulation at issue.⁴⁷

(c) “As Applied” versus “Facial” Challenges

Most cases discussed in this Chapter so far involve “facial” challenges—challenges to the regulation as written. But, because many prison regulations are vague, it is often hard for judges to object to them. In such cases, incarcerated people may instead bring an “as applied” challenge. As applied challenges occur when an incarcerated person objects to the way prison officials apply a regulation to him, rather than to the regulation itself.

*Nichols v. Nix*⁴⁸ and *Lyon v. Grossheim*⁴⁹ are good examples of as applied challenges to prison policies.⁵⁰ In both cases, the regulation at issue gave the superintendent power to deny an incarcerated person any publication likely to be disruptive or to produce violence. The court upheld the regulation as it was written because it facially passed the *Turner* standard: Preventing disruptions and violence is always a legitimate goal, and the regulation only applies to publications that are likely to hinder this goal. However, the court held that prison officials applied the regulation in an unconstitutional manner. In both cases, the court found that there was no evidence that the publications at issue were likely to threaten prison security because other incarcerated people had possessed similar publications without incident.⁵¹

If you think a prison policy is being applied in an unconstitutional way, you can challenge it even though it may look, as written, like policies that courts have upheld in the past.

(d) Procedural Safeguards

Note that several important procedural safeguards upheld by the Supreme Court in *Procunier v. Martinez* must still be respected by prison officials.⁵² First, an incarcerated person should be notified if prison officials return a letter addressed to him or if a letter by an incarcerated person is returned to the prison. Second, the author of the returned letter should be given a reasonable opportunity to protest the decision to restrict.⁵³

45. *Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989).

46. *See Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987)).

47. *Avery v. Powell*, 806 F. Supp. 7, 10–11 (D.N.H. 1992).

48. *Nichols v. Nix*, 810 F. Supp. 1448, 1466–1467 (S.D. Iowa 1993) (striking down a regulation as it was used to restrict publications that promoted racial segregation).

49. *Lyon v. Grossheim*, 803 F. Supp. 1538, 1540, 1554–1555 (S.D. Iowa 1992) (invalidating an official action denying incarcerated people access to “anti-Catholic” comic books which also contained negative references to homosexuality and the Soviet Union).

50. The cases were both decided in the Southern District of Iowa. Though they are only binding on prisons in that district, they provide good examples of as-applied challenges that you can bring elsewhere.

51. *Nichols v. Nix*, 810 F. Supp. 1448, 1463 (S.D. Iowa 1993) (“[T]he record is...devoid of evidence of past inmate confrontations as a result of other inmates possessing or reading [such] publications.”); *Lyon v. Grossheim*, 803 F. Supp. 1538, 1552 (S.D. Iowa 1992) (“There is...no evidence of past confrontations as a result of other inmates possessing or reading [such] publications.”).

52. *Procunier v. Martinez*, 416 U.S. 396, 418–419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974). *See also* Michael Mushlin, *Rights of Prisoners* § 14.6 (5th ed. 2017 & Supp. 2020) (describing procedural safeguards required of any prison censorship scheme).

53. *Procunier v. Martinez*, 416 U.S. 396, 418–419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974).

2. State and Federal Protections of the Right to General (Non-Legal) Correspondence

State and federal regulations may give you more rights than those the U.S. Constitution provides—these regulations cannot take away any rights guaranteed by the Constitution, but they can provide more than the Constitution does. The following is a discussion of New York State and City regulations, as well as federal regulations governing your right to communicate in writing with the general public. Incarcerated people in other states must consult their state and local regulations.⁵⁴

(a) New York State and City Regulations

In New York, the specific regulations governing your right to communicate with the outside world depend on the type of institution in which you are imprisoned. There are three different sets of regulations. One set applies only to prisons run by the New York State Department of Correctional Services (for example, Attica). The second applies to all city and county prisons and jails (for example, Nassau County Jail), and the third applies only to New York City prisons and jails (for example, Rikers Island). The Department of Correctional Services issued the first set of regulations; the New York State Commission of Correction, the second; and the New York City Department of Correction and/or the Board of Correction, the third. If you are in a New York City jail, both the second and third sets of regulations apply to you. If more than one set of regulations applies to you, courts will use the one that gives you more protection.

New York State regulations, which apply to prisons run by the Department of Correctional Services, provide protections to your right to communicate beyond the minimum required by the Constitution. These regulations allow incarcerated people, with some restrictions, to correspond with any person.⁵⁵ State regulations only prohibit incarcerated people from corresponding with people who have indicated they do not wish to receive mail from the incarcerated person or with persons listed on a court order of protection.⁵⁶ Furthermore, incarcerated people must receive advance approval in order to correspond with unrelated minors, persons on parole or probation, other New York incarcerated people, employees or former employees of the Department of Correctional Services, and victims of the incarcerated person's crime(s).⁵⁷ State regulations also prohibit prison officials from opening, inspecting, or reading outgoing correspondence (except for oversized envelopes, parcels, and incarcerated person-to-incarcerated person correspondence) without written authorization from the facility superintendent.⁵⁸ The superintendent cannot provide such authorization unless there is a reason to believe that the correspondence violates the department's regulations or that it threatens the safety, security, or good order of the prison. If authorization is given, the superintendent must set forth, in writing, the specific facts justifying it.⁵⁹

With respect to incoming mail, New York State regulations require the inspection of all such mail, but prohibit the reading of incoming correspondence (except for letters between incarcerated people and business mail) unless there is evidence that the mail contains plans for sending contraband in or out of the prison, plans for criminal activity, or information that would create a danger to others or to the prison's security and good order.⁶⁰ The facility superintendent must provide written authorization to read incoming correspondence and must specify why reading the mail is necessary.⁶¹ It is also important to be aware of your facility's specific restrictions on what can be sent through the mail; failing to follow these rules can result in your mail not reaching you.⁶²

54. *JLM*, Chapter 2, "Introduction to Legal Research," will be helpful in conducting this research.

55. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3 (2020).

56. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(a) (2020).

57. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(b) (2020).

58. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 720.3(c)–(e) (2020).

59. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(e)(1) (2020).

60. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.4(a)(2) (2020).

61. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.4(f) (2020).

62. Items prohibited in incoming correspondence include obscene, threatening, or fraudulent materials, nude photographs, Polaroid pictures, postage stamps, and letters from others (kiting) except minor children. There is also a five-page limit on incoming correspondence. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 712.2, 720.4(c)–

The local county jail regulations also provide protections.⁶³ These regulations provide that you may correspond, with a few restrictions, with anyone you wish. Prison officials may not impose restrictions based on the amount of mail sent or received, or based on the language in which the correspondence is written.⁶⁴ Outgoing correspondence may not be opened or read unless the chief administrative officer gives written approval based on a “reasonable suspicion” that the correspondence threatens the security of the prison or of another person.⁶⁵ Incoming correspondence may be opened outside the presence of the incarcerated person-recipient to ensure the absence of contraband, but it may not be read without the written approval of the chief administrative officer.⁶⁶ Any information prison officials obtain by opening your incoming correspondence without the superintendent’s authorization may not be used in a disciplinary hearing against you.⁶⁷

New York City has additional standards set out in the Minimum Standards Regulating the Conditions of Confinement.⁶⁸ New York City incarcerated people are urged to familiarize themselves with these standards. Find out if your prison library has a copy; if it does not, ask the librarian to get one. Copies of “Minimum Standards” can be obtained by writing to:

City of New York
Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

(b) Federal Regulations

If you are incarcerated in a federal prison (in a prison run by the Bureau of Prisons), you are subject to mail regulations the Federal Bureau of Prisons has issued. These rules apply only to incarcerated people who have been sentenced to serve a period of time in a prison run by the Bureau of Prisons. Some rules concerning general correspondence follow. The warden of each prison has the authority to establish your rules of correspondence.⁶⁹ The specific rules the warden develops must be communicated to you in writing upon arrival at the prison.⁷⁰ Prison authorities may open and read your mail if they determine doing so is necessary to maintain security or monitor a specific problem.⁷¹ They may not read mail that is “special” or “privileged,” although they may open it (in your presence only) to ensure that there is no contraband in the envelope.⁷² “Special” or “privileged” mail includes mail from attorneys, law enforcement officers, courts, and public officials. Regulations governing privileged mail are discussed further in Part C of this Chapter.

Prison officials may not open and read mail you are sending from a minimum-security or low-security prison unless they have “reason to believe [the mail] would interfere with the orderly running [of the prison], that it would be threatening to the recipient, or that it would facilitate

(d) (2020). *See also* State of N.Y. Department of Corrections And Community Supervision, Directive No. 4911, Packages & Articles Sent or Brought to Facilities (2013) (*as revised*, Jun. 28, 2019), <http://www.doccs.ny.gov/Directives/4911.pdf> (last visited May 23, 2020) (additional restrictions on packages brought or sent to you in prison).

63. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004 (2020).

64. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.1(b) (2020).

65. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.2 (f)–(g) (2020).

66. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.3 (a)–(b) (2020).

67. *See* Chavis v. Goord, 265 A.D.2d 798, 798, 697 N.Y.S.2d 409, 410 (4th Dept. 1999) (reversing a disciplinary decision because prison investigation relied on information obtained through unauthorized review of an incarcerated person’s mail).

68. Rules of the City of New York, Tit. 40, Ch. 1, § 11, *available at* <http://www1.nyc.gov/site/boc/jail-regulations/jail-regulations.page> (last visited May 23, 2020).

69. 28 C.F.R. § 540.10 (2020).

70. 28 C.F.R. § 540.12(b) (2020).

71. 28 C.F.R. §§ 540.12(b), 540.14(a) (2020).

72. 28 C.F.R. § 540.12(b) (2020).

criminal activity.”⁷³ In medium- and high-security institutions, prison officials may read all mail other than “special mail.”⁷⁴

Federal prisons must supply you with paper and envelopes at no cost, but you must pay for stamps. If you cannot afford postage, the warden must provide stamps for a reasonable number of letters per month.⁷⁵

For more information and details about the federal regulations, you should consult the relevant regulations themselves. They can be found in the Code of Federal Regulations, 28 C.F.R. § 540.

3. A Note on Foreign-Language Materials

The ability of prisons to restrict correspondence in foreign languages remains unclear. Some courts have found that regulations prohibiting incarcerated people from writing and receiving letters in languages that cannot be understood by prison officials are permissible as reasonably related to the legitimate prison interest of security.⁷⁶ On the other hand, some courts have held that a complete ban on all foreign-language correspondence is not rational.⁷⁷ Additionally, some courts have found the exclusion of foreign-language publications unreasonable under this standard.⁷⁸ By statute in New York State, prison officials may not impose restrictions based on the language in which the mail is written.⁷⁹ Make sure to check statutes, regulations, and court decisions in your state to find out what the law is.

C. Legal Correspondence with Courts, Public Officials, and Attorneys: Privileged Correspondence

Under *Procunier v. Martinez* and *Thornburgh v. Abbott*, two important cases discussed in Part B(1) of this Chapter, both legal and non-legal correspondence generally receive protection under the First Amendment.⁸⁰ However, correspondence with courts, public officials, and attorneys (“legal mail”) receives heightened protection because censorship of this mail implicates two other important concerns: your right of meaningful access to the courts and the attorney-client privilege. This Section discusses each of these sources of protection separately. Mail to and from attorneys, courts,

73. 28 C.F.R. § 540.14 (c)(1)(i) (2020). Prison authorities can also read this mail if you are on a restricted correspondence list, if the mail is being sent to another incarcerated person, or if the return address on the envelope is incomplete. 28 C.F.R. §§ 540.14 (c)(1)(ii)–(iv) (2020).

74. 28 C.F.R. § 540.14(c)(2) (2020).

75. 28 C.F.R. §§ 540.21(a), (b), (d), (e) (2020). *See also* Gittens v. Sullivan, 670 F. Supp. 119, 121, 123 (S.D.N.Y. 1987) (finding reasonable the provision of an amount equal to five free stamps per week for all correspondence, in addition to a \$20 advance for legal mail, where the superintendent may advance additional funds for postage on legal mail if the incarcerated person exceeds the twenty dollar limit), *aff’d*, 848 F.2d 389 (2nd Cir. 1988).

76. *See, e.g.,* Ortiz v. Fort Dodge Corr. Facility, 368 F.3d 1024, 1026–1027 (8th Cir. 2004) (finding acceptable a regulation that prohibited incarcerated people from writing letters in Spanish absent a ready alternative interpreter option). *See also* Sisneros v. Nix, 884 F. Supp. 1313, 1331–1333 (S.D. Iowa 1995) (upholding a regulation that prohibited the delivery of letters to or from an incarcerated person written in a language other than English unless that language was the only one spoken by an incarcerated person), *aff’d in part and rev’d in part on other grounds*, 95 F.3d 749, 750 (8th Cir. 1996); Nelson v. Woodford, No. C 04-03684 CRB (PR), 2006 U.S. Dist. LEXIS 11120, at *25–30 (N.D. Cal. Mar. 2, 2006) (*unpublished*) (stating that a ban on foreign-language publications was rationally related to the security goal of preventing coded communication by gangs), *aff’d*, 249 Fed. Appx. 529, 530 (9th Cir. 2007).

77. *Thongvanh v. Thalacker*, 17 F.3d 256, 259 (8th Cir. 1994) (holding that since the prison could have secured free translation services and the facility did not otherwise read every single piece of correspondence anyway, the ban on a Lao incarcerated person’s correspondence was not rational).

78. *See, e.g.,* Kikimura v. Turner, 28 F.3d 592, 598–600 (7th Cir. 1994) (invalidating a complete ban on foreign-language materials under the Turner test where the prison had made an attempt to accommodate the incarcerated person).

79. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.1(b)(2) (2020).

80. *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974); *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

paralegals, and legal organizations is treated as privileged and receives heightened protection (for instance, this mail cannot usually be censored). Mail to and from other public officials and agencies, such as U.S. Congressmen and the Department of Justice, is also usually treated as privileged and given greater protection than regular mail.

1. First Amendment Protections

Some courts have held that legal mail is entitled to a higher degree of First Amendment protection than other mail. The censorship or interference with an incarcerated person's mail is justified only "if it further one or more substantial governmental interests."⁸¹ This interference still must not be greater than necessary to the protection of said governmental interest. Even when this analysis is not applied, courts generally give legal mail more consideration than non-legal mail in evaluating restrictions.⁸²

(a) Incoming Legal Correspondence

Correspondence from your attorney is incoming mail, and so restrictions on it are evaluated under the *Turner* standard.⁸³ Restrictions on privileged incoming mail do not violate the First Amendment if the restrictions are reasonably related to a legitimate need to manage the prison or carry out your penalty. In *Wolff v. McDonnell*, the U.S. Supreme Court held that a state can require your lawyer to clearly mark her letters as coming from an attorney, and can require that her address be written on the envelope if the letters are to receive special treatment, and, finally, can require your lawyer to identify herself to prison officials before correspondence with you begins.⁸⁴ For example, in 2009, the Ninth Circuit of the U.S. Court of Appeals denied an incarcerated person's constitutional claims because the return address on his legal mail did not indicate that it came from an attorney, a valid prerequisite under California law for legal mail to receive special treatment.⁸⁵ *Wolff* seems to imply that prison officials cannot read or censor correspondence with your attorney if there is no suspicion that the correspondence is illegal, but this is not entirely clear.⁸⁶ According to *Wolff*, a requirement that letters from an attorney to an incarcerated person be opened by prison officials only in the presence of the incarcerated person may be more than what the Constitution demands.⁸⁷ Since *Wolff*, however, many courts have ruled that the incarcerated person must be present if the prison is opening his letters, or that the incarcerated person at least be given the opportunity to request such a safeguard.⁸⁸

81. *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).

82. *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003) ("In balancing the competing interests implicated in restrictions on prison mail, courts have consistently afforded greater protection to legal mail than to non-legal mail..."); *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) ("[W]hen the incoming mail is 'legal mail,' we have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts.").

83. *Thornburgh v. Abbott*, 490 U.S. 401, 414–419, 109 S. Ct. 1874, 1882–1885, 104 L. Ed. 2d 459, 473–477 (1989).

84. *Wolff v. McDonnell*, 418 U.S. 539, 576–577, 94 S. Ct. 2963, 2984–2985, 41 L. Ed. 2d 935, 963 (1974).

85. *See Paulino v. Todd*, 338 F. App'x 720, 721–722 (9th Cir. 2009).

86. *See Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 925, 963 (1974) ("As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence ensures that prison officials will not read the mail.").

87. *Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 935, 963 (1974) ("...we think that petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires"); *see also Brewer v. Wilkinson*, 3 F.3d 816, 825 (5th Cir. 1993) (holding "that the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights.").

88. *See Fontroy v. Beard*, 559 F.3d 173, 183–184 (3d Cir. 2009) (upholding under *Turner* and *Wolff* a policy requiring attorneys to apply for a Control Number and put it on all legal mail so that it could be identified as such and then opened in front of the incarcerated people. Even though this policy did place a burden on incarcerated

(b) Outgoing Legal Correspondence

Prisons cannot restrict correspondence sent *to* attorneys unless the restriction furthers an important or substantial governmental interest.⁸⁹ This rule applies to incarcerated people who are detained prior to their trial, which may result in incarceration. It also applies to those who have been convicted, but face further criminal prosecution. Some courts have found that outgoing legal correspondence does not present the same security threat as non-legal correspondence, and so there is minimal government interest in restricting it.⁹⁰ Letters to some government agencies, elected officials, and legal assistance and civil liberties groups enjoy the same protection as mail addressed to your attorney.⁹¹ Also, the government has a duty to provide indigent incarcerated people with stationery and a reasonable amount of postage for legal mail.⁹² However, one federal district court case found

people's First Amendment rights when attorneys did not properly request control numbers, the court found the procedure constitutional because it balanced the right with the facility's desire to avoid people sneaking in contraband through fake legal mail which had happened before and facilitated an escape); *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) (reaffirming that an opt-in policy, where an incarcerated person had to request being present when legal mail was opened, is constitutional so long as the incarcerated person is given written notice of it); *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974) (*per curiam*) (holding that because "prison officials in inspecting incoming mail outside the presence of an inmate are provided with an opportunity to obtain advanced warning of potential litigation which might involve the prison and more significantly, could become privy to stratagems being formulated between attorney and client with regard to pending litigation," the incarcerated person is entitled to be present during the opening of legal mail addressed to him); *Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996) (holding that an incarcerated person's right to be present during opening of his legal mail extends to hand-delivered correspondence as well as correspondence received through the U.S. Postal Service). *But see* *John v. New York City Dept. of Corr.*, 183 F. Supp. 2d 619, 629 (S.D.N.Y. 2002) (dismissing (with leave to amend) an incarcerated person's claim for denial of access to courts when prison officials opened mail outside his presence because he failed to allege either that the officials acted deliberately and maliciously in doing so or that he suffered any injury).

89. *Procunier v. Martinez*, 416 U.S. 396, 412–415, 94 S. Ct. 1800, 1811–1812, 40 L. Ed. 2d 224, 239–242 (1974), *overruled in part by* *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989) (noting that the ruling in *Martinez* only applies to outgoing correspondence).

90. *See* *Cancel v. Goord*, No. 00 Civ. 2042 (LMM), 2001 U.S. Dist. LEXIS 3440, at *16–17 (S.D.N.Y. Mar. 21, 2001) (*unpublished*) (finding that without more than general security interests, interference with outgoing legal mail is unconstitutional) (citing *Davidson v. Scully*, 694 F.2d 50, 53 (2d Cir. 1982)); *Taylor v. Sterrett*, 532 F.2d 462, 473–474 (5th Cir. 1976) (finding that censoring outgoing mail to attorneys, the courts or to government agencies is not significantly related to the advancement of jail security and thus unconstitutional); *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970) (holding that the reading of any outgoing mail violates the 1st Amendment unless pursuant to a duly obtained search warrant).

91. *See* *Davidson v. Scully*, 694 F.2d 50, 53–54 (2d Cir. 1982) (striking down regulation restricting outgoing mail to government agencies because "[i]f prison officials are able to deny inmates free access to public officials and agencies, the fundamental right [of access to the courts] is restricted just as surely as if the government denied prisoners access to traditional legal materials. In many cases an inmate's claim might be substantially furthered by information or aid available through government agencies."). *But see* *O'Keefe v. Van Boening*, 82 F.3d 322, 322–323 (9th Cir. 1996) (upholding regulation treating grievance mail to state agencies as non-legal); *Jackson v. Mowery*, 743 F. Supp. 600, 606 (D. Ind. 1990) ("[T]he legal mail protected by the Constitution extends only to safeguard communications between an inmate and his attorney, and [defendant] has no basis for his claim of interference with 'legal mail' to and from his family and friends.").

92. *See* *Bounds v. Smith*, 430 U.S. 817, 824–825, 97 S. Ct. 1491, 1496, 52 L. Ed. 2d 72, 81 (1977) (stating that it is "indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them") *overruled in part by* *Lewis v. Casey*, 518 U.S. 343, 354, 116 S. Ct. 2174, 2181, 135 L. Ed. 2d 606, 619–620 (1996) ("It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present . . . These statements appear to suggest that the State must enable the prisoner to discover grievances, and to litigate effectively once in court. *See* *Bounds*, 430 U.S. at 825–826, and n. 14. These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them"). *But see* *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) (citing *Bach v. Coughlin*, 508 F.2d 303, 307 (7th Cir. 1974)) (explaining that while incarcerated people have a right to access the courts, they are not entitled to unlimited free postage, and

that a ten-day delay in sending an incarcerated person's legal mail did not violate his limited constitutional right to freedom of association.⁹³ The mail was initially delayed because of insufficient funds on two occasions.⁹⁴

2. Your Right to Meaningful Access to the Courts and Assistance of Counsel

You have a constitutional right to meaningful court access and assistance of counsel.⁹⁵ In *Davidson v. Scully*, the Second Circuit held that restrictions on an incarcerated person's legal mail can violate this right.⁹⁶ For example, courts have stated that allowing prison officials to read mail to courts or between attorneys and incarcerated people can prevent incarcerated people from bringing abuses to the attention of courts because they fear retaliation.⁹⁷ Thus, even if your First Amendment claim fails because the restriction at issue is related to an important government objective, you can still challenge the restriction if it prevents you from having meaningful court access.

However, these claims will likely not succeed unless you also prove that there was some actual harm to your ability to assert a legal claim.⁹⁸ In one recent New York case, the district court reiterated

prison officials can balance incarcerated people's rights to use the mails against budgetary concerns); *Chandler v. Coughlin*, 763 F.2d 110, 114 (2d Cir. 1985) (finding that state is not required to provide indigent incarcerated people unlimited free postage, but only a "reasonably adequate" amount of postage for access to the courts); *Gittens v. Sullivan*, 670 F. Supp. 119, 123 (S.D.N.Y. 1987) (finding that "\$1.10 per week for stamps and an additional advance of \$36.00 for legal mailings satisfies the constitutional minimum for access to the courts"), *aff'd*, 848 F.2d 389, 390 (2d Cir. 1988).

93. *See* *Branham v. Mansfield*, No. 2:04-CV-286, 2009 U.S. Dist. LEXIS 87195 at *15 (W.D. Mich. 2009) (*unpublished*).

94. *See* *Branham v. Mansfield*, No. 2:04-CV-286, 2009 U.S. Dist. LEXIS 87195 at *15 (W.D. Mich. 2009) (*unpublished*).

95. *See* *Bounds v. Smith*, 430 U.S. 817, 821–823, 97 S. Ct. 1491, 1494–1495, 52 L. Ed. 2d 72, 78–80 (1977) (reviewing the history of Supreme Court decisions that have established a right of access to the courts and the assistance of counsel). *But see* *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (holding that an incarcerated person must prove that lack of necessary legal assistance or library actually hindered case). *See* Chapter 12 and Chapter 9, Part G of the *JLM* for a full discussion of the right to effective assistance of counsel.

96. *Davidson v. Scully*, 694 F.2d 50, 53 (2d Cir. 1982) (holding that prison officials who did not allow an incarcerated person to mail sealed letters to various public agencies violated the incarcerated person's right to meaningful access to the courts).

97. *See* *Taylor v. Sterrett*, 532 F.2d 462, 476 (5th Cir. 1976); *Martin v. Brewer*, 830 F.2d 76, 78–79 (7th Cir. 1987) (distinguishing incoming from outgoing mail to the courts on this ground).

98. *See* *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (holding the incarcerated person must prove his prison's law library or legal assistance program was lacking in a way actually hindering his efforts to pursue a legal claim); *Bourdon v. Loughren*, 386 F.3d 88, 98–99 (2d Cir. 2004) (holding appointment of counsel to an incarcerated person was sufficient to satisfy the incarcerated person's right of access to the courts; assistance from that counsel is measured not by the "effectiveness" standard of the Sixth Amendment, but by the counsel's capabilities as a qualified and trained person); *DeLeon v. Doe*, 361 F.3d 93, 94 (2d Cir. 2004) (dismissing incarcerated person's claim for denial of court access when prison officials caused delays to his court filings because case was not dismissed for untimeliness but instead on the merits after a bench trial); *Oliver v. Fauver*, 118 F.3d 175, 178 (3d Cir. 1997) (holding interference with mail, if it reaches its intended destination, is insufficient to show actual injury); *Taylor v. Coughlin*, 29 F.3d 39, 40 (2d Cir. 1994) (*per curiam*) (holding prison's failure to supply incarcerated people with adequate typewriters did not cause any injury; the incarcerated people were able to access the courts through handwritten documents); *Shango v. Jurich*, 1988 U.S. Dist. LEXIS 7597 at *63–64 (N.D. Ill. July 15, 1988) (*unpublished*) (holding that "the mere fact that some inmates may suffer delays or other inconveniences in obtaining access to the law library...does not amount to a constitutional violation."); *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) (holding that the loss of outgoing court documents was not a sufficient injury because the error was noted in time to allow the plaintiff to re-file the documents); *Jermosen v. Coughlin*, 877 F. Supp. 864, 871 (S.D.N.Y. 1995) (holding that the confiscation of a tape mailed to an incarcerated person did not qualify as a sufficient injury because the incarcerated person had access to the tape when preparing his civil action, and at the time the tape was taken, the incarcerated person's case had already been settled). *But see* *Key v. Artuz*, No. 95 CV 0392 (HB), 1995 U.S. Dist. LEXIS 13201, at *5–6 (S.D.N.Y. Sept. 19, 1995) (*unpublished*) (holding that a prison's mishandling of legal mail that resulted in the incarcerated person missing a court-imposed deadline was a sufficient showing of injury).

that to state a claim for denial of access to the courts, the incarcerated person must show that the defendant's actions actually hindered his pursuit of legal claims and caused actual injury.⁹⁹ The court determined that the incarcerated person in this case experienced only inconvenience and a delay in sending outgoing mail.¹⁰⁰ Neither of those reach the necessary threshold. The threshold requires that you experience a constitutional deprivation that is severe enough to bring a Section 1983 claim. Some courts have also required that the interference be "deliberate and malicious."¹⁰¹ In other words, they require that the prison authorities have intentionally interfered with an incarcerated person's legal mail with the purpose of denying him access to the courts. However, some courts have ordered that a claim of interference should be reviewed liberally if brought by a pro se litigant.¹⁰²

3. Attorney-Client Privilege

For communications with your attorney, you have the additional shield of the *attorney-client privilege*.¹⁰³ This privilege allows you to refuse to disclose, and to prevent any other person from disclosing, confidential communications between your attorney and you. The protection that it provides is limited in two ways. First, because the privilege only protects you against disclosure of your legal correspondence, it may only be used to challenge the reading of your legal mail, not the inspection of it.¹⁰⁴ However, even though prisons may declare temporary emergencies requiring them to open your mail, they may not use an emergency to justify indefinitely opening your mail out of your presence.¹⁰⁵ Second, there are exceptions to the kinds of communication that are protected by the privilege. For the attorney-client privilege to apply, you must intend for your communication to remain confidential.¹⁰⁶ In other words, if you disclose information to someone other than your attorney, this information will no longer be considered privileged. Disclosure to representatives of the attorney, such as his or her secretary or student clerk, however, is considered the same as communication with the

99. See *Wesolowski v. Washburn*, 615 F. Supp. 2d 126, 129 (W.D.N.Y. 2009).

100. See *Wesolowski v. Washburn*, 615 F. Supp. 2d 126, 129 (W.D.N.Y. 2009).

101. *Smith v. O'Connor*, 901 F. Supp. 644, 649 (S.D.N.Y. 1995) (holding that although corrections officials destroyed an incarcerated person's personal property, including his legal papers, the incarcerated person failed to show prejudice because the motion allegedly destroyed was one that could be filed any time and thus he failed to state a claim that he was denied access to the courts); *Herrera v. Scully*, 815 F. Supp. 713, 723 (S.D.N.Y. 1993) (holding that prison officials did not act in an "intentional and deliberate manner to deprive [the incarcerated person] of his constitutional rights by preventing his legal mail from arriving at court in a timely manner.").

102. See, e.g., *Key v. Artuz*, No. 95 CV 0392 (HB), 1995 U.S. Dist. LEXIS 13201, at *7 (S.D.N.Y. Sept. 13, 1995) (*unpublished*) (reading complaint liberally and denying defendant's motion to dismiss where interference caused incarcerated person to miss court-imposed deadline but incarcerated person failed to allege invidious (malicious) intent).

103. Attorney-client privilege will generally have its own statute in your state. In New York, the relevant statute can be found at N.Y. C.P.L.R. 4503 (McKinney 2007).

104. *Frye v. Henderson*, 474 F.2d 1263, 1264 (5th Cir. 1973) (*per curiam*) (stating opening mail to check for contraband is legitimate); *People v. Poe*, 193 Cal. Rptr. 479, 481, 145 Cal. App. 3d 574, 578 (Cal. Ct. App. 1983) (citing *Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 935, 963 (1974)). Some courts have even held prison officials can open mail from a court outside your presence, since court documents are public records and therefore not subject to the same protections. See *Keenan v. Hall*, 83 F.3d 1083, 1094 (9th Cir. 1996) (finding incoming mail from a court not "legal mail").

105. See *Jones v. Brown*, 461 F.3d 353, 362–363 (3d Cir. 2006) (finding that though a risk of anthrax terrorism might have justified temporarily opening incarcerated people's mail after September 11, 2001, there was no rational basis for continuing this policy more than three years later in the absence of a continuing risk).

106. *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) (holding that the fact that a meeting between an incarcerated person and his attorney "take[s] place away from public view" is not enough to prove that the incarcerated person intended the communication between them to be confidential); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962) (holding that in the case of an attorney preparing a tax return, no privilege could be expected since the form is not intended to be confidential but "is given for transmittal by the attorney to others"); *Priest v. Hennessy*, 51 N.Y.2d 62, 68–69, 409 N.E.2d 983, 986, 431 N.Y.S.2d 511, 514 (1980) ("[N]ot all communications to an attorney are privileged. In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services") (citing *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219, 391 N.E.2d 967, 970, 417 N.Y.S.2d 884, 887, (1979)).

attorney and is covered under the privilege.¹⁰⁷ It does not matter if your communications with your lawyer are written or oral; both are equally privileged.¹⁰⁸ An exception is that you cannot claim the attorney-client privilege if the communication furthers future wrongdoing.¹⁰⁹

4. Legal Correspondence and New York State and City Regulations

The following is a discussion of additional New York rules governing legal mail restrictions. Incarcerated people in other states must consult their state and local regulations. The New York Department of Correctional Services regulations state that incoming legal mail should be opened and examined only in the presence of the incarcerated person and will not be read by prison authorities without written superintendent authorization.¹¹⁰ Outgoing privileged mail may not be opened, inspected, or read without written superintendent authorization. The regulations applying to city and county jails in New York have essentially the same provisions, except they additionally state that mailed communications with attorneys may not be read without a search warrant.¹¹¹

The standards applicable to jails in New York City distinguish between privileged and non-privileged mail. Your privileged incoming mail cannot be opened except in your presence or pursuant to a search warrant, and your privileged outgoing correspondence can only be opened or read pursuant to a search warrant.¹¹²

5. Legal Correspondence and Federal Regulations

Privileged mail is referred to as “special mail” in the federal regulations governing the Federal Bureau of Prisons.¹¹³ This includes mail from state and federal courts, attorneys, the President and Vice-President, governors, members of the U.S. Congress, embassies and consulates, federal law enforcement officers, and the Department of Justice (excluding the Bureau of Prisons, but including U.S. Attorneys).¹¹⁴ Mail from any of these sources should be marked as follows on the envelope: “Special Mail—Open only in the presence of the inmate.”¹¹⁵ Prison authorities may still open these letters to ensure there is no contraband and to confirm the enclosed letter does in fact qualify as special mail. But, they may not read the letter. If the envelope is not marked as special mail, the correspondence will be treated as general correspondence.¹¹⁶ Mail from attorneys must be marked as described above and must indicate the attorney’s name and the fact that he or she is an attorney. While the word “Attorney” does not need to appear on the envelope, there must be some indication that the person sending the letter is an attorney. This indication does not have to be placed on any particular place on the envelope.¹¹⁷

As a practical matter, whether you are incarcerated in a state or federal prison, you should clearly label envelopes of privileged correspondence: “*Privileged Correspondence (Special Mail)—Do Not Open Except in the Presence of Intended Inmate-Recipient.*” You may also want to suggest your lawyer tape shut all mail sent to you. This will let you know whether your mail had been opened and read when you were not present, since you would be able to see where the tape was removed from the envelope.

107. See N.Y. C.P.L.R. 4503(a)(1) (McKinney 2007).

108. *Le Long v. Siebrecht*, 196 A.D. 74, 76, 187 N.Y.S. 150, 150 (2d Dept. 1921).

109. *In re Associated Homeowners & Businessmen’s Org., Inc.*, 87 Misc. 2d 67, 68, 385 N.Y.S.2d 449, 450 (Sup. Ct. N.Y. County 1976) (pointing towards the exception for communications “in furtherance of fraudulent or other unlawful acts” as reason for a denial of an application to quash subpoena of an attorney).

110. N.Y. COMP. CODES R. & REGS. tit. 7, § 721.3(b)(1) (2020).

111. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.4(d) (2020). Note that this section of the regulations distinguishes legal privileged correspondence from general privileged correspondence.

112. Rules of the City of New York, Tit. 40, Ch. 1, §1-11(c)(6), (e) *available at* <http://www1.nyc.gov/site/boc/jail-regulations/jail-regulations.page> (last visited May 24, 2020).

113. 28 C.F.R. § 540.2(c) (2020).

114. 28 C.F.R. § 540.2(c) (2020).

115. 28 C.F.R. § 540.2(c) (2020).

116. 28 C.F.R. § 540.18(b) (2020).

117. *Merriweather v. Zamora*, 569 F.3d 307, 313–314 (6th Cir. 2009); 28 CFR 540.19 (2020).

D. Internet Communication

The right of an incarcerated person to access the Internet is a new subject. There are not many cases testing the rights of incarcerated people to communicate through the Internet. However, the *Turner* standard applies to cases involving Internet communication.¹¹⁸

Most states ban incarcerated people from direct, unsupervised access to the Internet.¹¹⁹ Federal legislation prevents access without official supervision.¹²⁰ Though this statute has not yet been tested in court, it will likely be upheld because it does not completely ban access, but rather just requires supervision, and is related to a valid prison interest—security. Some states allow certain incarcerated people to access the Internet under supervision for educational and professional courses.¹²¹ Similarly, the Federal Bureau of Prisons has a program called the Trust Fund Limited Inmate Computer System (TRULINCS). This system lets incarcerated people send electronic messages to families and attorneys without actually using the Internet.¹²² Keep in mind, however, that in order to use TRULINCS, you must consent to monitoring of your messages by prison officials.¹²³ Attorney-client privilege does not apply to messages sent through TRULINCS.¹²⁴ You should look into the regulations of your own state to find out its specific rules.

Indirect use of the Internet happens when incarcerated people use third parties (non-incarcerated people) to help them communicate or receive information. For instance, an incarcerated person might write a letter to a third party describing the information he wants posted on the Internet or that he wants sent in an email. The third party would then post the information online or send the email, and afterwards would print any Internet response and mail it to the incarcerated person.¹²⁵ Some states have passed laws against this type of indirect Internet communication. For instance, Ohio prevents any access, direct or indirect, except for access related to educational programs.¹²⁶ Arizona has a similar statute that limits incarcerated people's direct and indirect access to the Internet and email.¹²⁷ Minnesota, California, Kansas, and Wisconsin have similar laws.¹²⁸

The reaction to these laws in various courts has been mixed. In 2004, the Ninth Circuit struck down a California policy that prohibited incarcerated people from receiving mail that has material

118. See Part B, Section 1 of this Chapter for an explanation of the *Turner* standard.

119. See Titia A. Holtz, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 859 (2002). Laura E. Gorgol, *Unlocking Potential: Results of a National Survey of Postsecondary Education in State Prisons*, INSTITUTE FOR HIGHER EDUCATION POLICY (2011).

120. Protection of Children from Sexual Predators Act of 1998, Title VIII, sec. 801, Pub. L. No. 105–314, 112 Stat. 2974, 2990 (1998) (withholding federal funding from any federal program that allows incarcerated people to have unsupervised access to the Internet). This statute was enacted in response to a specific case in which an incarcerated person who had been granted access to participate in online classes instead used his unsupervised time to download child pornography. Protection of Children from Sexual Predators Act of 1998, Title VIII, sec. 802, Pub. L. No. 105–314, 112 Stat. 2974, 2990 (1998).

121. See OHIO REV. CODE ANN. § 5145.31(C)(1)(a) (LexisNexis 2004).

122. Federal Bureau of Prisons, *TRULINCS: Frequently Asked Questions*, available at <https://www.bop.gov/inmates/trulincs.jsp> (last visited May 24, 2020) (discussing the Bureau of Prisons' e-mail program).

123. U.S. Department of Justice, Federal Bureau of Prisons, Form BP-A0934.052, Inmate Agreement for Participation in TRULINCS Electronic Messaging Program.

124. U.S. Department of Justice, Federal Bureau of Prisons, Form BP-A0934.052, Inmate Agreement for Participation in TRULINCS Electronic Messaging Program.

125. At least one court has held incarcerated people cannot be punished if third parties post accounts from those incarcerated people on the Internet for them. See *Canadian Coalition against the Death Penalty v. Ryan*, 269 F. Supp. 2d 1199, 1201, 1203 (D. Ariz. 2003). Keep in mind, however, that this is different from “kiting,” where you send a message to one person, and inside that message, include another message that will be sent to someone else. See section B(1)(a) of this chapter for more information on kiting.

126. OHIO REV. CODE ANN. § 5145.31(C)(1)(a) (LexisNexis 2004).

127. ARIZ. REV. STAT. ANN. § 41-1604 (2012).

128. See Valerie Alter, *Jailhouse Informants: A Lesson in E-Snitching*, 10 J. TECH. L. & POL'Y 223, 232 (2005); *Computer Use for/by Inmates*, <https://www.thefreelibrary.com/Computer+use+for%2Fby+inmates.-a0208273651> (last visited Oct. 5, 2020).

downloaded from the Internet.¹²⁹ Applying the *Turner* standard, the court did not find a logical relationship between the regulation and the legitimate concerns of security, and of increased workload for the mailroom.¹³⁰ On the other hand, a 2008 California case confirmed that incarcerated people may be denied direct Internet access, stating that there is no independent First Amendment right to computer and Internet access.¹³¹

The response at the district court level has also been mixed. A judge in Arizona found the state law to be unconstitutional,¹³² while a judge in Kansas upheld a similar law.¹³³ The Ninth Circuit case and the Arizona district court case show that the policies prohibiting indirect access to the Internet (by receiving Internet-generated materials in the mail) might be more likely to be struck down compared to policies dealing with direct Internet access. However, it is important to remember that there are still not enough cases on this matter to determine exactly how various courts will handle the issue of Internet communication.

E. Receipt and Possession of Publications

You have a First Amendment right to receive publications, and a publisher has a First Amendment right to send you publications. The same standards that govern censorship of incoming mail apply to your right to receive and possess books, magazines, and other reading material. Before 1989, *Procunier v. Martinez* held that a publication could not be prohibited unless the prison could show that the publication threatened prison security or order, or that the publication would negatively affect an incarcerated person's rehabilitation.¹³⁴

But, in 1989, in *Thornburgh v. Abbott*, the U.S. Supreme Court replaced the *Martinez* standard with a standard easier for prison officials to meet: the *Turner* standard.¹³⁵ Now, a court can limit your right to receive and possess publications for reasons related to a legitimate prison interest (the *Turner* standard).¹³⁶ The Supreme Court has noted that courts should respect and defer to the "informed discretion of correction officials."¹³⁷ This means that while censorship is not allowed just because the publication's content is unpopular or offensive, it will be relatively easy for officials to restrict access to publications by citing security concerns.¹³⁸

Lower federal and state court decisions that cancelled restrictions under the old *Martinez* standard most likely do not reflect current law, so you probably cannot reference them in any court papers. This means that you cannot rely on cases decided before 1989. See the discussion of *Martinez* and *Abbott* in Part B of this Chapter.

1. General Standards for Receiving Publications

Using the *Turner* standard, most courts have upheld restrictions on incarcerated people receiving incoming publications. This is generally the case for restrictions that are reasonably related to the

129. *Clement v. Cal. Dept. of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004).

130. *Clement v. Cal. Dept. of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004).

131. *Carmony v. County of Sacramento*, No. CIV S-05-1679 LKK GGH P, 2008 U.S. Dist. LEXIS 11137, at *47–48 (E.D. Cal. 2008) (*unpublished*).

132. *Canadian Coalition Against the Death Penalty v. Ryan*, 269 F. Supp. 2d 1199, 1203 (D. Ariz. 2003).

133. *Waterman v. Commandant*, 337 F. Supp. 2d 1237, 1241–1242 (D. Kan. 2004) (upholding a policy that allows prison personnel to reject incoming mail that has photocopies of publications or materials that do not come directly from the publisher). Note that the Kansas law differed from the Arizona law in that it prohibited what inmates could receive in the mail, as opposed to what inmates could send out to people to put on the internet.

134. *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 240 (1974).

135. *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (holding that restrictions on incoming mail should be analyzed under the standard established in *Turner v. Safley*, 482 U.S. 78, 89–91, 109 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 and not the *Martinez* standard which courts had been using for incoming mail since 1974).

136. *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989).

137. *Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1982)).

138. *Thornburgh v. Abbott*, 490 U.S. 401, 415–416, 109 S. Ct. 1874, 1882–1883, 104 L. Ed. 2d 459, 474–475 (1989).

legitimate governmental interests of security and order, screening contraband, preventing fire, and promoting rehabilitation.¹³⁹ In *Frost v. Symington*, a federal appeals court upheld regulations which did not allow incarcerated people to have sexually explicit magazines.¹⁴⁰ In *Malik v. Coughlin*, a New York state court, citing *Abbott*, allowed prisons to censor an incoming article that made critical and exaggerated allegations about prison medical personnel.¹⁴¹ The censored article said that correctional facilities used incarcerated people as guinea pigs for drug testing.¹⁴² Even though the article had been read by incarcerated people at two other prison facilities and had not caused violence, the court found that this prison could ban the article for security reasons.¹⁴³ Withholding publications that contain racist statements has also been upheld by federal courts relying on *Abbott*.¹⁴⁴ Prison officials can probably also ban internal incarcerated people's newsletters by claiming that they are contrary to prison security if the newsletters contain similar forbidden content. But, as one court held in *Epps v. Smith*, a prison cannot ban an outside incarcerated person's newsletter that does not contain prohibited content (in this case, a self-described "revolutionary prisoners' newspaper" published in California and distributed in a New York penitentiary).¹⁴⁵ The court there emphasized the rights of those outside the prison to express their political views.¹⁴⁶

Sometimes courts will not allow publications to be banned if the government does not have an important reason to ban them. In one case, the court did not allow a regulation that only allowed incarcerated people to receive publications they ordered and paid for directly because the government did not have a strong enough reason for imposing the rule.¹⁴⁷ Similarly, in another case, the court said that a restriction on publications that contained any nudity could be rejected as too broad because the restriction included scientific texts and works of art.¹⁴⁸

A common restriction imposed by prisons is the "publishers-only" rule, which allows incarcerated people "to receive newspapers, magazines, and books from publishers or book clubs

139. See, e.g., *Waterman v. Farmer*, 183 F.3d 208, 217–218 (3d Cir. 1999) (holding that a state statute prohibiting pornographic materials for incarcerated people had a rational relationship to sex offender rehabilitation); *Dawson v. Scurr*, 986 F.2d 257, 260–261 (8th Cir. 1993) (holding that there was a rational relationship between prohibiting psychologically unfit incarcerated people from seeing sexually explicit materials and the legitimate goal of rehabilitation); *Skelton v. Pri-Cor*, 963 F.2d 100, 103 (6th Cir. 1991) (holding that because hardback books can be used to smuggle contraband, a ban on such books was valid); *Malik v. Coughlin*, 154 A.D.2d 135, 137–138, 552 N.Y.S.2d 182, 184 (3d Dept. 1990) (holding that the accusations contained in the publication were likely to incite disobedience and were therefore properly restricted). But see *Prison Legal News v. Lehman*, 397 F.3d 692, 700 (9th Cir. 2005) (finding that banning catalogs and bulk mailings is not rationally related to decreasing the risk of fire, since limitations already exist on the number of possessions in incarcerated people's cells); *Morrison v. Hall*, 261 F.3d 896, 902 (9th Cir. 2001) (holding that reducing fire hazards is a legitimate government interest but banning bulk mailings does not rationally serve that interest when there are other regulations on the amount of paper incarcerated people can have in their cells).

140. *Frost v. Symington*, 197 F.3d 348, 357–358 (9th Cir. 1999) (finding that regulation of pornographic materials promotes security interests and so it satisfies *Turner*).

141. *Malik v. Coughlin*, 154 A.D.2d 135, 138–139, 552 N.Y.S.2d 182, 184 (App. Div. 3rd Dept. 1990).

142. *Malik v. Coughlin*, 154 A.D.2d 135, 136, 552 N.Y.S.2d 182, 183 (3d Dept. 1990).

143. *Malik v. Coughlin*, 154 A.D.2d 135, 137–138, 552 N.Y.S.2d 182, 184 (3d Dept. 1990).

144. See, e.g., *Thomas v. U.S. Sec'y of Def.*, 730 F. Supp. 362, 364–365 (D. Kan. 1990) (holding that restriction of materials that could cause racial confrontations was valid); *Chriceol v. Phillips*, 169 F.3d 313, 315–317 (5th Cir. 1999) (holding that restriction of materials that advocated racial, religious, or national hatred that could cause violence was valid); *Winburn v. Bologna*, 979 F. Supp. 531, 534–535 (W.D. Mich. 1997) (holding that restriction of mail that promoted racial supremacy was valid).

145. *Epps v. Smith*, 112 Misc. 2d 724, 730, 447 N.Y.S.2d 577, 581–582 (Sup. Ct. 1981).

146. See *Epps v. Smith*, 112 Misc. 2d 724, 728–729, 447 N.Y.S.2d 577, 580–581 (Sup. Ct. Wyoming County 1981) (finding that there was no evidence incarcerated people were using the paper to communicate); see also *Nasir v. Morgan*, 350 F.3d 366, 371–374 (3d Cir. 2003) (upholding a ban on correspondence between incarcerated people and the formerly incarcerated under *Turner* balancing test, despite the 1st Amendment interests of the non-incarcerated).

147. *Crofton v. Roe*, 170 F.3d 957, 960–961 (9th Cir. 1999).

148. *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1082 (W.D. Wis. 2000). But see *Mauro v. Arpaio*, 188 F.3d 1054, 1060 n.4 (9th Cir. 1999) (upholding a restriction on sexually explicit materials, even if it includes art and science texts, as not unconstitutionally overbroad).

only.”¹⁴⁹ The Supreme Court in *Bell v. Wolfish* held that a prison may adopt a publishers-only rule for hardcover books if they deem it necessary to prison security by preventing contraband smuggling.¹⁵⁰ If your prison has such a rule, you have no right to receive hardcover publications directly from friends or family. This case only dealt with hardcover books, so it is unclear to which other publications it applies. Lower courts have extended the publishers-only rule to other publications like magazines and soft-cover books because requiring incarcerated people to receive materials directly from the publisher is a minor inconvenience compared to requiring the prison to search all materials not sent in factory-sealed packages.¹⁵¹ But, courts have found that some restrictions on your ability to receive publications are not rational and have struck them down. For example, one circuit court has stated that prisons may not require books ordered from approved vendors to have special shipping labels.¹⁵² Also, some courts have said that prisons cannot place certain restrictions on bulk mail.¹⁵³ In a recent California case, a federal court held that stopping a vendor from sending free, softbound, religious materials to incarcerated people was not allowed.¹⁵⁴ Finally, one court found that prison officials should allow incarcerated people to receive magazine subscriptions as gifts, though a different, higher court supported a ban on magazine subscriptions.¹⁵⁵

Bans on certain publications, other than sexually explicit ones, can be found reasonably related to rehabilitation interests. The Supreme Court upheld a Pennsylvania regulation denying all newspapers and magazines to incarcerated people held in segregation and temporarily classified as particularly dangerous or unmanageable.¹⁵⁶ The reason for this was that such a restriction was reasonably related to the prison’s interest in promoting good behavior.¹⁵⁷ It was important in this case that the incarcerated people’s placement in segregation was not permanent, and that they could earn back their privileges to possess publications.¹⁵⁸ One of the Supreme Court justices, Justice Stevens, dissented (disagreed with the outcome) because he thought that the rationale of rehabilitation was too broad and could theoretically justify taking away any right or privilege in prison.¹⁵⁹ Because this case is relatively recent, it is important to note that there is some disagreement on the issue, even within the Supreme Court.

You cannot be punished for having literature that is prohibited if the literature is prohibited by an unconstitutional or illegal rule. If you are punished for having this literature, Chapter 18 of the

149. See, e.g., *Ward v. Washtenaw Cnty. Sheriff’s Dept.*, 881 F.2d 325, 326–327 (6th Cir. 1989).

150. *Bell v. Wolfish*, 441 U.S. 520, 550–552, 99 S. Ct. 1861, 1880–1881, 60 L. Ed. 2d 447, 475–477 (1979).

151. See *Ward v. Washtenaw Cnty. Sheriff’s Dept.*, 881 F.2d 325, 329–330 (6th Cir. 1989) (finding a publisher’s only rule applying to books, magazines and newspapers was reasonably related to a legitimate interest in maintaining prison security, as it allowed the prison “to control the security problems caused when contraband such as drugs and weapons are smuggled in various books, magazines, and newspapers to inmates from unidentified sources or visitors”).

152. *Ashker v. Cal. Dept. of Corr.*, 350 F.3d 917, 924 (9th Cir. 2003).

153. *Morrison v. Hall*, 261 F.3d 896, 904 (9th Cir. 2001) (holding that prison cannot ban incarcerated people from receiving subscriptions sent by bulk, third, or fourth class mail); *Prison Legal News v. Lehman*, 397 F.3d 692, 700–701 (9th Cir. 2005) (finding prison may not prohibit incarcerated people from receiving non-subscription bulk mail and catalogs).

154. *Jesus Christ Prison Ministry v. Cal. Dept. of Corr.*, 456 F. Supp. 2d 1188, 1201–1202 (E.D. Cal. 2006).

155. *Prison Legal News v. Werholtz*, No. 02-4054-MLB, 2007 U.S. Dist. LEXIS 73629, at *13 (D. Kan. Oct. 1, 2007) (*unpublished*) (finding that a Kansas policy of banning gift subscriptions was not rational and therefore unconstitutional). But see *Grissom v. Werholtz*, 524 F. App’x 467, 471–472 (10th Cir. 2013) (upholding a prison’s prohibition of magazine subscriptions for an incarcerated person who had been placed in isolation and had a history of possessing dangerous contraband).

156. *Beard v. Banks*, 548 U.S. 521, 524–525, 126 S. Ct. 2572, 2575–2576, 165 L. Ed. 2d 697, 702–703 (2006).

157. *Beard v. Banks*, 548 U.S. 521, 533, 126 S. Ct. 2572, 2580, 165 L. Ed. 2d 697, 707 (2006) (“[W]ithholding such privileges ‘is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.’” (quoting *Overton v. Bazzetta*, 539 U.S. 126, 134, 123 S. Ct. 2162, 2168–2169, 156 L. Ed. 2d 162, 171 (2003))).

158. *Beard v. Banks*, 548 U.S. 521, 532, 126 S. Ct. 2572, 2579–2580, 165 L. Ed. 2d 697, 707 (2006).

159. *Beard v. Banks*, 548 U.S. 521, 547–548, 126 S. Ct. 2572, 2588–2589, 165 L. Ed. 2d 697, 716–717 (2006) (Stevens, J., dissenting).

JLM, “Your Rights at Prison Disciplinary Proceedings,” should help you understand your rights during prison disciplinary proceedings.

Finally, you should remember that state law, and state and federal regulations, might also protect your access to literature. For example, federal regulations allow incarcerated people in minimum and low-security facilities to receive soft-cover books from any source, though they can receive hardcover books only from the publisher, a book club, or a bookstore.¹⁶⁰ Incarcerated people in medium- or high-security facilities must receive all books from the publisher, a book club, or a bookstore.¹⁶¹ In addition, facility administrators may reject publications if they contain content that could be considered a security risk, like depictions of violence and sexually explicit material (discussed in more detail below).¹⁶² So, you should research additional regulations or laws that might apply to you.

2. Receiving Sexually Explicit Materials

Some regulations specifically do not allow sexually explicit materials. Courts have upheld such regulations based on two different government interests: (1) promoting rehabilitation, and (2) protecting prison security. In *Ballance v. Virginia*, the court upheld the confiscation of photographs of partially nude children from a convicted pedophile, reasoning that “due . . . to the prison’s interest in rehabilitating this disease,” prison officials acted reasonably in confiscating the photographs.¹⁶³ Similarly, in *Dawson v. Scurr*, the court held that restrictions denying sexually explicit materials to psychologically unfit incarcerated people were justified because exposure to such materials would interfere with their rehabilitation.¹⁶⁴

The *Thornburgh* standard gives prison officials discretion to ban sexually explicit material if officials reasonably believe the material poses a threat to prison order.¹⁶⁵ Prison officials are given this discretion because allowing an incarcerated person to have such material may encourage violence by leading other incarcerated people to make assumptions about that incarcerated person’s beliefs, sexual orientation, or gang affiliations.¹⁶⁶ At least one federal circuit court has held that a ban on sexually explicit material is reasonable in order to prevent sexual harassment of female staff.¹⁶⁷ But, at least one other circuit has struck down blanket bans on sexually explicit material. Instead, that circuit requires the prison to show that giving a specific publication to incarcerated people will harm their rehabilitation before banning the publication.¹⁶⁸ Even if the prison decides to ban sexually explicit materials, some courts have held that both the incarcerated person and the publisher are entitled to notice of the ban and an opportunity to respond.¹⁶⁹ The reason for granting notice to publishers is that they have a First Amendment right to communicate with individual incarcerated people if they so

160. 28 C.F.R. § 540.71(a)(1), (3) (2020).

161. 28 C.F.R. § 540.71(a)(2) (2020).

162. For an explanation of content that can amount to a security risk, see 28 C.F.R. § 540.71(b) (2020).

163. *Ballance v. Virginia*, 130 F. Supp. 2d 754, 760 (W.D. Va. 2000).

164. *Dawson v. Scurr*, 986 F.2d 257, 260–262 (8th Cir. 1993).

165. *Thornburgh v. Abbott*, 490 U.S. 401, 411–412 109 S. Ct. 1874, 1880–1881, 104 L. Ed. 2d 459, 471–472 (1989).

166. *Thornburgh v. Abbott*, 490 U.S. 401, 412–413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–473 (1989).

167. *Mauro v. Arpaio*, 188 F.3d 1054, 1059–1060 (9th Cir. 1999).

168. See *Ramirez v. Pugh*, 379 F.3d 122, 129 (3d Cir. 2004) (finding that “the connection between the [restrictive statute] and the government’s rehabilitative interest” is not “obvious upon consideration of the entire federal inmate population, including those prisoners not incarcerated for sex-related crimes”).

169. *Montcalm Publishing Corp. v. Beck*, 80 F.3d 105, 106 (4th Cir. 1996) (finding that “publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate subscribers”); *Jacklovich v. Simmon*, 392 F.3d 420, 433–434 (10th Cir. 2004) (holding that publishers as well as incarcerated people have a right to be notified when inmate subscribers are prohibited from receiving the publishers’ publications). Note that the 10th Circuit later clarified that *Jacklovich* governed only intentional rejections of the publications, rather than accidental rejections such as a mistake in the mailroom. *Jones v. Salt Lake Cnty.*, 503 F.3d 1147, 1162–1163 (10th Cir. 2007).

choose.¹⁷⁰ Additionally, at least one court has held that incarcerated people have a right to appeal censorship decisions to someone other than the official who ordered the censorship.¹⁷¹

In *Thornburgh v. Abbott*, one of the regulations at issue allowed the warden to ban homosexually explicit material depicting people who are the same gender as the prison population.¹⁷² The Supreme Court held that the rule was valid. But, the same regulation in *Thornburgh* does not permit a warden to reject heterosexually explicit material, or non-explicit homosexual material, unless it is “detrimental to the security, good order, or discipline of the institution, or if it might facilitate criminal activity.” Nor does the regulation allow the warden to reject non-explicit homosexual material.¹⁷³ The Court reasoned that “prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow [prisoner]’s . . . sexual orientation . . . and cause disorder by acting accordingly . . . [I]t is essential that prison officials be given broad discretion to prevent such disorder.”¹⁷⁴

It is unclear what this means for the incarcerated person who wants to receive sexually explicit homosexual material because the discretion given to officials in *Thornburgh v. Abbott* may result in different decisions and regulations in different jurisdictions.¹⁷⁵ At least one court has suggested that because exposure of one’s homosexual identity is more likely to lead to assault by others in a maximum-security prison than in a minimum-security facility, security concerns are more legitimate in a maximum-security facility.¹⁷⁶ Such reasoning could mean that incoming sexually explicit homosexual material may be denied at maximum-security facilities, but not minimum-security facilities.

As a general rule, LGBTQ+ incarcerated people may seek to obtain non-sexually explicit homosexual material through the mail. Federal regulations seem to allow the general admission of these materials unless they are found to be detrimental to the security, good order, or discipline of the

170. *Montcalm Publishing Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996).

171. *Krug v. Lutz*, 329 F.3d 692, 699–700 (9th Cir. 2003).

172. *Thornburgh v. Abbott*, 490 U.S. 401, 405 n.6, 109 S. Ct. 1874, 1877 n.6, 104 L. Ed. 2d 459, 468 n.6 (1989) (The Program Statement No. 5266.5 explained that 28 C.F.R. § 540.71(b)(7) (2007) (the regulation at issue) allowed the warden to reject the following types of sexually explicit material: (1) homosexual (of the same sex as the prison population), (2) sado-masochistic, (3) bestial, or (4) material involving children.)

173. *Thornburgh v. Abbott*, 490 U.S. 401, 404–405, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (quoting 28 C.F.R. § 540.71(b)(7) (2020)).

174. *Thornburgh v. Abbott*, 490 U.S. 401, 412–413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–473 (1989).

175. *Thornburgh v. Abbott*, 490 U.S. 401, 417 n.15, 109 S. Ct. 1874, 1883 n.15, 104 L. Ed. 2d 459, 475 n.15 (1989) (noting that “the exercise of discretion called for by these regulations may produce seeming ‘inconsistencies,’ but what may appear to be inconsistent results are not necessarily signs of arbitrariness or irrationality.”). *Compare* *Inosencio v. Johnson*, 547 F. Supp. 130, 135–136 (E.D. Mich. 1982), *aff’d sub nom.* *Brown v. Johnson*, 743 F.2d 408, 413 (6th Cir. 1984) (holding that the prohibition of a homosexual worship service to be constitutional because incarcerated people attending such services would be exposing themselves to attacks from other incarcerated people), *with* *Lipp v. Procunier*, 395 F. Supp. 871, 877–878 (N.D. Cal. 1975) (holding the prohibition of homosexual worship services to be a possible violation of incarcerated people’s 1st Amendment right to religious freedom and requiring prison officials to present findings of fact that clearly supported their assertion that such a service would present a danger to the prison population). The Second Circuit has not considered the issue of sexually explicit homosexual materials in prisons, but it has upheld a regulation banning incarcerated people from keeping sexually explicit photos of their wives and girlfriends on the grounds that such photos may create violence among incarcerated people due to their personal nature. *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995). *See also* *Thomas v. Scully*, No. 89 Civ. 4715, 1990 U.S. Dist. LEXIS 16229 at *3 (S.D.N.Y. Dec. 4, 1990) (*unpublished*) (holding that a ban on nude photographs of incarcerated people’s wives and girlfriends is reasonably related to the prison’s legitimate interest in preventing violence between an incarcerated person and a guard or another incarcerated person and therefore does not violate the 1st Amendment because of the emotionally charged nature of the photographs).

176. *See* *Inosencio v. Johnson*, 547 F. Supp. 130, 135 (E.D. Mich. 1982), *aff’d sub nom.* *Brown v. Johnson*, 743 F.2d 408 (6th Cir. 1984) (citing testimony by the director of the California Department of Corrections that the Department could make a good argument for denying incarcerated people the ability to attend an LGBTQ+ church service in a maximum-security prison while allowing those in a medium-security facility to attend such services). The same court would likely reason that receiving sexually explicit homosexual materials could also put an inmate at a greater risk of attack in a maximum-security prison than in a medium security one. *See also* C.F.R. §§ 540.71(b)(7), 540.72 (2020).

institution.¹⁷⁷ State incarcerated people who desire such material, however, may encounter the same arguments used by prison officials to ban sexually explicit homosexual materials. For instance, one court applied an identification theory in *Harper v. Wallingford* to find that an incarcerated person's First Amendment rights were not violated when non-explicit mail promoting consensual sexual relationships between adult men and juvenile males was withheld from him.¹⁷⁸ The court accepted the prison officials' concern that the material, when seen by other incarcerated people, would make the incarcerated person a target as a homosexual and would thus make him vulnerable to assault.¹⁷⁹ However, these arguments might fail to persuade courts if it is clear that the incarcerated person is already known to identify as LGBTQ. This is because one of the main arguments used by prison officials is identification.¹⁸⁰ For more information on gay, lesbian, bisexual, and transgender issues, see *JLM*, Chapter 30, "Special Information for Lesbian, Gay, Bisexual, Transgender, and/or Queer Incarcerated People."

Courts have also allowed restrictions on explicit heterosexual materials, including sexually explicit photographs of incarcerated people's wives or girlfriends.¹⁸¹ While these restrictions are almost always found to be constitutional, a few courts have reviewed such regulations much more closely. In *Aiello v. Litscher*, the court held that a regulation banning all written or visual materials containing nudity or sexual behavior was too vague because it would also ban important works of art and literature.¹⁸² It noted that a jury could find that the prohibition of these works is not reasonably related to legitimate prison interests. It also concluded that there was no evidence that the materials threaten security or rehabilitation.¹⁸³

F. Access to the News Media

You may want to publicize your case by attracting the media's attention. The Supreme Court has held that a reasonable and effective means of communication between incarcerated people and the media must exist.¹⁸⁴ But, prisons have a legitimate security interest in limiting access to outside visitors, including the press.¹⁸⁵ The Court held that limiting or prohibiting face-to-face interviews with

177. See *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (noting that publications can be restricted only if they are "detrimental to the security, good order, or discipline of the institution or if [they] might facilitate criminal activity").

178. *Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir. 1989) (determining that the materials at issue could incite violence by and against the incarcerated people reading them).

179. *Harper v. Wallingford*, 877 F.2d 728, 730 (9th Cir. 1989).

180. See *Espinoza v. Wilson*, 814 F.2d 1093, 1098–1099 (6th Cir. 1987) (finding that protecting the sexual identity of incarcerated people was not a valid reason for restricting access to LGBTQ+ publications since the incarcerated people in question were already open about being LGBTQ but finding in favor of the warden because he stated other legitimate reasons for restricting access).

181. *Mauro v. Arpaio*, 188 F.3d 1054, 1059–1060 (9th Cir. 1999) (upholding restrictions on explicit heterosexual materials as reasonably related to the goal of preventing sexual harassment of female prison guards); *Giano v. Senkowski*, 54 F.3d 1050, 1055–1056 (2d Cir. 1995) (holding that the regulation was rationally related to the prevention of violence in prisons; the court pointed out that other avenues are available for reinforcing emotional bonds, such as non-nude photographs or romantic letters, and for satisfying the right to graphic sexual imagery, such as commercially produced erotica or sexually graphic letters).

182. *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1082 (W.D. Wis. 2000).

183. *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1081 (W.D. Wis. 2000); see also *Kaufman v. McCaughtry*, 419 F.3d 678, 685 (7th Cir. 2005) (following *Aiello* in finding that a definition of "pornography" agreed to in a settlement by the parties could not be contested as overly broad).

184. *Pell v. Procunier*, 417 U.S. 817, 841, 94 S. Ct. 2800, 2810, 41 L. Ed. 2d 495, 512 (1974) (1974) (holding that prison officials will be given discretion in regulating the entry of reporters into prison for interviews with inmates so long as reasonable and effective means of communication remain open to incarcerated people).

185. *Pell v. Procunier*, 417 U.S. 817, 826, 94 S. Ct. 2800, 2806, 41 L. Ed. 2d 495, 503–504 (1974); see also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850, 94 S. Ct. 2811, 2815, 41 L. Ed. 2d 514, 519–520 (1974) (*Pell*'s companion case, finding that under the Federal Bureau of Prisons regulations, the media does not have the right to access prisons and inmates beyond the rights granted to members of the general public. *Saxbe* differs from *Pell* in that *Saxbe* only looks at the rights of the media, while *Pell* also addresses the rights of incarcerated people to communicate with the media).

the press does not violate the First Amendment as long as incarcerated people can still communicate with the press in writing or through visitors.¹⁸⁶ The Court has said that the freedom of the press does not grant the media special access to prisons.¹⁸⁷ This means that the news media's physical access (through visitation, tours, photographs, etc.) can be restricted just like the public's physical access based on security interests can. In a recent case, a court noted that these kinds of restrictions can vary depending on the security of a particular prison or unit.¹⁸⁸

Federal regulations governing incarcerated people held by the Federal Bureau of Prisons provide that correspondence sent to the media be treated as if it were privileged and is considered special mail.¹⁸⁹ The rules discussed in Part C of this Chapter for privileged correspondence therefore apply to letters to the media for those incarcerated people. Correspondence from the media is subject to inspections for contraband, qualification as media correspondence, and content likely to promote either illegal activity or conduct contrary to Bureau regulations.¹⁹⁰ But an incarcerated person may not receive pay for any correspondence with the media, act as a reporter, or publish under a byline.¹⁹¹ This restriction on publishing under a byline was recently successfully challenged in a federal district court.¹⁹² The court found the absolute restriction was too broad for the stated interest of maintaining prison security, especially considering incarcerated people were allowed other publishing opportunities.¹⁹³ As this is a recent development, you should watch to see if other courts agree.

The warden of a federal prison has a duty to provide information to the media about certain events that take place in the prison. These include deaths, inside escapes, and institutional emergencies.¹⁹⁴ The warden must also provide basic information about an incarcerated person that is a matter of public record if the media requests it, unless the information is confidential.¹⁹⁵

G. Visitation

If you have been convicted, your constitutional rights to visitation may be severely restricted. However, pretrial detainees are almost certainly allowed reasonable visitation rights,¹⁹⁶ since lack of access to visitors like attorneys can infringe the right to due process and counsel.¹⁹⁷ In *Overton v.*

186. *Pell v. Procunier*, 417 U.S. 817, 835, 94 S. Ct. 2800, 2810, 41 L. Ed. 2d 495, 509 (1974). For example, the California policy in *Pell* allowed incarcerated people face to face visits with members of their family, their clergy, their attorneys, and friends of prior acquaintance. *Pell v. Procunier*, 417 U.S. 817, 824–825, 94 S. Ct. 2800, 2085, 41 L. Ed. 2d 495, 503 (1974).

187. *Houchins v. KQED*, 438 U.S. 1, 15–16, 98 S. Ct. 2588, 2597, 57 L. Ed. 2d 553, 565 (1978) (holding that a local broadcast company could be subjected to a prison's restrictions on in-person visits, despite the company's investigation into the prison's bad conditions).

188. *Hammer v. Ashcroft*, 570 F. 3d 798, 804–805 (7th Cir. 2009) (upholding a ban on person to person meetings between the media and incarcerated people in the special confinement unit, which contains most incarcerated people facing the federal death penalty).

189. 28 C.F.R. §§ 540.2(b), 540.20(a) (2020).

190. 28 C.F.R. § 540.20(c) (2020).

191. 28 C.F.R. § 540.20(b) (2020).

192. *Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1126 (D. Colo. 2007).

193. *Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1124–1126 (D. Colo. 2007) (reaching the same outcome under both the *Turner* and *Martinez* standards).

194. 28 C.F.R. § 540.65(a) (2020).

195. 28 C.F.R. § 540.65(b), (c) (2020).

196. *See Jones v. Diamond*, 594 F.2d 997, 1013–1014 (5th Cir. 1979), *on reh'g*, 636 F.2d 1364 (1981); *see also Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 463–465, 109 S. Ct. 1904, 1910–1911, 104 L. Ed. 2d 506, 517–518 (1989) (holding that state regulations setting forth categories of visitors who might be excluded from visitation did not implicate an incarcerated person's liberty interest in receiving visitors under the Due Process Clause of the 14th Amendment); *see also Martinez v. Coombe*, 95-CV-1147, 1996 U.S. Dist. LEXIS 15330, at *9 (N.D.N.Y. Aug. 22, 1996) (clarifying the language set forth by the Supreme Court in *Thompson*, by concluding that although a court can no longer look only to mandatory language of a statute, the statute is still relevant in determining whether a liberty interest exists).

197. *See Procunier v. Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974) (“[I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and

Bazzetta, the Supreme Court did not clearly define the rights of incarcerated people to visitation. Instead, the Court ruled that a regulation restricting visits was reasonably related to the prison interest of security and therefore the regulation did not violate the incarcerated person's constitutional rights.¹⁹⁸ Regardless of whether you have been convicted or are still awaiting trial, visitation rights may be restricted for certain reasons, including institutional administration, security, and rehabilitation.¹⁹⁹ Prison officials may regulate the time, place, and manner of visits²⁰⁰ (but note that for pretrial detainees, those regulations must be reasonable).²⁰¹ Prison officials may also restrict some of the rights of visitors.²⁰² The *Turner* reasonableness standard also applies to visitation, so courts can invalidate unreasonable restrictions.²⁰³ Contact visits are not constitutionally required for pretrial detainees or for convicted people.²⁰⁴

Prison officials have broad discretion in decisions about who may visit because visitors do impact security. It is up to the prison official to produce evidence that a visitation restriction was due to a security concern. The incarcerated person then must show by substantial evidence that the prison officials' response was exaggerated and unjustified. Some restrictions on visitation are allowable for security reasons.²⁰⁵ In one case, for instance, the Supreme Court upheld a regulation requiring an "approved visitor list" as reasonably related to security interests.²⁰⁶

Courts have upheld rules restricting visits to those who have a personal or professional relationship with the incarcerated person. They have also upheld rules denying visits by formerly incarcerated people²⁰⁷ and people suspected of smuggling contraband.²⁰⁸ The Supreme Court upheld

practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.").

198. *Overton v. Bazzetta*, 539 U.S. 126, 131–132, 123 S. Ct. 2162, 2167, 156 L. Ed. 2d 162, 170 (2003) ("We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question.").

199. *See Overton v. Bazzetta*, 539 U.S. 126, 129, 123 S. Ct. 2162, 2166, 156 L. Ed. 2d 162, 168 (2003) (finding that rehabilitation, maintenance of basic order, and prevention of violence are legitimate objectives of the correctional system); *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501 (1974) (finding that an incarcerated person retains 1st Amendment rights that are not inconsistent with legitimate penological objectives).

200. *See Martin v. Tyson*, 845 F.2d 1451, 1455–1456 (7th Cir. 1988) (*per curiam*) (holding that legitimate safety concerns and other practical constraints justified restrictions imposed on pretrial detainees).

201. *See Martin v. Tyson*, 845 F.2d 1451, 1458 (7th Cir. 1988) (*per curiam*) (upholding policy limiting pretrial detainee's telephone access to every other day).

202. *See Gray v. Bruce*, 26 F. App'x. 819, 823–824 (10th Cir. 2001) (holding that subjecting an incarcerated person's wife to drug tests was generally acceptable as people have diminished privacy rights when visiting a prison. However, subjecting her to an "ion spectrometer test," which tests for the presence of illegal drugs, may have been an unlawful search under the Fourth Amendment because it was unreliable and required her to submit to a strip search to enter the facility once a positive result was obtained).

203. *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170 (2003) (applying *Turner* test to Michigan regulations restricting visits).

204. *See Block v. Rutherford*, 468 U.S. 576, 589, 104 S. Ct. 3227, 3234, 82 L. Ed. 2d 438, 449 (1984) (holding contact visits are a privilege, not a right and that visits can be denied due to security concerns).

205. *See Pell v. Procunier*, 417 U.S. 817, 826–828, 94 S. Ct. 2800, 2806–2807, 41 L. Ed. 2d 495, 503–505 (1974) (holding that placing certain restrictions on visitations may further significant governmental interests and is therefore permitted).

206. *Overton v. Bazzetta*, 539 U.S. 126, 131–136, 123 S. Ct. 2162, 2167–2170 156 L. Ed. 2d 162, 169–173 (2003).

207. *See Farmer v. Loving*, 392 F. Supp. 27, 31 (W.D. Va. 1975) (allowing ban on visitation by formerly incarcerated people).

208. *See Robinson v. Palmer*, 841 F.2d 1151, 1156–1157 (D.C. Cir. 1988) (finding a ban on visits by the wife of an incarcerated person, who was caught smuggling marijuana into prison, was justified by prison's interest in preventing drug smuggling and because the incarcerated person had other ways to communicate with his wife); *Thorne v. Jones*, 765 F.2d 1270, 1275 (5th Cir. 1985) (finding a ban on visits from an incarcerated person's mother, who was suspected of smuggling drugs and refused to submit to a strip search, was justified by security interests and did not violate the First Amendment); *Rowland v. Wolff*, 336 F. Supp. 257, 260 (D. Neb. 1971) (holding the

similar regulations in *Overton*.²⁰⁹ The Seventh Circuit denied the constitutional claims of an incarcerated person whose niece and daughter had been removed from his visitor list.²¹⁰ The court held that this was reasonable because the individual had previously been convicted of violent sex offenses and admitted to raping two children. Based on the holdings in *Overton* and *Turner*, the Seventh Circuit stated that a prison policy that restricts an incarcerated person's constitutional rights is valid if it is rationally related to legitimate interests. To decide if a restriction meets this standard, the court must consider four issues: (1) whether a rational relationship exists between the policy and the interest it claims to advance, (2) whether there are other ways to exercise the right in question, (3) the impact that accommodating the right will have on prison resources, and (4) whether there are alternatives to the policy.²¹¹ A 2009 New York case held that the Commissioner of Correctional Services had a rational basis for denying the incarcerated person's request to participate in a family reunion program. The court emphasized that this decision is highly discretionary and will be upheld as long as there is a rational basis.²¹² The Commissioner in this case considered the appropriate factors, including the incarcerated person's disciplinary record and participation in counseling sessions. The Commissioner ultimately based his decision on the nature of the incarcerated person's crimes, and the court found this decision rational.²¹³

Visits by immediate family usually receive greater protection. Nevertheless, protection of children plays an important role. Regarding visiting children, the court is primarily concerned with the best interests of the children. At least in New York, Family Court has broad discretion to make these decisions.²¹⁴ In one 2001 New York case, the court found that an incarcerated father's petition for visitation with his daughters was properly denied based on the children's best interests.²¹⁵ The court said that the mere fact of incarceration is not enough to deny visitation.²¹⁶ However, in this case, the incarcerated father had almost no contact with his children in the five years he had been incarcerated. The children would have to travel many hours with a paternal grandmother they barely knew in order to visit, and the children themselves did not express any interest in seeing their father.²¹⁷ This was enough to deny visitation.

Restrictions on visits from minor children who are not closely related to the incarcerated person are routinely upheld. The court generally views those restrictions as reasonably related to prison security and protecting children.²¹⁸ In one case, the court upheld a prison's decision to deny visitation by the three-month-old niece of an incarcerated person convicted of sexual assault. The incarcerated person argued that this restriction violated his familial association rights, and that the decision to

interest of the state in preventing the introduction of lethal weapons outweighs an incarcerated person's interest in being visited by his sisters).

209. *Overton v. Bazzetta*, 539 U.S. 126, 133–134, 123 S. Ct. 2162, 2168–2169, 156 L. Ed. 2d 162, 171–172 (2003).

210. *Stojanovic v. Humphreys*, 309 F. App'x 48, 49 (7th Cir. 2009).

211. *Stojanovic v. Humphreys*, 309 F. App'x 48, 52 (7th Cir. 2009) (holding that not all prongs must be addressed for the restriction to be valid if the other factors speak overwhelmingly in favor of the restriction).

212. *Philips v. Comm'r of Corr. Servs.*, 65 A.D.3d 1407, 1408, 885 N.Y.S.2d 138, 138 (3d Dept. 2009) (decision to deny an incarcerated person convicted of sexually assaulting four teenage girls, three of them at gunpoint, from participating in a family reunion program was supported by rational basis). *See also* *Cabassa v. Goord*, 40 A.D.3d 1281, 1281, 836 N.Y.S.2d 351, 351–352 (3d Dept. 2007) (denying an incarcerated person's participation in a family reunion program as supported by a rational basis based on his involuntary protective custody status and the associated security concern).

213. *Philips v. Comm'r of Corr. Servs.*, 65 A.D.3d 1407, 1408, 885 N.Y.S.2d 138, 139 (3d Dept. 2009).

214. *See, e.g., Williams v. Tillman*, 289 A.D.2d 885, 885, 734 N.Y.S.2d 727, 728 (3d Dept. 2001).

215. *See, e.g., Williams v. Tillman*, 289 A.D.2d 885, 885, 734 N.Y.S.2d 727, 728 (3d Dept. 2001).

216. *See, e.g., Williams v. Tillman*, 289 A.D.2d 885, 886, 734 N.Y.S.2d 727, 728 (3d Dept. 2001).

217. *See, e.g., Williams v. Tillman*, 289 A.D.2d 885, 886, 734 N.Y.S.2d 727, 728 (3d Dept. 2001).

218. *Overton v. Bazzetta*, 539 U.S. 126, 133, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170–171 (2003). *See also* *Wirsching v. Colorado*, 360 F.3d 1191, 1199–1200 (10th Cir. 2004) (upholding rule barring a person convicted of sex offenses from visits with his minor daughter as reasonably related to promoting his rehabilitation and to the child's best interest).

deny visitation was irrational and unreasonable.²¹⁹ However, the court found that the restriction had a connection to the prison's legitimate interests in safety and rehabilitation. In that case, the prison's decision was based on a recommendation by the incarcerated person's social worker who recommended that the incarcerated person not see female minors because of his past conduct of sexual assaults and failure to receive sexual offender treatment.²²⁰

In addition to safety, visitation restrictions are sometimes upheld for reasons of rehabilitation. These restrictions usually take away visitation privileges from incarcerated people who have broken institutional rules. In *Overton*, the Supreme Court upheld a Michigan regulation that prevented incarcerated people with two substance abuse disciplinary violations from receiving visitors (except legal and religious visitors). The court there emphasized the prison's interest in rehabilitation.²²¹ However, it was important in this case that the visitation ban was not permanent, since visitation could be reinstated for good behavior. It was also important that incarcerated people had other ways to communicate with the persons who were denied visitation.²²² A federal court in New York similarly held that suspending an incarcerated person from the Family Reunion Program did not violate the Constitution, since contact visitation is a privilege, not a right.²²³ If the regulation in your case differs from these regulations (for example, if it is permanent), you may be able to challenge it in court. But be careful of filing a claim that might be dismissed as frivolous (having no legal merit), since it would become a strike under the Prison Litigation Reform Act ("PLRA").²²⁴ *JLM*, Chapter 14 has more information on the PLRA. In one New York case, the court struck down a prison's decision to take away an incarcerated person's contact visits. The prison took away visits after a failed urine drug test, but the court questioned whether the new visit restrictions were really connected to any safety or security concerns. The court struck it down because the restriction was arbitrary and capricious and therefore a due process violation.²²⁵

Incarcerated LGBTQ+ individuals who want visitation from their partners should note the case *Doe v. Sparks*.²²⁶ In that case, an incarcerated person, who is a lesbian, challenged the officials' refusal to allow visits from her girlfriend. There, prison rules only permitted visits between heterosexual people and their opposite sex partners. The court struck down this restriction. The court decided that the visitation policy had a rational relationship to security and disciplinary needs, but that other prison policies weakened this rational relationship.²²⁷ The court found that the connection between the policy and the supposed reasons for the policy were "so remote as to be arbitrary."²²⁸ The policy was thus unconstitutional. *Whitmire v. Arizona*²²⁹ is another helpful decision for LGBTQ+ couples. In this case, an Arizona policy prohibited same-sex kissing and hugging but allowing heterosexuals to

219. Phillips v. Thurmer, No. 08-cv-286-bbc, 2009 U.S. Dist. LEXIS 46331, at *1-4 (W.D. Wis. June 1, 2009).

220. Phillips v. Thurmer, No. 08-cv-286-bbc, 2009 U.S. Dist. LEXIS 46331, at *4-5 (W.D. Wis. June 1, 2009).

221. Overton v. Bazzetta, 539 U.S. 126, 134, 123 S. Ct. 2162, 2168-2169, 156 L. Ed. 2d 162, 171-172 (2003).

222. Overton v. Bazzetta, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003).

223. See Giano v. Goord, 9 F. Supp. 2d 235, 241 (W.D.N.Y. 1998) (stating that it is well-established that contact visits are a privilege, not a right) *overruled on other grounds*, Giano v. Goord, 250 F.3d 146 (2d Cir. 2001).

224. Giano v. Goord, 9 F. Supp. 2d 235, 242 (W.D.N.Y. 1998) (dismissing an incarcerated person's complaint with prejudice for being frivolous), *overruled on other grounds*, Giano v. Goord 250 F.3d 146 (2d Cir. 2001).

225. Matter of Rivera v. New York City Dept. of Corr., 24 Misc. 3d 536, 541, 876 N.Y.S.2d 631, 635 (Sup. Ct. Bronx County 2009).

226. Doe v. Sparks, 733 F. Supp. 227, 228 (W.D. Pa. 1990).

227. Doe v. Sparks, 733 F. Supp. 227, 233 (W.D. Pa. 1990). Policies limiting the freedoms of incarcerated gay people often focus, in the case of the prison's security interests, on the danger of the gay person being "outed" and thus becoming a target for sexual or non-sexual assault. As for the prison's disciplinary interests, the usual rationale is that the prison runs the risk of appearing to condone gay relations in prison unless it limits some of the freedoms incarcerated people have. Doe v. Sparks, 733 F. Supp. 227, 233 (W.D. Pa. 1990).

228. Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

229. Whitmire v. Arizona, 298 F.3d 1134, 1135 (9th Cir. 2002).

embrace during visits. A gay couple sued, and the Court of Appeals struck down the policy because the policy was not rationally related to prison safety.²³⁰

Courts today are likely to be even more protective of the rights of same-sex couples. The Supreme Court has grown increasingly suspicious of classifications based on sexual orientation.²³¹ And, after *Lawrence v. Texas*,²³² decided ten years after *Sparks* and one year after *Whitmire*, the Court would likely recognize a constitutional right of privacy to LGBTQ+ conduct protected under the Due Process and Equal Protection clauses of the Constitution.²³³

One area in which the rights of same-sex couples is particularly relevant is conjugal visitation, or extended family visitation. Certain incarcerated people get visitation with their families for several days at a time at a private location on the prison campus. In June 2007, California became the first state to grant incarcerated LGBTQ+ people in registered domestic partnerships the same rights to conjugal visits as married heterosexual couples.²³⁴ Along with California, only New York, Washington, and Connecticut explicitly allow same-sex partners to participate in conjugal visits.²³⁵ Similar to California, Washington State allows same-sex couples in state registered domestic partnerships the same rights to conjugal visits as married heterosexual couples.²³⁶ However, in Connecticut, conjugal visits with your partner are only allowed if the two of you were legally married before you were incarcerated and the two of you have children in common.²³⁷

New York has instituted a Family Reunion Program in about one-third of its correctional facilities. The program allows incarcerated people to spend up to several days in privacy with their spouses, children, or parents. In January 2009, the Department of Correctional Services updated its “eligible relations” policy to include same-sex partners validly married to an incarcerated person in a jurisdiction that recognizes same-sex marriage.²³⁸ At the same time, same-sex partners who are not married in this way and who have instead registered their relationship through New York’s domestic partnership program are still excluded from participating in the Family Reunion Program.²³⁹ However, New York courts may be receptive to discrimination claims, because New York law explicitly

230. *Whitmire v. Arizona*, 298 F.3d 1134, 1135–1137 (9th Cir. 2002).

231. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women’s Rts. L. Rep. 357, 387 (2009); see, e.g., *Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620, 1629, 134 L. Ed. 2d 855, 867–868 (1996) (finding a Colorado law that banned protecting gay and lesbian people from discrimination unconstitutional).

232. *Lawrence v. Texas*, 539 U.S. 558, 562 123 S. Ct. 2472, 2475, 156 L. Ed. 2d 508, 515 (2003) (holding that a Texas law that made it a crime for persons of the same sex to engage in certain intimate conduct was unconstitutional because it violated the due process right to privacy).

233. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women’s Rts. L. Rep. 357, 388–389 (2009).

234. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women’s Rts. L. Rep. 357, 368–369 (2009). See also Cal. Fam. Code § 297.5(g) (2010).

235. See Dana Goldstein, *Conjugal Visits*, THE MARSHALL PROJECT (2015), available at <https://www.themarshallproject.org/2015/02/11/conjugal-visits> (last visited Oct. 7, 2020).

236. See State of Washington Department of Corrections, *Prison Visits*, WA DEPARTMENT OF CORRECTIONS (2020), available at <https://www.doc.wa.gov/corrections/incarceration/visiting/prison-visits.htm#efv> (last visited Oct. 7, 2020); State of Washington Department of Corrections, *Frequently Asked Questions (FAQ)*, WA DEPARTMENT OF CORRECTIONS (2020), available at <https://www.doc.wa.gov/corrections/incarceration/visiting/faq.htm#immediate-family> (last visited Oct. 7, 2020).

237. See Christopher Reinhart, *Extended Family Visits in Prison*, CONNECTICUT GENERAL ASSEMBLY (2014), available at <https://www.cga.ct.gov/2014/rpt/2014-R-0053.htm> (last visited Oct. 7, 2020).

238. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women’s Rts. L. Rep. 357, 377–378 (2009).

239. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women’s Rts. L. Rep. 357, 378 (2009). See also State of New York, Department of Corrections and Community Supervision, Directive No. 4500, Family Reunion Program, 5–6 (as revised Jan. 5, 2016), available at <https://doccs.ny.gov/system/files/documents/2019/08/4500%20Family%20Reunion%20Program.pdf> (last visited July 4, 2020).

prohibits discrimination on the basis of sexual orientation, and New York domestic partners have the same right to visitation as any spouse at hospitals, nursing homes, and other health care facilities.²⁴⁰

Under *Turner*²⁴¹, it is important to determine whether there are other ways to communicate with those who cannot visit. For instance, oftentimes incarcerated people can still communicate with those restricted from visiting through telephone calls and letters.²⁴² In addition, *Turner* says courts should consider the burden of accommodating many visits, like security and personnel costs.²⁴³

Keep in mind that federal, state, and local regulations may give you additional visitation rights. People incarcerated in facilities run by the New York Department of Correctional Services should consult the Family Handbook for visitation restrictions. Most visitors do not need special permission. However, the Superintendent must give approval in writing in advance for visitors under parole or probation, with past or pending criminal histories, or who are also Department employees or volunteers.²⁴⁴ The Superintendent also has the power to deny visitation as necessary for security or other reasons.²⁴⁵

H. Using Telephones

While some courts hold that incarcerated people have a First Amendment right to telephone access,²⁴⁶ other courts refuse to hold that incarcerated people have such a right.²⁴⁷ Even courts

240. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 379 (2009).

241. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987), *superseded by statute on other grounds*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2018) (prohibiting the government from restricting an incarcerated person's free exercise of religion, unless it serves a compelling government interest, and is narrowly tailored to serve that interest).

242. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (stating that incarcerated people have other means of communication and noting these alternatives need not be ideal, only available).

243. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (citing *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 162 (1987)).

244. State of New York, Department of Corrections and Community Supervision, Handbook for Families and Friends of New York State DOCCS Inmates 10–11 (*as revised* Dec. 2019), *available at* <https://doccs.ny.gov/system/files/documents/2020/01/family-handbook-english-final-12.2019-002.pdf> (last visited Jul. 4, 2020).

245. State of New York, Department of Corrections and Community Supervision, Handbook for Families and Friends of New York State DOCCS Inmates 11 (*as revised* Dec. 2019), *available at* <https://doccs.ny.gov/system/files/documents/2020/01/family-handbook-english-final-12.2019-002.pdf> (last visited Jul. 4, 2020).

246. *See Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 1999) (affirming that incarcerated people have a First Amendment right to telephone access but holding that incarcerated people are not entitled to a specific rate for their telephone calls); *see also Walton v. N.Y. State Dep't of Corr. Servs.*, 18 Misc. 3d 775, 786–787, 849 N.Y.S.2d 395, 404–405 (Sup. Ct. Albany County 2007) (upholding constitutional right to telephone access but dismissing claim that rates under a contract between the Department of Correctional Services and MCI, a telephone provider, violated families' and others' rights under the New York constitution). Many decisions involve pretrial detainees' phone access rights; *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984) (holding that the First Amendment protects reasonable access to telephone communication for a pretrial detainee); *Moore v. Janing*, 427 F. Supp. 567, 576–577 (D. Neb. 1976) (affirming the unconstitutionality of institutional eavesdropping on the telephone calls of pretrial detainees but finding timing restrictions on telephone access reasonable); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–1052 (8th Cir. 1989) (finding a policy limiting pretrial detainees to one call to their lawyers every two weeks “patently inadequate” to secure assistance of counsel); *Johnson v. Brelje*, 701 F.2d 1201, 1207–1208 (7th Cir. 1983) (finding limiting pretrial detainee to two 10-minute calls a week and no incoming calls violated his right to court access), *overruled on other grounds by Maust v. Headley*, 959 F.2d 644, 647–648 (7th Cir. 1992). Check if your state has enacted laws granting incarcerated people rights to phone access.

247. *U.S. v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000) (stating that “[p]risoners have no per se constitutional right to use a telephone”); *Edwards v. Horn*, No. 10 Civ. 6194, 2012 U.S. Dist. LEXIS 30968, at *20 (S.D.N.Y. Mar. 7, 2012) (stating that “phone restrictions do not impinge on a prisoner's constitutional rights where

recognizing a right to telephone access say the right can be severely limited.²⁴⁸ The *Turner* case governs these restrictions on phone use. Courts point to prison security as a valid reason under *Turner*.²⁴⁹ Courts also point to the fact that incarcerated people have only a limited need for telephones because they have other ways of communicating with the outside world, like letter-writing and visitation.²⁵⁰ In short, courts usually uphold restrictions on phone use unless the restrictions eliminate telephone access entirely or get in the way of attorney representation.²⁵¹

These restrictions govern how much you have to pay to make a call, what types of calls you can make, whom you can call, and how many calls you can make. In one case,²⁵² the Ninth Circuit said incarcerated people were not entitled to a specific telephone rate and so it was okay to charge them a

an inmate has alternate means of communicating with the outside world.”) (quoting *Henry v. Davis*, No. 10 Civ. 7575, 2011 U.S. Dist. LEXIS 84100, at *6 (S.D.N.Y. Aug. 1, 2011)).

248. See, e.g., *U.S. v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998) (upholding the constitutionality of severe restrictions on an incarcerated person’s telephone use where those restrictions were related to the state’s interest in preventing him from ordering further crime from within the prison); *Carter v. O’Sullivan*, 924 F. Supp. 903, 909–910 (C.D. Ill. 1996) (holding the computerized collect calling system employed by a prison, which blocked certain callers and prevented three way calling, was a “reasonable restriction” on the constitutional right to telephone communication and finding “[m]onitoring of inmate telephone calls is acceptable because of legitimate concerns regarding prison security.”); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (holding that incarcerated people have a 1st Amendment right to telephone access but this right can be limited for the legitimate security interests of the prison and finding that denial of access to a telephone in the 30 minutes of imprisonment was not a violation of the incarcerated person’s rights).

249. See, e.g., *United States v. Felipe*, 148 F.3d 101, 110–113 (2d Cir. 1998) (applying the *Turner* test to severe limitations on communication and finding the goal of prison security legitimate to justify restrictions); *Gilday v. Dubois*, 124 F.3d 277, 293–294 (1st Cir. 1997) (finding no right for an incarcerated person to use the telephone “on his own terms,” and holding that, because of reasonable prison security measures, it does not violate any constitutional right, or the Massachusetts Wiretap Act, to interfere with calls by incarcerated people to numbers not on a pre-approved list); *Carter v. O’Sullivan*, 924 F. Supp. 903, 909–910 (C.D. Ill. 1996) (upholding the constitutionality of a prison’s computerized collect calling system that blocked certain callers and prevented three way calling because it provided for additional prison security, among other things); *Wooden v. Norris*, 637 F. Supp. 543, 555 (M.D. Tenn. 1986) (holding that a coinless telephone system requiring operator assistance did not infringe on incarcerated people’s First Amendment rights since it helped to prevent illicit activity between incarcerated people, fraudulent billing, and vandalism).

250. See, e.g., *United States v. Lentz*, 419 F. Supp. 2d 820, 835–836 (E.D. Va. 2005) (holding that, if incarcerated people have other means for confidential communication, monitoring inmate-counsel telephone calls does not infringe on 6th Amendment rights because “prisoners are not entitled to any particular method of access to the courts or to their lawyers”); *Bellamy v. McMickens*, 692 F. Supp. 205, 214 (S.D.N.Y. 1988) (denying a claim of deprivation when the telephone restrictions were not an absolute denial of access to counsel because “states have no obligation to provide the best manner of access to counsel”); *Pino v. Dalsheim*, 558 F. Supp. 673, 675 (S.D.N.Y. 1983) (holding that “the procedures providing for unlimited personal and mail communication with an attorney are constitutionally sufficient,” even though incarcerated people and their attorneys may prefer to communicate by telephone); *Wooden v. Norris*, 637 F. Supp. 543, 554 (M.D. Tenn. 1986) (stating that the court would consider both “the alternative means of communication offered by the prison administration” and “the justification” offered by the incarcerated person in preferring the telephone system in order to determine “the effect the current telephone system and policies have on the ability of inmates’ families to communicate with” those incarcerated).

251. Compare *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (denying an incarcerated person’s claim that he had been deprived of his First Amendment right to telephone access because he could still make calls for emergencies or to his lawyer), with *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–1052 (8th Cir. 1989) (finding a policy limiting pretrial detainees to one call to their attorney every two weeks “patently inadequate” to secure assistance of counsel), with *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1258 (D.N.M. 2003) (finding restrictions, including a ban on attorney visits and a five-minute limit on attorney phone calls, “would ‘unjustifiably obstruct the availability of professional representation’”) (quoting *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974), *overruled on other grounds*, *Thornburgh v. Abbot*, 490 U.S. 401, 481, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)).

252. *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000), *rev’d on other grounds*, *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005).

higher rate than people outside prison. In another case,²⁵³ the Ninth Circuit upheld a rule requiring all calls to be operator-assisted and collect (which means that incarcerated people there cannot call toll-free numbers). In another case,²⁵⁴ the Sixth Circuit upheld a regulation that only allowed calls to people on an approved list. Courts have also upheld restrictions on the number of calls an incarcerated person can make.²⁵⁵

Additionally, these restrictions govern your privacy during phone calls. Call monitoring does not violate your Fourth Amendment privacy rights for two reasons. First, there is no reasonable expectation of privacy in outbound calls from prison.²⁵⁶ Second, incarcerated people are considered to have consented to monitoring when they are made aware of the surveillance, either by signs near the telephones or informational handbooks.²⁵⁷ However, as an exception to this general rule, many courts have held prisons must allow unmonitored phone calls between an incarcerated person and his attorney so long as the phone call is arranged in advance.²⁵⁸ If such a call between an incarcerated person and his attorney is not arranged in advance, it can be monitored like any other call. Courts justify monitoring lawyer-prisoner phone calls that were not pre-arranged by noting that incarcerated people have the alternative of corresponding with their lawyers confidentially through the mail.²⁵⁹

I. Conclusion

Limitations on your right to communicate with the outside world, as discussed in this Chapter, may be among the most frustrating restrictions you have to face while in prison. In most circumstances, prison authorities have great discretion to restrict your right to communicate. You may want to challenge a restriction, or its application to you, if you feel that the restriction is not reasonably related to a legitimate prison interest and violates your constitutional rights. You should be careful, however, that your challenge does not appear frivolous. This means that you must have some specific constitutional basis for making your challenge.²⁶⁰

253. *Shoot v. Roop*, No. 92-35532, 1993 U.S. App. LEXIS 5890, at *5-6 (9th Cir. Mar. 16, 1993).

254. *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994); *see also* *Carter v. O'Sullivan*, 924 F. Supp. 903, 910-911 (C.D. Ill. 1996) (upholding collect call system requiring each incarcerated person to provide officials with a list of up to thirty individuals the incarcerated person wished to call).

255. *See, e.g., Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996) (upholding a restriction limiting number of individuals an incarcerated person can call to ten); *Robbins v. South*, 595 F. Supp. 785, 789 (D. Mont. 1984) (upholding a restriction of one call per week); *Moore v. Janing*, 427 F. Supp. 567, 576-577 (D. Neb. 1976) (upholding a restriction of three five-minute calls per week).

256. *See, e.g., United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (holding that "any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls.").

257. *See, e.g., United States v. Workman*, 80 F.3d 688, 693-694 (2d Cir. 1996) (holding that a sign placed below telephones warning that calls would be monitored was sufficient notice of surveillance, and that use of the telephones after such notice indicated implied consent); *see also* *United States v. Verdin-Garcia*, 516 F.3d 884, 894 (10th Cir. 2008) (holding that "[a] prisoner's voluntarily made choice . . . to use a telephone he knows may be monitored implies his consent to be monitored").

258. *See generally* *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991) ("[O]fficials may tape a prisoner's telephone conversations with an attorney only if such taping does not substantially affect the prisoner's right to confer with counsel."); *Martin v. Tyson*, 845 F.2d 1451, 1458 (5th Cir. 1988) (allowing a prison to maintain an unmonitored line for legal calls and monitored lines for all other calls).

259. *See, e.g., United States v. Felipe*, 148 F.3d 101, 110-111 (2d Cir. 1998) (allowing "severe" restrictions on an incarcerated person's ability to communicate with the outside world because the incarcerated person could still contact his attorney, among others, through correspondence); *Gilday v. Dubois*, 124 F.3d 277, 294 (1st Cir. 1997) (citing retention of the right to correspond with counsel and family through the mail as one factor in establishing the reasonableness of a restrictive telephone system); *Pino v. Dalsheim*, 558 F. Supp. 673, 675 (S.D.N.Y. 1983) (holding "the procedures providing for unlimited personal and mail communication with an attorney are constitutionally sufficient").

260. The Prison Litigation Reform Act (PLRA) has a "three strikes" provision that prevents incarcerated people from filing a suit if on three previous occasions, they sued in federal court and their cases were dismissed for being frivolous, malicious, or failed to state a claim. 28 U.S.C. § 1915(g). So, proceed carefully, using this

Chapter as a guide to successful and unsuccessful suits. For more information on the PLRA, see Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

CHAPTER 20

USING ARTICLE 440 OF THE NEW YORK CRIMINAL PROCEDURE LAW TO ATTACK YOUR UNFAIR CONVICTION OR ILLEGAL SENTENCE*

A. Introduction

If you have been convicted in a New York state court, it may be possible for you to challenge and overturn your conviction. Under certain circumstances (explained below), you may ask the trial court to either “vacate” (cancel) the judgment or “set aside” your sentence. You can make this request in a “motion” brought under Article 440 of the New York Criminal Procedure Law.¹² Part B of this Chapter explains what Article 440 motions are, why you may make a motion, and when a court will consider your motion. Part C explains how to make an Article 440 motion. Part D describes what usually happens after you make an Article 440 motion. Part E details the positive decisions possible through an Article 440 motion. Part F explains how to appeal a court’s denial of your Article 440 motion. Part G summarizes important things to think about when making an Article 440 motion. Finally, Appendix B to this Chapter contains forms for filing Article 440 motions.

If you have been convicted in another state court (besides New York), see Appendix A for a list of similar post-conviction relief statutes from other states.

B. When to Use Article 440

1. What is an Article 440 Motion?

An Article 440 motion challenges the legality of your conviction or sentence.³ If your Article 440 motion succeeds, you will receive a new trial or a new sentence. An Article 440 motion is not an “appeal”⁴ and is not a substitute for an appeal or second appeal.⁵ In an appeal, you request a higher court (i.e., the “appellate division” or a “court of appeals”) to review errors of the trial court. In an appeal, you may only raise issues that were part of the trial record. The following list describes information included within your trial record. This information is usually part of a traditional appeal. The following information is not usually included in an Article 440 motion:

- (1) The “complaint” and the “indictment,”
- (2) The “minutes” of any “hearing to suppress evidence” (a hearing to exclude evidence resulting from an illegal search or seizure) and other hearings, and
- (3) The report of the formal proceedings in the trial court. This includes:
 - (a) the pleadings and motions made by both sides,

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1. A motion is a request to a court or judge asking for a ruling or order in your favor.

2. The laws pertaining to Article 440 motions can be found in §§ 440.10–440.70 of the New York Criminal Procedure Law (“N.Y. CRIM. PROC. LAW”).

3. Other ways of attacking your conviction include filing an appeal, or a state or federal writ of habeas corpus. For information about how to file an appeal, please see Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence.” For information about federal and state writ of habeas corpus, please see Chapter 13 of the *JLM*, “Federal Habeas Corpus,” and Chapter 21 of the *JLM*, “State Habeas Corpus: Florida, New York, and Michigan.” These two chapters describe the federal writ of habeas corpus and the state writ of habeas corpus, respectively. Both of these writs can be used to obtain post-conviction relief for state and federal constitutional violations.

4. For more on how to appeal your conviction, see Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence.”

5. See *People v. Harris*, 109 A.D.2d 351, 353, 491 N.Y.S.2d 678, 682 (2d Dept. 1985) (explaining that an Article 440 motion “is designed to inform the court of facts not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the judgment.”).

- (b) the minutes of a guilty plea if you made one,
- (c) the minutes of the trial court, including objections made by both sides and court rulings,
- (d) the charges to the jury, if it was a jury trial,
- (e) the minutes of the arraignment and the sentencing,
- (f) the minutes of any adjournment, and
- (g) any trial testimony and evidence such as documents, photographs, reports, etc.

An Article 440 motion allows you to inform the trial court of facts that were not in the trial record. You would not be able to raise these facts on appeal⁶ because appellate courts cannot consider facts not in the trial record.⁷ There are two types of Article 440 motions: a “motion to vacate judgment” and a “motion to set aside sentence.”

The first kind of motion, a motion to vacate a judgment, is found in Section 440.10 of the New York Criminal Procedure Law. This motion challenges the fairness and/or legality of your conviction. This motion attacks your conviction by stating that the trial court acted improperly when it found you guilty. If this motion is granted, you receive a new trial or appeal.

The second kind of motion, a motion to set aside your sentence, is based on Section 440.20 of the New York Criminal Procedure Law. This motion attacks your sentence by arguing that the punishment you received is too harsh for the crime. It does not challenge your guilt. For example, you can challenge your sentence if it exceeds the maximum sentence allowed by the law.

Article 440 was created to partially replace the remedy of “*coram nobis*.” Some courts may still refer to an Article 440 motion as a “writ of *coram nobis*.”⁸ A “writ of *coram nobis*” is an order by an appeals court to a lower court to consider facts not on the trial record, which might have changed the outcome of the lower court case if known at the time of trial. *Coram nobis* comes from common law, which means that it came from opinions written by judges on various cases (case law). Article 440, on the other hand, is a statute, which means that the New York state legislature passed the law. After a statute is passed, it is added to the state (or federal) code, so sometimes people refer to these laws as “codified.”

A writ of *coram nobis* is not available in situations covered by Article 440.⁹ However, in some situations, you can still use a writ of *coram nobis* even if an Article 440 motion is unavailable. For example, a *coram nobis* motion, not an Article 440 motion, should be used to raise a claim of ineffective assistance of appellate counsel (the lawyer who helped with your appeal).¹⁰ However, you should still

6. See *People v. Bell*, 161 A.D.2d 772, 772–773, 556 N.Y.S.2d 118, 119 (2d Dept. 1990) (holding that one cannot appeal directly based on matters outside of the record); *People v. Piparo*, 134 A.D.2d 295, 295, 520 N.Y.S.2d 621, 622 (2d Dept. 1987) (stating that facts not contained in the record are not reviewable on direct appeal).

7. See *Martin v. Manhattan and Bronx Surface Transit Authority*, 198 A.D.2d 160, 160 (1st Dept. 1993) (explaining that a court may not consider facts outside the record raised for the first time on appeal).

8. See *People v. Crimmins*, 38 N.Y.2d 407, 413–14, 343 N.E.2d 719, 724, 381 N.Y.S.2d 1, 6 (1975) (stating that motion to vacate judgment was formerly known as *coram nobis*); *People v. Donovan*, 107 A.D.2d 433, 443, 487 N.Y.S.2d 345, 352 (2d Dept. 1985) (stating that CPL 440.10 (that is, Article 440) is the codification into statutory law of common law post-judgment *coram nobis* proceedings); *People v. Lyon*, 143 Misc. 2d 690, 692–693, 541 N.Y.S.2d 702, 704 (Suffolk Cnty. Ct. 1989) (referring to CPL 440.10 as a post-judgment writ of *coram nobis*).

9. See *People v. Perez*, 162 Misc. 2d 750, 763, 616 N.Y.S.2d 928, 937 (Sup. Ct. Kings Cnty. 1994) (holding that writ of *coram nobis* is unavailable where an Article 440 motion is applicable).

10. See *People v. Bachert*, 69 N.Y.2d 593, 600, 509 N.E.2d 318, 323, 516 N.Y.S.2d 623, 628 (1987), *abrogated on other grounds* by *People v. Andrews*, 23 N.Y.3d 605, 993 N.Y.S.2d 236 (2014) (stating that a claim of ineffective assistance of appellate counsel is covered by a writ of *coram nobis* and not an Article 440 motion). You can file a *coram nobis* motion in New York claiming that you received ineffective assistance of appellate counsel, or that you were wrongfully deprived of appellate counsel. If the Appellate Division denies your *coram nobis* motion, you may be able to appeal the denial to the Court of Appeals. However, the denial of *your coram nobis* motion must have occurred on or after November 1, 2002, and you must first be granted a certificate of leave to appeal by either a judge of the Court of Appeals or a justice of the Appellate Division department that denied your motion. N.Y. CRIM. PROC. LAW § 450.90 (McKinney 2005); N.Y. CRIM. PROC. LAW § 450.90 practice cmnt. at 273 (McKinney 2005). See Part B(2)(a) of this Chapter for a discussion of the standard under which a court will examine ineffective assistance of trial counsel.

use an Article 440 motion for a claim of ineffective assistance of trial (versus appellate) counsel when the *trial record* does not contain sufficient facts for an appellate court to review your claim on appeal. Ineffective assistance of counsel occurs when your lawyer did not follow professional standards while representing you, and there is a reasonable probability that your lawyer's poor work negatively affected the outcome of your case.¹¹

Article 440 replaced the remedy of state habeas corpus. State habeas corpus challenges the government's right to keep you in prison by making sure your imprisonment is legal. State habeas corpus is still available for New York state incarcerated people in some situations, but courts generally require you to make an Article 440 motion instead (most frequently, state habeas can still be used to challenge parole and bail decisions). The remedy for a habeas corpus violation is immediate release from custody. Under an Article 440 motion, the relief granted is not immediate release but rather a new trial, appeal, or sentence.¹²

2. What You Can Complain About in an Article 440 Motion

(a) Motion to Vacate Judgment

Article 440.10 lists eleven wrongs that you may complain about in a motion to vacate judgment.¹³ These eight wrongs are as follows.

- (1) The trial court lacked "jurisdiction" to decide your case.¹⁴
- (2) The judge or prosecutor (or a person representing one of them) used fraud, "misrepresentation" (false statements), or "duress" (physical or undue psychological pressure) to secure your conviction.¹⁵ However, you cannot simply claim that the judge or district attorney used fraud or misrepresentation.¹⁶ You must support your Article 440 motion with specific facts in the form of an "affidavit" and, if possible, witnesses.¹⁷
- (3) At trial, the prosecutor introduced (or the judge allowed in) "material evidence" (key evidence that significantly impacted the trial) which the prosecutor or judge knew was false at the time of trial.¹⁸ Again, you cannot just state that the judge or district attorney knew certain facts were false, you must show that they knew the facts to be false.¹⁹
- (4) The prosecutor introduced material evidence that was obtained in violation of your rights under the U.S. or New York State Constitutions.²⁰

11. See Chapter 12 of the *JLM*, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," for more information.

12. See Chapter 21 of the *JLM*, "State Habeas Corpus: Florida, New York, and Michigan," for more information.

13. N.Y. CRIM. PROC. LAW §§ 440.10(1)(a)–(k) (McKinney 2005).

14. N.Y. CRIM. PROC. LAW § 440.10(1)(a) (McKinney 2005). For an explanation of jurisdiction, see Chapter 2 of the *JLM*, "Introduction to Legal Research."

15. N.Y. CRIM. PROC. LAW § 440.10(1)(b) (McKinney 2005).

16. See *People v. Smith*, 227 A.D.2d 655, 656, 641 N.Y.S. 2d 905, 907 (3d Dept. 1996) (finding that the defendant's claims of duress, fraud, and misrepresentation by the prosecution and the court, were conclusory and could not serve as a basis for vacating the judgment), *People v. Gates*, 168 A.D. 2d 995, 995, 564 N.Y.S.2d 938, 938 (4th Dept. 1990) (finding that an unsupported claim of fraud, without more, is not enough to overturn a conviction).

17. See *People v. Saunders*, 301 A.D. 2d 869, 872, 753 N.Y.2d 620, 624 (3d Dept. 2003) (finding that affidavits were insufficient to require an Article 440 hearing because they did not contain any supporting evidentiary facts useful to the defendant's case).

18. N.Y. CRIM. PROC. LAW § 440.10(1)(c) (McKinney 2005).

19. See *People v. Brown*, 56 N.Y.2d 242, 246–47, 436 N.E.2d 1295, 1297, 451 N.Y.S. 2d 693, 695 (1982) (upholding the trial court's denial of the defendant's motion to vacate judgment because the defendant's motion papers did not contain any evidence demonstrating that the prosecution was aware of the witness' false testimony).

20. N.Y. CRIM. PROC. LAW § 440.10(1)(d) (McKinney 2005). For more information on such violations, see *JLM*, Chapter 13, "Federal Habeas Corpus", which lists possible violations of the Constitution, and Chapter 21, "State Habeas Corpus," which lists possible violations of New York State's Constitution. Be aware you may not

- (5) You could not understand or participate in the trial because you suffered from a mental disability of some kind.²¹ For instance, in one case, an incarcerated person claimed in his Article 440 motion that he did not remember or understand his plea or the sentencing proceedings. In support of his motion, he noted that after the judgment he had been diagnosed with psychosis associated with brain trauma. In light of this fact, the court held that there should be a hearing on the individual's motion to vacate the conviction for manslaughter.²²
- (6) The record of your case failed to include "prejudicial" (improper and biased) conduct that occurred at your trial, and an appellate court would reverse the judgment against you if the conduct was in the record.²³ Such conduct includes the prosecutor's failure to supply you with "*Brady* material." *Brady* material is any evidence that the prosecutor has or that the prosecutor knows that is favorable to the defense and material to guilt or punishment.²⁴ This material is often referred to as "exculpatory evidence" (that is, evidence favorable to the defendant). To have a conviction overturned based upon the failure to produce *Brady* material, there must be a "reasonable probability" that the evidence would have affected the ultimate outcome of the trial.²⁵ However, if your trial was in a New York state court and your defense counsel made a specific request for the evidence in question, and the prosecutor did not give you that evidence, there need only be a "reasonable possibility" that the evidence would have changed the outcome.²⁶ The reasonable probability test is harder to satisfy than the reasonable possibility test. Under the reasonable probability test, the undisclosed evidence receives the same weight as it would have been given had it been introduced at trial. Thus, the trial court reviewing an Article 440 motion must determine how the evidence would have affected the

be able to raise these constitutional violations if you raised them unsuccessfully on appeal. See Part B(3) of this Chapter.

21. N.Y. CRIM. PROC. LAW § 440.10(1)(e) (McKinney 2005).

22. *People v. Hennessey*, 111 A.D.3d 1166, 1167–1169, 975 N.Y.S.2d 502, 503–505 (3d Dept. 2013).

23. N.Y. CRIM. PROC. LAW § 440.10(1)(f) (McKinney 2005); *see also* *People v. Letizia*, 155 A.D.2d 952, 952–953, 547 N.Y.S.2d 767, 768 (4th Dept. 1989) (finding that where the record did not contain conduct claimed to be improper and prejudicial, the issue could be raised in an Article 440 motion); *People v. Cleveland*, 132 A.D.2d 921, 921, 518 N.Y.S.2d 477, 477–478 (4th Dept. 1987) (finding that defendant's claim that the District Attorney had previously represented him on other charges and was therefore disqualified from prosecuting him could be raised in an Article 440 motion since the conduct which was claimed to be improper and prejudicial did not appear in record).

24. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963) (holding that the suppression of evidence by the prosecution denied petitioner due process).

25. *People v. McCray*, 23 N.Y.3d 193, 198, 12 N.E. 3d 1079, 1081, 989 N.Y.S.2d 649, 651–652 (2014) ("Under *Brady*, a defendant is entitled to the disclosure of evidence favorable to his case 'where the evidence is material.' In New York, the test of materiality where ... the defendant has made a specific request for the evidence in question is whether there is a 'reasonable possibility' that the verdict would have been different if the evidence had been disclosed.") (citations omitted); *see also* *People v. Garrett*, 23 N.Y.3d 878, 891–892, 18 N.E.3d 722, 733, 994 N.Y.S.2d 22, 33 (2014) (explaining that, to satisfy the materiality prong of *Brady* test, there must be "a 'reasonable possibility' that [disclosure of specific documents] would have changed the result of the proceedings" and finding no "reasonable probability that disclosure ... would have changed the result of defendant's proceedings") (internal citations omitted); *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 506 (1995) (holding that for *Brady* purposes, "a 'reasonable probability' of a different result is ... shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial'" (quoting *U.S. v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481, 492 (1985))).

26. *See* *People v. Bond*, 95 N.Y.2d 840, 843, 735 N.E.2d 1279, 1281, 713 N.Y.S.2d 514, 516 (2000) (vacating second degree murder conviction because a reasonable possibility existed that the result would have been different if prosecutor had disclosed, in response to a specific *Brady* request, key witness' denial of having seen the shooting); *People v. Vilardi*, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920–921, 556 N.Y.S.2d 518, 523–524 (1990) (holding that a showing of a "reasonable possibility" that failure to disclose favorable evidence contributed to the guilty verdict is the appropriate standard under New York State constitutional law where the defendant has made a specific request for the exculpatory material); *People v. Carver*, 114 A.D.3d 1199, 1199–1200, 979 N.Y.S.2d 752, 752–753 (4th Dept. 2014) (reversing conviction of assault in the first degree because there existed a "reasonable possibility" that the timely disclosure of a 911 call recording specifically requested by the defendant would have changed the result of the case).

jury's deliberations. While you do not have to show that, with the evidence, you would not have originally been convicted, the evidence must be strong enough to call into question the fairness of your conviction.²⁷ On the other hand, the reasonable possibility test focuses on the evidence withheld, and the court must determine whether the failure to disclose it may have contributed to the verdict.²⁸ Additionally, the evidence in both cases must be admissible in court. For example, "polygraph" (lie detector) test results suggesting that a witness lied are of no use since they are not admissible as evidence.²⁹ *Brady* material may also include evidence in the possession of other law enforcement agencies involved in your prosecution (for example, FBI Crime Lab notes). However, if an out-of-state agency refuses to turn over materials, the prosecution cannot be held responsible for failure to disclose.³⁰

- (7) After your trial, you uncovered new evidence that you could not have discovered before or during your trial. To succeed on this ground, you must show that the evidence: (a) will probably change the result in your case if a new trial is granted, (b) was discovered after the trial, (c) could not have been discovered before or during the trial by the exercise of "due diligence" (proper research), (d) is material to the issue of your guilt, and (e) does not simply duplicate or contradict other evidence.³¹ Furthermore, if you would like to make an Article 440 motion on the grounds of newly discovered evidence, you must make the motion within a reasonable time after you find the new evidence. If you were convicted after pleading guilty, you may use newly discovered forensic DNA testing of evidence for an Article 440 motion if the court decides that

27. See *People v. Wagstaffe*, 120 A.D.3d 1361, 1364–1365, 992 N.Y.S.2d 340, 344 (2d Dept. 2014) (finding that "there was a reasonable probability that, had the prosecution identified these documents when delivering them to the defendants, the employment of these documents would have changed the outcome of the defendants' trial").

28. See *People v. Bond*, 95 N.Y.2d 840, 843, 735 N.E.2d 1279, 1281, 713 N.Y.S.2d 514, 516 (2000) (vacating second degree murder conviction because a reasonable possibility existed that the result would have been different if prosecutor had disclosed, in response to a specific *Brady* request, key witness' denial of having seen shooting); *People v. Carver*, 114 A.D.3d 1199, 1199–1200, 979 N.Y.S.2d 752, 752–753 (4th Dept. 2014) (reversing conviction of assault in the first degree because there existed a "reasonable possibility" that the timely disclosure of a 911 call recording specifically requested by the defendant would have changed the result of the case); *People v. Williams*, 50 A.D.3d 1177, 1180, 854 N.Y.S.2d 586, 590 (3d Dept. 2008) (finding a "reasonable possibility" existed of a different result if requested evidence that would have impeached a key witness had been properly disclosed); *cf.* *People v. Phillips*, 55 A.D.3d 1145, 1149, 865 N.Y.S.2d 787, 791 (3d Dept. 2008) (finding no "reasonable possibility" that disclosure of a witness's investigation for drug-related offenses would have produced a different result since witness's credibility was "already blemished" during cross-examination).

29. See *People v. Garrett*, 23 N.Y.3d 878, 892, 18 N.E.3d 722, 733, 994 N.Y.S.2d 22, 33 (2014) ("This Court has not squarely addressed whether ... inadmissible evidence may be considered 'material' under *Brady* so long as it 'could lead to admissible evidence'" (citations omitted)); *People v. Mazyck*, 118 A.D.3d 728, 730–731, 987 N.Y.S.2d 95, 98–99 (2d Dept. 2014) (holding that the defendant's purported statements, which would not be admissible because they were hearsay, could not be basis for vacating judgment of conviction under article 440). *But see* *People v. Scott*, 88 N.Y.2d 888, 890–891, 667 N.E.2d 923, 924, 644 N.Y.S.2d 913, 915 (1996) (finding that the failure to produce the scratch sheet from a polygraph examination of the witness is not grounds for vacating conviction in part because the polygraph results would have been inadmissible as evidence).

30. See *People v. Santorelli*, 95 N.Y.2d 412, 421–422, 741 N.E.2d 493, 497–498, 718 N.Y.S.2d 696, 700–701 (2000) (refusing to vacate conviction based upon prosecutor's failure to provide reports from a parallel FBI investigation where the FBI, "an independent Federal law enforcement agency not subject to State control," was unwilling to turn over the reports to the prosecutor).

31. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005); *see also* *People v. Watson*, 993 N.Y.S.2d 645, 645, 2014 NY Slip Op 50927(U), ¶¶ 13–14, 43 Misc. 3d 1234(A), 1234A (Sup. Ct. Bronx County 2014) (setting standards for newly discovered evidence); *People v. Smith*, 108 A.D.3d 1075, 1075–1077, 968 N.Y.S.2d 786, 786–789 (4th Dept. 2013) (holding that the affidavit of a co-defendant, which merely contradicted earlier statements, did not constitute new evidence and could not serve as a basis for vacating judgment of the defendant's conviction for attempted second-degree murder, first-degree assault, and second-degree criminal possession of weapon); *People v. Sherman*, 372 N.Y.S.2d 546, 547–549, 83 Misc.2d 563, 564–565 (Sup. Ct. N.Y. County 1975) (holding that the indictment of a police officer who testified at trial and the investigation of a judge who signed the search warrant were not enough to grant an Article 440 motion).

you have demonstrated a substantial probability of innocence.³² If you were convicted after a trial, you must show a reasonable probability that the newly discovered forensic DNA testing of evidence would have led to a more favorable verdict in order to use it for an Article 440 motion.³³

- (8) Your conviction was obtained in violation of your constitutional rights.³⁴ Chapter 13 of the *JLM*, “Federal Habeas Corpus,” provides a long list of possible violations of your rights under the Constitution. You may raise any of these violations in your Article 440 motion as long as they are applicable to your case and your motion satisfies the conditions described in Part B(3) of this Chapter.³⁵ For example, if you do not include your constitutional attack in your direct appeal of your conviction, you will not be able to make an Article 440 motion based on that constitutional claim later on, unless your claim falls into one of the exceptions described in Part B(3) of this Chapter.³⁶
- (9) You were convicted after being arrested for prostitution, loitering for the purpose of prostitution, or prostitution in a school zone, and you participated as a victim of sex trafficking or labor trafficking or while compelling prostitution.³⁷ A person is guilty of compelling prostitution when he knowingly forces or intimidates a person less than eighteen years old to engage in prostitution.³⁸ If you would like to make an Article 440 motion on these grounds, you must make the motion within a reasonable time after you have ceased to be a victim of such trafficking or compelling prostitution. Reasonable concerns for your safety or the safety of family members and other victims of trafficking and compelling prostitution are considered in determining what counts as a reasonable time.³⁹ You do not need to have official documentation of your status as a victim of trafficking or compelling prostitution at the time of the offense in order to make an Article 440 motion, but if you do, it will create a presumption that your participation in the offense was a result of having been a victim of trafficking or compelling prostitution.⁴⁰
- (10) You were convicted of a class A or unclassified misdemeanor prior to August 28, 2019, and your conviction was obtained in violation of your constitutional rights.⁴¹ If you file an Article 440 motion on these grounds, the court will presume that a conviction by plea was not knowing, voluntary and intelligent if it has severe and ongoing consequences. The court will also presume that a conviction by verdict for these offenses violates the state constitution.
- (11) You were convicted of unlawful possession of marijuana in the second degree, which means you knowingly and unlawfully possessed marijuana, or you were convicted of unlawful possession of marijuana in the first degree, which means you knowingly and unlawfully possessed one or more substances containing marijuana and the substances weighed more

32. N.Y. CRIM. PROC. LAW § 440.10(1)(g-1)(1) (McKinney 2005).

33. N.Y. CRIM. PROC. LAW § 440.10(1)(g-1)(2) (McKinney 2005).

34. N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2005).

35. As noted in Chapter 13 of the *JLM*, “Federal Habeas Corpus,” “exhaustion” (doing all you can to get state courts to change your conviction or sentence) is required for a federal court to grant a writ of habeas corpus to a petitioner. *See Bossett v. Walker*, 41 F.3d 825, 828 (2d Cir. 1994) (stating that a federal court cannot grant a writ of habeas corpus “unless the petitioner has exhausted state remedies” or the state does not have corrective processes) (quoting 28 U.S.C. § 2254(b) (1988)). In many situations, you must raise a federal constitutional violation through an Article 440 motion in order to satisfy the exhaustion requirement. *See, e.g., U.S. ex rel. Cleveland v. Casscles*, 479 F.2d 15, 19–20 (2d Cir. 1973) (finding that, in light of a new factual allegation, the petitioner should be required to raise an Article 440 motion with the state court before a district court could consider a possible constitutional violation).

36. *See People v. Skinner*, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934–935 (1st Dept. 1990) (holding that failure to raise an issue on appeal when defendant had knowledge to do so forecloses an Article 440 motion).

37. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005).

38. N.Y. PENAL LAW § 230.33 (McKinney 2008).

39. N.Y. CRIM. PROC. LAW § 440.10(1)(i)(i) (McKinney 2005).

40. N.Y. CRIM. PROC. LAW § 440.10(1)(i)(ii) (McKinney 2005).

41. N.Y. CRIM. PROC. LAW § 440.10(1)(j) (McKinney 2005).

than one ounce.⁴² These judgments must have occurred prior to August 28, 2019. If you file an Article 440 motion on these grounds, the court will presume that a conviction by plea was not knowing, voluntary and intelligent if it has severe and ongoing consequences. The court will also presume that a conviction by verdict for these offenses violates the state constitution.

In addition to federal constitutional violations, you may also raise violations of your rights under the New York State constitution. These rights are generally very similar to your federal constitutional rights. For example, the law under both constitutions forbids attorneys from intentionally discriminating against people by race or gender in selecting a jury.⁴³ This claim could be raised as a violation of your rights under the New York State constitution and under the U.S. Constitution.

You should be aware that some of your rights under the New York State constitution are broader than the same rights under the U.S. Constitution. For example, the New York State constitution provides you with greater protection against unreasonable police searches than the U.S. Constitution.⁴⁴ The New York State constitution also provides you with greater protection against a court imposing a longer sentence upon you after a successful appeal.⁴⁵ In addition, the New York State constitution requires a prosecutor to supply you with more evidence than the U.S. Constitution requires.⁴⁶ Finally, your right to a lawyer is broader under the New York State constitution than the U.S. Constitution.⁴⁷

You should include claims of state constitutional violations in your Article 440 motion. If you claim a violation of a specific federal constitutional provision (for example, the Fourth Amendment's prohibition against unreasonable searches and seizures), it is a good idea to cite the equivalent state constitutional provision (which, in this example, would be Article I, Section 12 of the New York State constitution).

Another example of state and federal constitutional violations that can be raised in an Article 440 motion is ineffective assistance of counsel at trial. This is a claim that states your lawyer did not comply with professional standards while representing you, and there is a reasonable probability your

42. N.Y. CRIM. PROC. LAW § 440.10(1)(k) (McKinney 2005). For the definitions of unlawful possession of marijuana in the second and first degree, see N.Y. PENAL LAW § 221.05, 221.10 (McKinney 2008).

43. *See, e.g.,* *People v. Kern*, 75 N.Y.2d 638, 649–653, 554 N.E.2d 1235, 1240–1243, 555 N.Y.S.2d 647, 652–655 (1990) (discussing the New York State constitution's ban on racial discrimination in jury selection); *see also* *Batson v. Kentucky*, 476 U.S. 79, 84–98, 106 S. Ct. 1712, 1716–1724, 90 L. Ed. 2d 69, 79–89 (1986) (discussing the Federal Constitution's ban on racial discrimination in jury selection).

44. *See* *People v. Dunn*, 77 N.Y.2d 19, 25, 564 N.E.2d 1054, 1058, 563 N.Y.S.2d 388, 392 (1990) (finding that police use of a specially trained narcotics detection dog to conduct a “canine sniff” outside defendant's apartment is a search under the New York State constitution).

45. *See* *People v. Van Pelt*, 76 N.Y.2d 156, 161–162, 556 N.E.2d 423, 425–426, 556 N.Y.S.2d 984, 986–987 (1990) (finding that a sentence following retrial that was longer than the sentence from the first trial is presumed to be vindictive (that is, driven by anger, resentment, and/or revenge) and must be set aside, even if the second trial judge is different from the first trial judge).

46. *See* *People v. Vilardi*, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920, 556 N.Y.S.2d 518, 523 (1990) (holding that where a specific discovery request made the prosecutor aware that defendant considered exculpatory (that is, favorable to the defendant) evidence important to the defense, the standard is “reasonable possibility” that not turning over the evidence contributed to the outcome, rather than “reasonable probability”); *cf.* *People v. Lesiuk*, 161 A.D.2d 21, 25, 560 N.Y.S.2d 711, 713 (3d Dept. 1990) (stating that the standard is “reasonable probability” where the prosecution has tried hard to produce a missing exculpatory police informant), *aff'd*, 81 N.Y.2d 485, 617 N.E.2d 1047, 600 N.Y.S.2d 931 (1993). The reasonable probability test is more difficult to satisfy than the reasonable possibility test. The difference between the tests is that under the reasonable probability test, the undisclosed evidence receives no more weight than it would have been given had it been introduced at trial. Thus, the trial court reviewing an Article 440 motion must determine how that evidence would have affected the jury's deliberations. On the other hand, the reasonable possibility test focuses on the evidence withheld, and the court must determine whether the failure to disclose it possibly contributed to the verdict.

47. *See* *People v. Velasquez*, 68 N.Y.2d 533, 536, 503 N.E.2d 481, 483, 510 N.Y.S.2d 833, 835 (1986) (“In this State the right to counsel, both as to the time of its attachment and as to its waiver, is broader than the protection afforded under Federal law.”) (internal citation omitted). *See also* *People v. Hobson*, 39 N.Y.2d 479, 483–484, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 421–422 (1976) (detailing New York case law that extended protections for the defendant under the State constitution beyond those guaranteed by the Constitution).

case was negatively affected.⁴⁸ You should be aware that in New York, you may not make a claim of ineffective assistance of counsel solely because your lawyer unsuccessfully used a certain trial strategy—even if that strategy was offensive, outrageous,⁴⁹ daring, or innovative.⁵⁰ In addition, you cannot simply claim that your lawyer was ineffective. You must identify your lawyer’s specific acts or omissions (failing to act) that you believe were so ineffective that you were deprived of your right to counsel. Then, you must also show that this lack of counsel prejudiced your defense so much that the trial was not a fair trial.⁵¹ For example, it is unlikely that an error by counsel, even if professionally unreasonable, would result in setting aside the judgment if the error did not affect the outcome. However, if you can show that your attorney had a conflict of interest while representing you, and that this conflict made the attorney’s performance worse, courts will presume that you were prejudiced.⁵² Your attorney would have had a conflict of interest if your attorney had a work-related reason or a substantial personal reason to give you less than a full effort. One possible reason would be if your attorney, without telling you or the judge, also represented a witness who testified against you.⁵³

(b) Motion to Set Aside Sentence

Unlike the Article 440.10 motion to challenge your conviction (discussed above), an Article 440.20 motion attacks your sentence as unauthorized, illegally imposed, or in some other way invalid.⁵⁴ A

48. See Chapter 12 of the *JLM* “Appealing Your Conviction Based on Ineffective Assistance of Counsel,” for more information.

49. See *People v. Sullivan*, 153 A.D.2d 223, 226–227, 550 N.Y.S.2d 358, 359–360 (2d Dept. 1990) (holding that the defense attorney’s reference to victims as “skells,” “pimps,” or “junkies” was not ineffective counsel because it is presumed to have been a part of trial strategy).

50. See *People v. Baldi*, 54 N.Y.2d 137, 151–152, 429 N.E.2d 400, 407–408, 444 N.Y.S.2d 893, 900–901 (1981) (holding that the defense attorney’s strategy of testifying at his client’s trial in an attempt to present an insanity defense was not ineffective assistance even though his being on the stand left his client without representation).

51. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (stating you must first specify the error made by counsel, and then show that the error prejudiced your defense to such an extent that it affected the result of the trial). In New York, you are entitled to meaningful representation. *People v. Baldi*, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981) (“So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.”). New York has retained the *Baldi* “meaningful representation” standard in preference to the federal *Strickland* standard in evaluating claims of ineffective assistance of trial counsel. Under the *Baldi* “meaningful representation” standard, showing prejudice is important but not required. Under the federal *Strickland* standard, you must show your defense was prejudiced. *People v. Stultz*, 2 N.Y.3d 277, 282, 810 N.E.2d 883, 886, 778 N.Y.S.2d 431, 434 (2004) (stating that the appropriate standard for effective assistance of counsel is the same meaningful representation standard as *People v. Baldi*). You should note, however, “meaningful representation” does not mean “perfect representation,” but only reasonably competent representation. *People v. Benevento*, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998) (quoting *People v. Modica*, 64 N.Y.2d 828, 829, 476 N.E.2d 330, 331, 486 N.Y.S.2d 931, 932 (1985)).

52. See *Cuyler v. Sullivan*, 446 U.S. 335, 349–350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 347 (1980) (stating that a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice); *Nix v. Whiteside*, 475 U.S. 157, 176, 106 S. Ct. 988, 999, 89 L. Ed. 2d 123, 140 (1986) (noting that “conflict” does not include the one created by a client proposal that violates an attorney’s ethical obligations); see also *Winkler v. Keane*, 812 F. Supp. 426, 431 (S.D.N.Y. 1993) (finding that existence of a contingency fee arrangement between defendant and his attorney does not amount to a per se claim of ineffective assistance of counsel); *People v. Wandell*, 75 N.Y.2d 951, 952, 554 N.E.2d 1274, 1275, 555 N.Y.S.2d 686, 687 (1990) (stating that an attorney must inform the client and the trial court of conflicting interests so that the court may conduct a record inquiry to determine whether the client understands the implications of the conflict); *People v. Gomberg*, 38 N.Y.2d 307, 314–316, 342 N.E.2d 550, 555, 379 N.Y.S.2d 769, 776–777 (1975) (holding that trial judge’s inquiry into possible conflict of interest between defendants and their counsel, and defendants’ opportunity to retain separate counsel, fulfilled attorney’s obligation to protect defendants’ rights).

53. See Chapter 12 of the *JLM*, “Appealing Your Conviction Based on Ineffective Assistance of Counsel,” for more examples of conflicts of interest.

54. N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2009).

sentence is unauthorized if it is longer than the law allows.⁵⁵ For example, third degree burglary, a Class D felony,⁵⁶ carries a maximum sentence of seven years if you are a first or second felony offender.⁵⁷ Thus, you could make an Article 440 motion to attack a sentence of seven years and one day for third degree burglary if you are a first or second felony offender. However, you could not attack a sentence of seven years. Even if this sentence is longer than sentences that other defendants received for the same crime, the law allows a seven-year sentence.⁵⁸ You cannot raise a claim that your sentence was too harsh or long under this motion as long as the sentence is allowed by law.⁵⁹

In addition to the unauthorized sentence described above, there may be other reasons you can raise an Article 440 motion to set your sentence aside as illegal. Some of these grounds include:

- (1) “Due process” errors in the sentencing procedures,⁶⁰
- (2) The sentencing court disregarded your “right of allocution,” which means that the judge failed to ask you at your sentencing if you wished to address the court on your own behalf,⁶¹
- (3) The sentencing court ignored your right to be present at sentencing,⁶²

55. See *People v. Fuller*, 119 A.D.2d 692, 692, 501 N.Y.S.2d 116, 116 (2d Dept. 1986) (changing sentence that was longer than maximum length of time for the crime committed).

56. N.Y. PENAL LAW § 140.20 (McKinney 2010). The N.Y. Penal Law describes and classifies every felony. In order to determine whether your sentence was authorized by law, you should first find out what class of felony you were convicted of by looking up your offense in the Penal Law. Burglary and related offenses, for example, are defined in § 140.05 through § 140.40 of the Penal Law. Then, you should check § 70.00 of the Penal Law, which specifies the longest and shortest terms of sentence that can be imposed for the various classes of felonies.

57. N.Y. PENAL LAW § 70.00(2)(d) (McKinney 2009).

58. See *People v. Baraka*, 109 Misc. 2d 271, 272–273, 439 N.Y.S.2d 827, 829–830 (Crim. Ct. N.Y. Cty. 1981) (holding that the court deciding an Article 440 motion has no authority to change a sentence that conforms to the Penal Law).

59. N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2009); N.Y. Crim. Proc. Law § 440.20 practice cmt. (McKinney 2009). See Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” for more information on appeals.

60. See *People v. Bellamy*, 160 A.D.2d 886, 887–888, 554 N.Y.S.2d 320, 321 (2d Dept. 1990) (vacating sentence and finding that, while the judge had authority to vacate a previously-imposed minimum permissible sentence, defendant’s right to due process was violated when the judge then imposed maximum permissible sentence, without offering any explanation for doing so).

61. N.Y. CRIM. PROC. LAW § 380.50(1) (McKinney 2009) gives you the right to make such a statement. To have your sentence set aside on this ground, you must show that, had your right been honored, you would have said or revealed something that would have required the court to conduct further inquiry before sentencing you. See *People v. St. Claire*, 99 A.D.2d 982, 982, 473 N.Y.S.2d 19, 20 (1st Dept. 1984) (stating that violation of right to allocution should be raised in Article 440.20 motion); *People v. Quiles*, 72 A.D.2d 610, 610, 421 N.Y.S.2d 119, 119–120 (2d Dept. 1979) (stating that where a defendant at sentencing raised the possibility of a defense that possibly negated his criminal intent, the trial court was required to conduct further inquiry); *People ex rel. Boddingham v. La Vallee*, 50 A.D.2d 692, 692, 375 N.Y.S.2d 477, 477–478 (3d Dept. 1975) (holding that defendant who was denied right of allocution is entitled only to resentencing and not release from incarceration); *People v. Luchey*, 41 A.D.2d 1023, 1023–1024, 343 N.Y.S.2d 997, 998 (4th Dept. 1973) (reversing sentence because the judge did not ask the defendant if the defendant wanted to speak during the sentencing proceeding).

62. N.Y. CRIM. PROC. LAW § 380.40(1) (McKinney 2018) gives you the right to be present at sentencing and at resentencing. See *People v. Brown*, 155 A.D.2d 608, 608, 547 N.Y.S.2d 664, 664 (2d Dept. 1989) (finding that the court’s failure to produce the defendant at resentencing denied him his right to be present). You may waive this right if you are being charged with a misdemeanor or petty offense, in which case a court may sentence you in your absence. N.Y. CRIM. PROC. LAW § 380.40(2) (McKinney 2018). To succeed on an Article 440 motion based on a denial of this right, you must show that, if you were present, you would have said something that would have required the court to investigate your case further. However, your right to be present may have been forfeited by your actions if you were removed from the courtroom due to misbehavior after being warned that you would be sentenced without your presence. See *People v. Herrera*, 160 A.D.2d 416, 416, 554 N.Y.S.2d 30, 30–31 (1st Dept. 1990) (based on defendant’s behavior, “it is clear that defendant voluntarily absented himself from the sentencing proceedings, thereby waiving such right”). You may also have forfeited your right to be present if you failed to appear after being advised that a sentence would be pronounced in your absence. See *People v. Griffin*, 135 A.D.2d 730, 731, 522 N.Y.S.2d 632, 634 (2d Dept. 1987) (holding that the defendant gave up his right to be present at his felony hearing and sentencing by not appearing even though “he knew when he refused to attend that the hearing court would proceed in his absence”). Finally, if you willfully failed to appear in order to ruin the sentencing

- (4) The court violated your First Amendment right of free association by, for example, considering at sentencing your membership in a racist organization even though this membership was not relevant to any of the issues at your trial.⁶³
- (5) The court sentenced you as a second-time or third-time offender, but the prior conviction was obtained in violation of your constitutional rights or was in some other way invalid.⁶⁴ For example, you may challenge the constitutional validity of the prior convictions or the decision to count them as “predicates” (prior convictions). The most common error is the use of out-of-state convictions as predicate felonies. Your out-of-state conviction will only count as a felony if your criminal conduct would have been a felony in New York, or if in the other state your conduct was punishable by a sentence of more than one year imprisonment and is also punishable by a sentence of more than one year under New York law.⁶⁵ For example, a felony conviction in New Jersey of promoting prostitution by soliciting persons to patronize a prostitute cannot be used as a predicate felony in New York since the equivalent New York crime (promoting prostitution in the fourth degree) is a misdemeanor.⁶⁶
- (6) The court incorrectly imposed “consecutive sentences” (one sentence running after another) when you should have been sentenced to “concurrent sentences” (two sentences running at the same time).⁶⁷ In general, consecutive sentences cannot be imposed where (a) a single act constitutes two or more offenses, or (b) a single act constitutes one offense and is a material element of another.⁶⁸ For example, if you committed armed robbery, you can be charged with the crimes of robbery and weapons possession. However, you cannot be sentenced consecutively for these crimes, as they were part of the same act.

process, your right to be present may have been forfeited by your actions. *See People v. Corley*, 67 N.Y.2d 105, 109–110, 491 N.E.2d 1090, 1092, 500 N.Y.S.2d 633, 635 (1986) (affirming the sentence imposed in the defendant’s absence where the “defendant willfully absented himself from the court for the purpose of frustrating the sentencing process.”).

63. *See Dawson v. Delaware*, 503 U.S. 159, 165–166, 112 S. Ct. 1093, 1097–1098, 117 L. Ed. 2d 309, 317–318 (1992) (holding that admitting evidence of the defendant’s membership in racist gang at the capital sentencing proceeding was error because that evidence was not relevant to any issue in the punishment phase).

64. *See People v. Simmons*, 143 A.D.2d 153, 154, 531 N.Y.S.2d 928, 928–929 (2d Dept. 1988) (finding that the defendant’s prior conviction for buying, receiving, and concealing stolen property under an Alabama statute that did not specify monetary value for stolen property was not a predicate (prior) felony for purposes of second felony offender status, as the New York statute required proof that the value of the stolen property exceeded \$250). If you did not raise an objection at the time the prosecution identified to you the prior felony to be used for sentencing enhancement, an appeals court will not review this sentencing issue. *See People v. Sullivan*, 153 A.D.2d 223, 233, 550 N.Y.S.2d 358, 364 (2d Dept. 1990) (“When the defendant fails to raise an objection, and when, as a result, the legality of the sentence cannot be determined by this court upon the information contained in the appellate record, review as a matter of law should be denied.”). If no objection was made due to mutual mistake, the appellate court can still reverse if the use of the predicate (prior) felony was clear error (meaning that it was apparent on the record that use of the predicate felony was error). *See People v. Eason*, 168 Misc. 2d 44, 46–47, 641 N.Y.S.2d 1018, 1020 (Sup. Ct. Queens Cty. 1996) (setting aside sentence where the defendant was improperly determined to be a second felony offender by mutual mistake because the prior felony had not yet been sentenced, making it unavailable as a predicate, and the error was clear on the record); *see also* N.Y. CRIM. PROC. LAW §§ 400.15(7)(b), 400.16, 400.20(6) (McKinney 2018), & 400.21(7)(b) (McKinney 2005).

65. N.Y. PENAL LAW § 70.06(1)(b)(i) (McKinney 2009).

66. *See People v. Johnson*, 127 A.D.2d 1003, 1003, 513 N.Y.S.2d 60, 6160 (4th Dept. 1987) (holding that a New Jersey felony conviction for promoting prostitution did not constitute a felony for New York sentencing purposes because the crime would have been a misdemeanor in New York, for which a term of imprisonment in excess of one year was not authorized).

67. *See People v. Riggins*, 164 A.D.2d 797, 797–798, 559 N.Y.S.2d 535, 536 (1st Dept. 1990) (finding that the court had no authority to change concurrent sentences to consecutive ones on its own without being asked to do so by either side).

68. *See* N.Y. PENAL LAW § 70.25(2) (McKinney 2009); *People v. Jeanty*, 268 A.D.2d 675, 679–681, 702 N.Y.S.2d 194, 200–201 (3d Dept. 2000) (holding that the lower court erred in making sentences, for robbery in the first degree and burglary in the first degree, consecutive to a felony murder sentence because the conduct constituting the robbery and burglary offense could have been a material element of the felony murder; however, the court also held that aggregate sentence of 75 years to life was proper).

Remember, a motion under Article 440.20 deals only with your sentence and has no effect on your underlying conviction. If your motion is granted, the court will vacate your sentence and resentence you in accordance with the law.⁶⁹

(c) Request for DNA Testing

In a relatively new section of Article 440, a defendant may request in his 440 motion that a forensic DNA test be done on evidence introduced at trial.⁷⁰ The court will order that a test be done if it determines that the following requirements are met:

- (1) Your 440 motion requests forensic testing on clearly identified specific and particular evidence,
- (2) The evidence upon which you are requesting a DNA test was obtained in connection with the trial that resulted in your conviction, and
- (3) There is a reasonable probability that if the results of a DNA test had been admitted at the trial, the verdict would have been more favorable to you.⁷¹

The third requirement is probably the most important one. The court will not order a DNA test if it believes there is no reasonable probability that the verdict would have been different even if you are right about the DNA test.⁷² For more information on DNA testing, see Chapter 11 of the *JLM*, “Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence.”

3. When You Can Get Relief Under Article 440

There are strict requirements for making a motion to vacate judgment under Section 440.10. In contrast, the requirements for making a motion to set aside a sentence under Section 440.20 are more relaxed. The requirements for making each type of motion are discussed separately below.

(a) When You Are Not Entitled to File a Motion to Vacate a Judgment Under Section 440.10

There are four circumstances in which the court must deny your motion to vacate a judgment under Section 440.10.⁷³ These four circumstances are:

- (1) If your claim was raised on appeal and the court denied your complaint on the merits (in other words, when the appellate court considered your claims and decided that they were not sufficient to overcome your guilty conviction).⁷⁴ There is an exception to this rule. The exception applies when the law changed after your appeal was decided, and the courts apply the new law “retroactively” (in other words, the courts apply a new law to old cases which have been tried, decided, or appealed before the change in the law occurred).⁷⁵ The Court of Appeals will only give full retroactivity to new laws which aim to protect the fact-finding process from unreliably obtained information which relates directly and substantially to guilt or innocence (in other words, to prevent a defendant from being found guilty on unreliably obtained

69. N.Y. CRIM. PROC. LAW § 440.20(4) (McKinney 2005); N.Y. CRIM. PROC. LAW § 440.20 practice cmt. (McKinney 2005).

70. N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005).

71. N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005). See Footnote 39 of this Chapter for an explanation of “reasonable probability.”

72. N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005); *see also* *People v. Tookes*, 167 Misc. 2d 601, 605–606, 639 N.Y.S.2d 913, 916 (Sup. Ct. N.Y. Cty. 1996) (finding no reasonable probability where: (1) there was no case for mistaken identity, (2) there was clear evidence of rape, (3) defendant failed earlier to pursue an enzyme analysis, and (4) a showing that defendant’s DNA did not match the crime scene sample would not likely have resulted in a “verdict more favorable to the defendant”). See Footnote 39 of this Chapter for an explanation of “reasonable probability.”

73. N.Y. CRIM. PROC. LAW § 440.10(2)(a)–(d) (McKinney 2005).

74. N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2005); *see, e.g.*, *People v. Skinner*, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934 (1st Dept. 1990) (holding that arguments raised and rejected on their merits on direct appeal may not be subsequently raised in an Article 440 motion).

75. N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2005).

information).⁷⁶ “Full retroactivity” means you can raise the new law in a post-conviction proceeding, such as an Article 440 motion, even though you were convicted and had appealed before the new law came into effect. However, full retroactivity has been applied very rarely in New York.⁷⁷ The courts decide whether a new rule should apply retroactively based on three factors:

- (a) the new rule’s purpose (that is, whether the purpose of the new law is to protect the fact-finding process from unreliably obtained information which relates directly to guilt or innocence),
 - (b) the extent of the reliance on the old rule (in other words, whether there were a great number of cases and, as a result, a large number of defendants were convicted and incarcerated under the old rule), and
 - (c) the effect on the administration of justice in applying the new rule retroactively (in other words, because the old rule applied to so many cases, making the new rule retroactive would result in too many over rulings and retrials, and it would over-burden the criminal courts. In such a situation, the courts are unwilling to apply the new rule retroactively).⁷⁸
- (2) You cannot make a Section 440.10 motion on the basis of an error that you may still raise in an appeal of your conviction, or that you have already raised in an appeal that is pending (an appeal is pending if the appeals court has not yet handed down a decision).⁷⁹ Remember,

76. See *People v. Laffman*, 161 A.D.2d 111, 112–13, 554 N.Y.S.2d 840, 841 (1st Dept. 1990) (“Where a new rule ... has as its purpose preserving the fact-finding process from unreliably obtained information bearing directly and substantially on a defendant’s guilt or innocence, the rule should be applied retroactively ...”).

77. See *People v. Hill*, 85 N.Y.2d 256, 263–264, 648 N.E.2d 455, 458–459, 624 N.Y.S.2d 79, 82 (1995) (vacating the conviction and remanding for a new trial, holding that the new *Ryan* rule, which states that a defendant could only be found guilty if he had knowledge of the weight of the illegal drugs he possessed, should be applied retroactively to cases of sale of illegal drugs); *People v. Laffman*, 161 A.D.2d 111, 111–113, 554 N.Y.S.2d 840, 841 (1st Dept. 1990) (vacating the judgment and remanding for a new trial, holding that a standard applying to stationhouse identification procedures in a subsequent case should apply retroactively whether on direct review or collateral proceedings). But see *People v. Pepper*, 53 N.Y.2d 213, 221–222, 423 N.E.2d 366, 369–370, 440 N.Y.S.2d 889, 892–893 (1981) (finding the defendant was not entitled to retroactive application of a court decision that held that once an indictment or complaint has been filed, a defendant could not have waived his constitutional right to counsel unless in presence of counsel); *People v. Douglas*, 205 A.D.2d 280, 292, 617 N.Y.S.2d 733, 740 (1st Dept. 1994) (stating that the *Ryan* decision, which held that defendant’s knowledge of drug weight was to be proved by the prosecution, will not be applied retroactively); *People v. Byrdsong*, 161 Misc. 2d 232, 234–235, 613 N.Y.S.2d 543, 544–545 (Sup. Ct. Queens Cty. 1994) (holding that the retroactivity of a rule, which stated that defendants generally had the right to be present during *Sandoval* hearings, was limited to only direct appeals and not to post-conviction hearings); *People v. Alvarez*, 151 Misc. 2d 697, 701, 573 N.Y.S.2d 592, 594–595 (Sup. Ct. Kings Cty. 1991) (stating that the *Van Pelt* decision, which held that a presumption of vindictiveness applies where a second sentence is higher after retrial than the original sentence, will not be applied retroactively).

78. See *People v. Pepper*, 53 N.Y.2d 213, 220–221, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 891–892 (1981) (outlining the three-part test for retroactivity but holding that changes in the rules governing a defendant’s right to pre-trial counsel applied retroactively only to cases still on direct review at the time of the change in law); see also *People v. Mitchell*, 80 N.Y.2d 519, 528–529, 606 N.E.2d 1381, 1386, 591 N.Y.S.2d 990, 995 (1992) (applying the three-part *Pepper* test in holding that a new state statutory right applied only prospectively and not retroactively because (1) the new rule did not fix any constitutional problems and only indirectly related to the fact-finding process, (2) the courts had substantially relied on the old rule, and (3) retroactive application would substantially burden the justice system); *People v. Douglas*, 205 A.D.2d 280, 289–290, 617 N.Y.S.2d 733, 738–739 (1st Dept. 1994) (holding that although there is a very good argument for the first prong of the test, retroactivity cannot apply because the second prong would not be met since the vast majority of drug cases relied on the old rule, and the third prong would therefore not be met because retroactivity would place a huge burden on the court system); *People v. Perez*, 162 Misc. 2d 750, 762–763, 616 N.Y.S.2d 928, 936 (Sup. Ct. Kings Cty. 1994) (observing that a certain new rule would not apply retroactively because retroactivity would violate the second and third prongs of this three-pronged test due to past substantial reliance and the potential for future substantial burden on the administration of justice).

79. N.Y. CRIM. PROC. LAW § 440.10(2)(b) (McKinney 2005); see also *People v. Cooks*, 67 N.Y.2d 100, 104, 491 N.E.2d 676, 678, 500 N.Y.S.2d 503, 505 (1986) (holding that if the record is sufficient for review of the issue on direct appeal, the issue cannot be also reviewed in an Article 440 motion); *People v. Griffin*, 115 A.D.2d 902, 904, 496 N.Y.S.2d 799, 801 (3d Dept. 1985) (denying the defendant’s Article 440 motion because judgment was already

Article 440 is not a substitute for an appeal. However, you may complain in a Section 440.10 motion about an error without first appealing the error if your trial record does not contain sufficient facts to allow an appeals court to review the error.⁸⁰ For example, if you have found new evidence that could not have been available at the time of the trial, and therefore was not included in the record, yet would have been more favorable to you, you may bring a Section 440.10 motion directly.⁸¹ But be very careful about deciding to use an Article 440 motion to complain about a decision without first bringing a direct appeal. The court reviewing your Article 440 motion decides if your trial record contains sufficient facts for an appeal. If the court finds that there are sufficient facts in your trial record for direct appeal, your Article 440 motion will be dismissed. If you did not also file or pursue a direct appeal, it may be too late to do so.⁸² Sometimes there may be doubt as to whether there are sufficient facts in the record for an appeals court to review. In that situation, you should be careful to file a timely direct appeal, and you should not just rely solely on an Article 440 motion in case the motion is denied.⁸³ However, you may complain in a Section 440.10 motion without first appealing if you were a victim of sex trafficking.⁸⁴ In order to qualify for this exception, you must have been arrested for prostitution under N.Y. Penal Law § 230.00 or for loitering for the purpose of prostitution under N.Y. Penal Law § 240.37. Additionally, your participation in the offense must have been a result of having been a victim of sex trafficking.⁸⁵

- (3) An error cannot be brought up in an Article 440 motion unless you brought it up in your appeal or you have a good excuse for not raising the issue on appeal. If you appealed only your sentence and not your conviction or if you did not include the error in your appeal, then you may not bring up the error.⁸⁶ One example of a good excuse would be where the error was overlooked due to ineffective assistance of appellate counsel.⁸⁷ (But if you believe your lawyer was ineffective because your lawyer did not tell you of your right to appeal, you must make a motion instead under N.Y. Crim. Proc. Law Section 460.30.) Another good excuse is where an appeal seemed useless due to the state of the law at the time, but the law changed later and

on appeal to the Appellate Division and defendant failed to demonstrate the existence of relevant new evidence not in the record). Part B(1) of this Chapter contains a list of information found in your trial record.

80. N.Y. CRIM. PROC. LAW § 440.10(2)(b) (McKinney 2005). See Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” for a full discussion of how to appeal your sentence and/or conviction.

81. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005).

82. See *People v. Cooks*, 67 N.Y.2d 100, 104, 491 N.E.2d 676, 678, 500 N.Y.S.2d 503, 505 (1986) (holding that if the defendant could have raised the issue on direct appeal, the judge must dismiss the Article 440 motion); N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2005) (“[S]hould the record be found by the motion court to have been sufficient for review of the point on direct appeal, the motion must be dismissed ... and the defendant, having permitted the time for perfecting the appeal to elapse, will be left without a remedy.”).

83. N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2005).

84. N.Y. CRIM. PROC. LAW §§ 440.10(1)(i), (2)(b) (McKinney 2005).

85. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005) (“[A]nd the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law ... or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78)...”)

86. N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2005); see, e.g., *People v. Skinner*, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934–935 (1st Dept. 1990) (holding that the defendant's failure to present his constitutional attack in his direct appeal prevented any consideration of it in an Article 440 motion); *People v. Cunningham*, 104 Misc. 2d 298, 302–304, 428 N.Y.S.2d 183, 187–188, (Sup. Ct. Bronx Cty. 1980) (holding that a court must deny an Article 440 motion where a defendant could have, but did not, raise the issue on direct appeal, despite a subsequent retroactively effective change in the law regarding that issue).

87. See N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2009) (discussing that the writ of *coram nobis* “remains available as a remedy where one is required and none is provided by statute” and accordingly that the writ of *coram nobis* can be used to bring a claim of ineffective appellate counsel); see also *People v. Bachert*, 69 N.Y.2d 593, 599, 509 N.E.2d 318, 322, 516 N.Y.S.2d 623, 627 (1987) (holding that § 440.10 did not invalidate the writ of *coram nobis* and therefore review of ineffective counsel by the appellate court was available). See Footnote 10 of this Chapter for more discussion on a claim of ineffective assistance of counsel.

courts applied the new law retroactively. Because of those changes, you can argue that your conviction is fundamentally unfair.⁸⁸

- (4) The judge will deny your Section 440.10 motion if it is based on an issue that involves only the validity of your sentence, rather than your conviction.⁸⁹ Instead, you must complain about your sentence in a motion to set aside your sentence under N.Y. Crim. Proc. Law § 440.20, not Section 440.10.

(b) When You May File a Motion to Vacate Judgment Under Section 440.10

While a judge must deny your Section 440.10 motion in the four circumstances listed above, there are other circumstances in which a judge can deny, but is not required to deny, your Section 440.10 motion.⁹⁰ These circumstances are:

- (1) You did not “preserve the issue for review on appeal.” This means that you did one or more of the following things: (1) you did not object at the trial to errors that happened during the trial, (2) you did not ask the court to give a particular instruction to the jury, (3) you did not ask the court to make a ruling on an issue, (4) you did not present facts that would have supported your claim and that you should have found through due diligence (proper research), or (5) in some way you did not make sure that an issue would be in the trial record.⁹¹ The following are examples of some of the issues you may raise in an Article 440 motion even though the issues were not preserved (kept) for review on appeal.
- (a) You may complain that you received ineffective, or bad, assistance of counsel at trial, but your claim depends on what information is found in your trial record. Since the trial record does not usually contain details of your lawyer’s performance at trial, the New York Court of Appeals believes that an Article 440 motion is usually better than an appeal for an ineffective assistance of counsel claim.⁹² However, if the trial record does contain facts that would allow an appellate court to review a claim of ineffective assistance of counsel, it is important that you raise the claim on direct appeal.⁹³

88. See N.Y. CRIM. PROC. LAW § 440.10(3)(b) (McKinney 2005); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009) (discussing how a court, under § 440.10(3)(b), may choose not to bar relief if there has been a retroactively effective change in law).

89. N.Y. CRIM. PROC. LAW § 440.10(2)(d) (McKinney 2005).

90. N.Y. CRIM. PROC. LAW §§ 440.10(3)(a)–(c) (McKinney 2005) (stating that although the court may deny the motion under any of the circumstances specified, in the interest of justice and for good cause shown, it can use its discretion to grant the motion and vacate the judgment.).

91. N.Y. CRIM. PROC. LAW § 440.10(3)(a) (McKinney 2005); see *People v. Green*, 177 A.D.2d 856, 857, 576 N.Y.S.2d 625, 626 (3d Dept. 1991) (holding denial of defendant’s 440.10 motion was proper because his failure to object to prosecutor’s use of peremptory challenges did not allow for the creation of a record subject to review); *People v. Nuness*, 151 A.D.2d 987, 988, 542 N.Y.S.2d 76, 77 (4th Dept. 1989) (holding that because defendant did not object at trial to prosecutor’s failure to turn over police notes or request a hearing to determine the existence of the notes, the issue was not preserved for appeal and could not be raised in a § 440.10 proceeding); *People v. Craft*, 123 A.D.2d 481, 482, 506 N.Y.S.2d 492, 493 (3d Dept. 1986) (holding that the shackling of the defendant in the presence of the jury was not a basis for a § 440.10 motion because defendant did not object at trial nor request an instruction to the jury to disregard the shackling); *People v. Donovan*, 107 A.D.2d 433, 443–444, 487 N.Y.S.2d 345, 352–353 (2d Dept. 1985) (holding that because the defendant did not claim at trial that his confession was obtained in violation of his right to counsel, the defendant could not raise this issue for the first time in a § 440.10 motion). As explained in Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” you or your lawyer must protest errors that occur at trial when they happen in order to ensure that these errors will be reviewed on appeal.

92. See *People v. Brown*, 45 N.Y.2d 852, 853–854, 382 N.E.2d 1149, 1149–1150, 410 N.Y.S.2d 287, 287 (1978) (observing that since the record often does not provide enough information for appeal on effectiveness of counsel, an Article 440 motion is usually a better method for ineffectiveness of counsel claims); see also N.Y. Crim. Proc. Law § 440.10(3)(a) (McKinney 2005) (stating that a court may deny a motion to vacate a judgment where the defendant failed to raise an issue prior to sentencing, even though facts in support of the issue raised in the Article 440 motion could have easily appeared on the record had the defendant acted with due diligence, but also noting that “[t]his paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right.”).

93. See *People v. Gonzalez*, 158 A.D.2d 615, 615, 551 N.Y.S.2d 586, 587 (2d Dept. 1990) (denying an Article

- (b) You may raise an issue in your motion if you could not have raised the issue at trial because, at that time, you could not have discovered the important facts.⁹⁴ For example, in one Article 440 motion, a defendant complained that he was not told the prosecutor had an agreement with a witness against the defendant, even though defendant's counsel asked the prosecutor. The prosecutor had agreed to recommend a lesser sentence for the witness in exchange for the witness's testimony against the defendant. The trial court denied the motion because the defendant could have raised this issue at trial and the intermediate appellate court "affirmed" (approved) the trial court's order. But, the Court of Appeals disagreed, finding that the defendant could not have known of or discovered the agreement at the time of trial and, therefore, could not have raised the issue at trial.⁹⁵
- (c) You may claim that there was prejudicial or harmful newspaper publicity about your case before and during the trial. However, if you did not alert the trial court to such newspaper publicity, and therefore, this negative publicity was not included in the record for the appeals court to review, a judge may decide to deny a Section 440.10 motion which raises this issue.⁹⁶
- (d) You may claim that you were a victim of sex trafficking if you have been arrested for prostitution under N.Y. Penal Law § 230.00 or for loitering for the purpose of prostitution under N.Y. Penal Law § 240.37.⁹⁷ In addition, your participation in the offense must have been a result of having been a victim of sex trafficking under N.Y. Penal Law § 230.34 or trafficking in persons under the Trafficking Victims Protection Act.⁹⁸
- (2) A trial court can decide to either consider or reject a second motion to vacate the judgment (do away with it) as long as (i) the issue was not decided on direct appeal, and (ii) it was included in your first Article 440 motion.⁹⁹ Again, there is an exception to this rule if the law has changed since your earlier motion and the change has been held to apply retroactively (applying to a past event).¹⁰⁰
- (3) The third situation where a trial court can decide to grant or reject your motion is when you could have raised this issue in a previous Section 440.10 motion, but you did not. Unless you can show a good reason for not including the issue in your earlier motion, the court may deny your second motion.¹⁰¹ It is important, therefore, that you include all possible supporting issues and complaints in your Section 440.10 motion. You may not be able to raise any additional issues that you leave out in another Article 440 motion.

(c) Alleging Omission of *Rosario* Materials

You may file a 440 motion if the government did not give you what is called "*Rosario* material." *Rosario* material is any recorded statement of a prosecution witness (including police officers) that the police or prosecution have in their possession that relates to the subject matter of the witness' trial

440 motion in part due to the ineffectiveness of counsel's claims. Counsel's claims were based on matters in the record and the court held that they should have been raised on direct appeal rather than in an Article 440 motion).

94. See *People v. Qualls*, 70 N.Y.2d 863, 865–866, 517 N.E.2d 1346, 1347, 523 N.Y.S.2d 460, 461–462 (1987) (finding defendant could not have discovered evidence of the prosecutor's misconduct during trial, based on the prosecutor's misrepresentation of the substance of its cooperation agreement with a witness, and so defendant was granted a hearing on his Article 440 motion).

95. *People v. Qualls*, 70 N.Y.2d 863, 865–866, 517 N.E.2d 1346, 1347, 523 N.Y.S.2d 460, 461–462 (1987).

96. N.Y. CRIM. PROC. LAW § 440.10(3)(a) (McKinney 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009).

97. N.Y. CRIM. PROC. LAW § 440.10(1)(i)–(ii) (McKinney 2009) (McKinney 2009).

98. N.Y. PENAL LAW § 230.34 (McKinney 2009), 22 U.S.C. § 7101 (2012).

99. N.Y. CRIM. PROC. LAW § 440.10(3)(b) (McKinney 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009).

100. N.Y. CRIM. PROC. LAW § 440.10(3)(b) (McKinney 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009).

101. N.Y. CRIM. PROC. LAW § 440.10(3)(c) (McKinney 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009).

testimony. By law, the prosecutor must give you those statements that relate to the witness' testimony at your trial.¹⁰² But, note that even if the prosecutor failed to give you the *Rosario* materials, that does not mean that your conviction is automatically overturned. Instead, the court must find a "reasonable possibility" that the failure to give you such statements "materially" (substantially) contributed to a verdict against you. Only then will the court reverse your conviction on appeal because *Rosario* materials were not given to you.¹⁰³ Likewise, if you raise the issue of omitted (left out) *Rosario* materials in an Article 440 motion, the court will reverse your conviction only if you can prove that the omission of the materials was not harmless error (in other words, that the omission negatively affected your defense).¹⁰⁴ If you raise this claim for the first time in an Article 440 motion, you must show that there was a reasonable possibility that the failure to give you these statements contributed to the verdict against you.¹⁰⁵

Furthermore, it is unlikely that a court will reverse your conviction for this reason if the material kept by the prosecution duplicates (repeats) material in the record,¹⁰⁶ or if the prosecution merely delayed in producing the material.¹⁰⁷ However, courts interpret "duplication" very narrowly. Unless

102. N.Y. CRIM. PROC. LAW § 240.45(1)(a) (McKinney 2009); *see also* *People v. Rosario*, 9 N.Y.2d 286, 290–91, 173 N.E.2d 881, 883–84, 213 N.Y.S.2d 448, 450–51 (1961) (finding that the trial court should have turned over to defense counsel, on their request, statements given by prosecution witnesses before trial that related to their trial testimony, so that defense counsel could have rightfully used those statements on cross-examination). Note that in this case the error was found to be harmless due to its specific circumstances.

103. *See* N.Y. CRIM. PROC. LAW § 240.75 (McKinney 2009) (removing the previous rule from *People v. Ranghelle*, 69 N.Y.2d 56, 63, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986) that failure to turn over *Rosario* material was per se (automatic) reversible error, replacing the *Ranghelle* rule with the "reasonable possibility" standard); *People v. Sorbello*, 285 A.D.2d 88, 95–96, 729 N.Y.S.2d 747, 752–753 (2d Dept. 2001) (holding that § 240.75, which replaced the old *Ranghelle* rule, applies retroactively to all cases that are being prosecuted or appealed as of February 1, 2001); *see also* *People v. Rosas*, 297 A.D.2d 390, 390–391, 746 N.Y.S.2d 610, 611 (2d Dept. 2002) (finding that failure to disclose certain statements that related to the identification of the defendant by the victim's son could reasonably have affected the verdict); *People v. Potter*, 283 A.D.2d 1011, 1011–1012, 725 N.Y.S.2d 778, 779–780 (4th Dept. 2001) (granting new trial because of the reasonable possibility that failure to disclose tapes and statement relating to the witness' trial testimony materially contributed to the verdict). *But see* *People v. Delosanto*, 307 A.D.2d 298, 299, 763 N.Y.S.2d 629, 631 (2d Dept. 2003) (denying reversal despite finding that a *Rosario* violation was committed because there was no reasonable possibility that disclosure of grand jury minutes would have contributed to the trial).

104. *People v. Jackson*, 78 N.Y.2d 638, 641, 585 N.E.2d 795, 797, 578 N.Y.S.2d 483, 485 (1991) (stating that motion for post-conviction relief brought after a completed direct appeal will only be successful if defendant can prove both improper conduct by prosecutor and prejudice to the defense); *see also* *People v. Machado*, 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997) (holding that in an Article 440 motion, defendant/movant must prove that the failure to turn over *Rosario* material prejudiced the outcome of the defendant/movant's case, even if an appeal is pending at the time the Article 440 motion is filed).

105. *See* *People v. Machado*, 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997) (stating that defendant/movant must prove the omission of materials prejudiced his case and contributed to the verdict against him, conviction will not be automatically reversed regardless of whether defendant's direct appeal is still pending or completed); *People v. Vilardi*, 76 N.Y.2d 67, 77–78, 555 N.E.2d 915, 920–921, 556 N.Y.S.2d 518, 523–524 (1990) (explaining that the standard for determining whether an omission of *Rosario* material was prejudicial is whether there was a reasonable possibility that the defendant would not have been convicted had the *Rosario* material been provided at trial); *People v. Nikollaj*, 155 Misc. 2d 642, 648–649, 589 N.Y.S.2d 1013, 1017–1018 (Sup. Ct., Bronx County 1992) (granting defendant new trial because prosecution's withholding of a lot of *Rosario* materials, including a 16-minute recorded interview of the main eyewitness, prejudiced defendant's case, and there was a reasonable possibility that the violations contributed to the verdict).

106. *See* *People v. Cortez*, 184 A.D.2d 571, 573, 584 N.Y.S.2d 609, 611 (2d Dept. 1992) (finding that conviction need not be reversed if material withheld by prosecution is duplicative of other evidence in the record); *People v. Ray*, 140 A.D.2d 380, 382–383, 527 N.Y.S.2d 864, 866 (2d Dept. 1988) (stating that the prosecution must prove the undisclosed statements are indeed duplicative).

107. *See* *People v. Blagrove*, 183 A.D.2d 837, 837–838, 584 N.Y.S.2d 86, 87 (2d Dept. 1992) (stating that the prosecution's delay in turning over material relating to a prosecution witness' testimony will only result in a reversal if the defense was substantially prejudiced by the delay, and finding no delay where "[t]he defendant received the notes prior to the doctor's testimony, and had a full opportunity to cross-examine him based upon the notes . . . [and] the defendant was generally apprised of the fact that the notes were based on the autopsy report

the excluded material appears in the record in identical or almost identical form, the court will probably not reject your claim on the grounds that the undisclosed *Rosario* material was duplicative.¹⁰⁸

(d) When You May File a Motion to Set Aside a Sentence under Section 440.20

Just like in a motion to vacate a judgment under Section 440.10, in a motion to vacate your sentence under Section 440.20, you do not have to wait until you have appealed your conviction to make the motion. You can make this motion at any time after your sentencing.¹⁰⁹ But, if you challenged your sentence when you appealed your conviction and lost, you cannot challenge your sentence again through a Section 440.20 motion.¹¹⁰ There is an exception to this rule that applies if (1) the law has changed in the time since your appeal, and (2) the new law is made retroactive (meaning that the new law can apply to your case even though that law was passed after you were convicted and sentenced).¹¹¹ In addition, the judge may deny your motion if the issue was already decided in a previous Section 440.20 motion or a similar non-appeal proceeding, such as a habeas corpus motion.¹¹² The court may grant your motion, however, if it is in the interest of justice and a good reason is shown.¹¹³

C. How to File an Article 440 Motion

1. Preparing Your Motion Documents

Appendix B of this Chapter (beginning on page 627) contains forms to help you prepare an Article 440 motion. For any motion you make using Article 440, you will need at least two documents. The first document is a Notice of Motion. It tells the court that you are challenging your conviction and/or sentence. It also states the reason for your challenge. The notes after the sample Notice of Motion in Appendix B tell you how to fill out this document.

The second document is an “affidavit.” This is a sworn statement of facts made by someone with firsthand knowledge of the facts. Either you, a witness at your trial, or someone else who knows facts that will convince the court your conviction or sentence was wrong can prepare and swear to an affidavit. Appendix B of this Chapter provides a sample affidavit written as though you (the defendant) made the affidavit.¹¹⁴

To write a good affidavit, you must do more than make general claims such as “I was deprived of my constitutional right to counsel” or “the officer had no probable cause to arrest me.” If you make these claims in your motion, you must give details of the specific circumstances under which you were

and other physical evidence.”).

108. See *People v. Young*, 79 N.Y.2d 365, 370–371, 591 N.E.2d 1163, 1166–1167, 582 N.Y.S.2d 977, 980–981 (1992) (finding that two documents cannot be duplicative if “there are variations or inconsistencies between them[,]” including omissions, that the exception to an automatic reversal rule for duplicate material is “simply not consistent with the principles underlying our case law[,]” and should be read very narrowly to apply when material is in fact a duplication of material in the record).

109. N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2009).

110. N.Y. CRIM. PROC. LAW § 440.20(2) (McKinney 2009). See, e.g., *People v. Chapman*, 115 A.D.2d 911, 911, 496 N.Y.S.2d 588, 588 (3d Dept. 1985) (finding that a court must deny an Article 440 motion when the sentencing issue was previously determined on the merits as part of a direct appeal).

111. A court will review a claim that you raised in a previous Article 440 motion if the law has changed since your appeal, and the new law applies to cases decided before the change. N.Y. Crim. Proc. Law § 440.20(2) (McKinney 2005 & Supp. 2011) (“[T]he court may deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.”).

112. N.Y. CRIM PROC. LAW § 440.20(3) (McKinney 2009).

113. N.Y. CRIM PROC. LAW § 440.20(3) (McKinney 2009). Note, however, that it is rare for the court to grant a 440.20 motion on these grounds. See, e.g., *People v. Baraka*, 109 Misc. 2d 271, 274, 439 N.Y.S.2d 827, 830 (N.Y. Crim. Ct., New York County 1981) (reading the “interest of justice” and “good cause” grounds narrowly for the discretion that a judge holds in this context).

114. A witness affidavit would look almost the same as the defendant’s affidavit, except that the witness must identify himself and explain why he is aware of the facts to which he is swearing.

denied counsel or state in a clear and detailed way what led to your arrest. For example, if you asked for a lawyer at trial and the judge told you that you were not entitled to a lawyer, you should include in your affidavit the name of the judge, the exact words he used (if you can remember them), the date (or approximate date) that the statement was made, and the names of any witnesses who heard the judge make the statement.

If a judge thinks that there is no reasonable possibility that the facts stated in your affidavit are true, he or she will deny your motion.¹¹⁵ Therefore, you should be as detailed and precise about the facts of your story as possible. In addition, if any witnesses are available, you should have them write affidavits that support your story.

You should also be careful to include all of the possible reasons or issues on which you could bring an Article 440 motion.¹¹⁶ If you leave one out, a court will probably not allow you to raise the ground in a later motion.¹¹⁷

You must swear in the presence of a notary that the facts stated in your affidavit are true.¹¹⁸ If prison officials refuse to provide you with a notary, you can verify your affidavit through a witness. In order to verify your affidavit, you should sign your own name at the bottom of the form. You should also ask a friend to witness (watch) as you sign the affidavit and have the friend sign his own name under the line that reads “sworn to before me” at the end of the affidavit. Finally, you should write an explanation under the signature of the friend who witnessed your signature regarding the fact that the prison officials refused to provide a notary. Appendix A of *JLM*, Chapter 17, contains a “Sample Verification” (A-2) that can be filled out by a friend.

2. When and Where to File

(a) When to File

There is no “statute of limitations” (time limit) for making an Article 440 motion.¹¹⁹ But, if you wait too long after your sentencing, a court may decide to deny your motion.¹²⁰ For example, one court denied a Section 440.10 motion that a defendant made three years after his conviction because he could not explain the delay. The court believed he could have discovered the facts underlying his claim earlier.¹²¹ Furthermore, Article 440 requires you to make a motion based on newly discovered evidence *within a reasonable time* after you discover the new evidence.¹²²

(b) Where to File

You must bring an Article 440 motion in the trial court where you were convicted. You cannot bring it in the court of another county where you happen to be imprisoned. To file your motion, mail your Notice of Motion, your sworn statement(s) (affidavit(s)), and all supporting documents to the clerk

115. See *People v. Selikoff*, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 638 (1974) (denying motion based on incredible and unsubstantiated claim that trial judge, deceased at time of motion, had made an off-the-record sentencing promise to defendant). But see *People v. Seminara*, 58 A.D.2d 841, 843, 396 N.Y.S.2d 472, 475 (2d Dept. 1977) (granting motion for hearing where defendant claimed that judge’s law secretary made probation promise to defendant and claim was supported by affidavit from his trial attorney).

116. N.Y. CRIM. PROC. LAW § 440.30(1) (McKinney 2009).

117. N.Y. CRIM. PROC. LAW § 440.10(3)(c) (McKinney 2009).

118. N.Y. CRIM. PROC. LAW § 440.30(1) (McKinney 2009).

119. See *People v. Corso*, 40 N.Y.2d 578, 580, 357 N.E.2d 357, 359, 388 N.Y.S.2d 886, 889 (1976) (holding that a § 440.10 claim may be filed at any time).

120. See *People v. Byrdsong*, 161 Misc. 2d 232, 236, 613 N.Y.S.2d 543, 545 (Sup. Ct. Queens County 1994) (denying relief to an incarcerated person who filed a §440 motion nine years after trial and seven years after all appeals had been exhausted); *People v. Wilson*, 81 Misc. 2d 739, 740, 365 N.Y.S.2d 961, 962–963 (Dist. Ct. Nassau County 1975) (denying motion to vacate judgment and finding it to be a “significant factor” that defendant waited almost five years to complain of his conviction).

121. See *People v. Friedgood*, 58 N.Y.2d 467, 470–471, 448 N.E.2d 1317, 1319, 462 N.Y.S.2d 406, 408 (1983).

122. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005).

of the court where you were convicted.¹²³ See Appendix II of the *JLM* for the addresses of the trial courts for each county in New York State. In New York State, the trial courts are called the supreme courts. You must also send a copy of your papers to the district attorney of the county where you were convicted. See Appendix III in the back of the *JLM* for a list of the addresses of the district attorneys' offices for each county in New York.

3. How to Get Help from a Lawyer

You do not have a right to a lawyer to help you prepare your Article 440 motion. But the court may decide to assign you a lawyer under certain circumstances. First, the court must decide to hold a hearing based on your motion and affidavits, and then you must request a lawyer.¹²⁴ You should request a lawyer because he can usually help you present a better case.

To request a lawyer, you need to file certain documents ("poor person's papers"). "Poor person's papers" state that you would like a lawyer, but are unable to pay for one. These papers also allow you to request that the clerk of the court serve the district attorney with all of your papers, so you do not have to serve the papers yourself. "Poor person's papers" are also known as a request to proceed "*in forma pauperis*." Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," describes poor person's papers in more detail and also contains sample poor person's papers. You may make and use a copy of the papers in Appendix B of Chapter 9 of the *JLM* (but do not tear them out of the book), as long as you:

- (1) Replace all references to "Appeal" with either "Motion to Vacate Judgment" or "Motion to Set Aside Sentence," whichever is applicable,
- (2) Delete all references to "Appellate Division" and "Judicial Department" (make sure that "Supreme Court" still appears), and
- (3) Make sure that the county in which you were convicted is included wherever there is a reference to the Supreme Court.

D. What to Expect After You Have Filed Your Article 440 Motion

Once you have filed your motion, the district attorney will ordinarily file a response ("answer") to your motion with the judge who received your motion. The district attorney must also send you or your lawyer a copy of the answer.¹²⁵ The answer will usually deny some or all of the allegations in your motion and supporting papers.

The judge will then review the facts and arguments set forth in the district attorney's answer and in your motion and supporting affidavits. Next, the judge will grant your motion, deny your motion, or hold a hearing. The judge will grant your motion if your papers state a legal ground for "vacating" (canceling) the judgment or setting aside your sentence. The judge will deny your motion without a hearing if your papers do not state a legal ground for vacating the judgment or setting aside your sentence. Additionally, the judge will deny your motion without a hearing if your papers lack facts to support a legal ground.¹²⁶ The judge will also deny your motion without a hearing if:

123. If your trial was moved to a different county (for example, to avoid pretrial publicity), you should send your motion to the court in the county where you were indicted. *See People v. Klein*, 96 Misc. 2d 564, 566, 409 N.Y.S.2d 374, 375–376 (Sup. Ct. Suffolk County 1978) (holding the appropriate venue for a hearing in the nature of a fundamental error ("*coram nobis*") would be in the county of the indictment, rather than the county where the case was moved for the purpose of trial).

124. *See* N.Y. COUNTY LAW § 722(4) (McKinney 2017); *People ex rel. Anderson v. Warden*, 68 Misc. 2d 463, 470, 325 N.Y.S.2d 829, 837 (Sup. Ct. Bronx County 1971) ("Assignment of counsel other than for an evidentiary hearing is discretionary in both habeas corpus and Article 440 proceedings.").

125. N.Y. CRIM. PROC. LAW § 440.30(1)(a) (McKinney 2005).

126. N.Y. CRIM. PROC. LAW § 440.30(4)(a) (McKinney 2005). *See, e.g., People v. Risalek*, 172 A.D.2d 870, 870–871, 568 N.Y.S.2d 172, 173–174 (3d Dept. 1991) (denying motion where defendant's allegations of fraud and coercion were contradicted by transcripts, other allegations in motion were not supported by affidavits or other evidence, and defendant failed to preserve the objection to the plea he knowingly entered into); *People v. Portalatin*, 132 A.D.2d 581, 582, 517 N.Y.S.2d 301, 302 (2d Dept. 1987) (denying hearing because allegations of

- (1) Affidavits do not support the facts you use to support your motion;
- (2) Documentary proof shows that a fact necessary to support your motion is clearly false;
- (3) The record from your trial contradicts a fact necessary to support your motion; or
- (4) A fact necessary to support your motion is either contradicted by an official court document or supported only by your own testimony, and there is no reasonable possibility the claim is true.¹²⁷

Otherwise, the judge must grant a hearing on your motion.¹²⁸ Whether the court grants you a hearing or not, the court must state for the official record what facts it found to be true, how it viewed the law, and why it decided the way it did.¹²⁹

If the judge decides to hold a hearing, you have the right to attend this hearing. You may decide to “waive” (not use) this right in writing.¹³⁰ It is recommended that you go to the hearing, and you do not waive the right to appear. At the hearing, you will bear the responsibility of proving that your claims are true (this responsibility is called a “burden of proof”).¹³¹ To meet your burden of proof, you must persuade the judge that the essential facts of your story are true by a “preponderance” (majority) of the evidence, which means that the facts are more likely to be true than not true.¹³² In other words, you must convince the judge that the evidence supporting your claim outweighs the evidence against your claim.

Even if the hearing convinces the court that the facts stated in your motion and affidavit are true, the court will not automatically grant your motion. The facts stated in your motion must also persuade the judge that your conviction or sentence was unfair.¹³³ Part B of this Chapter explains what kinds of acts by the trial judge or prosecutor may make a conviction or sentence unfair under Article 440.

E. What Relief the Court Can Provide Under Article 440

1. Motion to Vacate Judgment (440.10)

In deciding on a Section 440.10 motion, the court has several choices:

- (1) Even if the court finds that the facts you have stated are true, the court may deny your motion if the court finds that your conviction was fair;¹³⁴

prosecutorial misconduct were not preserved or without merit); *People v. Batts*, 96 A.D.2d 842, 842–843, 465 N.Y.S.2d 600, 601 (2d Dept. 1983) (denying motion for failure to set forth sufficient grounds to justify a hearing).

127. N.Y. CRIM. PROC. LAW § 440.30(4)(b)–(d) (McKinney 2005).

128. N.Y. CRIM. PROC. LAW § 440.30(5) (McKinney 2005). *See, e.g.*, *People v. Ferreras*, 70 N.Y.2d 630, 631, 512 N.E.2d 301, 302, 518 N.Y.S.2d 780, 781 (1987) (finding that defendant who submitted personal affidavit supporting claim of ineffective counsel due to conflict of interest was entitled to hearing on motion).

129. N.Y. CRIM. PROC. LAW § 440.30(7) (McKinney 2005).

130. N.Y. CRIM. PROC. LAW § 440.30(5) (McKinney 2005).

131. N.Y. CRIM. PROC. LAW § 440.30(6) (McKinney 2005). In contrast, the prosecutor had to prove you guilty beyond a reasonable doubt at your trial.

132. N.Y. CRIM. PROC. LAW § 440.30(6) (McKinney 2005). *See, e.g.*, *People v. Richard*, 156 A.D.2d 270, 270, 548 N.Y.S.2d 659, 660 (1st Dept. 1989) (denying defendant’s Article 440 motion because claims were not supported by the required preponderance of evidence).

133. *See, e.g.*, *People v. Lehrman*, 155 A.D.2d 693, 694, 548 N.Y.S.2d 260, 260–61 (2d Dept. 1989) (finding defendant failed to demonstrate that jury misconduct impaired his right to trial); *People v. Dean*, 125 A.D.2d 948, 949, 510 N.Y.S.2d 41, 41 (4th Dept. 1986) (denying Article 440 motion because defendant could have raised issue on appeal and defendant failed to show denial of due process); *People v. Rhodes*, 92 A.D.2d 744, 745, 461 N.Y.S.2d 81, 83 (4th Dept. 1983) (stating that to prevail on Article 440 motion based on claim of juror misconduct, defendant must prove misconduct by a preponderance of the evidence and show that the misconduct created a substantial risk of prejudice; mere speculation of prejudice is insufficient).

134. *See, e.g.*, *People v. Machado*, 90 N.Y.2d 187, 188–89, 681 N.E.2d 409, 410, 659 N.Y.S.2d 242, 243 (1997) (holding that the defendant must demonstrate prejudice in Article 440 motions made after a direct appeal has concluded, even though reversal is required upon a direct appeal when prosecution fails to turn over a pretrial witness statement); *People v. Dean*, 125 A.D.2d 948, 949, 510 N.Y.S.2d 41, 41 (4th Dept. 1986) (denying Article 440 motion because defendant could have raised issue on appeal and defendant failed to show denial of due process).

- (2) The court may grant your Section 440.10 motion to vacate the judgment and dismiss the indictment or charge against you. If the court grants your Section 440.10 motion, you will either be released from prison or (more likely) receive a new trial;¹³⁵ or
- (3) If your motion raises new evidence, the judge may vacate the judgment and order a new trial.¹³⁶ Alternatively, the judge may reduce your conviction to a lesser offense, if the district attorney agrees.¹³⁷

2. Motion to Set Aside Sentence (440.20)

Even if the judge decides to grant your motion to set aside your sentence under Section 440.20, he will not change your underlying conviction. The court must resentence you by following the New York Penal Code's guidelines and limits for sentences.

F. How to Appeal if Your Article 440 Motion is Denied

You do not have the automatic right to appeal a denial of your Article 440 motion to an intermediate appellate court (in New York, the intermediate appellate court is called the Appellate Division).¹³⁸ To appeal, you must request "leave" (permission) from a judge of the intermediate appellate court to which you want to appeal.¹³⁹ You must request leave to appeal within thirty days after you receive a copy of the court's order denying your Article 440 motion.¹⁴⁰ When you request leave, you must apply for a "certificate granting leave to appeal."¹⁴¹ In order to apply for a certificate, you must check the appropriate appellate division rules. The appellate court you appeal to will be located in one of four departments. Use the rules for the department where the intermediate appellate court you appeal to is located.¹⁴² If the judge of the appellate court grants you permission to appeal, you will receive the certificate indicating that you may appeal.¹⁴³ Within fifteen days after you receive this certificate, you must file the certificate and a notice of appeal in the court that denied your Article 440 motion.¹⁴⁴ You must also "serve" (give) the certificate and notice of appeal upon the district

135. N.Y. CRIM. PROC. LAW § 440.10(4) (McKinney 2009).

136. N.Y. CRIM. PROC. LAW § 440.10(5)(a) (McKinney 2009). The new evidence must be substantial enough to create a probability that it would have changed the outcome of the original trial had it been admitted in time.

137. N.Y. CRIM. PROC. LAW § 440.10(5)(b) (McKinney 2009); *see also* *People v. Reyes*, 92 A.D.2d 776, 777, 459 N.Y.S.2d 614, 614 (1st Dept. 1983) (reducing defendant's conviction for robbery in the first degree to robbery in the second degree after evidence showed gun was a toy pistol). *See* Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a detailed explanation and example of lesser included offense.

138. N.Y. CRIM. PROC. LAW § 450.15 (McKinney 2009); *see also* *People v. Farrell*, 85 N.Y.2d 60, 70, 647 N.E.2d 762, 768, 623 N.Y.S.2d 550, 556 (1995) (holding that the New York constitution does not prevent the legislature from limiting a defendant's right to appeal a denial of a non-final post-judgment collateral motion). However, you do have the right to appeal an order that sets aside your sentence if the district attorney makes an Article 440 motion under § 440.40 to seek a longer sentence against you. N.Y. Crim. Proc. Law § 450.10(4) (McKinney 2009).

139. N.Y. CRIM. PROC. LAW § 460.15 (McKinney 2009). Assuming you were convicted in a New York supreme court and filed your Article 440 motion there, you would appeal from a denial of your Article 440 motion to the appellate division of the department in which you were convicted. For a listing of the counties included in each department, *see* note 134 below.

140. N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2009).

141. N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2009).

142. N.Y. CRIM. PROC. LAW § 460.15(2) (McKinney 2009). These rules are located in N.Y. COMP. CODES R. & REGS. tit. 22, § 600.8(d) (for the 1st Dept.), § 670.6(b) (for the 2d Dept.), § 800.3 (for the 3d Dept.), and 1000.13(o) (for the 4th Dept.). The First Department includes the counties of the Bronx and New York. The 2nd Department includes the counties of Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester. The Third Department includes the counties of Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, and Washington. The 4th Department includes the counties of Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, and Yates.

143. N.Y. CRIM. PROC. LAW § 460.15(1) (McKinney 2009).

144. N.Y. CRIM. PROC. LAW § 460.10(4)(b) (McKinney 2009). *See* Chapter 9 of the *JLM*, "Appealing Your

attorney of the county where your trial court is located.¹⁴⁵ Once you have completed these steps, you have “taken” your appeal.¹⁴⁶

You should be aware that judges rarely grant permission to appeal from denials of Article 440 motions. Nonetheless, it is essential that you seek leave to appeal from a denial of your Article 440 motion. As noted in Chapter 13 of the *JLM*, “Federal Habeas Corpus,” you must seek leave to appeal to satisfy the exhaustion requirements for raising a claim in a federal habeas corpus petition.

If a judge of the intermediate court denies you leave to appeal, the state appeals process ends at that stage and cannot be pursued further.¹⁴⁷ (Note, however, that you may still be able to raise your claim in a federal habeas corpus petition as described in Chapter 13, “Federal Habeas Corpus,” of the *JLM*.) If you do receive permission to appeal and the appellate court then denies your appeal, you may appeal the denial to the New York Court of Appeals, the state’s highest court.¹⁴⁸ To do so, you must request permission to appeal from a judge of the Court of Appeals.¹⁴⁹ You must make your request within thirty days after the intermediate appellate court hands down the denial you are trying to appeal.¹⁵⁰ Again, if you are granted permission to appeal, you will be issued a certificate indicating you have permission to appeal.¹⁵¹ Upon issuance of the certificate, your appeal is “taken.”¹⁵²

In addition, the district attorney has the right to appeal an Article 440 motion that sets aside either your conviction or your sentence.

G. Conclusion

With an Article 440 motion, you can challenge your conviction (Section 440.10) or your sentence (Section 440.20). Remember that if you have already appealed your case and lost, you cannot raise any issue already decided by the appellate court in the course of your appeal. But if a court has not decided on your appeal yet, you can still make an Article 440 motion. You can then make a motion to “consolidate” (combine) the appeal and the 440 motion for the sake of “judicial economy” (efficiency). If you consolidate, the range of factual matters the court may examine will be expanded in the appeal. Also, all of the errors presented together may better persuade the court that your trial was unfair.

You must prove that the facts stated in your motion and affidavit are true. You must also prove that the facts state a legal ground that is serious enough to require a court to grant your motion. If you claim that the court made a mistake during your trial, you must show that the mistake affected your chance of being not guilty or that the mistake was so serious that you must be protected from it. If you could have raised a claim in an earlier Article 440 motion, a court will probably deny your present motion. A court will also probably deny your present motion if you have already made an Article 440 motion on the same ground(s) and lost.

If you plead guilty at your trial, you will have a harder time succeeding on a motion to vacate judgment.

Conviction or Sentence,” for a definition of a notice of appeal and a description of the appeals process, generally, and also for a sample notice of appeal from a denial of an Article 440 motion.

145. N.Y. CRIM. PROC. LAW §§ 460.10(3)(b), 460.10(4) (McKinney 2009).

146. See Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence,” to see what steps may still be necessary to legally perfect your appeal.

147. N.Y. CRIM. PROC. LAW § 450.15 (McKinney 2009).

148. N.Y. CRIM. PROC. LAW § 460.10(5) (McKinney 2009).

149. N.Y. CRIM. PROC. LAW § 460.10(5) (McKinney 2009). You may also seek permission from an appellate division judge if the appellate division denied your motion. See Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence” for more information.

150. N.Y. CRIM. PROC. LAW §§ 460.10(5)(a), 460.20 (McKinney 2009).

151. N.Y. CRIM. PROC. LAW § 460.10(5)(b) (McKinney 2009).

152. N.Y. CRIM. PROC. LAW § 460.10(5)(b) (McKinney 2009). Again, however, you must still perfect your appeal. See Chapter 9 of the *JLM*, “Appealing Your Conviction or Sentence.”

APPENDIX A

STATE POST-CONVICTION RELIEF STATUTES

Alabama	ALA. CODE § 15-21-1 <i>et seq.</i>
Alaska	ALASKA STAT. § 12.75.010 <i>et seq.</i>
Arizona	ARIZ. R. CRIM. P. 32, ARIZ. REV. STAT. § 13-4121 <i>et seq.</i>
Arkansas	ARK. R. CRIM. P. 37, ARK. CODE ANN. § 16-112-101 <i>et seq.</i>
California	CAL. PENAL CODE § 1473 <i>et seq.</i>
Colorado	COLO. R. CRIM. P. 35, COLO. REV. STAT. § 13-45-101 <i>et seq.</i>
Connecticut	CONN. GEN. STAT. ANN. § 52-466 <i>et seq.</i>
Delaware	DEL. SUP. CT. CRIM. R. 35, DEL. CODE ANN. tit. 10, § 6901 <i>et seq.</i>
D.C.	D.C. CODE § 23-110, D.C. CODE § 16-1901 <i>et seq.</i>
Florida	FLA. R. CRIM. P. 3.850
Georgia	GA. CODE ANN. § 9-14-1 <i>et seq.</i>
Hawaii	HAW. REV. STAT. § 660-3 <i>et seq.</i>
Idaho	IDAHO CODE ANN. § 19-4901 <i>et seq.</i>
Illinois	725 ILL. COMP. STAT. 5/122-1 <i>et seq.</i>
Indiana	IND. CODE ANN. § 34-25.5-1-1 <i>et seq.</i> , IND. R. P. FOR POST-CONVICTION REMEDIES R. PC 1.
Iowa	IOWA CODE ANN. § 663A.1 <i>et seq.</i>
Kansas	KAN. STAT. ANN. § 60-1501 <i>et seq.</i>
Kentucky	KY. R. CRIM. P. 11.42, KY. REV. STAT. ANN. § 419.020 <i>et seq.</i>
Louisiana	LA. CODE CRIM. PROC. ANN. art. 924 <i>et seq.</i>
Maine	ME. REV. STAT. ANN. tit. 15, § 2121 <i>et seq.</i> , ME. REV. STAT. ANN. tit. 14, § 5501 <i>et seq.</i>
Maryland	MD. CODE ANN., CRIM. PROC. § 7-101 <i>et seq.</i> , MD. CODE ANN., CTS. & JUD. PROC. § 3-701 <i>et seq.</i>
Massachusetts	MASS. R. CRIM. P. 30, MASS. GEN. LAWS ch. 276, § 19
Michigan	MICH. COMP. LAWS ANN. § 600.4301 <i>et seq.</i>
Minnesota	MINN. STAT. ANN. § 590.01 <i>et seq.</i>
Mississippi	MISS. CODE ANN. § 99-39-1 <i>et seq.</i>
Missouri	MO. S. CT. R. CRIM. P. 91.01, MO. ANN. STAT. § 532.010
Montana	MONT. CODE ANN. § 46-21-101 <i>et seq.</i>
Nebraska	NEB. REV. STAT. § 29-3001 <i>et seq.</i>
Nevada	NEV. REV. STAT. §§ 34.720, 176.515.
New Hampshire	N.H. REV. STAT. ANN. § 534:1 <i>et seq.</i>
New Jersey	N.J. STAT. ANN. § 2A:67-1 <i>et seq.</i>
New Mexico	N.M. STAT. ANN. § 31-11-6
North Carolina	N.C. GEN. STAT. 15A-1411 <i>et seq.</i> , N.C. GEN. STAT. 17-1 <i>et seq.</i>
North Dakota	N.D. CENT. CODE § 32-22-01 <i>et seq.</i>
Ohio	OHIO REV. CODE ANN. § 2953.21 <i>et seq.</i>
Oklahoma	OKLA. STAT. ANN. tit. 22, § 1080 <i>et seq.</i>
Oregon	OR. REV. STAT. § 138.510 <i>et seq.</i>
Pennsylvania	42 PA. CONS. STAT. ANN. § 6501 <i>et seq.</i>
Rhode Island	R.I. GEN. LAWS § 10-9.1-1 <i>et seq.</i> , R.I. GEN. LAWS § 10-9-3 <i>et seq.</i>
South Carolina	S.C. CODE ANN. § 17-27-10 <i>et seq.</i>
South Dakota	S.D. CODIFIED LAWS § 21-27-1 <i>et seq.</i>
Tennessee	TENN. CODE ANN. § 40-9-119 <i>et seq.</i>
Texas	TEX. CODE CRIM. PROC. ANN. art. 11.01 <i>et seq.</i>
Utah	UTAH CODE ANN. § 78B-9-101 <i>et seq.</i>
Vermont	VT. STAT. ANN. tit. 13, § 7131 <i>et seq.</i>
Virginia	VA. CODE ANN. § 8.01-654 <i>et seq.</i>
Washington	WASH. REV. CODE ANN. § 7.36.010 <i>et seq.</i>
West Virginia	W. VA. CODE § 53-4A-1 <i>et seq.</i>
Wisconsin	WIS. STAT. ANN. § 974.06 <i>et seq.</i>
Wyoming	WYO. STAT. ANN. § 7-14-101 <i>et seq.</i> , WYO. STAT. ANN. § 1-27-101 <i>et seq.</i>

APPENDIX B

SAMPLE ARTICLE 440 MOTIONS AND SUPPORTING PAPERS

This Appendix contains the following materials:

- B-1. Sample Notice of Motion by Defendant to Vacate Judgment
- B-2. Sample Defendant's Affidavit in Support of Motion to Vacate Judgment
- B-3. Sample Notice of Motion by Defendant to Set Aside Sentence
- B-4. Sample Defendant's Affidavit in Support of Motion to Set Aside Sentence

DO NOT TEAR THESE FORMS OUT OF THE *JLM*. Copy them on your own paper and fill them out according to the facts of your particular case. The endnotes following the sample documents tell you how to fill in the necessary information. Remember, your affidavit is a sworn statement, you can be punished if you intentionally include any statements that you know are false. Change the wording of the forms, if necessary, so that all the statements apply to your case. You must sign your affidavit in the presence of a notary public.

No poor person's papers (*in forma pauperis*) have been included in these forms. Part C(3) of this Chapter tells you how to use poor person's papers to obtain a lawyer in an Article 440 proceeding. Sample poor person's papers may be found in Chapter 9 of the *JLM*.

Appendix II at the end of the *JLM* lists the addresses and jurisdictions of the New York state courts to which these papers should be addressed.

B-1. Sample Notice of Motion by Defendant to Vacate Judgment

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF _____ⁱ

_____	X	
The People of the State of New York	:	
	:	
Plaintiffs,	:	NOTICE OF MOTION
	:	TO VACATE JUDGMENT
	:	
- against -	:	Indictment No. _____ ⁱⁱ
	:	
_____, ⁱⁱⁱ	:	
	:	
Defendant.	:	
_____	X	

PLEASE TAKE NOTICE that upon the annexed affidavit of _____,^{iv} duly sworn to the ____ day of _____, _____,^v (and documents attached thereto) and upon the accusatory instrument and _____,^{vi} and all proceedings previously heretofore held herein, defendant will move this Court at Criminal Term, Part _____^{vii} thereof, at the Courthouse located at _____,^{viii} on the ____ day of _____, _____ at ____ a.m.,^{ix} or as soon thereafter as counsel may be heard, for:

An order pursuant to Criminal Procedure Law § 440.10(____)^x vacating the judgment entered against the above-named defendant on the ____ day of _____, _____,^{xi} on the following grounds:

1. _____
2. _____^{xii}

[*if applicable, include*] An order pursuant to N.Y. Crim. Proc. Law § 440.30(1-a), directing that forensic Deoxyribonucleic Acid (DNA) testing be performed on evidence specified in the annexed affidavit,

An order, pursuant to N.Y. Crim. Proc. Law § 440.30(5), to produce the defendant at any hearing to be conducted for the purpose of determining this motion, and

Such other and further relief as the Court may deem just and proper.

Dated: _____
 _____,^{xiii}
 _____^{xiv}
 _____^{xv}

Defendant, *pro se*.^{xvi}

To: .

District Attorney of
 _____ County,
 _____, New York^{xvii}

B-2. Sample Defendant's Affidavit in Support of Motion to Vacate Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____^{xviii}

_____	X	
The People of the State of New York	:	
	:	
Plaintiffs,	:	AFFIDAVIT
	:	
- against -	:	Indictment No. _____ ^{xix}
	:	
_____, ^{xx}	:	
Defendant.	:	
_____	X	

State of New York)
County of _____^{xxi} ss.:)

_____,^{xxii} being duly sworn, deposes and says:

1. I am the defendant in the above-entitled proceeding. I make this affidavit in support of a motion, pursuant to section 440.10, subdivision _____,^{xxiii} to vacate the judgment of conviction herein, upon the ground that _____.^{xxiv}

2. I was indicted for _____.^{xxv} At the arraignment I entered a plea of "not guilty" and posted bail in the amount of \$ _____.^{xxvi} I was tried in this court before Hon. Judge _____^{xxvii} on _____, _____.^{xxviii} The case was submitted to a jury, which rendered a verdict of guilty.^{xxix}

3. On _____, _____,^{xxx} I was sentenced to _____.^{xxxi}

4. The evidence adduced at my trial may be summarized as follows:

_____,^{xxxii}
_____,^{xxxiii}

6. *[If applicable, include:]* Among the evidence gathered by the State in its investigation of the crime and admitted at my trial *[or]* but not admitted at my trial was _____, which contains Deoxyribonucleic Acid (DNA). DNA testing of _____ is relevant to proof of guilt in that _____.
_____.^{xxxiv} My conviction occurred prior to January 1, 1996, to wit, on _____.

7. The ground(s) for relief raised upon this motion has (have) not previously been determined on the merits upon a prior motion or proceeding in a court of this state, or upon an appeal from the judgment, or upon a prior motion or proceeding in a federal court.^{xxxv}

WHEREFORE, I respectfully request that my conviction be vacated on the ground that _____,^{xxxvi} and that this Court grant such other and further relief as it may deem just and proper *[or if applicable:]* WHEREFORE, I respectfully request an Order of this Court pursuant to N.Y. Crim. Proc. Law § 440.30(1-a), directing that forensic Deoxyribonucleic Acid (DNA) testing be conducted upon _____.^{xxxvii}

_____^{xxxviii}

_____^{xxxix}

Sworn to before me this:

day of _____, 20____

xl

NOTARY PUBLIC

B-3. Sample Notice of Motion by Defendant to Set Aside Sentence

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF _____^{xli}

_____	X	
The People of the State of New York	:	
	:	
Plaintiffs,	:	NOTICE OF MOTION
	:	TO SET ASIDE SENTENCE
	:	
- against -	:	Indictment No. _____ ^{xlii}
	:	
_____, ^{xliii}	:	
	:	
Defendant.	:	
_____	X	

PLEASE TAKE NOTICE that upon the annexed affidavit of _____,^{xliv} duly sworn to the _____ day of ___, 20___,^{xlv} (and documents attached thereto) and upon the accusatory instrument and all other papers filed and proceedings heretofore had herein, defendant will move this Court, Part _____^{xlvi} thereof, at the Courthouse located at _____,^{xlvii} on the ___ day of _ ___, 20___, at ___ a.m.,^{xlviii} or as soon thereafter as counsel may be heard, for:

(1) an order, pursuant to Criminal Procedure Law, section 440.20, setting aside the sentence heretofore imposed upon the above-named defendant on the __ day of _____, _____,^{xlix} or, in the alternative, ordering a hearing to determine whether such sentence should be set aside on the ground(s) that:

_____^[reasons],¹

(2) An order, pursuant to Crim. Proc. Law § 440.30(5), to produce the defendant at any hearing conducted to determine this motion, and

(3) Such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are to be served upon the undersigned at least ___^{li} days prior to the return of this motion.

Dated: _____

_____^{lii}

_____^{liii}

Defendant, *pro se*.

To:

District Attorney of

_____ County,

_____, New York^{liv}

B-4. Sample Defendant's Affidavit in Support of Motion to Set Aside Sentence

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____^{lv}

_____	X	
The People of the State of New York	:	
	:	
Plaintiffs,	:	AFFIDAVIT
	:	
- against -	:	Indictment No. _____ ^{lvi}
	:	
_____, ^{lvii}	:	
Defendant.	:	
_____	X	

State of New York)
County of _____^{lviii} ss.:)

_____,^{lix} being duly sworn, deposes and says:

1. I am the defendant in the above-entitled proceeding. I make this affidavit in support of a motion, pursuant to section 440.20 to set aside the sentence herein, upon the ground that _____^{lx}

2. I was indicted for _____^{lxi}. At the arraignment I entered a plea of "not guilty" and posted bail in the amount of \$_____.^{lxii} I was tried in this court before Hon. Judge _____^{lxiii} on _____, _____^{lxiv}

3. After a trial^{lxv} held on _____, _____, ^{lxvi} I was found guilty of count(s) _____^{lxvii} of the indictment charging _____ in the _____ degree, a Class _____ felony.^{lxviii} Bail was revoked and I was held in the _____, located at _____, _____^{lxix} New York, until the sentencing for my conviction held on _____, _____^{lxx} before Hon. Judge _____^{lxxi} in Criminal Term Part _____ of the _____^{lxxii} County Supreme Court.

4. I was sentenced to a _____ term of imprisonment at _____ Correction Facility, _____, ^{lxxiii} New York.

5. _____^{lxxiv}

6. _____^{lxxv}

7. The ground(s) for relief described by this affidavit has (have) not previously been determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court.^{lxxvi}

WHEREFORE, I respectfully request that this Court enter an order, pursuant to section 440.20 of the Criminal Procedure Law, setting aside the sentence imposed upon me and resentencing me in accordance with law, and granting such other and further relief as the Court may deem just and proper.

_____^{lxxvii}

Sworn to before me this:

day of _____, 20____^{lxxviii}

NOTARY PUBLIC

Fill in the blanks indicated in the sample documents as follows:

-
- i. Fill in the name of the county in which the court hearing your motion is located.
 - ii. Fill in your indictment number.
 - iii. Fill in your name.
 - iv. Since you should submit an affidavit with your motion, you should fill your name in here. Also, if you are submitting affidavits of other people who have taken part in your case, their names should be filled in, and the word "affidavit" changed to "affidavits."
 - v. Fill in the date or dates on which you or others signed your affidavits: day, month, year.
 - vi. Describe briefly other documents, if any, that you are attaching because they will help you make your case to the court. For example, you can mention a transcript of your trial.
 - vii. Fill in the "Part" number of the court, if you know it.
 - viii. Fill in the address of the court.
 - ix. Fill in the date on which the hearing will be held.
 - x. Fill in the subsection of § 440.10 that corresponds to the ground upon which you are making your motion. See Section B(2) of this Chapter for information on these subsections.
 - xi. Fill in the day, month, and year on which the judgment of conviction was entered against you.
 - xii. List the reasons why you think the court should vacate the judgment against you. See Section B(2) of this Chapter for more information.
 - xiii. Fill in date on which you signed this notice, and the city and state in which you signed it.
 - xiv. Sign your name here.
 - xv. Fill in your complete mailing address here.
 - xvi. *Pro se* means that you are acting as your own legal representative (without a lawyer).
 - xvii. Fill in the name of the district attorney, and the county and town in which he or she is located.
 - xviii. Fill in the name of the county in which the court hearing your motion is located.
 - xix. Fill in your indictment number.
 - xx. Fill in your name.
 - xxi. Fill in the name of the county in which you are signing this affidavit.
 - xxii. Your name, in capital letters.
 - xxiii. Fill in the subsection of § 440.10 that corresponds to the ground upon which you are making your motion. See Section B(2) of this Chapter.
 - xxiv. List briefly the ground that corresponds to the subsection of N.Y. Crim. Proc. Law § 440.10 provided above. See Section B(2) of this Chapter for a list of grounds.
 - xxv. Fill in the name of the offense for which you were indicted.
 - xxvi. Fill in the amount of bail you posted.
 - xxvii. Fill in the trial judge's name.
 - xxviii. Fill in the date or dates including the day, month, and year on which your trial took place.
 - xxix. If you did not have a jury trial, simply indicate that the judge found you guilty.
 - xxx. Fill in the day, month, and year on which judgment was given in your case.
 - xxxi. Fill in the sentence ordered in your case.
 - xxxii. Summarize the evidence that the prosecution relied upon and that the jury was allowed to consider.
 - xxxiii. Summarize the facts which support the reasons you set out in numbers 1 through 8, above, for challenging your conviction.
 - xxxiv. Fill in the evidence, if any, containing DNA samples, how that evidence proves your innocence, and the date, prior to January 1, 1996, that your conviction occurred, if applicable.
 - xxxv. If you have previously raised the issues on which you are basing this motion, you should change this paragraph to reflect that fact. If the law has changed since you previously litigated the issues, you should state this.
 - xxxvi. Briefly state the reasons for your motion.
 - xxxvii. Fill in the evidence upon which you want DNA testing performed.
 - xxxviii. Sign your name, ***in the presence of a notary public***. If your prison will not give you access to a notary, see Appendix A, Endnote 102 to Chapter 16 of the *JLM*.
 - xxxix. Print your complete mailing address below your signature.
 - xl. The notary will sign and fill in the date here after seeing you sign the document.
 - xli. Fill in the name of the county in which the court hearing your motion is located.
 - xlii. Fill in your indictment number.
 - xliii. Fill in your name.
 - xliv. Since you should submit an affidavit with your motion, your name should be filled in here. Also, if you are submitting affidavits of other people who took part in the case, their names should be filled in, and the word "affidavit" changed to "affidavits."
 - xlv. Fill in the date you signed your affidavit.

-
- xlvi. Enter the number of the court part, if you know it.
 - xlvii. Enter the address and city of the court hearing your motion.
 - xlviii. Enter the date and time of your hearing.
 - xliv. Enter the day, month, and year on which you were sentenced.
 - l. Give the reasons your sentence should be set aside. See Section B(2) of this Chapter. The three grounds are (a) sentence unauthorized, (b) sentence illegally imposed, or (c) sentence invalid otherwise, as a matter of law. If you can raise more than one ground, you should include all that apply.
 - li. Fill in the amount of notice you feel is necessary, considering the length of time you will need to develop arguments to answer their affidavit.
 - lii. Fill in date on which you signed this notice, and the city and state in which you signed it.
 - liii. Sign your name and print your complete mailing address underneath.
 - liv. Enter the name of the district attorney, followed by his or her county and address.
 - lv. Fill in the name of the county in which the court hearing your motion is located.
 - lvi. Fill in your indictment number.
 - lvii. Fill in your name.
 - lviii. Fill in the name of the county in which you are signing this affidavit.
 - lix. Your name, in capital letters.
 - lx. List briefly the reasons why you think the court should vacate the sentence against you. See Section B(2) of this Chapter for a list of possible reasons.
 - lxi. Fill in the name of the offense for which you were indicted.
 - lxii. Fill in the amount of bail you posted.
 - lxiii. Fill in the trial judge's name.
 - lxiv. Fill in the date or dates, including day, month, and year on which your trial took place.
 - lxv. If you pled guilty, leave out this first sentence in paragraph 3. Instead, write: "I entered a plea of guilty to (give the name of the crime), a Class (give the class of the felony: A, B, C, etc.) felony."
 - lxvi. If you had a trial, fill in the date or dates, including the day, month, and year of the trial.
 - lxvii. If you had a trial, fill in the numbers of the counts of the indictment of which you were convicted.
 - lxviii. If you had a trial, fill in the names, degrees (if any), and classes of the offenses of which you were convicted.
 - lxix. Give the name and address of the facility where you were held while you were waiting to be sentenced.
 - lxx. Fill in the date, including the day, month, and year of your sentencing.
 - lxxi. Fill in the name of the judge who sentenced you.
 - lxxii. Enter the county and part number of the court that sentenced you.
 - lxxiii. Enter the terms of the sentence that you received and the name and address of the facility in which you are to serve your sentence.
 - lxxiv. Indicate whether or not an appeal has been taken in your case. If so, give the name of the court, the date it was heard/decided, and the name of the judge who heard your appeal.
 - lxxv. Give the reasons why you think your sentence is illegal. See Section B(2) of this Chapter for a list of possible reasons.
 - lxxvi. If you have previously raised the issues on which you are basing this motion, you should change this paragraph to reflect the previous court proceedings. If the law has changed since you previously litigated the issues, you should state this.
 - lxxvii. Sign your name, *in the presence of a notary public*, and print your complete mailing address below your signature.
 - lxxviii. The notary will sign and fill in the date here after seeing you sign the document.

CHAPTER 21

STATE HABEAS CORPUS: FLORIDA, NEW YORK, AND MICHIGAN*

A. Introduction

This Chapter discusses how the writ of habeas corpus is applied in three states: Florida, New York, and Michigan.¹ The rules about habeas corpus in Florida, New York, and Michigan are often similar. This Introduction will give you a short overview of habeas corpus. Part B has specific information about Florida petitions, Part C has specific information about New York petitions, and Part D has specific information about Michigan petitions. These parts offer important information, including how, where, and when to file your petition. If you are in prison in a state other than Florida, New York, or Michigan, and wish to file a habeas corpus petition in state court, the laws may differ in important ways from the ones described below.² You should be sure to check the laws in your own state before filing a state habeas petition.³

1. What is a Writ of Habeas Corpus?

When you file a petition for a writ of habeas corpus, you are asking a judge for a hearing to determine whether your imprisonment is lawful. This hearing is not another trial. Instead of deciding whether you were guilty or not, the judge will evaluate the fairness of the procedure used to convict and sentence you. To get a writ of habeas corpus, you must file a petition for a civil (not criminal) proceeding in either state or federal court. An incarcerated person filing a habeas corpus petition is often referred to as a “petitioner” or “relator.” This chapter will cover filing a petition in state, not federal, court. To learn more about federal habeas corpus, you should read *JLM*, Chapter 13, “Federal Habeas Corpus.”

2. Requirements for Habeas Relief

There are four requirements you must fulfill in order to get state habeas relief:

- (1) you must be in custody,
- (2) you must be entitled to immediate release if your petition is successful,
- (3) you must be incarcerated within a state prison, and
- (4) there must be no other legal procedure to get the relief you want.

(a) Custody

Custody means you are confined by the state in some way. Usually you cannot challenge a sentence you have not started to serve. In Florida, New York, and Michigan, you may apply for habeas corpus if you are in jail or prison. Whether you may apply for habeas corpus if you are on parole, released on a bond, or released on your own recognizance (“ROR”), depends on which state convicted you.⁴ See

* This Chapter was revised by Tanya Sehgal based in part on previous versions by Renate Lunn, Alison Wright and Jennifer Morrison.

1. “Habeas corpus” is often shortened to “habeas.” Also, “petition for a writ of habeas corpus” is sometimes shortened to “petition for habeas corpus,” or “habeas petition.”

2. See *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence,” Appendix A, for a list of statutes for state post-conviction relief in other states. *JLM*, Chapter 2, “Introduction to Legal Research” can help you to conduct further research on the laws in your state.

3. If you are incarcerated in a federal prison, you cannot file for state habeas corpus. You must file a petition for federal habeas corpus. See *JLM*, Chapter 13, “Federal Habeas Corpus” for more information about federal habeas corpus.

4. The phrase “released on your own recognizance” (often shortened to “ROR’d” or simply “ROR”) means that the court has released you without bail because you have given a written promise to appear at your next court date.

Parts A(3)(c), B(3)(c), C(2)(c), and D(2)(c) of this Chapter for more information about habeas corpus petitions if you are on probation or parole.

(b) Immediate Release

Florida, New York, and Michigan courts will usually refuse to consider your habeas corpus petition unless a successful petition will result in your immediate release.⁵ For example, if you are serving time for several convictions, you may not petition for a writ of habeas corpus to challenge only one conviction or sentence, since you will remain imprisoned for the other convictions regardless of the outcome of your petition.⁶

However, you may be able to petition for habeas corpus even though it will not result in your immediate release if you complain about a specific aspect of your incarceration. For example, if you are incarcerated at the wrong facility or your bail was set too high, you may petition for a writ of habeas corpus. While you will not be released if your petition is granted, you will be transferred to the correct facility or your bail will be lowered.

(c) Incarcerated within the state

If you are incarcerated in a federal prison, state habeas corpus relief is not available to you.⁷ See *JLM*, Chapter 13, “Federal Habeas Corpus,” for help with applying for a habeas writ in federal court

5. **In Florida:** see *North v. State*, 217 So. 2d 608, 609 (Fla. Dist. Ct. App. 1969) (denying petition for writ of habeas corpus when defendant was no longer in custody); *Schmunk v. State ex rel. Sandstrom*, 353 So. 2d 907, 907 (Fla. Dist. Ct. App. 1977) (denying petition when defendant was fined for a traffic violation, but never in custody). **In New York:** see *People ex rel. Daniels v. Beaver*, 303 A.D.2d 1025, 1025, 757 N.Y.S.2d 195, 195 (4th Dept. 2003) (holding that trial court properly dismissed habeas petition where, even if petitioner had been denied the right to appear before the Parole Board, he would not have been entitled to immediate release); *People ex rel. Chakwin v. Warden*, 63 N.Y.2d 120, 125, 470 N.E.2d 146, 148, 480 N.Y.S.2d 719, 721 (1984) (“[H]abeas corpus generally will lie only where the defendant would become entitled to his immediate release upon the writ being sustained[.]”); *People ex rel. Kaplan v. Comm’r of Corr.*, 60 N.Y.2d 648, 649, 454 N.E.2d 1309, 1309, 467 N.Y.S.2d 566, 566 (1983) (denying writ of habeas corpus because petitioner would only be entitled to the remedies of a new trial or new appeal, not immediate release). See also *People ex rel. DeFlumer v. Strack*, 212 A.D.2d 555, 555, 623 N.Y.S.2d 1, 1 (2d Dept. 1995) (denying habeas petition where petitioner challenged several conditions of his conditional release); *People ex rel. Travis v. Coombe*, 219 A.D.2d 881, 881, 632 N.Y.S.2d 340, 340 (4th Dept. 1995) (denying habeas petition where conditions for conditional release were not met and petitioner was therefore not entitled to immediate release even if the writ was granted). **In Michigan:** see *Trayer v. Kent Cnty. Sheriff*, 304 N.W.2d 11, 12, 104 Mich. App. 32, 34–35 (Mich. Ct. App. 1981) (finding petition for writ of habeas corpus not proper where petitioner was transferred out of state and therefore the state that was petitioned could not provide immediate release).

6. **In Florida:** see *Alderman v. State*, 188 So. 2d 803, 804 (Fla. 1966) (denying writ of habeas corpus when an incarcerated person was legally incarcerated on concurrent sentences and only challenged one sentence); *Gorman v. Cochran*, 127 So. 2d 667, 667–668 (Fla. 1961) (denying writ of habeas corpus to an incarcerated person who was attacking a future sentence he had not yet begun to serve). **In New York:** see *People ex rel. Brown v. N.Y. State Div. of Parole*, 70 N.Y.2d 391, 398, 516 N.E.2d 194, 197, 521 N.Y.S.2d 657, 660 (1987) (denying writ of habeas corpus because an incarcerated person, “in addition to being held on the parole violation, is being held on unrelated pending criminal charges. Because success on the merits in this proceeding would not entitle him to immediate release from custody, the remedy of habeas corpus is unavailable.”). **In Michigan:** see *In re Rhyndress*, 317 Mich. 21, 23, 26 N.W.2d 581, 582 (1947) (denying writ of habeas corpus to an incarcerated person serving two sentences, one for breaking and entering and one for escaping from prison, at least “until the expiration of the sentence imposed upon him for escaping from prison”).

7. **In Florida:** see *Simmons v. State*, 579 So. 2d 874, 874 (Fla. Dist. Ct. App. 1991) (holding that the state circuit court is without power to issue a writ of habeas corpus for an incarcerated person who is not in the custody of the state). **In New York:** see N.Y. C.P.L.R. § 7002(a) (McKinney 2013) (“A person illegally imprisoned or otherwise restrained in his liberty within the state. . . may petition without notice for a writ of habeas corpus[.]”); N.Y. C.P.L.R. § 7002(c)(3) (McKinney 2013) (“The petition. . . shall state. . . that a court or judge of the United States does not have exclusive jurisdiction to order [the petitioner] released.”). **In Michigan:** see *In re Abbott*, 255 N.W. 603, 604, 267 Mich. 703, 706 (1934) (“No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them.”).

if you are incarcerated in a federal prison or if you are unsure about whether you are incarcerated in a federal prison. Importantly, if you are incarcerated within a state prison, you must submit your petition in the state where you are incarcerated.⁸

(d) No Other Options

You may not petition the court for a writ of habeas corpus if there are still other ways to get the relief you seek. Other procedures include an appeal, administrative procedures, and grievance procedures. If you have not yet finished your appeal or are in the middle of a grievance hearing, you should not file a habeas petition until you are done with those other procedures. A habeas petition is different from these other procedures. For instance, when you appeal, you are asking the court to reconsider the decision of the lower court. When you file a habeas petition, on the other hand, you are asking the court to consider whether the conviction and sentencing procedure was fair. You should read *JLM*, Chapter 15, “Inmate Grievance Procedures,” for more information about grievance proceedings for incarcerated people, and *JLM*, Chapter 9, “Appealing Your Conviction or Sentence,” for discussion of an appeal. Each state has its own standards for and exceptions to the general rule that other procedures must not be available when seeking habeas relief.

3. What You Can Complain About in Your Habeas Petition

(a) Before Trial⁹

If you are incarcerated (detained) before your trial, you may be able to claim one of the following grounds for habeas relief: improper extradition, excessive bail, or delay. In Florida, you can also challenge a search warrant or probable cause. These grounds are discussed in detail in Part B of this Chapter.

(i) Extradition

An extradition is a warrant for arrest demanding that the arrested person be returned to and tried in the state issuing the warrant. If you were arrested in Florida, New York, or Michigan on an extradition warrant from another state (the demanding state), you may contest extradition to that state by petitioning the court for a writ of habeas corpus in the state in which you are in custody.¹⁰ However, the Supreme Court has held that in such circumstances the state court may only consider the following issues: whether the documents from the demanding state are in order, whether you are a fugitive, whether you have been charged with a crime in the demanding state, and whether you are the person named in the extradition warrant.¹¹

8. **In Florida:** see *Dugger v. Jackson*, 598 So. 2d 280, 282, 17 Fla. L. Weekly 1264, 1266 (Fla. Dist. Ct. App. 1992) (vacating lower court's grant of habeas corpus writ because incarcerated person had not petitioned the state of conviction, South Carolina, nor had the state given its authority for the Florida court to hear such claim). **In New York:** see *People ex rel. Warren v. People*, 171 A.D.2d 768, 768, 567 N.Y.S.2d 321, 321 (2d Dept. 1991) (dismissing federal incarcerated person's habeas corpus petition because the petitioner was incarcerated outside of New York State); **In Michigan:** see MICH. COMP. LAWS § 600.4307, 600.4310 (1961) (specifying that actions for habeas corpus may not be brought “in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts”).

9. See *JLM*, Chapter 3, “Your Right to Learn the Law and Go to Court” for more information generally on your rights before trial.

10. For example, if you are arrested in Florida on an extradition warrant from Georgia, you could contest your extradition to Georgia using the Florida state habeas corpus procedures.

11. The demanding state is the state that requested the arrest and the state to which the incarcerated person will be extradited (sent) for prosecution. The state in which the incarcerated person is being held is known as the asylum state. See *State v. Luster*, 596 So. 2d 454, 456, 17 Fla. L. Weekly 206, 206 (Fla. 1992) (adopting *Doran* in Florida); *People ex rel. Coster v. Andrews*, 104 Misc. 2d 506, 512, 428 N.Y.S.2d 594, 597–598 (Sup. Ct. Broome County 1980) (applying *Doran* to New York); *Michigan v. Doran*, 439 U.S. 282, 289, 99 S. Ct. 530, 535, 58 L. Ed. 2d 521, 527 (1978) (“[A] court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether

You may challenge the extradition warrant on the following two grounds: (1) if you can prove by convincing evidence that you were not in the demanding state at the time the crime was committed, or (2) if you have been held longer than allowed by the laws of the state in which you are held.¹²

(ii) Bail

You do not have a constitutional right to bail, but if you are granted bail, it must not be excessive. Florida, New York, and Michigan all permit you to ask for habeas relief if you have been denied bail, or if the bail was excessive.¹³ Each state has different ways to decide when bail is too much. Read the state-specific parts of this Chapter and research your state's laws to get the most correct information.

(iii) Delay

Each state has a maximum amount of time that it can keep you in prison without filing formal charges. You can file for habeas corpus if you have been in prison for longer than this without being charged. There are two types of formal charges. The first is called an *information*. Prosecutors can issue an information without a grand jury. New York prosecutors usually use informations to charge people with misdemeanors. The second formal charge is called an *indictment*. Grand juries issue indictments.

(b) After Your Conviction

If you are incarcerated after your conviction, you may be able to claim one of the following grounds for habeas relief:

- (1) confinement beyond your sentence or a miscalculation of sentence;
- (2) violation of fundamental constitutional or statutory rights;
- (3) new or void law;
- (4) ineffective assistance of counsel; or

the petitioner is a fugitive.”). *See also* *People v. Culwell*, 163 Misc. 2d 576, 579–580, 621 N.Y.S.2d 490, 492–493 (Sup. Ct. Schoharie County 1995) (granting writ of habeas corpus and finding that petitioner was not a fugitive where the demanding state failed to comply with N.Y. Crim. Proc. Law § 570.16 (McKinney 2009), which required proof that petitioner either committed a crime in the demanding state *or* did acts in New York which would constitute a crime in the demanding state).

12. In **Florida**, this ties into the other factors. If you were not in the demanding state at the time of the incident then you are also not a fugitive from justice. *See* *Galloway v. Josey*, 507 So. 2d 590, 594, 12 Fla. L. Weekly 182, 182 (Fla. 1987) (granting habeas petition and holding that once a petitioner comes forward with clear and convincing evidence to rebut the presumption that he was a fugitive, the burden shifts to the state to produce competent evidence discrediting an incarcerated person's proof to such a degree that it is no longer clear and convincing). *See also* *State v. Cox*, 306 So. 2d 156, 159, (Fla. Dist. Ct. App. 1974) (“[T]he question of whether an accused is a fugitive from justice asks nothing more than whether he was bodily present in the demanding state at the time of the offense and thereafter departed from that state.”); *State ex rel. Smith v. Clark*, 33 So. 2d 721, 722, 160 Fla. 113, 114 (Fla. 1948) (denying habeas petition where record determined that petitioner was in the state at the time of the commission of the robbery); *Trent v. McLeod*, 179 So. 906, 907, 131 Fla. 617, 618–619 (Fla. 1938) (denying habeas petition where nothing in the record supported petitioner's claim that he was not in the demanding state); *State ex rel. Stringer v. Quigg*, 107 So. 409, 412, 91 Fla. 197, 203 (Fla. 1926) (holding that the court must consider, among other things, whether the warrant shows that he was in the demanding state at the time that the offense was committed); *Kuney v. State*, 102 So. 547, 549, 88 Fla. 354, 358–359 (Fla. 1924) (reversing lower court because it did not consider whether petitioner was in the demanding state at the time of the alleged offense).

In **New York**: *see* *People ex rel. Friedman v. Comm'r of N.Y.C. Dept. of Corr.*, 66 A.D.2d 689, 690, 411 N.Y.S.2d 267, 268–269 (1st Dept. 1978) (holding that failure to specify when a crime was committed deprived petitioner of the right to prove that he was out of the state at the time). *But see* *People ex rel. Pata v. Lindemann*, 75 A.D.2d 654, 654–655, 427 N.Y.S.2d 445, 446 (2d Dept. 1980) (denying habeas petition and holding that where the indictment charged crimes of a continuing nature which allegedly took place throughout the entire period covered by the indictment, it was up to the accused to prove his absence from the demanding state throughout the entire period).

13. In **Florida**: *see* FLA. R. CRIM. P. § 3.131(d)(3) (West 2019). In **New York**: *see* N.Y. C.P.L.R. § 7010(b) (McKinney 2013).

(5) discovery of new evidence.

In New York, you can also file if there has been excessive delay before your trial, or a violation of the rules of your sentence.¹⁴ Each state has a different approach. For more information on grounds for habeas petitions in particular states, see Parts B (Florida), C (New York), and D (Michigan) of this Chapter.

(c) While You Are On Probation or Parole

You can also file a habeas petition if your parole or probation is taken away. Every state gives you the right to a hearing to decide if you have violated the terms of your parole.¹⁵ The hearing determines if you will be held in custody until the decision on whether your parole will be taken away.

The court must tell you when and where the hearing will take place. You have the right to attend the hearing, speak for yourself, bring witnesses to speak for you, and question witnesses speaking against you. You also have the right to a *hearing* on whether your parole or probation will be taken away “within a reasonable time” after you have been taken into custody.¹⁶ For more information about parole, see *JLM*, Chapter 35, “Getting Out Early: Conditional and Early Release,” and *JLM*, Chapter 36, “Parole.”

In Florida, you can use a habeas petition to challenge any mistakes made in these hearings. You can also use a habeas petition to challenge Florida Probation and Parole Commission decisions about your expected parole release date.¹⁷ You can file a habeas petition if you are still in prison after your expected release date.¹⁸

New York¹⁹ and Michigan allow habeas petitions in connection with parole revocation hearings.

14. *See People ex rel. Anderson v. Warden, N.Y.C. Corr. Inst. for Men*, 68 Misc. 2d 463, 468, 325 N.Y.S.2d 829, 835 (Sup. Ct. Bronx County 1971) (holding that “if there is an unreasonable delay in the disposition of an article 440 motion, the defendant can, perhaps, properly bring a writ of habeas corpus.”); *see also People ex rel. Lee v. Smith*, 58 A.D.2d 987, 987, 397 N.Y.S.2d 266, 267 (4th Dept. 1977) (granting a hearing on the merits of relator’s habeas corpus petition, even though an appeal was pending, because the relator’s appeal had been pending for more than four years). You should read Part C(2)(b)(vi) of this Chapter for more information about “unreasonable delay” habeas grounds in New York. *See People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (1961) (holding that “it seems quite obvious that any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry.”). You should read Part C(2)(h)(1) of this Chapter for more information about “violation of the conditions of your sentence” habeas grounds in New York.

15. *Morrissey v. Brewer*, 408 U.S. 471, 485, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496–497 (1972). Since this is a Supreme Court case, it applies to all states.

16. *Morrissey v. Brewer*, 408 U.S. 471, 487–488, 92 S. Ct. 2593, 2603–2604, 33 L. Ed. 2d 484, 498 (1972).

17. *See State v. Sampson*, 297 So. 2d 120, 121–122 (Fla. Dist. Ct. App. 1974) (finding that habeas corpus is the proper method for challenging an order of the Florida Parole and Probation Commission); *see also State ex rel. Wainwright v. Holley*, 234 So. 2d 409, 410 (Fla. Dist. Ct. App. 1970) (holding that the proper way to challenge an error in post-conviction proceedings such as parole revocation is through habeas corpus); *Jackson v. Mayo*, 73 So. 2d 881, 882–883 (Fla. 1954) (granting relief where no evidence was offered to authorize revocation of parole); *Beal v. Mato*, 70 So. 2d 367, 369 (Fla. 1954) (holding that where there is a complete absence of any adjudication at all, the judgment and sentence will be subject to being set aside on habeas corpus); *Sellers v. Bridges*, 15 So. 2d 293, 295, 153 Fla. 586, 590–591 (Fla. 1943) (holding that whether an incarcerated person inexcusably violated conditions of pardon or parole was proper for habeas inquiry). *See Williams v. Florida Parole Comm’n*, 625 So. 2d 926, 934, 18 Fla. L. Weekly 2258 (Fla. Dist. Ct. App. 1993) (finding that the proper remedy to challenge presumptive release date is habeas corpus and the proper remedy for refusal to set a presumptive release date is mandamus).

18. *See Jenrette v. Wainwright*, 410 So. 2d 575, 576–578 (Fla. Dist. Ct. App. 1982) (ruling that incarcerated person whose presumptive parole release date had passed was entitled to immediate release on habeas corpus).

19. Read Part C(2)(j)(ii) of this Chapter for more information about bringing a petition for habeas corpus in connection with your parole revocation hearing in New York.

(d) Jurisdiction

You may also get habeas relief if the court that imprisoned you did not have *jurisdiction* to do so. Jurisdiction is the ability to hear and decide your case. Every court needs two types of jurisdiction. First, the court must have personal jurisdiction, or the power to judge you. The court must also have subject matter jurisdiction, or the power to judge the act you were charged with. If the court that sentenced you did not have either or both of these, you can file a habeas petition.²⁰

(i) Personal Jurisdiction

A court has personal jurisdiction over you when you are brought to that court and appear before the judge.²¹ This probably already happened when you were convicted or at your *arraignment* (if you have not yet gone to trial). Because of this, it is very difficult to petition for habeas by arguing that the court lacked personal jurisdiction.

(ii) Subject Matter Jurisdiction

Subject matter jurisdiction is the court's ability to decide cases related to the action that you were charged with. The court only has subject matter jurisdiction if the right kind of charges have been issued.²² Formal charges give jurisdiction to a court, so you can file a habeas petition before or after your conviction if the charges against you have serious issues.²³ To get habeas relief, the charges must

20. *See Ex parte Livingston*, 156 So. 612, 618, 116 Fla. 640, 654 (Fla. 1934) (“Want of jurisdiction over person or subject matter is always ground for relief on habeas corpus.”).

21. *See Frisbie v. Collins*, 342 U.S. 519, 522–523, 72 S. Ct. 509, 511–512, 96 L. Ed. 541, 545–546 (1952) (denying petitioner's application for habeas corpus even though he was brought into the court's jurisdiction by forcible abduction).

In New York, *see* *People ex rel. Ortiz v. Warden*, 119 A.D.2d 526, 528, 501 N.Y.S.2d 667, 668 (App. Div. 1st Dept. 1986) (dismissing petition for habeas corpus, and, by applying two U.S. Supreme Court cases to New York, ruling that even though New York authorities did not provide the proper papers for extradition, court has personal jurisdiction if petitioner is present in court).

22. An “information” and an “indictment” are both considered formal charges. *See JLM*, Appendix V: Definitions of Words Used in the *JLM*. Read Part A(3)(a)(iii) of this Chapter for information about the different types of formal charges.

23. **In Florida**: *see Ex parte Livingston*, 156 So. 612, 618, 116 Fla. 640, 654 (Fla. 1934) (holding that a faulty indictment may be grounds to overturn a conviction and may be challenged at any time); *see also* *Farrior v. State ex rel. Compton*, 13 So. 2d 147, 147, 152 Fla. 754, 756 (Fla. 1943) (finding that habeas is a proper remedy for an indictment that fails to allege a crime); *Locklin v. Pridgeon*, 30 So. 2d 102, 103 158 Fla. 737, 739 (Fla. 1947) (finding that “the sufficiency of the indictment may be challenged in habeas corpus proceedings when it totally fails to charge an offense under any valid law,” and granting a writ of habeas corpus where the statute under which he was convicted was too indefinite and uncertain to comply with due process requirements); *Ex parte Wilson*, 14 So. 2d 846, 846–847, 153 Fla. 459, 460–461 (Fla. 1943) (granting habeas petition and remanding with instructions where verdict purporting to find petitioner guilty of criminal offense was defective as the crime was not found within the statutes and judgment pronounced by trial court was imperfect), *aff'd* 155 Fla. 511, 20 So. 2d 673 (1945); *House v. State*, 172 So. 734, 735, 127 Fla. 145, 149–150 (Fla. 1937) (granting habeas petition when court failed to adjudicate the petitioner as “guilty” following his guilty plea, leaving the resolution of his case “incomplete”); *Martin v. State*, 166 So. 467, 467, 123 Fla. 143, 144–45 (Fla. 1936) (holding that petitioner could raise issue of defective information on post-conviction petition for writ of habeas corpus). **In New York**: *see People ex rel. Morris v. Skinner*, 67 Misc. 2d 221, 224, 323 N.Y.S.2d 905, 909 (Sup. Ct. Monroe County 1971) (granting habeas relief where information failed to charge petitioner with a crime); *John A. Gebauer et al.*, 64 N.Y. Jur. 2d, Habeas Corpus § 47 (2nd ed. 2020) (“Where it appears, on the return to a writ of habeas corpus, that the relator is improperly detained because of the failure to lodge the proper information against him or her, it is the duty of the court to discharge him or her from future detention. . .”); *see also People ex rel. Gray v. Tekben*, 86 A.D.2d 176, 180, 449 N.Y.S.2d 276, 280 (N.Y. App. Div. 2d. Dept. 1982) (granting habeas corpus where the indictment charging assault in second degree only conferred jurisdiction to enter judgment on such crime or lesser included offenses, and petitioner was convicted of another offense, which was neither included in the indictment nor a lesser included offense of assault), *aff'd*, 57 N.Y.2d 651, 439 N.E.2d 875, 454 N.Y.S.2d 66 (1982). **In Michigan**: *see Ringstaff v. Mintzes*, 539 F.Supp.1124, 1129 (E.D. Mich. 1982) (holding that “habeas corpus relief can be invoked with respect to indictments returned by grand juries only where the indictment is so defective that a valid conviction could

be so wrong that they do not even charge you with a crime.²⁴ What constitutes as a defective indictment varies from state to state. For instance, a defective indictment might not list all of the elements of the crime, or it might charge you with something not against the law, or it might have been issued after the *statute of limitations* for the offense has run. If the court finds the indictment is defective, it will be voided and you will be entitled to immediate release for that charge. But, the prosecutor may try to re-indict you for the same offense, using an indictment that is not defective.

B. Florida

This Part explains some of the basic rules for filing a habeas corpus petition in Florida.

1. Requirements

The Florida writ of habeas corpus rules can be found in Rule 3.850 of the Florida Rules of Criminal Procedure and in Title VI, Section 79.01 of the Florida State Statutes.²⁵ To challenge your conviction, sentence, or confinement, you must either file a Rule 3.850 motion or file a habeas petition. If you want to challenge your conviction on any of the grounds specified in Rule 3.850 (see the next Section titled “Requirements of a Rule 3.850 Motion”), then you must file a Rule 3.850 motion. If your grounds for relief do not fall within those listed in the Section “Determining Whether to File a Rule 3.850 Motion or a Habeas Petition” below, then you may file a habeas petition. Although the Rule 3.850 motion asks for relief similar to a habeas petition, you should be sure to follow its own specific pleading requirements. Incarcerated persons facing the death penalty in Florida must follow a different procedure.²⁶ The rest of this Section will explain the requirements for a habeas petition, and the requirements for a Rule 3.850 petition will follow.

(a) Custody

If you are on parole or probation, you are eligible for habeas corpus.²⁷ However, if you have been released on bond or “released on your own recognizance” (you signed a promise saying that you will show up for future court appearances and will not engage in any illegal activity), you may not file a petition for writ of habeas corpus in Florida.²⁸

(b) Immediate Release

You must be entitled to immediate release upon the success of your habeas claim.

(c) Incarcerated Person within the state

In Florida, if you were convicted in another state, but sent to prison in Florida, the state that convicted you (the sending state) must hear your habeas corpus petition.²⁹

under no circumstances result from facts proved thereunder”).

24. In Florida: *see Ex parte Stirrup*, 19 So. 2d 712, 713, 155 Fla. 173, 174 (Fla. 1944) (holding habeas will not secure release where the indictment was merely defective in its allegations but that it will secure release when the charge fails to state any offense); *see also Petersen v. Mayo*, 65 So. 2d 48, 48 (Fla. 1953) (“Defects in an information are not subject to attack in a habeas corpus proceeding unless the defects are of such magnitude that the information utterly fails to charge any crime or offense under the laws of the State of Florida.”).

25. FLA. R. CRIM. P. 3.850(a)–(n) (2009). FLA. STAT. ANN. § 79.01 (2009).

26. *See* FLA. R. CRIM. P. 3.851 (2009) (setting out additional relief procedures after a death sentence has been imposed and affirmed on direct appeal).

27. *See* *State v. Bolyea*, 520 So.2d 562, 563–564, 13 Fla. L. Weekly 117, 117 (Fla. 1988) (holding that a petitioner on probation is in custody); *Sellers v. Bridges*, 15 So. 2d 293, 295–296, 153 Fla. 586, 590–591 (Fla. 1943) (holding that parole is sufficient restraint on freedom to consider parolee in custody).

28. *See* *State ex rel. Curley v. Gatlin*, 5 So. 2d 54, 54, 149 Fla. 1, 1 (Fla. 1941) (holding that incarcerated person released on an appearance bond is not entitled to habeas relief because incarcerated person is no longer in custody). *See* *Sandstrom v. Kolski*, 305 So. 2d 75, 76 (Fla. Dist. Ct. App. 1974) (refusing to entertain petition for habeas corpus when petitioner promised to appear in court at a future date, since petitioner was not in custody).

29. *See* *Meyer v. Moore*, 826 So. 2d 330, 331, 27 Fla. L. Weekly 764 (Fla. Dist. Ct. App. 2002) (denying a petition for writ of certiorari because although petitioner was serving time in Florida he was convicted in Kansas,

(d) No Other Options

If you are appealing administrative action taken against you by the Florida State Department of Corrections or complaining about the conditions of your confinement, you must follow Florida's administrative procedures before filing a petition for relief in state court. Rule 33-103 of the Florida Administrative Code describes the administrative procedures available to you.³⁰ Your petition for habeas corpus will not be granted unless you have followed these procedures.³¹ For example, your habeas petition may be dismissed if you file it before “exhausting” (using up) all administrative procedures.³² Florida courts will also refuse to consider your habeas petition if you could have raised an issue or error on appeal, but did not.³³ Alleging “ineffective assistance of counsel” will not allow you to raise issues in your habeas petition that could have been raised on appeal.³⁴

1. Requirements of a Rule 3.850 Motion

(a) Grounds for Motion³⁵

You may bring a Rule 3.850 motion for relief from *judgment* or release from custody if:

- (1) The judgment entered against you or sentence imposed on you violates the U.S. Constitution, Federal law, or Florida law.
- (2) The court did not have jurisdiction to enter the judgment against you.
- (3) The court did not have jurisdiction to impose the sentence.
- (4) The sentence exceeded the maximum authorized by law.
- (5) Your plea was *involuntary*.
- (6) The judgment against you or sentence imposed is otherwise subject to *collateral attack*.

(b) Time Limits

If you believe that your sentence exceeds the time limits provided by law, you may file your Rule 3.850 motion at any time during your proceedings. However, all Rule 3.850 claims must be filed no later than two years after your judgment and sentence become final.³⁶

These time requirements will not apply if you can prove that you did not know the facts critical to your Rule 3.850 motion before the deadline. You must also show that these facts could not have been discovered through the exercise of “due diligence” (reasonable or expected actions). The time limit will also not apply if you are asserting a violation of your constitutional rights, which were established

and the Florida circuit court lacked jurisdiction to consider or grant a writ of habeas corpus)).

30. FLA. ADMIN. CODE ANN. r. 33–103 (2010).

31. *See* Seccia v. Wainwright, 517 So. 2d 80, 81, 12 Fla. L. Weekly 2886 (Fla. Dist. Ct. App. 1987) (dismissing incarcerated person's habeas claim for improper administrative confinement where petitioner failed to exhaust administrative remedies); Sutton v. Strickland, 485 So. 2d 25, 25–26, 11 Fla. L. Weekly 675 (Fla. Dist. Ct. App. 1986) (dismissing incarcerated person's petition for writ of habeas corpus on the ground that he failed to exhaust incarcerated person grievance procedures); Griggs v. Wainwright, 473 So. 2d 49, 49–50, 10 Fla. L. Weekly 1844 (Fla. Dist. Ct. App. 1985) (holding that an incarcerated person challenging his confinement must exhaust his administrative remedies before seeking habeas relief).

32. *See* Comer v. Fla. Parole & Prob. Comm'n, 388 So. 2d 1341, 1341 (Fla. Dist. Ct. App. 1980) (holding that the failure to exhaust all available administrative remedies may procedurally bar relief by writ of habeas corpus).

33. *See* Hardwick v. Dugger, 648 So. 2d 100, 105, 19 Fla. L. Weekly 433 (Fla. 1994) (finding habeas corpus was not an available remedy where errors of law either were or could have been raised on direct appeal); *see also* T.L.W. v. Soud, 645 So. 2d 1101, 1105, 19 Fla. L. Weekly 2520 (Fla. Dist. Ct. App. 1994) (stating that habeas claims concerning whether the detention of minors is contrary to a Florida statute must first be addressed to trial courts or in a motion for post-conviction relief).

34. *See* Mills v. Dugger, 574 So. 2d 63, 65, 15 Fla. L. Weekly 589 (Fla. 1990) (finding that alleging ineffective counsel will not allow relator to raise issues that should have been raised on appeal).

35. *See* FLA. R. CRIM. P. 3.850(a) (2009).

36. FLA. R. CRIM. P. 3.850(b) (2009).

after the two-year time period had passed. Finally, you can challenge the Rule 3.850 time period if you retained counsel to file your motion, but your lawyer failed to file the motion on time.³⁷

(c) Contents of Motion

Your Rule 3.850 motion must be made under oath and include facts and details about the judgment or sentence under attack. If you have appealed the judgment or sentence, you must include those facts, and you must include the ruling of the court on your appeal.³⁸ You must inform the court whether you have filed a previous post-conviction motion, and if so, how many motions you have filed.³⁹ If you filed a previous motion or motions, you must also state the reason or reasons you did not raise your current Rule 3.850 claims in those prior filings. Finally, you must inform the court of the type of relief you want, as well as provide a brief statement of facts you relied upon in the motion.⁴⁰

2. Determining Whether to File a Rule 3.850 Motion or a Habeas Petition(a) Before Trial

(i) Extradition

In Florida, you may be held for a maximum of thirty days before you can be “extradited” (moved) to another state.⁴¹ If you have been held for over thirty days awaiting extradition, you may bring a habeas corpus petition in Florida. Extradition issues may be brought to the court through a writ of habeas corpus, and not according to the procedures laid out in Rule 3.850.⁴²

(ii) Bail

You may ask for habeas relief on the ground that you were denied bail or that your bail is excessive.⁴³ Some courts require petitioners to prove that they have tried to make bail and will not

37. FLA. R. CRIM. P. 3.850(b) (2009).

38. FLA. R. CRIM. P. 3.850(c) (2009); *see also* Catlett v. State, 367 So. 2d 735, 735 (Fla. Dist. Ct. App. 1979) (dismissing a motion to vacate because the plaintiff failed to mention prior appeals or Rule 3.850 motions).

39. FLA. R. CRIM. P. 3.850(c) (2009); *see also* Catlett v. State, 367 So. 2d 735, 735 (Fla. Dist. Ct. App. 1979) (dismissing a motion to vacate because the plaintiff failed to mention prior appeals or Rule 3.850 motions).

40. FLA. R. CRIM. P. 3.850(c) (2009).

41. *See* Hill v. Roberts, 359 So. 2d 911, 913 (Fla. Dist. Ct. App. 1978) (finding an incarcerated person entitled to discharge on a habeas writ where he was available for extradition for more than thirty days, and demanding state took no action to receive him); *see also* FLA. STAT. ANN. § 941.15 (2006) (setting statutory maximum of thirty days).

42. *See* State v. Luster, 596 So. 2d 454, 454, 17 Fla. L. Weekly 206 (Fla. 1992) (holding that a court considering release on habeas corpus can do no more than decide whether extradition documents sent by demanding state are in order on their face, whether petitioner has been charged with a crime in the demanding state, whether petitioner has been named in the demand, and whether petitioner is a fugitive); Galloway v. Josey, 507 So. 2d 590, 591, 12 Fla. L. Weekly 182 (Fla. 1987) (finding that, on habeas review, when an extradition warrant is based upon a facially valid probable cause hearing in another state, the accused may only avoid extradition by producing clear and convincing proof that he is not a fugitive).

43. *See* Bennett v. State, 96 Fla. 237, 238, 118 So. 18, 18 (Fla. 1928) (finding that a person seeking release on bail should do so by filing a habeas corpus petition); *see also* Bradwell v. McClure, 488 So. 2d 566, 567, 11 Fla. L. Weekly 978 (Fla. Dist. Ct. App. 1986) (granting habeas relief and ordering trial court to set a reasonable bail for petitioner). *See* Nicholas v. Cochran, 673 So. 2d 882, 883, 21 Fla. L. Weekly 989, 989 (Fla. Dist. Ct. App. 1996) (granting writ after finding that trial court's large increase of bail upon discovering that petitioner possessed more assets than the court was aware of did not comply with the purposes of bail); Rawls v. State, 540 So. 2d 946, 947, 14 Fla. L. Weekly 935, 935 (Fla. Dist. Ct. App. 1989) (finding that writ of habeas corpus is available when petitioner can show that the trial court has set bail at an unreasonable amount and that bond schedules do not justify excessive bail). In order to discourage the profits from the sale of drugs being used to post bail, under Fla. Stat. Ann. § 903.046(2)(h) (2009), courts may consider the street value of drugs when setting bail on drug-related offenses. *See* Alvarez v. Crowder, 645 So. 2d 63, 63–64, 19 Fla. L. Weekly 2363, 2363 (Fla. Dist. Ct. App. 1994) (citing Fla. Stat. Ann. § 903.046 (1993)) (noting that the criteria that should be taken into consideration in evaluating the amount of bail include: “nature of the offense and applicable penalty, family ties, length of residence in the community, employment history, financial resources, the defendant's prior criminal record, risk of flight,

consider a habeas petition if the evidence indicates that you could not post bail in any amount.⁴⁴ If the court finds in your favor, it may grant relief or lower your bail. If you have already been convicted, the court will not review any petition requesting bail because you cannot get bail after you are convicted. To challenge your bail proceedings or pretrial detainment conditions, you do not need to exhaust Rule 3.850 procedures. Instead, you may immediately file a habeas petition.⁴⁵

(iii) Delay

If no formal charges are filed against you within twenty-one days, you may be entitled to release on a Rule 3.850 motion. You may raise a habeas claim after completing all Rule 3.850 procedures.⁴⁶ If you are released or charged before the court rules on your habeas petition, your petition becomes “moot” (not relevant) and the court will not consider it.⁴⁷ You may also petition the court for a writ of habeas corpus if you request a preliminary hearing and are not granted one in a timely manner.⁴⁸

(iv) Search Warrant and Probable Cause

If you were arrested through a search warrant, you may file a pretrial motion under Rule 3.850 challenging whether the search warrant was valid.⁴⁹ You may also challenge your arrest on the ground that there is no probable cause to believe that you committed the crime with which you are charged.⁵⁰ Probable cause is a low standard to prove and courts are not likely to grant habeas relief on this ground.⁵¹ When deciding your petition, the court will not evaluate conflicting testimony in order to

danger to the community and street value of any drugs involved”). *But see* Sikes v. McMillian, 564 So. 2d 1206, 1208, 15 Fla. L. Weekly 1949, 1949 (Fla. Dist. Ct. App. 1990) (finding Fla. Stat. Ann. § 903.046(2)(h) (2009) does not support a court increasing bail when defendant is charged with purchasing and not selling drugs).

44. *See Ex parte Smith*, 141 Fla. 434, 434–435, 193 So. 431, 431–432 (Fla. 1940) (holding that reduction of bail will not be considered on habeas petition where the record indicates that petitioner would not have been able to make bail in any amount, but without prejudice to renew petition if petitioner becomes able to make bail).

45. *See Dupree v. Cochran*, 698 So. 2d 945, 946, 22 Fla. L. Weekly 2201 (Fla. Dist. Ct. App. 1997) (granting petitioner’s habeas petition because trial judge failed to specify the facts and reasons why she revoked the bond); *Wilson v. State*, 669 So. 2d 312, 313–314, 21 Fla. L. Weekly 661 (Fla. Dist. Ct. App. 1996) (finding, upon habeas review, that trial court abused its discretion in committing petitioner to custody for failure to appear at rescheduled trial).

46. *See* Fla. R. Crim. P. 3.133(b) (2009); *see also* Beicke v. Boone, 527 So. 2d 273, 275, 13 Fla. L. Weekly 1410, 1410 (Fla. Dist. Ct. App. 1988) (finding that the state’s failure to file charges within twenty-one days of arrest entitled defendant to an adversary preliminary hearing on any felony charge pending against him; the state’s failure to present evidence at the required hearing entitled defendant to “release on his own recognizance,” release conditioned on the promise to appear in court when required, on any felony charges resulting from the crime for which he was arrested).

47. *See* *Bowens v. Tyson*, 578 So. 2d 696, 697, 16 Fla. L. Weekly 270, 270 (Fla. 1991) (holding that defendant who was held in custody for thirty days without filing information or indictment was not entitled to automatic pretrial release where the state filed information after the thirty-day period, but before the court heard defendant’s motion for release).

48. The state is prohibited from holding anyone in custody beyond forty days unless they have been formally charged with a crime. *See* Fla. R. Crim. P. 3.134 (2019).

49. *See* *State ex rel. Wilson v. Quigg*, 154 Fla. 349–358, 17 So. 2d 697, 698–703 (Fla. 1944) (considering search warrant’s validity on appeal from a habeas corpus proceeding, where defendant was held in part based on the warrant).

50. *See* *Jefferson v. Sweat*, 76 So. 2d 494, 501 (Fla. 1954) (finding habeas corpus is a proper remedy for testing validity of arrest warrant); *State ex rel. Hanks v. Goodman*, 253 So. 2d 129, 130 (Fla. 1971) (stating defendant in custody has remedy through habeas corpus if there is no probable cause to hold him).

51. *See* *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416, 110 L. Ed. 301, 308 (1990) (“[P]robable cause means ‘a fair probability that contraband or evidence of a crime will be found.’”) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983)). *But see* *Pierce v. Mims*, 418 So. 2d 273, 273 (Fla. Dist. Ct. App. 1982) (finding no probable cause for arrest warrant when the only evidence presented at preliminary hearing was hearsay).

make determinations of fact.⁵² The court will leave this determination for trial. After completing all Rule 3.850 procedures, you may raise these same issues in a habeas petition.

(b) After Your Conviction

(i) Confinement Beyond Sentence

You are also entitled to Rule 3.850 relief if your sentence is “void” (not valid). A court will consider a sentence void if it was not issued properly based on what is required by the law. For example, if the judgment fails to state an offense, does not state clearly that you have been found guilty, or lists a charge not on the indictment, your conviction and sentence might be void.⁵³ If you are denied relief under Rule 3.850, you may then raise this claim in a habeas corpus proceeding.

(ii) Fundamental Rights

You may attack prior criminal proceedings under Rule 3.850 by asserting a violation of your “fundamental” (most basic) constitutional rights. If you are denied relief, you may raise these issues in a petition for habeas relief. Although there is no comprehensive list of rights that Florida courts have declared “fundamental,” courts have consistently allowed petitioners to claim certain rights in habeas petitions. These include the right to a trial by jury, the right to due process, the right not to be convicted twice of the same charge (also called the right against double jeopardy), the right to appeal, and the right to a speedy trial.⁵⁴ You may also claim the right to be free from cruel and unusual

52. See *State ex rel. Price v. Stone*, 128 Fla. 637, 641, 175 So. 229, 231 (Fla. 1937) (denying motion to appoint special commissioner to take testimony because “while on habeas corpus the court will examine the *legal* sufficiency of the alleged facts to make out a crime, it will not determine the probative force of conflicting testimony upon which the charge is based.”).

53. See *Anglin v. Mayo*, 88 So. 2d 918, 921–922 (Fla. 1956) (granting writ of habeas corpus for illegal sentencing when defendant was sentenced to imprisonment for five years using an outdated statute and the sentence imposed by the revised statute was shorter); *Anderson v. Chapman*, 109 Fla. 54, 57–58, 146 So. 675, 677 (Fla. 1933) (“[I]f the vice of a sentence is not merely that it is defective, but [that it] is of an entirely different character from that authorized by law, it is generally held that such sentence is void, and that the incarcerated person will be discharged on habeas corpus.”); see also *Dean v. State*, 476 So. 2d 318, 319, 10 Fla. L. Weekly 2331 (Fla. Dist. Ct. App. 1985) (reversing sentences of youthful offender that exceeded maximums specified in Youthful Offender Act); *R.J.K. v. State*, 375 So. 2d 871, 871 (Fla. Dist. Ct. App. 1979) (granting writ to juvenile because committing the juvenile to the Department of Health and Rehabilitative Services for an indeterminate period was improper); *State ex rel. Saunders v. Boyer*, 166 So. 2d 694, 696–697 (Fla. Dist. Ct. App. 1964) (remanding case for resentencing as sentence of one year of hard labor for contempt of court was not authorized by statute and was void). But see *Dixon v. Mayo*, 124 Fla. 485, 487, 168 So. 800, 800–801 (Fla. 1936) (denying writ of habeas corpus when court found relator’s argument—that the language of the judgment appeared to find him guilty of a charge different than the one on the indictment—was “not tenable” (or not reasonable) because the differing element was not material to the crime).

54. See *Myrick v. Wainwright*, 243 So. 2d 179, 180 (Fla. Dist. Ct. App. 1971) (considering and denying habeas petition because the official court record clearly showed that the petitioner had been advised of his right to appeal his conviction and sentence); *Dennis v. Wainwright*, 243 So. 2d 181, 182 (Fla. Dist. Ct. App. 1971), *aff’d sub nom.*, 247 So. 2d 88 (Fla. Dist. Ct. App. 1971) (finding that to raise the issue of denial of right to appeal because of untimely filing (filing for an appeal after the deadline had passed), petitioner must prove that the frustration (denial) of right to appeal was due to state action and not to petitioner’s negligence). See also *Deal v. Mayo*, 76 So. 2d 275, 276 (Fla. 1954) (holding that habeas corpus review is proper to test whether petitioner was subject to double jeopardy at trial); *Sneed v. Mayo*, 69 So. 2d 653, 655 (Fla. 1954) (despite non-compliance with state statute, court denied writ because constitutional requirement of due process was met in this case (because the defendant waived his right to a jury trial); *Lightfoot v. Wainwright*, 369 So. 2d 110, 111 (Fla. Dist. Ct. App. 1979) (finding that a person who has been denied right to due process is entitled to habeas relief). See *Sneed v. Mayo*, 66 So. 2d 865, 869–870, 874 (Fla. 1953) (holding that habeas corpus is proper to review the allegation that petitioner was denied right to trial by jury). To raise this issue in a habeas petition, you must have been denied your right to a jury trial. If you were offered a jury trial and turned it down, then you expressly waived your right to a jury trial and may not petition the court for habeas on this issue. See *Pena v. Schultz*, 245 So. 2d 49, 50 (Fla. 1971) (finding habeas is proper to determine whether right to speedy trial was denied); *Griswold v. State*, 77 Fla. 505, 515–517, 82 So. 44, 48 (Fla. 1919) (holding that unless there was evidence that the continuance [delay in trial] was granted

punishment (in other words, you may challenge your prison conditions by alleging they are so unbearable that they must be considered cruel and unusual punishment).⁵⁵

(iii) New or Void Law

You may also petition the court under Rule 3.850 on the ground that you were prosecuted under an unconstitutional statute.⁵⁶ It is very rare for courts to find a statute unconstitutional. If the statute you were prosecuted under is declared unconstitutional, you are entitled to immediate release.

(d) Ineffective Counsel

You have the right to effective assistance of counsel to help you with your appeal. You may petition the court according to the process laid out in Rule 3.850 if you: (1) are “indigent” (poor), (2) requested counsel on appeal, **and** (3) were denied that right to counsel.⁵⁷ If you did not make your need for counsel known, the court is not likely to consider your petition. You may also petition the court for habeas relief if your counsel was ineffective.⁵⁸ Proving ineffective assistance of counsel is very difficult. The court will only consider whether the attorney’s mistakes were so great that they were “grossly” (obviously) outside the range of acceptable performance and “hindered” (prevented) your appeal and undermined its result.⁵⁹ You must show there is a good chance that, if your counsel had not made these

without good cause, the court presumed one continuance did not violate the defendant’s speedy trial right). This issue should be brought before trial. It is very unlikely the court will grant relief on this issue after conviction.

55. *See* *Graham v. Vann*, 394 So. 2d 176, 177 (Fla. Dist. Ct. App. 1981) (affirming writ of habeas corpus where petitioners sought relief from prison conditions that were constantly dangerous to the lives and safety of the incarcerated people, even though a federal case challenging inadequate medical care was pending). Prison conditions may also be challenged using 42 U.S.C. § 1983; see *JLM*, Chapter 16 “Using 42 U.S.C § 1983 to Obtain Relief from Violations of Federal Law” for more information.

56. *See* *Sandstrom v. Leader*, 370 So. 2d 3, 5 (Fla. 1979) (“[A] writ of habeas corpus may be utilized by an accused to challenge the constitutionality of a statutory provision under which he is charged.”); *State ex rel. Matthews v. Culver*, 114 So. 2d 796, 796 (Fla. 1959) (holding petitioner was being unlawfully detained because he was convicted and sentenced under a statute that was later declared unconstitutional and therefore he must be released); *Coleman v. State ex rel. Jackson*, 140 Fla. 772, 774, 193 So. 84, 85 (Fla. 1939) (holding habeas corpus is the proper procedure where the charge made does not constitute a crime under the laws of Florida because the statute under which the charge is being made is unconstitutional); *La Tour v. Stone*, 139 Fla. 681, 695–697, 190 So. 704, 710–711 (Fla. 1939) (stating the right to attack an information or indictment by writ of habeas corpus is limited, and a habeas corpus proceeding is a proper vehicle when the offense charged does not constitute a crime under the laws of the State because the statute invoked is unconstitutional); *Roberts v. Schumacher*, 127 Fla. 461, 462, 173 So. 827, 827 (Fla. 1937) (noting habeas corpus is appropriate relief when the statute under which offense was charged is invalid); *State ex rel. Dixon v. Cochran*, 114 So. 2d 228, 229 (Fla. Dist. Ct. App. 1959) (granting a writ of habeas corpus for a conviction and sentence under a statute that was later held invalid by the Florida Supreme Court).

57. *See* *Baggett v. Wainwright*, 229 So. 2d 239, 241–242 (Fla. 1969) (holding that incarcerated people have a constitutional right to counsel for purposes of direct appeal and the state’s failure to give access to a lawyer entitles an incarcerated person to habeas relief to enforce that right, as long as the incarcerated person makes his need for counsel known). For more information on ineffective assistance of counsel claims, see Chapter 12 of the *JLM*, “Appealing Your Conviction Based on Ineffective Assistance of Counsel.”

58. *See* *Owen v. Crosby*, 854 So. 2d 182, 188, 28 Fla. L. Weekly 615, 615 (Fla. 2003) (holding that petition for post-conviction relief is the proper method to raise claims of ineffective assistance of appellate counsel); *Groover v. Singletary*, 656 So. 2d 424, 425, 20 Fla. L. Weekly 151, 151 (Fla. 1995) (denying habeas petition because all claims had been raised in prior Rule 3.850 proceedings and were found to be procedurally barred or without merit and therefore appellate counsel was not ineffective for failing to raise them); *Nerey v. State*, 634 So. 2d 206, 206–207, 19 Fla. L. Weekly 661 (Fla. Dist. Ct. App. 3d Dist. 1994) (denying habeas petition and finding appellate counsel was not ineffective because counsel could reasonably have concluded that an argument would not prevail [succeed]).

59. *See* *Rogers v. Singletary*, 698 So. 2d 1178, 1180–1181, 21 Fla. L. Weekly 503, 22 Fla. L. Weekly 561 (Fla. 1996) (applying *Pope v. Wainwright*, 496 So. 2d 798, 11 Fla. L. Weekly 533 (Fla. 1986), and denying writ of habeas corpus where the court found that the relator [the petitioner] did knowingly and intelligently waive the right to counsel for his appeal); *Pope v. Wainwright*, 496 So. 2d 798, 800, 11 Fla. L. Weekly 533 (Fla. 1986) (limiting

mistakes, the outcome on appeal would have been different.⁶⁰ You may not use a habeas corpus proceeding to allege ineffective assistance of your counsel at *trial* that issue may only be raised on appeal.⁶¹ Finally, you do not need to complete all Rule 3.850 procedures if you are challenging the ineffectiveness of the lawyer who helped with your appeal. In those circumstances, you may immediately file a habeas petition.⁶²

(e) New Evidence

If there is newly discovered evidence in your case, you may attack or challenge the judgment against you according to Rule 3.850 procedures.⁶³ If you later file a habeas petition, be aware that the evidence must be very strong.⁶⁴ It must be so strong that, if admitted, it would probably produce an acquittal on retrial.⁶⁵ In addition, you must be able to prove that the information was not known by you or your attorney and could not have been discovered by you or your attorney at the time of the trial.⁶⁶ The court will be required to hold an evidentiary hearing on your claim for post-conviction relief, unless the evidence is plainly refuted by the record.⁶⁷ You may also file for post-conviction relief if you can show that the prosecutor failed to turn over exculpatory evidence (evidence tending to support your innocence).⁶⁸ To establish a claim that the prosecutor failed to turn over such evidence, you must be able to show that:

determinations of ineffective appellate counsel to situations where the alleged failures of counsel are important enough to be serious error or serious failure to perform professionally as a lawyer and whether the failure by counsel interfered with the process of the appeal so much that the result cannot be trusted) (citing *Johnson v. Wainwright*, 463 So. 2d 207, 209, 10 Fla. L. Weekly 85 (Fla. 1985)); *Jackson v. Dugger*, 580 So. 2d 161, 162, 16 Fla. L. Weekly 327 (Fla. Dist. Ct. App. 4th Dist. 1991) (granting petition for habeas corpus where counsel was determined to be defective due to his failure to raise an issue on appeal that counsel for relator's [petitioner's] co-defendant raised, causing co-defendant's conviction to be reversed).

60. For more information on ineffective assistance of counsel claims, see Chapter 12 of the *JLM*, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

61. See *Breedlove v. Singletary*, 595 So. 2d 8, 10, 17 Fla. L. Weekly 67 (Fla. 1992) (holding that claims of trial counsel's effectiveness cannot be heard in habeas corpus proceedings).

62. See *Groover v. Singletary*, 656 So. 2d 424, 425, 20 Fla. L. Weekly S151 (Fla. 1995) (noting that a petition for a writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel).

63. See *McLin v. State*, 827 So. 2d 948, 951–952, 27 Fla. L. Weekly 743 (Fla. 2002) (analyzing a Rule 3.850 motion raising newly discovered evidence by incorporating an affidavit of an eyewitness to the murder stating that McLin did not commit the crime for which he was convicted); see also FLA. R. CRIM. P. 3.850 (West 2018) (outlining the general grounds on which a sentence can be vacated, set aside, or corrected).

64. DNA evidence may be such an example. See *JLM*, Chapter 11, "Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence."

65. See *Jones v. State*, 591 So. 2d 911, 915, 16 Fla. L. Weekly 745 (Fla. 1991) ("[T]he newly discovered evidence must be of such a nature that it would *probably* produce an acquittal on retrial."); see also *Davis v. State*, 736 So. 2d 1156, 1159, 24 Fla. L. Weekly 260 (Fla. 1999) (denying post-conviction relief motion because petitioner's allegations regarding expert witness testimony were speculative and thus not newly discovered evidence); *Williamson v. Dugger*, 651 So. 2d 84, 89, 19 Fla. L. Weekly 582 (Fla. 1994) (denying habeas corpus petition because new affidavits petitioner offered to impeach a witness's credibility were not likely to lead to an acquittal on retrial).

66. See *Jones v. State*, 591 So. 2d 911, 916, 16 Fla. L. Weekly 745 (Fla. 1991) (holding newly discovered information must have been unknown at time of trial and could not have been discovered through reasonable diligence); see also *Steinhorst v. State*, 695 So. 2d 1245, 1247–1248, 22 Fla. L. Weekly 335 (Fla. 1997) (affirming the denial of defendant's habeas motion because due diligence could have uncovered files relating to the fact that defendant's judge recused himself [excused for potential conflict of interest or lack of impartiality] on a co-defendant's case, which defendant attempted to offer as newly discovered evidence); *Correll v. State*, 698 So. 2d 522, 523–524, 22 Fla. L. Weekly 188 (Fla. 1997) (denying petitioner's post-conviction relief because the evidence on an expert witness's education offered to impeach the witness could have been discovered at trial).

67. See *McLin v. State*, 827 So. 2d 948, 954, 27 Fla. L. Weekly 743 (Fla. 2002) ("To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held on a claim for post-conviction relief, an appellate court must accept the defendant's factual allegations to the extent they are not refuted by the record.") (quoting *Foster v. State*, 810 So. 2d 910, 914, 27 Fla. L. Weekly 147 (Fla. 2002)).

68. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963)

- (1) The state possessed evidence favorable to your case;
- (2) You did not possess nor could have obtained such evidence with reasonable effort;
- (3) The prosecution suppressed (did not turn over) the evidence; and
- (4) There is a reasonable probability the case would have come out differently if the evidence had been disclosed.⁶⁹

(f) Probation or Parole

Florida courts have held that a Rule 3.850 motion, followed by a habeas petition if unsuccessful, is the correct procedure by which you can challenge errors in parole revocation proceedings and orders of the Florida Probation and Parole Commission.⁷⁰ You may also file a habeas petition to challenge the Parole Commission's determinations of presumptive parole release dates, or if you are incarcerated after your presumptive release date.⁷¹

(g) Subject Matter Jurisdiction

In Florida, courts will ordinarily find that as long as an indictment or information does not completely fail to charge an offense, it provides the accused with enough information to construct a

("[S]uppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* *Kyles v. Whitley*, 514 U.S. 419, 421–422, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) (applying *Brady* and reversing the denial of a habeas corpus petition because the state failed to disclose evidence favorable to the petitioner); *Brown v. Wainwright*, 785 F.2d 1457, 1458 (11th Cir. 1986) (reversing a petitioner's conviction because the prosecution knowingly allowed false testimony to be introduced and exploited in its case).

69. *Downs v. State*, 740 So. 2d 506, 513–517, 24 Fla. L. Weekly 231, 231 (Fla. 1999) (denying motion for post-conviction relief because appellant's contentions that appellee had, among other things, withheld exculpatory evidence and that appellant had received ineffective assistance of counsel were meritless); *Mills v. State*, 684 So. 2d 801, 806, 21 Fla. L. Weekly 527, 527 (Fla. 1996) (denying motion for successive petition where defendant failed to produce statements or evidence to show that further proceedings would have changed court's conclusion of guilt); *Scott v. State*, 657 So. 2d 1129, 1132, 20 Fla. L. Weekly 133, 133 (Fla. 1995) (reversing trial court's decision and remanding for evidentiary hearing on issue of possible *Brady* violations raised by defendant's motion, but denying habeas petition as procedurally barred); *Hildwin v. Dugger*, 654 So. 2d 107, 110–111, 20 Fla. L. Weekly 39, 39 (Fla. 1995) (denying habeas petition but vacating and remanding for new sentencing before a jury because counsel's errors had deprived petitioner of a reliable penalty phase).

70. *See* *Bush v. State*, 945 So. 2d 1207, 1210, 31 Fla. L. Weekly 879 (Fla. 2006) (holding that the proper remedy for an incarcerated person to pursue in challenging a sentence-reducing credit determination by the Department of Corrections, where the incarcerated person has exhausted administrative remedies and is alleging entitlement to immediate release, is a petition for writ of habeas corpus); *State v. Sampson*, 297 So. 2d 120, 121–122 (Fla. Dist. Ct. App. 4th Dist. 1974) (finding that habeas corpus is the proper method for challenging order of the Florida Parole and Probation Commission); *State ex rel. Wainwright v. Holley*, 234 So. 2d 409, 410 (Fla. Dist. Ct. App. 2d Dist. 1970) (holding that the proper way to challenge error in post-conviction proceedings such as parole revocation is through habeas corpus); *see also* *Jackson v. Mayo*, 73 So. 2d 881, 882–883 (Fla. 1954) (granting relief where the commission revoked parole based on evidence that had not been introduced at the revocation hearing); *Beal v. Mato*, 70 So. 2d 367, 369 (Fla. 1954) (affirming that where there is a complete absence of any adjudication at all, the judgment and sentence will be subject to being set aside on habeas corpus); *Sellers v. Bridges*, 15 So. 2d 293, 295, 153 Fla. 586, 590–591 (1943) (holding that whether the incarcerated person inexcusably violated conditions of pardon or parole was proper for habeas inquiry).

71. *See* *Williams v. Fla. Parole Comm'n*, 625 So. 2d 926, 934, 18 Fla. L. Weekly 2258 (Fla. Dist. Ct. App. 1st Dist. 1993) (finding that the proper remedy to challenge presumptive release date is habeas corpus), *overruled in part on other grounds by* *Sheley v. Fla. Parole Comm'n*, 703 So. 2d 1202, 23 Fla. L. Weekly 130 (Fla. Dist. Ct. App. 1st Dist. 1997). *See* *Jenrette v. Wainwright*, 410 So. 2d 575, 577–579 (Fla. Dist. Ct. App. 3d Dist. 1982) (ruling that incarcerated person whose presumptive parole release date has passed is entitled to immediate release on habeas corpus). *But see* *Kirsch v. Greadington*, 425 So. 2d 153, 155 (Fla. Dist. Ct. App. 1st Dist. 1983) (holding that a successful habeas petition merely obliges the parole commission to exercise its judgment without the previous unconstitutional factors).

defense and protects him from future prosecution for the same act. Therefore, courts generally will not find such indictments or informations void or defective.⁷²

3. How to File a Habeas Petition

(a) When to File

First, make sure you are not eligible to bring a Rule 3.850 motion. Florida courts will refuse to issue a writ of habeas corpus if you can pursue your claim through another available action, like a Rule 3.850 motion, but fail to do so.⁷³

If you are facing the death penalty, your petition for a writ of habeas corpus must be filed at the same time as the initial brief filed on your behalf in the appeal of the circuit court's order on a motion to vacate, set aside, or correct a sentence.⁷⁴

(b) Where to File

Where you file depends upon the stage of your criminal case. If you have not yet been convicted, or are filing a petition related to a probation violation, you must petition the circuit court judge presiding over your case.⁷⁵ But if the state Supreme Court has affirmed your conviction, you must file your petition with the state Supreme Court.⁷⁶ If you originally file with the circuit court, and the circuit court denies your petition, then you may file another petition with the state Supreme Court.⁷⁷ In general, you should file the petition in the jurisdiction in which you are incarcerated. However, if you are raising an issue that should have been raised on direct appeal (like ineffective assistance of counsel), you should file in the court where the original sentence was imposed.⁷⁸

(c) What to Include in Your Petition

Because the writ of habeas corpus is such a unique right, the courts in Florida may occasionally grant applications for writs that do not follow statutory requirements. For example, an attorney may make a telephone call to a judge to apply for a writ, or a judge may decide that the informal letters from an incarcerated person provide sufficient grounds for issuing the writ.⁷⁹ However, it is always

72. *See* *Stack v. State ex rel. LaFratta*, 230 So.2d 15, 16 (Fla. App. 1969) (holding that where the information did not completely fail to state a violation of the law, a habeas petition was not the proper way to challenge it; instead, petitioner should have brought a motion to quash); *State ex rel. Burton v. Taylor*, 148 So.2d 11, 13 (Fla. 1962) (holding that "information adequately informed petitioner of the nature of the accusation against him, the date of its alleged commission and of the particulars surrounding the transaction alleged to be a violation of the statute" such that it "did not 'utterly' or 'wholly fail' to charge the offense"); *Taylor v. Chapman*, 173 So. 143, 146, 127 Fla. 401, 407–408 (1937) (refusing to grant a writ where the information sufficiently claimed intent and overt acts that would have resulted in commission of the crime).

73. FLA. R. CRIM. P. 3.850(l) (West 2018) (allowing for belated appeal and discretionary review).

74. FLA. R. CRIM. P. 3.851(d)(3) (West 2018).

75. FLA. STAT. ANN. § 79.01 (West 2009); *see also* *Newkirk v. Jenne*, 754 So. 2d 61, 62, 25 Fla. L. Weekly 518 (Fla. Dist. Ct. App. 4th Dist. 2000) (finding that where the petitioner was being detained in relation to a probation violation, the circuit court judge presiding over her case had full authority to order her release).

76. *See* *Kinsey v. Davis*, 19 So. 2d 323, 325, 154 Fla. 889, 892 (Fla. 1944) (holding that where the petitioner's conviction had been affirmed by the Supreme Court, his habeas petition should have been made to the Supreme Court because the circuit court could not grant a writ).

77. *See* *Deeb v. Gandy*, 148 So. 540, 541 110 Fla. 283, 284 (Fla. 1933) (holding that the petitioner was entitled to bail after the circuit court held that he should be remanded without bail).

78. *See* FLA. STAT. ANN. § 79.01 (West 2009); *see also* *Collins v. State*, 859 So. 2d 1244, 1245, 28 Fla. L. Weekly 2628 (Fla. 2003) (stating that when a petitioner attacks the validity of the conviction by raising issues relating to the trial or to the propriety of the plea, jurisdiction lies with the trial court that imposed the sentence); *McLeroy v. State*, 704 So. 2d 151, 152, 22 Fla. L. Weekly 2718 (Fla. Dist. Ct. App. 5th Dist. 1997) (denying a petition for writ of habeas corpus alleging ineffective assistance of counsel because the incarcerated person improperly filed in the jurisdiction where he was incarcerated rather than where the original sentence was imposed).

79. *See* *Jamason v. State*, 455 So. 2d 380, 381, 9 Fla. L. Weekly 330 (Fla. 1983) (upholding an oral writ of

better to comply with statutory requirements if you can, basing your argument on enough detailed, factual allegations to make a case that on its face shows you are entitled to be released.⁸⁰ The statutory requirements for your application for a writ include:

- (1) The facts you are relying on for relief,
- (2) A request for a writ of habeas corpus, and
- (3) An optional argument in support of the petition with citations of authority.⁸¹

While you do not need to present all the evidence of your wrongful detention, you should attach to your petition copies of the warrant, process, or proceeding that is causing you to be detained.⁸² You should also state that you have exhausted all the administrative remedies available to you.⁸³

(d) How to File

After you have created your petition for habeas corpus including all the items outlined in Part (B)(3)(c) above, “What to Include in Your Petition”, you should send your petition and any supporting documents to the court specified above in Part (B)(3)(b), “Where to File”.

habeas corpus which was issued in response to an oral application by the client’s attorney over the telephone). *See Sneed v. Mayo*, 66 So. 2d 865, 868 (Fla. 1953) (finding that although the application for a writ was an informal letter not conforming to statutory requirements, the communication was sufficient); *McKay v. Jenkins*, 405 So. 2d 287, 289 (Fla. Dist. Ct. App. 1st Dist. 1981) (construing [interpreting] the appellant’s informal letter to the court as a petition for a writ).

80. *See Sneed v. Mayo*, 66 So. 2d 865, 870 (Fla. 1953) (stating that a habeas petition must contain at least “some good faith suggestion of illegal detention”); *Sullivan v. State ex rel. McCrory*, 49 So. 2d 794, 796 (Fla. 1951) (noting that a habeas petition should be dismissed if the petition does not make a case that on its face shows that the petitioner should be released from custody); *Herring v. State*, 181 So. 892, 892, 132 Fla. 658, 659 (Fla. 1938) (denying a habeas petition since the incarcerated person did not claim unlawful detention); *Sims v. Dugger*, 519 So. 2d 1080, 1082, 13 Fla. L. Weekly 292 (Fla. Dist. Ct. App. 1st Dist. 1988) (reversing the dismissal of a petition for habeas corpus because the petition contained detailed factual allegations); *Brown v. Wainwright*, 498 So. 2d 679, 679, 11 Fla. L. Weekly 2626 (Fla. Dist. Ct. App. 1st Dist. 1986) (denying a petition for habeas in part because the petition failed to include any arguments in support of the allegations); *DeAngelo v. Strickland*, 426 So. 2d 1264, 1264 (Fla. Dist. Ct. App. 1st Dist. 1983) (affirming the denial of an incarcerated person’s habeas petition because the incarcerated person was not entitled to the relief he sought and he failed to make a prima facie case because he did not claim that he was illegally imprisoned); *Bennington v. Thornton*, 370 So. 2d 856, 857 (Fla. Dist. Ct. App. 4th Dist. 1979) (denying an incarcerated person’s habeas petition because he failed to show that the trial court abused its discretion in denying him bail or failing to hold a hearing as soon as was possible); *Bagley v. Brierton*, 362 So. 2d 1048, 1049 (Fla. Dist. Ct. App. 1st Dist. 1978) (per curiam) (affirming the portion of the trial court’s denial of an incarcerated person’s habeas petition in which he claimed he was denied adequate medical care because even if the allegations were true, he would not be entitled to relief); *Smith v. State*, 176 So. 2d 383, 384 (Fla. Dist. Ct. App. 3d Dist. 1965) (per curiam) (affirming the trial court’s denial of an incarcerated person’s habeas petition because the petition did not contain factual allegations to support its conclusions).

81. FLA. R. CIV. P. 1.630(b) (West 2018).

82. *See Johnson v. Lindsey*, 103 So. 419, 421, 89 Fla. 143, 148 (Fla. 1925) (stating that a habeas petition does not need to include all of the evidence necessary to establish that the detention is wrongful). *See Cooper v. Lipscomb*, 122 So. 5, 5, 97 Fla. 668, 670 (Fla. 1929) (stating that where the petitioner was arrested and held by the sheriff pursuant to a warrant, a habeas petition should include a copy of the warrant); *Johnson v. Lindsey*, 103 So. 419, 421, 89 Fla. 143, 148 (Fla. 1925) (stating that if a petitioner claims that he is unlawfully detained because the processes or proceedings under which he is being held are invalid, then the habeas petition should include copies of such proceedings or processes); *see also Simons v. State*, 555 So. 2d 960, 961, 15 Fla. L. Weekly 253 (Fla. Dist. Ct. App. 1st Dist. 1990) (denying a petition for writ of habeas corpus, in which the petitioner claimed he was being deprived of his right to a pretrial release due to his inability to afford bond, because the petition did not include a copy of the order or a transcript of the hearing from the lower court on bond reduction); *McNamara v. Cook*, 336 So. 2d 677, 679 (Fla. Dist. Ct. App. 4th Dist. 1976) (finding a habeas petition insufficient because it did not include documentary evidence).

83. *See Moore v. Dugger*, 613 So. 2d 571, 572, 18 Fla. L. Weekly 499 (Fla. Dist. Ct. App. 1st Dist. 1993) (finding that a petition for writ was insufficient because it did not allege that the petitioner had exhausted administrative remedies).

4. Your Right to Counsel for Your Habeas Petition

The U.S. Supreme Court has held that you have no federal constitutional right to counsel for state habeas corpus proceedings.⁸⁴ In Florida, you have no right to appointed counsel (a lawyer assigned by the court) in a habeas proceeding.⁸⁵ A public defender may represent you, but there is no requirement that one be appointed to you.⁸⁶ But if you are applying for a writ because you are about to be extradited, you are entitled to be provided with an attorney.⁸⁷

5. What to Expect After You File

In Florida, the court must issue a writ of habeas corpus if your petition states allegations (claims or assertions of wrongdoings), which, if true, would entitle you to release.⁸⁸ When the court issues the writ, it establishes a date for the person who has you in custody to return you to the court.⁸⁹ The respondent (whoever has you in custody) may provide a response, also called a “return.”⁹⁰ The response includes the respondent’s arguments for keeping you in custody. If the respondent does not return you to court by the scheduled date, he must pay you \$300.⁹¹ You have a right to provide a reply to a response within twenty days of receiving it.⁹² If the return does not address a fact that you allege in your petition, you do not need to prove that fact in your reply.⁹³ In your reply, you may, if necessary, put forth other important, material facts not stated in your petition.⁹⁴

The court may decide to hold a hearing to evaluate the facts you allege in your petition. This hearing is usually held after a return is filed, but the court may also decide to hold a hearing before issuing the writ.⁹⁵ You have the right to a hearing if your petition is “facially sufficient,” which means

84. *See* *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545, 55 U.S.L.W. 4612 (1987) (“[T]he right to appointed counsel extends to the first appeal of right, and no further.”).

85. *See* *Coffee v. Wainwright*, 172 So. 2d 851, 853 (Fla. Dist. Ct. App. 1st Dist. 1965) (finding that because post-conviction habeas corpus proceedings are civil, not criminal, “there is no absolute right to assistance of a lawyer” (quoting *State v. Weeks*, 166 So. 2d 892, 896 (Fla. 1964))).

86. *See* *Graham v. Vann*, 394 So. 2d 176, 178 (Fla. Dist. Ct. App. 1st Dist. 1981) (“[T]he court possesses the authority to appoint counsel to represent the indigent appellees.”).

87. *See* *Bentzel v. State*, 585 So. 2d 1118, 1119–1120, 16 Fla. L. Weekly 2410 (Fla. Dist. Ct. App. 1st Dist. 1991) (finding that an incarcerated person has a statutory right to counsel at a habeas corpus proceeding challenging extradition).

88. *See* *Guess v. Barton*, 599 So. 2d 770, 771, 17 Fla. L. Weekly 1427 (Fla. Dist. Ct. App. 1st Dist. 1992) (“For purposes of appellate review, [the court] must assume that the allegations of appellant’s habeas petition are true.”); *Roy v. Dugger*, 592 So. 2d 1235, 1236, 17 Fla. L. Weekly 386 (Fla. Dist. Ct. App. 1st Dist. 1992) (reversing summary denial of the lower court on the ground that if the incarcerated person’s allegations were true, they could establish that the department had failed to comply with due process, which could establish a violation of due process or the protection against cruel and unusual punishment).

89. FLA. STAT. ANN. § 79.04(2) (West 2009).

90. FLA. R. APP. P. 9.100(j) (West 2018).

91. FLA. STAT. ANN. § 79.05(1) (West 2009).

92. FLA. R. APP. P. 9.100(k) (West 2018).

93. *See* *State ex rel. Libtz v. Coleman*, 5 So. 2d 60, 61, 149 Fla. 28, 30 (Fla. 1941) (holding that undenied allegations in a petition for writ of habeas corpus are taken as true).

94. *See* *Sneed v. Mayo*, 66 So. 2d 865, 870 (Fla. 1953) (stating that, in his reply, petitioner “may allege facts not appearing in the petition”); *see also* *Bard v. Wolson*, 687 So. 2d 254, 255 (Fla. Dist. Ct. App. 1st Dist. 1996) (reversing an order denying a petition for writ because the appellant was not given an opportunity to reply to the response); *Matera v. Buchanan*, 192 So. 2d 18, 20 (Fla. Dist. Ct. App. 3d Dist. 1966) (finding that after the respondent has filed a return, the petitioner may “allege facts not appearing in the petition or return that may be material in the case”).

95. *See* *Turiano v. Butterworth*, 416 So. 2d 1261, 1263 (Fla. Dist. Ct. App. 4th Dist. 1982) (finding that the trial court did not err (make a mistake) in holding an evidentiary hearing before issuing a writ of habeas corpus).

that if everything on your petition is true, you would be entitled to a writ.⁹⁶ In Florida, hearings are informal, and if a witness is unable to attend, he may provide an affidavit instead.⁹⁷

Once the hearing is completed, the court may release you, remand (return) you to custody, or release you on bail.⁹⁸ Though there are no fees to apply for a writ, you may be ordered to pay the cost of the proceedings if the writ is not granted.⁹⁹

6. Your Right to Appeal

You may appeal the denial of your application for a writ of habeas corpus to the state's highest court. Filing the petition in the appellate court will be treated as a notice of appeal as long as you raise the same issues you raised in lower court.¹⁰⁰ However, you also should usually file a notice of appeal.

C. New York

This Part explains some of the basic rules for filing a habeas corpus petition in New York.

1. Requirements

The New York habeas corpus rules can be found in Article 70 of New York Civil Practice Law and Rules, also known as N.Y. C.P.L.R. 7001–7012 (McKinney 2009). The New York State Legislature has restricted the use of the writ of habeas corpus. For most post-conviction relief (challenges to your conviction or sentence), you must file an Article 440 motion, not a petition for a writ of habeas corpus.¹⁰¹

(e) Custody

If you have been released on parole, on probation, on *conditional release*, ROR, or you are free on bail, a New York court cannot grant a writ of habeas corpus.¹⁰²

(f) Immediate Release

You are entitled to immediate release if your habeas petition is successful.¹⁰³

(g) Incarcerated Person in the State

You must be incarcerated in New York.

96. *See* Seibert v. Dugger, 595 So. 2d 1083, 1084, 17 Fla. L. Weekly 784 (Fla. Dist. Ct. App. 1st Dist. 1992) (finding that dismissal of a petition for writ of habeas corpus without a hearing is error when the incarcerated person makes specific allegations which, if true, would establish that the department of corrections had failed to comply with its own rules).

97. FLA. STAT. ANN. § 79.08 (West 2009).

98. FLA. STAT. ANN. § 79.08 (West 2009).

99. *See* Beasley v. Cahoon, 147 So. 288, 295, 109 Fla. 106, 126 (Fla. 1933) (finding that a petitioner can be required to pay costs in a habeas case).

100. *See* Garner v. Wainwright, 454 So. 2d 28, 28 (Fla. Dist. Ct. App. 1st Dist. 1984) (per curiam) (treating filing of same habeas petition as a notice of appeal since it was filed with the appellate court within 30 days, as the appellate rules required).

101. For more information on filing an Article 440 motion, see *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence.”

102. *See* People *ex rel.* Doty v. Krueger, 26 N.Y.2d 881, 882, 258 N.E.2d 215, 215, 309 N.Y.S.2d 932, 932 (1970) (person on probation); People *ex rel.* Nunez v. N.Y. State Bd. of Parole, 182 A.D.2d 998, 998, 585 N.Y.S.2d 716, 716 (3d Dept. 1992) (person on parole); People *ex rel.* Birt v. Grenis, 76 A.D.2d 872, 872, 428 N.Y.S.2d 494, 494 (2d Dept. 1980) (person on conditional release); People *ex rel.* Doyle v. Fischer, 159 A.D.2d 208, 208, 551 N.Y.S.2d 830, 830 (1st Dept. 1990) (ROR); Bayless v. Wandel, 119 Misc. 2d 82, 84, 462 N.Y.S.2d 396, 397 (Sup. Ct. Fulton County 1983) (person free on bail).

103. People *ex rel.* Goldberg v. Warden of Rikers Is. Corr. Facility, 45 A.D.3d 356, 356, 846 N.Y.S.2d 15, 15 (1st Dept. 2007) (declining to issue a writ of habeas corpus because the incarcerated person was not entitled to immediate release).

(h) No Other Options

A New York court will not grant your petition for a writ of habeas corpus if there are other procedures available, unless there are exceptional circumstances of “practicality and necessity.”¹⁰⁴ In other words, you must have a very good reason for filing a petition for habeas corpus instead of appealing your conviction, filing an Article 78 petition, or filing an Article 440 motion.¹⁰⁵ See Section 2(b)(ii) below for more information about what might constitute exceptional circumstances of practicality and necessity. To find out more about how to challenge your conviction or sentence using Article 440, see *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence.” For a description of how to appeal administrative decisions using Article 78, see *JLM*, Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Laws and Rules.”

2. What You Can Complain About in Your Habeas Petition

(a) Before Trial: Extradition

You may be held in custody in New York for no more than ninety days before you are extradited. After the first thirty days of custody, New York may file an extension for sixty additional days of custody.¹⁰⁶ Therefore, a failure to extradite you may entitle you to a writ of habeas corpus in two situations. First, a court may grant habeas corpus relief if you have been held in custody in New York for over ninety days. Second, a court may issue a writ if you have been held for more than thirty days *and* the state of New York has not applied for an extension.

(b) Bail

You have grounds for a habeas petition if the court improperly set or denied bail. The court may have acted improperly if it did not follow New York's statutory guidelines, violated constitutional provisions forbidding excessive bail (for example, bail was set too high), or denied bail arbitrarily (for example, the court did not give a reason for why bail was not set).¹⁰⁷ New York Criminal Procedure Law § 510.30(2)(a) lists factors that a court must use to determine the amount, if any, of your bail.¹⁰⁸

104. *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 900 (1966) (ruling that habeas corpus is not the preferred means of protecting fundamental rights and that departure from “traditional orderly proceedings”, such as appeal, should be allowed only when required by reason of “practicality and necessity”).

105. *See People ex rel. Wise v. Scully*, 163 A.D.2d 444, 444, 570 N.Y.S.2d 1018, 1018 (2d Dept. 1990) (holding that the court cannot review errors already considered on a direct appeal); *People ex rel. Sanchez v. Hoke*, 132 A.D.2d 861, 862, 518 N.Y.S.2d 69, 70 (3d Dept. 1987) (declining to grant habeas relief where petitioner had direct appeal pending and had raised the same issues in an unsuccessful application under Article 440); *People ex rel. Proctor v. Henderson*, 74 A.D.2d 718, 719, 425 N.Y.S.2d 680, 680 (4th Dept. 1980) (holding that habeas corpus is not available where the issue had already been decided in an earlier Article 440 motion, but suggesting that the incarcerated person could bring another Article 440 motion seeking the same relief).

106. *See People ex rel. Linaris v. Weizenecker*, 89 Misc. 2d 814, 816, 392 N.Y.S.2d 813, 815 (Sup. Ct. Putnam County 1977) (granting writ of habeas corpus where petitioner had been held beyond 90-day period without warrant even though other charges were pending against him in New York); *see also* N.Y. CRIM. PROC. LAW §§ 570.36, 570.40 (McKinney 2009).

107. *See People ex rel. Klein v. Krueger*, 25 N.Y.2d 497, 499, 255 N.E.2d 552, 554, 307 N.Y.S.2d 207, 209–210 (1969) (holding that in a habeas corpus proceeding, the court can review a bail decision if the decision appears to be excessive or arbitrary according to constitutional or statutory standards); *see, e.g., People ex rel. Gutierrez v. Jacobson*, 219 A.D.2d 740, 740, 632 N.Y.S.2d 466, 466 (2d Dept. 1995) (dismissing habeas petition because the lower court's bail determination was reasonable and did not violate constitutional or statutory standards); *People ex rel. Hunt v. Warden of Rikers Is. Corr. Facility*, 161 A.D.2d 475, 476, 555 N.Y.S.2d 742, 743 (1st Dept. 1990) (dismissing habeas petition because the lower court did not abuse discretion in denial of bail); *see also* N.Y. C.P.L.R. 7010(b) (McKinney 2013).

108. These factors are character, reputation, habits, and mental condition; employment and financial resources; ties to family and community and length of residence in community; criminal record; juvenile record; previous failure to show up in court; the likelihood of conviction or the merit of any pending appeal; and the

If a court bases its bail determination on a factor not included in the statute, or ignores one or more of the factors, you may challenge the court's action by petitioning for habeas corpus.¹⁰⁹ Normally, when deciding a habeas corpus petition, the court can only review the record that was before the court that set your bail. In other words, the court deciding on your petition can only look at the facts and evidence that were presented at your bail hearing. It cannot consider new evidence that the bail-fixing court did not see.¹¹⁰ If you can show that bail was set too high, the court can grant a writ of habeas corpus reducing the amount, but it will not release you.¹¹¹ If you have already been tried and convicted, the court will dismiss your habeas petition as moot or irrelevant, because bail no longer matters once you have been convicted.¹¹²

(c) Delay

You may petition for a writ of habeas corpus if you were arrested without a warrant, have been detained for longer than twenty-four hours, and have not yet been arraigned (an "arraignment" is when you are called before the court to answer your charge).¹¹³ At your arraignment, you should receive a complaint. If you are charged with a misdemeanor, the District Attorney's office has five days (not counting Sunday) to replace the complaint with an information.¹¹⁴ If you have been arrested for a felony, the District Attorney's office has five days either to file an indictment against you by a grand jury vote or to file an information. These five days do not include weekends or holidays.¹¹⁵ However, even if these requirements are not met, your application for habeas relief may be denied if: (1) the delay is a result of your own actions; (2) the District Attorney already filed a certification that an

sentence that may be imposed. N.Y. CRIM. PROC. LAW § 510.30(2)(a) (McKinney 2009).

109. See *People ex rel. Bryce v. Infante*, 144 A.D.2d 898, 899, 535 N.Y.S.2d 215, 216 (3d Dept. 1988) (overturning denial of bail set on the basis of defendant's suicidal tendencies); *People ex rel. Ryan v. Infante*, 108 A.D.2d 987, 988 n.1, 485 N.Y.S.2d 852, 853–854 n.1 (3d Dept. 1985) (finding that a judge cannot increase bail to force a defendant to locate an absent codefendant, unless the defendant has assisted the co-defendant in bail jumping); *People ex rel. Bauer v. McGreevy*, 147 Misc. 2d 213, 216, 555 N.Y.S.2d 581, 583 (Sup. Ct. Rensselaer County 1990) (holding that bail cannot be denied solely to protect the community from possible future criminal conduct by the defendant); *Becher ex rel. Vadakin v. Dunston*, 142 Misc. 2d 103, 104, 536 N.Y.S.2d 396, 397 (Sup. Ct. Rensselaer County 1988) (overturning denial of bail issued without conducting a hearing and on the ground that the defendant disobeyed a court order to testify before the grand jury); *People ex rel. Glass v. McGreevy*, 134 Misc. 2d 1085, 1086, 514 N.Y.S.2d 622, 623 (Sup. Ct. Rensselaer County 1987) (holding that a negative AIDS test cannot be made a condition for bail).

110. See *People ex rel. Rosenthal v. Wolfson*, 48 N.Y.2d 230, 231–233, 397 N.E.2d 745, 745–746, 422 N.Y.S.2d 55, 55–56 (1979) (holding that, absent "extraordinary circumstances", new evidence relevant to bail determination should be submitted to the bail-fixing court, not to a habeas court).

111. N.Y. C.P.L.R. 7010(b) (McKinney 2013) ("If the person detained has been admitted to bail but the amount fixed is so excessive as to constitute an abuse of discretion, and he is not ordered discharged, the court shall direct a final judgment reducing bail to a proper amount."). For example, if you were indicted for selling heroin on two different occasions for amounts totaling \$19,000, and you have a wife and son with whom you had been living in the community, the court may find that bail set at \$150,000 is excessive. *People ex rel. Mordkofsky v. Stancari*, 93 A.D.2d 826, 827, 460 N.Y.S.2d 830, 832 (2d Dept. 1983).

112. See *Kassebaum v. al-Rahman*, 212 A.D.2d 482, 483, 624 N.Y.S.2d 573, 573 (1st Dept. 1995) (denying habeas petition challenging bail amount because petitioner had already been tried and convicted).

113. See *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422, 426–427, 570 N.E.2d 223, 225, 568 N.Y.S.2d 575, 577 (1991) (granting habeas because an unexplained delay of arraignment for more than 24 hours violates N.Y. CRIM. PROC. LAW 140.20(1)); see also N.Y. CRIM. PROC. LAW § 140.20(1) (McKinney 2004).

114. See N.Y. CRIM. PROC. LAW § 170.70 (McKinney 2007); *People ex rel. Alvarez v. Warden, Bronx House of Det.*, 178 Misc. 2d 254, 256, 680 N.Y.S.2d 153, 154–155 (Sup. Ct. Bronx County 1998) (granting a writ of habeas corpus because an information was not filed within five days); see also *People ex rel. Neufeld v. McMickens*, 70 N.Y.2d 763, 765, 514 N.E.2d 1368, 1368, 520 N.Y.S.2d 744, 744 (1987) (holding that five-day period includes the first day of custody unless the first day preceded arraignment or was a Sunday).

115. See *People ex rel. Barna v. Malcolm*, 85 A.D.2d 313, 316–317, 448 N.Y.S.2d 176, 178–179 (1st Dept. 1982) (finding that time to file an indictment or information may be extended if it expires upon a Saturday, Sunday, or public holiday, or if there is "good cause").

indictment has been voted; (3) a grand jury filed an indictment or a direction to file an information; or (4) a court finds good cause for the delay.¹¹⁶

You may also petition for a writ of habeas corpus if you are being denied your right to a speedy trial under subdivision (2) of New York's speedy trial statute.¹¹⁷ This statute applies to people who are incarcerated and have an information or indictment filed against them, but who have not yet gone to trial.¹¹⁸ If the court grants your petition, you will have the right to "be released on bail or on [your] own recognizance, upon such conditions as may be just and reasonable."¹¹⁹ If your trial has started, you can no longer bring a habeas corpus petition on this ground. Instead, you should raise the issue on direct appeal.¹²⁰

(d) After Your Conviction

(i) Confinement Beyond Sentence

You may petition for habeas corpus relief if you have already served your sentence and are still being detained. This detainment may be due to clerical error, office delay, or miscalculation of jail or prison time. However, you can only bring the petition only as long as you are entitled to immediate release if you win.¹²¹

Unless one of the administrative mistakes listed above has been committed, you may not file for a writ of habeas corpus to contest your sentence. For example, if you are serving time for several convictions, you may not petition for a writ of habeas corpus to challenge only one of these convictions or sentences, since you will remain imprisoned under the other convictions. This is explained more in Part A(2)(b) of this Chapter. Also, if you were improperly given a consecutive sentence instead of a concurrent sentence, or you were incorrectly sentenced as a "predicate" or "persistent felon" instead of a first-time offender, you cannot petition for a writ of habeas corpus to fix this mistake because it would not result in your immediate release.¹²² Instead, you must raise such issues in a direct appeal or an Article 440 motion.

116. N.Y. CRIM. PROC. LAW § 180.80 (McKinney 2007 & Supp. 2020).

117. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2018 & Supp. 2020).

118. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2018 & Supp. 2020). You may only petition for a writ of habeas corpus to challenge a violation of subdivision (2), not subdivision (1), of § 30.30. Under subdivision (2), a defendant charged with a felony cannot be held in custody before going to trial for longer than 90 days. A defendant charged with a misdemeanor, where the punishment for the misdemeanor is longer than three months of incarceration, cannot be held in custody for longer than 30 days before going to trial. A defendant charged with a misdemeanor where the punishment for the misdemeanor is less than three months of incarceration cannot be held for longer than 15 days before going to trial. And a defendant charged with only a violation cannot be held in custody before going to trial for longer than five days. *See People ex rel. Chakwin v. Warden*, 63 N.Y.2d 120, 126, 470 N.E.2d 146, 149, 480 N.Y.S.2d 719, 722 (1984) (finding that a delay of 91 days, after excluding delay due to defendant's motions, exceeds 90-day time limit, and requires release of defendant). Note that you must file a motion for release in order to have a habeas claim to challenge the violation of your right to a speedy trial. *People ex rel. Bullock v. Barry*, Index No. 02-403954, 2002 N.Y. Misc. LEXIS 1525, at *4-5 (Sup. Ct. N.Y. County 2002) (*unpublished*).

119. N.Y. CRIM. PROC. LAW § 30.30(2) (McKinney 2018 & Supp. 2020).

120. *See Kassebaum v. Al-Rahman*, 212 A.D.2d 482, 483, 624 N.Y.S.2d 573, 573 (1st Dept. 1995) (affirming the denial of habeas petition on speedy trial grounds because petition was brought after trial had commenced); *see also People ex rel. McDonald v. Warden*, 34 N.Y.2d 554, 554, 310 N.E.2d 537, 537, 354 N.Y.S.2d 939, 939 (1974) (finding that once criminal action is brought to trial, habeas petition based on denial of right to speedy trial should be denied).

121. *See People ex rel. Henderson v. Casscles*, 66 Misc. 2d 492, 495, 320 N.Y.S.2d 99, 104 (Sup. Ct. Westchester County 1971) (noting that although habeas petition would be appropriate where petitioner was entitled to immediate release, petitioner should use Article 78 motion if he seeks only to re-compute jail time).

122. *See People ex rel. Sims v. Senkowski*, 226 A.D.2d 800, 801, 640 N.Y.S.2d 820, 820-821 (3d Dept. 1996) (ruling that petitioner claiming that he should not have been sentenced as a persistent felon should raise this argument on direct appeal or file an Article 440 motion); *People ex rel. McGourty v. Senkowski*, 213 A.D.2d 954, 954, 624 N.Y.S.2d 308, 308 (3d Dept. 1995) (dismissing habeas petition where petitioner claimed that he was improperly sentenced as a persistent felon because, if successful, petitioner would be entitled only to resentencing, not immediate release); *People ex rel. Hampton v. Scully*, 166 A.D.2d 734, 734-735, 561 N.Y.S.2d 482, 483 (2d

(ii) Fundamental Rights

Some cases suggest that New York courts will not require you to use other available procedures if you are claiming a violation of a fundamental right.¹²³ However, courts have been reluctant to hold that a violation of a fundamental right alone can serve as a basis for a writ of habeas corpus. Generally, courts will only bypass traditional proceedings, such as appeal, where “practicality and necessity” require it.¹²⁴ Some cases go so far as to state that habeas corpus may not be used to attack a judgment on constitutional grounds when habeas corpus is not the primary cause of the case.¹²⁵

(e) New or Void Law

You may also petition the court on the ground that the statute under which you were prosecuted is unconstitutional.¹²⁶ It is very rare for courts to declare a statute unconstitutional. If a court does declare that you were prosecuted under a statute that was unconstitutional, you are entitled to immediate release on a habeas petition. A New York court may also grant writs of habeas corpus when the law has changed, and the law used to convict you has been declared void. Finally, a court may grant a writ of habeas corpus if your claim involves the “violation of a fundamental constitutional right, which was not clearly recognized nor fully articulated” by the Court of Appeals until after you had completed all appeals of your conviction.¹²⁷

Dept. 1990) (denying habeas petitions because the re-calculation of the sentence would not result in immediate release, and holding that an Article 78 proceeding would be more appropriate to force a re-calculation of the sentence). *But see* *People ex rel. Colan v. La Vallee*, 14 N.Y.2d 83, 86–87, 198 N.E.2d 240, 241, 248 N.Y.S.2d 853, 855 (1964) (granting habeas corpus where defendant was not informed, before his guilty plea, that his previous conviction would increase his punishment).

123. *See* *Roberts v. County Court of Wyoming County*, 39 A.D.2d 246, 253, 333 N.Y.S.2d 882, 890 (4th Dept. 1972) (“[W]hile some form of alternative relief, such as *coram nobis* [an order changing a judgement based on the discovery of a fundamental error], might also have been available to the relator in the present case, this should not foreclose the relator from proceeding by way of habeas corpus.”); *People ex rel. Rohrlach v. Follette*, 20 N.Y.2d 297, 299–300, 229 N.E.2d 419, 420, 282 N.Y.S.2d 729, 730–731 (1967) (finding that habeas corpus is appropriate to test whether there has been a deprivation of a fundamental constitutional or statutory right in a criminal prosecution, in this case, right to a trial by jury). Note that these are old cases and courts have become increasingly reluctant to review habeas corpus petitions if other procedures are available. For a list of constitutional and statutory rights in criminal cases, see *JLM*, Chapter 9, “Appealing Your Conviction or Sentence.” For more information on other forms of alternative relief, such as Article 440 motions and *coram nobis*, see *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence.”

124. *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 900 (1966) (ruling that habeas corpus is not the preferred means of providing relief for fundamental constitutional or statutory rights and that departing from traditional orderly proceedings, such as appeal, should be permitted only when dictated by reason of “practicality and necessity.”); *People ex rel. Hall v. LeFevre*, 92 A.D.2d 956, 957, 460 N.Y.S.2d 640, 641 (3d Dept. 1983) (holding that the “facts of this case do not demonstrate a violation of petitioner’s fundamental constitutional rights so egregious as to compel a departure from traditional orderly procedure.”); *People ex rel. Russell v. LeFevre*, 59 A.D.2d 588, 588, 397 N.Y.S.2d 27, 28 (3d Dept. 1977) (holding that habeas is not a proper remedy for attacking the judgment of conviction and noting the petitioner should have filed an Article 440 motion).

125. *See* *People ex rel. Sales v. LeFevre*, 93 A.D.2d 945, 946, 463 N.Y.S.2d 58, 59 (3d Dept. 1983) (holding that habeas corpus may not be utilized to collaterally attack the judgment on constitutional grounds—in this case, the right of confrontation—and that the facts of the case do not compel departure from traditional orderly procedure); *People ex rel. Russell v. LeFevre*, 59 A.D.2d 588, 588, 397 N.Y.S.2d 27, 28 (3d Dept. 1977) (dismissing a habeas corpus petition alleging violation of a constitutional right because habeas is not the proper remedy for attacking the judgment of conviction and noting the petitioner should have filed an Article 440 motion).

126. *See* *People ex rel. Haines v. Hunt*, 242 N.Y.S. 105, 107–108, 229 A.D. 419, 420–422 (3d Dept. 1930) (holding that habeas corpus is the proper remedy for a relator convicted under an unconstitutional statute).

127. *See* *People ex rel. Rodriguez v. Harris*, 84 A.D.2d 769, 770, 443 N.Y.S.2d 784, 785 (2d Dept. 1981). In *Rodriguez*, the petitioner filed for a writ of habeas corpus alleging a violation of his right to counsel based on a Court of Appeals decision, *People v. Rogers*, 48 N.Y.2d 167, 422 N.Y.S.2d 18, 397 N.E.2d 709 (1979) (prohibiting police interrogation of defendant, in absence of counsel, on matters related or unrelated to pending charges for which defendant is already represented by counsel). The *Rodriguez* court upheld the lower court’s dismissal of the

(f) Ineffective Counsel

In New York, you cannot use habeas corpus proceedings to claim ineffective assistance of counsel.¹²⁸ This is because the remedy would be a new trial and not release from custody (and habeas petitions are only for getting released from custody). Filing an Article 440.10 motion would be the appropriate cause of action.¹²⁹

(g) New Evidence

In New York, if you wish to raise the issue of new evidence, you must file an Article 440 motion.¹³⁰ See *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence” for more information on how to do this.

(h) Unreasonable Delay

A court may grant a writ of habeas corpus if there has been an “unreasonable delay” in the disposition (settlement) of an Article 440 motion¹³¹ or if your appeal has been pending for an unusually long time.¹³²

In addition, you may petition for habeas corpus if waiting for the appeal of your conviction will cause you to face a longer prison term.¹³³ In one case, an incarcerated person petitioned for habeas corpus on the grounds that he was wrongfully imprisoned in New York. The individual’s commitment order indicated that he should be imprisoned in Alabama, where he had earlier escaped from prison. The court granted the writ of habeas corpus even though an appeal that raised the issue of wrongful imprisonment was pending, because the appeal was not due to be heard by the court until later in the

writ, ruling that the *Rogers* decision could not be given retroactive application to petitioner’s criminal case. *People ex rel. Rodriguez v. Harris*, 84 A.D.2d 769, 770, 443 N.Y.S.2d 784, 785 (2d Dept. 1981). Note that the court denied the petition in *Rodriguez* on narrow grounds. The Court of Appeals had previously held in *People v. Pepper*, 53 N.Y.2d 213, 221, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 892 (1981), that in cases involving a defendant’s right to counsel in pretrial encounters, retroactive application of a change in decisional law is limited to those cases still on direct review at the time the change in law occurred. *See also* *People ex rel. Gallo v. Warden*, 32 A.D.2d 1051, 1052, 303 N.Y.S.2d 752, 753 (2d Dept. 1969) (holding that a habeas corpus proceeding was proper for reviewing propriety of imposition of a consecutive sentence where the petition was based upon decisions rendered after petitioner’s appeal).

128. For more information about ineffective assistance of counsel claims, see *f*, Chapter 12, “Appealing Your Conviction Based on Ineffective Assistance of Counsel.”; *see also* *Application of Jones*, 34 Misc. 2d 564, 565, 227 N.Y.S.2d 1002, 1004 (Sup. Ct. Special Term New York County 1962) (denying a habeas petition because habeas is “not the proper remedy for testing the requirements of due process or whether relator was properly represented by assigned counsel”).

129. *See People ex rel. Hall v. LeFevre*, 460 N.Y.S.2d 640, 641, 92 A.D.2d 956, 957 (3d Dept. 1983) (holding that issues of inadequacy of counsel must proceed using a 440 motion). For more information on filing Article 440.10 motions, see *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence.”

130. *See People v. Taylor*, 246 A.D.2d 410, 411, 668 N.Y.S.2d 583, 584 (1st Dept. 1998) (holding that the power to set aside a verdict on the grounds of new evidence is derived from N.Y. Crim. Proc. Law § 440.10(1)(g) and listing the six criteria that new evidence must meet).

131. *See People ex rel. Anderson v. Warden, New York City Corr. Inst. for Men*, 68 Misc. 2d 463, 468, 325 N.Y.S.2d 829, 835 (Sup. Ct. Bronx County 1971) (“[I]f there is an unreasonable delay in the disposition of an article 440 motion, the defendant can, perhaps, properly bring a writ of habeas corpus.”).

132. *See People ex rel. Lee v. Smith*, 58 A.D.2d 987, 987, 397 N.Y.S.2d 266, 267 (4th Dept. 1977) (granting a hearing on the merits of petitioner’s habeas corpus petition, even though an appeal was pending, because the petitioner’s appeal had been pending for more than four years).

133. *See State ex rel. Harbin v. Wilmut*, 104 Misc. 2d 272, 274–275, 428 N.Y.S.2d 152, 154–155 (Sup. Ct. Chemung County 1980) (finding a writ of habeas corpus “available when an incarcerated person is confined in the wrong State penal institution” and the incarcerated person’s current place of incarceration will result in a longer term of imprisonment).

year, and none of the time that the incarcerated person served in New York would count against his Alabama sentence.¹³⁴

(i) Violations of the Conditions of Your Sentence (New York Only)

You may also petition for a writ of habeas corpus if the conditions of your imprisonment are worse than the conditions authorized by your judgment of conviction or by the New York and U.S. Constitutions.¹³⁵ For example, you may petition for habeas corpus on the grounds that:

- (1) You are being denied the rehabilitation, care, or treatment required by your sentence;¹³⁶
- (2) You were arbitrarily and illegally transferred to an institution for the criminally insane;¹³⁷
- (3) You have been found not guilty because of mental illness¹³⁸ and are being held at an institution for the criminally insane, but you have not received a hearing or proceeding to evaluate your mental health as required by New York Criminal Procedure Law Section 330.20;¹³⁹
- (4) You have been found not guilty because of mental illness and are being held at an institution for the criminally insane, but are no longer suffering from mental illness and are thus entitled to release, or are no longer dangerous and are thus entitled to transfer to a non-secure facility as required by New York Criminal Procedure Law Section 330.20;¹⁴⁰
- (5) You are held in a different prison than the one on the sentencing court's commitment order;¹⁴¹ or

134. *See State ex rel. Harbin v. Wilmot*, 104 Misc. 2d 272, 274–275, 428 N.Y.S.2d 152, 154–155 (Sup. Ct. Chemung County 1980).

135. *See People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (3d Dept. 1961) (“[I]t seems quite obvious that any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry.”).

136. *See People ex rel. Smith v. La Vallee*, 29 A.D.2d 248, 250, 287 N.Y.S.2d 601, 604 (4th Dept. 1968) (petitioner with an indeterminate sentence is entitled to psychiatric treatment and examination).

137. *See People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (3d Dept. 1961) (holding that lower court wrongly refused to consider petition for habeas corpus that challenged the transfer of a person convicted of rape from a prison to a mental hospital).

138. This is also known as “not guilty by reason of insanity.”

139. *See People ex rel. Thorpe v. Von Holden*, 63 N.Y.2d 546, 555, 473 N.E.2d 14, 18, 483 N.Y.S.2d 662, 666 (4th Dept. 1984) (finding that a habeas petition is proper to test whether petitioner may remain in custody when the Department of Mental Health Commissioner has failed to comply with time, notice, and hearing requirements for a statutory retention order). If your petition is granted for this reason, the court will order your release or your transfer to a non-secure facility, unless there is evidence of a dangerous mental disorder. If the court has ordered your release, the State Commissioner of Mental Health or Mental Retardation and Developmental Disabilities may, however, apply to the court to have you remain at the institution. This application may be granted if it is immediately filed and processed. *See State ex rel. Henry L. v. Hawes*, 174 Misc. 2d 929, 933–934, 667 N.Y.S.2d 212, 216 (Co. Ct. Franklin County 1997) (granting petitioner's habeas writ and ordering petitioner immediately transferred to a non-secure facility because the order of confinement had expired and no application for the order's extension had been made, in violation of N.Y. CRIM. PROC. LAW § 330.20).

140. *See McGraw v. Wack*, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135, 136 (1st Dept. 1995) (finding that writ of habeas corpus is the proper proceeding for petitioner to seek transfer to a non-secure facility or release); *People ex rel. Schreiner v. Tekben*, 160 Misc. 2d 724, 727, 611 N.Y.S.2d 734, 736 (Sup. Ct. Orange County 1994) (holding that the habeas corpus proceeding was an appropriate mechanism for transfer from a secure psychiatric facility to a non-secure facility), *aff'd sub nom. People ex rel. Richard S. v. Tekben*, 219 A.D.2d 609, 610, 631 N.Y.S.2d 524, 524 (2d Dept. 1995) (holding that habeas petition is the proper mechanism to seek transfer from a secure to a non-secure facility).

141. *See People ex rel. Harbin v. Wilmot*, 104 Misc. 2d 272, 274, 428 N.Y.S.2d 152, 154 (Sup. Ct. Chemung County 1980) (holding that an incarcerated person was illegally imprisoned within New York State when he was held in a prison in New York rather than the Alabama prison that was specified on his commitment order by the sentencing court).

- (6) You were transferred to solitary confinement as a result of unconstitutional discrimination.¹⁴²

However, wardens and the Department of Corrections and Community Supervision (“DOCCS”) have wide discretion in determining the conditions of your incarceration, and courts will find that few forms of punishment inside the prison will violate your constitutional rights or the conditions of your sentence.¹⁴³

(j) Probation or Parole

(i) Preliminary Revocation Hearings

If DOCCS tries to revoke your parole, you are entitled to a hearing. You may petition for habeas corpus if your preliminary parole revocation hearing was not conducted in accordance with the law. You are entitled to the following:

- (1) Written notice of the charges against you (including the conditions of presumptive release, parole, conditional release or post-release supervision that you allegedly violated), as well as the time and place of your hearing.¹⁴⁴ You are entitled to this notice within three days of the execution of the warrant for your retaking and temporary detention, or within five days of the execution of the warrant if you are detained in another state and were not in that state through an out-of-state parolee supervision agreement;¹⁴⁵
- (2) A hearing conducted within fifteen days of the warrant being executed;¹⁴⁶

142. See *People ex rel. Rockey v. Krueger*, 62 Misc. 2d 135, 136, 306 N.Y.S.2d 359, 360 (Sup. Ct. Nassau County 1969) (finding placement of a Muslim incarcerated person in solitary confinement because he would not shave his beard for religious reasons was unconstitutional discrimination, and ordering release of person from solitary confinement); see also *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law,” *JLM*, Chapter 18, “Your Rights at Prison Disciplinary Proceedings,” and *JLM*, Chapter 27, “Religious Freedom in Prison.”

143. See, e.g., *People ex rel. France v. Coughlin*, 99 A.D.2d 599, 599, 471 N.Y.S.2d 695, 696 (3d Dept. 1984) (denying habeas petition because administrative segregation of the incarcerated person was well within the terms of confinement ordinarily contemplated by a prison sentence, and petitioner failed to show that confinement violated his constitutional rights); *People ex rel. Jacobson v. Warden of Brooklyn House of Det.*, 77 A.D.2d 937, 937, 431 N.Y.S.2d 114, 115 (2d Dept. 1980) (upholding warden’s denial of contact visits with person who allegedly helped in an earlier escape on grounds that such restriction is outside the scope of habeas corpus relief).

144. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018).

145. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018). However, even if you are not given notice of your parole violation within three days of your hearing, that is not necessarily a reason to grant a petition for habeas corpus. You must also show that the lack of notice somehow hurt your ability to prepare for the hearing. See *People ex rel. Wise v. N.Y. State Div. of Parole*, 50 A.D.3d 303, 303, 853 N.Y.S.2d 886, 886 (1st Dept. 2008) (denying writ of habeas corpus, even after assuming that the petitioner did not receive proper notice of the preliminary revocation hearing, when petitioner appeared for the hearing and did not object, request an adjournment to prepare, or argue that he lacked notice regarding the basis of the parole violation or was otherwise prejudiced); *People ex rel. Washington v. N.Y. State Div. of Parole*, 279 A.D.2d 379, 379–380, 720 N.Y.S.2d 22, 23 (1st Dept. 2001) (affirming dismissal of a habeas petition where there was no showing of prejudice caused by lateness of notice of hearing); *People ex rel. Williams v. Walsh*, 241 A.D.2d 979, 980, 661 N.Y.S.2d 371, 371 (4th Dept. 1997) (finding defendant was not entitled to restoration of parole or dismissal of parole violation warrant based on a one-day delay in serving statutory notice and failure to comply with three-day notice rule where the preliminary hearing was held in a timely manner, defendant did not request adjournment to prepare for the hearing or contend that he lacked adequate notice of a basis for parole violation, and did not contend that he was prejudiced by the one-day delay); see also *People ex rel. Walker v. N.Y. State Bd. of Parole*, 98 A.D.2d 33, 33–35, 469 N.Y.S.2d 780, 782 (2d Dept. 1983) (holding that it is inappropriate for a court to decide factual issues concerning the presence or absence of timely notice until the final revocation hearing is conducted and where the final hearing has been scheduled within the statutory 90 day period).

146. N.Y. EXEC. LAW § 259-i(3)(c)(i) (McKinney 2018); see also, e.g., *People ex rel. Richman v. Warden, Bronx House of Det.*, 122 Misc. 2d 957, 958, 472 N.Y.S.2d 291, 292 (Sup. Ct. Bronx County 1984) (vacating warrant and reinstating parole when parolee was not granted a preliminary parole revocation hearing within 15 days of service of notice of

- (3) Evidence introduced at your preliminary parole revocation hearing sufficient to provide probable cause¹⁴⁷ to believe that you had violated a condition of your parole;¹⁴⁸ and
- (4) To appear and speak on your own behalf, present witnesses, and cross-examine witnesses (question the witnesses against you).¹⁴⁹

Any denial of the above requirements may be grounds for a habeas petition in New York. Note that you are not entitled to a preliminary parole revocation hearing if you were convicted of a new crime.¹⁵⁰

(ii) Final Parole Revocation Hearings

You may petition for habeas corpus if your final parole revocation hearing was not conducted in accordance with the law. You are entitled to the following:

- (1) A hearing that is conducted within ninety days of the probable cause hearing;¹⁵¹

his parole violation). If the court finds that the delay is not the state's fault, it may dismiss the habeas corpus petition. *See, e.g., People ex rel. Goldberg v. Warden, Rikers Island Corr. Facility*, 45 A.D.3d 356, 356, 846 N.Y.S.2d 15, 16 (1st Dept. 2007) (denying petition for habeas where the preliminary parole revocation hearing was timely scheduled but “adjourned for the legitimate reason that petitioner was confined for medical reasons”); *People ex rel. Hampton v. Warden, Rikers Is. Corr. Facility*, 211 A.D.2d 566, 567, 621 N.Y.S.2d 580, 581 (1st Dept. 1995) (dismissing habeas petition where timely hearing was postponed a few days due to closure of courthouse during snowstorm and then rescheduled to allow probationer to attend). In addition, the law does not require that the hearing be *completed* within 15 days. *See, e.g., Matter of Emmick v. Enders*, 107 A.D.2d 1066, 1067, 486 N.Y.S.2d 559, 560 (4th Dept. 1985) (holding that the law requires only that the hearing be “scheduled to take place” within the statutory 15 day period, and that “[w]hen a preliminary parole revocation hearing has been timely scheduled, or held in whole or in part, and thereafter is adjourned for legitimate reasons, without prejudice to the petitioner, there is no violation of the 15-day limit”). Finally, a court may find that you have waived (given up) your right to a timely hearing. *See People ex rel. Miller v. Walters*, 60 N.Y.2d 899, 901, 458 N.E.2d 1251, 1251, 470 N.Y.S.2d 574, 575 (1983) (denying petition for writ of habeas corpus because petitioner waived preliminary hearing and thereby waived right to challenge board's failure to afford him a timely preliminary hearing). However, that waiver must be clearly made or it will be invalid. *See People ex rel. Melendez v. Warden of Rikers Island Corr. Facility*, 214 A.D.2d 301, 302-303, 624 N.Y.S.2d 580, 582 (1st Dept. 1995) (ruling that the state failed to prove that the petitioner had waived his right to a timely hearing, and ordering that petitioner be reinstated to parole).

147. “Probable cause” in this case means reasonable cause, or reasonable grounds for believing, based on existing facts, that you have violated your parole. *Probable Cause*, Black's Law Dictionary (11th ed. 2019).

148. N.Y. EXEC. LAW § 259-i(3)(c)(vi) (McKinney 2018); *see also People ex rel. Davis v. N.Y. State Div. of Parole*, 149 Misc. 2d 741, 744-745, 566 N.Y.S.2d 469, 471-472 (Sup. Ct. Westchester County 1991) (ruling that there was not probable cause to believe that the parolee violated a condition of his parole in an important respect where the parolee failed to notify parole officer of arrest for 95 hours despite the requirement that officer be notified immediately, when parolee had only a 50-minute window of opportunity to do so); *People ex rel. Glenn v. Bantum*, 132 Misc. 2d 676, 678, 505 N.Y.S.2d 359, 361 (Sup. Ct. Bronx County 1986) (holding that there was no legal evidence presented at the preliminary hearing to support probable cause that the parolee was in possession of drugs where the sole evidence was hearsay testimony of parole officer's conversations with arresting officer, and parole officer was unable to testify that the substances in question were recovered from the parolee).

149. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018); *see also People ex rel. Deyver by Weinstein v. Travis*, 172 Misc. 2d 83, 85–86, 657 N.Y.S.2d 306, 307 (Sup. Ct. Erie County 1997) (granting petitioner's habeas petition and finding that, to preserve petitioner's statutory right to effective cross-examination, petitioner was entitled to production of parole officer's notes, upon which parole officer had relied on in testifying at hearing).

150. *See N.Y. EXEC. LAW § 259-i(3)(c)(i)* (McKinney 2018); *People ex rel. Felder v. Warden of Queens House of Det. for Men*, 173 Misc. 2d 1029, 1030, 662 N.Y.S.2d 729, 731 (Sup. Ct. Queens County 1997) (ruling that parolee was not entitled to preliminary parole hearing on his violation because he had been convicted of a new crime while released on parole).

151. N.Y. EXEC. LAW § 259-i(3)(f)(i) (McKinney 2018); *see People ex rel. Brown v. N.Y. State Div. of Parole*, 70 N.Y.2d 391, 402, 516 N.E.2d 194, 200, 521 N.Y.S.2d 657, 663 (1987) (vacating parole violation warrant and dismissing parole violation proceeding where revocation hearing was not held within 90 days). However, the court may find that the hearing was timely if the delay was due to the parolee. *See, e.g., People ex rel. Williams v. Allard*, 19 A.D.3d 890, 891, 798 N.Y.S.2d 153, 154-55 (3d Dept. 2005) (finding final parole revocation hearing was timely because 119 days of the delay were “attributable to petitioner's numerous requests for adjournments”). If you were incarcerated out of state, the court may also find that your hearing was timely even if it was held after 90 days from the probable cause determination. N.Y. EXEC. LAW § 259-i(3)(a)(iii) (McKinney 2018) (“Where the alleged violator is detained in another state ... the warrant will not be deemed to be executed until the alleged

- (2) Representation by a lawyer at the hearing;¹⁵²
- (3) Written notice of the date, place, and time of the hearing given to you and your attorney at least fourteen days prior to the scheduled hearing date;¹⁵³
- (4) An opportunity to cross-examine witnesses against you, unless there was good cause for witnesses not to attend the hearing (as determined by the hearing officer);¹⁵⁴ and
- (5) Proof of your parole violation by a *preponderance* of the evidence.¹⁵⁵

violator is detained exclusively on the basis of such. . . [parole] warrant. . ."); *see also* *People ex rel. Johnson v. Warden, Manhattan House of Det.*, 178 A.D.2d 331, 331 579 N.Y.S.2d 1, 1 (1st Dept. 1991) (ruling defendant's final revocation hearing was not untimely, particularly as he was never detained "exclusively" on basis of parole revocation warrant).

152. N.Y. EXEC. LAW, § 259-i(3)(f)(v) (McKinney 2018); *see also* *People ex rel. Brown v. Smith*, 115 A.D.2d 255, 255, 496 N.Y.S.2d 123, 123–124 (4th Dept. 1985) (holding that a parolee has the right to counsel in a final parole revocation hearing). You can waive (give up) this right if you decide that you do not want or need counsel. *See* *People ex rel. Martinez v. Walters*, 99 A.D.2d 476, 476–477, 470 N.Y.S.2d 56 (2d Dept. 1984) (finding that incarcerated person had waived his right to counsel at his revocation hearing because the decision was knowing, intelligent, and voluntary; finding that the right to counsel may be waived in the absence of counsel). However, a waiver must be knowingly, intelligently, and voluntarily made in order to be valid. *See, e.g.,* *People ex rel. Perez v. Warden*, 139 A.D.2d 477, 478, 527 N.Y.S.2d 233, 234 (1st Dept. 1988) (holding parolee's waiver of counsel ineffective as the hearing officer failed to conduct sufficient inquiry to reasonably ensure that parolee appreciated the dangers and disadvantages of waiving his right to counsel).

153. N.Y. EXEC. LAW § 259-i(3)(f)(iii) (McKinney 2018); *see also* *People ex rel. Rivera v. N.Y. State Div. of Parole*, 83 A.D.2d 918, 919, 442 N.Y.S.2d 511, 512 (3d Dept. 1981) (granting petitioner new final parole revocation hearing because notice of time and date of hearing was mailed five days before the hearing in violation of state law, which requires 14 days' notice). Note that an adjournment [postponement] of the final parole revocation hearing does not require a new 14-day notice to parolee. *See* *People ex rel. Crooks v. N.Y. State Bd. of Parole*, 194 A.D.2d 376, 376, 598 N.Y.S.2d 263, 264 (1st Dept. 1993).

154. N.Y. EXEC. LAW § 259-i(3)(f)(v) (McKinney 2018); *see also* *People ex rel. Rosenfeld v. Sposato*, 87 A.D.3d 665, 666–667, 928 N.Y.S.2d 350, 352 (2d Dept. 2011) (finding that "the petitioner's due process rights were violated when he was afforded no opportunity to cross-examine the parole officer who prepared the report and who possessed personal knowledge of the alleged violations" when the State's only reason for the officer's absence "was that he was on vacation"); *People ex rel. McGee v. Walters*, 62 N.Y.2d 317, 322, 465 N.E.2d 342, 344, 476 N.Y.S.2d 803, 805 (1984) (ruling that a parolee's right to confront adverse witnesses at parole revocation hearings should not be "underestimated or ignored," and finding that there was no good cause given for declarant's absence but that "a hearing examiner may, nevertheless, upon a specific finding of good cause, permit the introduction of adverse hearsay statements without affording the parolee an opportunity to confront the declarant"); *People ex rel. Martin v. Warden, Ossining Corr. Facility*, 133 A.D.2d 134, 135, 518 N.Y.S.2d 669, 670 (2d Dept. 1987) (ruling that good cause existed for dispensing with production of New Jersey parole officer at parole hearing, where the state of New Jersey had an established and firm policy of refusing to allow its supervising parole officers to travel to other states for parole revocation hearings, and petitioner refused to submit interrogatories to New Jersey officer).

155. N.Y. EXEC. LAW § 259-i(3)(f)(viii) (McKinney 2018). You will waive this ground if you do not raise it in your habeas petition. In other words, if you do not state in your habeas petition that your parole violation was unproven, you cannot argue this point at a later time. *People ex rel. McWhinney v. Smith*, 219 A.D.2d 879, 879, 632 N.Y.S.2d 40, 40 (4th Dept. 1995). Also, even if you do not think that there is enough evidence for your parole to be revoked, you must wait until after the final revocation hearing before you file your habeas petition. *See* *People ex rel. Wallace v. N.Y. State Bd. of Parole*, 111 A.D.2d 940, 941, 491 N.Y.S.2d 50, 50 (2d Dept. 1985) (dismissing a habeas petition because it was filed before the final revocation hearing).

Any denial of the above requirements may be grounds for a habeas petition. You may also petition if: (1) you were denied your fundamental constitutional right to be present at the hearing;¹⁵⁶ or (2) you requested a local parole revocation hearing, and your request was denied.¹⁵⁷

Note that you are not entitled to a final parole revocation hearing if your parole was revoked because of a new felony conviction.¹⁵⁸ You may not petition for a writ of habeas corpus for the above reasons if you would remain imprisoned for other convictions.¹⁵⁹

(k) Subject Matter Jurisdiction

In New York, supreme and county courts have jurisdiction to try felonies.¹⁶⁰ District, city, town, and village courts have jurisdiction over misdemeanors.¹⁶¹ If you are convicted by a court that does not have authority to try your offense, you may petition for habeas corpus.¹⁶² A court may also lack subject matter jurisdiction if the allegations made in your indictment are insufficient in some way.¹⁶³

156. *See Wyche v. N.Y. State Bd. of Parole*, 66 A.D.3d 541, 542, 887 N.Y.S.2d 71, 72 (1st Dept. 2009) (affirming that a “parolee’s right to be present and be heard at a parole revocation hearing is a fundamental due process right” and reinstating parole for petitioner on grounds that he did not waive his right to be present at the hearing); *In re Schwartz v. Warden*, N.Y. State Corr. Facility at Ossining, 82 A.D.2d 870, 871, 440 N.Y.S.2d 270, 271-72 (2d Dept. 1981) (finding that parolee, who invoked his right to counsel and who refused to attend revocation hearing due to inability of his attorney to attend the hearing, did not waive his right to appear; and that it was therefore an error for hearing officer to conduct the hearing without parolee). Note, however, that a court may find that you have waived this right. If you are called to a hearing, you must appear even if you have applied for an adjournment. Otherwise, you have waived your appearance. *See, e.g., People ex rel. Rodriguez v. Warden*, 163 A.D.2d 206, 206-207, 558 N.Y.S.2d 59, 59 (1st Dept. 1990).

157. N.Y. EXEC. LAW § 259-i(3)(e)(i) (McKinney 2018) (“If the alleged violator requests a local revocation hearing, he or she shall be given a revocation hearing reasonably near the place of the alleged violation or arrest if he has not been convicted of a crime committed while under supervision.”); *see People ex rel. Campolito v. Portuondo*, 248 A.D.2d 768, 769, 669 N.Y.S.2d 726, 727 (3d Dept. 1998) (finding that where an incarcerated person had not requested a local parole revocation hearing, he was not entitled to one); *People ex rel. Starks v. Superintendent, Clinton Corr. Facility*, 138 A.D.2d 818, 819, 525 N.Y.S.2d 739, 740 (3d Dept. 1988) (ordering new parole revocation hearing for petitioner whose request for a local revocation hearing was denied, on the grounds that Rikers Island is not “reasonably near” Syracuse).

158. *See N.Y. EXEC. LAW § 259-i(3)(d)(iii)* (McKinney 2018); *see also O’Quinn v. N.Y. State Bd. of Parole*, 132 Misc. 2d 92, 94–95, 503 N.Y.S.2d 483, 484–485 (Sup. Ct. N.Y. County 1986) (noting statute which removes right to final revocation hearing where parolee has been convicted of felony while on parole does not violate due process).

159. *See People ex rel. Linares v. Dalsheim*, 107 A.D.2d 728, 728, 484 N.Y.S.2d 89, 90 (2d Dept. 1985) (noting that habeas corpus was not available since petitioner was incarcerated due to a subsequent felony conviction and would not have been entitled to immediate release). You may, however, bring an Article 78 proceeding to challenge Parole Board decisions even if you will remain incarcerated for other convictions. *See People ex rel. Mack v. Reid*, 113 A.D.2d 962, 963, 494 N.Y.S.2d 25, 26–27 (2d Dept. 1985) (stating that petitioner who had raised the issue of untimeliness before Parole Board should bring Article 78 proceeding after Board decides against him). Be aware that a four-month statute of limitations applies to Article 78 petitions. *See, e.g., Soto v. N.Y. State Bd. of Parole*, 107 A.D.2d 693, 694–696, 484 N.Y.S.2d 49, 50–52 (2d Dept. 1985) (dismissing Article 78 petition filed three years after the parole revocation hearing because it violated four-month statute of limitations for Article 78 proceedings). *See Chapter 22 of the JLM* “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules” for a discussion of Article 78 proceedings.

160. N.Y. CRIM. PROC. LAW § 10.20(1)(a) (McKinney 2018 & Supp. 2020) (superior courts have exclusive jurisdiction over felonies); N.Y. CRIM. PROC. LAW § 10.10(2) (McKinney 2018 & Supp. 2020) (supreme court and county courts are the superior courts). Felonies are offenses that are punishable by a prison term of more than one year. N.Y. PENAL LAW § 10.00(5) (McKinney 2009).

161. N.Y. CRIM. PROC. LAW § 10.30(1) (McKinney 2018 & Supp. 2020). Misdemeanors are offenses punishable by fine and/or a jail sentence of more than 15 days, but less than a year. N.Y. PENAL LAW § 10.00(4) (McKinney 2009).

162. *See People ex rel. Clifford v. Krueger*, 59 Misc. 2d 87, 93, 297 N.Y.S.2d 990, 996–997 (Sup. Ct. Nassau County 1969) (granting petitioner’s writ of habeas corpus, finding the conviction illegal because the crime of which he was convicted was an offense over which Family Court had exclusive original jurisdiction, and transferring the matter to Family Court).

163. N.Y. CRIM. PROC. LAW § 20.20 (McKinney 2018).

This issue should normally be raised on appeal or in an Article 440 motion. However, if you give a compelling reason why the court should depart from regular procedure, you may petition for habeas corpus if:

- (1) An indictment or information was not filed against you;¹⁶⁴
- (2) Your indictment failed to state facts that made up every necessary element, or part, of your crime, and the court was entirely stripped of jurisdiction as a result;¹⁶⁵ or
- (3) The court convicted you of a crime not included in the indictment (this does not include lesser included offenses of the offenses¹⁶⁶ charged in your indictment). If you failed to object to the submission of the offense at your trial, however, you may have waived this claim.¹⁶⁷

In the above circumstances, a court will review your habeas corpus petition only if the issue is very important and would invalidate your conviction.¹⁶⁸ In one case, for example, an incarcerated person petitioned for habeas corpus on the ground that attempted escape could not serve as the basis for a felony murder conviction because attempted escape was only classified as a misdemeanor, not a felony.¹⁶⁹ Though the person had not raised this issue in a second appeal from his conviction (he did raise it in his first appeal), the court heard his argument for granting a writ of habeas corpus due to the importance of the issue and its impact upon the validity of the conviction and sentence for murder. The court believed that the issue needed to be resolved and noted that it would have to reverse the incarcerated person's murder conviction if the court resolved the issue in his favor.¹⁷⁰

164. *See People ex rel. Battista v. Christian*, 249 N.Y. 314, 321, 164 N.E. 111, 113 (1928) (granting habeas corpus petition because there was no presentment or indictment of a grand jury). Note that an indictment no longer has to be filed for every crime; the prosecutor may file an information instead. In November 1973, the New York Constitution was amended to provide an exception to the indictment requirement where the accused is charged with an offense that is not punishable by death or life imprisonment. N.Y. Const. art. I, § 6. This amendment is explained in *People v. Trueluck*, 88 N.Y.2d 546, 548–549, 670 N.E.2d 977, 978, 647 N.Y.S.2d 476, 477 (1996) (noting that “a defendant may waive an indictment and consent to be prosecuted ... by a superior court information where (1) the local criminal court has held the defendant for the action of a Grand Jury, (2) the defendant is not charged with a class A felony, and (3) the District Attorney consents to the waiver of indictment.” (citing N.Y. CRIM. PROC. LAW § 195.10(1) (McKinney 2018 & Supp. 2020))).

165. For example, if your indictment for 1st degree murder fails to describe acts that showed that you intended to kill another person, the court does not have jurisdiction to convict you of 1st degree murder, because intent to kill is a necessary element of 1st degree murder. However, the court does have jurisdiction to convict you of 2nd degree murder, since intent is not a necessary element of 2nd degree murder. Therefore, in this case, you could challenge your conviction for 1st degree murder, but not 2nd degree murder, in a petition for habeas corpus. *See People ex rel. Williams v. La Vallee*, 30 A.D.2d 1034, 1034, 294 N.Y.S.2d 824, 826 (4th Dept. 1968). *But see People ex rel. Wysokowski v. Conboy*, 19 A.D.2d 663, 664, 241 N.Y.S.2d 245, 246 (3d Dept. 1963) (denying habeas corpus petition because a simplified form of indictment that omitted certain facts did not deprive the court of jurisdiction).

166. *See JLM*, Chapter 9, “Appealing Your Conviction or Sentence,” for an explanation of lesser included offenses.

167. For example, if your indictment charged you with murder, but the judge announced that he or she also would consider whether you were guilty of robbery (which is not a lesser included offense within the crime of murder), and you were subsequently convicted of robbery, you may challenge your conviction only if you objected at your trial to the judge's intention to consider robbery. *See People ex rel. Tanner v. Vincent*, 44 A.D.2d 170, 173–174, 354 N.Y.S.2d 145, 148 (2d Dept. 1974) (denying habeas corpus petition where the petitioner failed to raise an objection on appeal to a robbery conviction when the petitioner had been indicted for common law murder, felony murder, and possession of a weapon, but was instead convicted of robbery, which is not a lesser included offense within the crime of felony murder).

168. *See People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262–263, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 899–900 (1966) (“traditional orderly proceedings” other than habeas corpus should be followed unless habeas corpus is required by “reason of practicality and necessity.”); *People ex rel. Culhane v. Sullivan*, 139 A.D.2d 315, 321–322, 531 N.Y.S.2d 287, 291 (2d Dept. 1988) (refusing to grant a writ of habeas corpus where the information included sufficient showings of intent and overt acts constituting a crime under state law).

169. Felony murder is a rule of criminal law which holds that a defendant is responsible for any killing that occurred during the commission of a felony.

170. *People ex rel. Culhane v. Sullivan*, 139 A.D.2d 315, 317, 531 N.Y.S.2d 287, 288 (2d Dept. 1988); *see also*

3. How to File Your Habeas Corpus Petition

(a) When to File

In New York, before you file your habeas corpus petition, make sure you cannot bring any of these proceedings:

- (1) Appeal (refer to *JLM*, Chapter 9, “Appealing Your Conviction or Sentence”),
- (2) Article 440 (refer to *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence”), or
- (3) Article 78 (refer to *JLM*, Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules”).

(b) Where to File

In New York, you may petition any of the following courts or judges for a writ of habeas corpus:

- (1) The supreme court in the judicial district in which you are imprisoned;
- (2) The appellate division of the department in which you are imprisoned;
- (3) Any justice of the supreme court; or
- (4) A county judge within the county in which you are imprisoned, or a county judge from an adjoining county, if no judge within the county can or will issue a writ.¹⁷¹

Appendix II of the *JLM* provides the addresses for New York courts.

(c) What to Include in Your Petition

The habeas corpus petition you submit should include the following information:

- (1) The name of your prison and of the warden or official imprisoning you, if you know their names;
- (2) A copy of the mandate by which you are detained or an explanation of why you could not obtain a copy of the mandate;¹⁷²
- (3) The reason you are imprisoned, to the best of your knowledge;
- (4) An explanation of why your imprisonment is illegal;¹⁷³
- (5) The result of any appeal from the trial court’s judgment, or a statement that you did not take an appeal, if that is the case;
- (6) The date, result, and name of the court or judge to whom you previously petitioned for a writ of habeas corpus, plus a statement of any new facts in your current petition that you did not raise in earlier petitions. If you have not petitioned for a writ of habeas corpus before, state this fact in your petition;¹⁷⁴ and

People *ex rel.* Bartlam v. Murphy, 9 N.Y.2d 550, 553–554, 175 N.E.2d 336, 337–338, 215 N.Y.S.2d 753, 755–756 (1961) (ruling in favor of a relator in a habeas corpus petition and ordering a hearing on whether the relator was denied the right to be present when the jury received further instructions, which is an issue essential to the court’s jurisdiction to proceed with trial). *But see* People *ex rel.* Lupo v. Fay, 13 N.Y.2d 253, 257, 196 N.E.2d 56, 58–59, 246 N.Y.S.2d 399, 402 (1963) (denying writ of habeas corpus and holding that the defendant’s absence when counsel made a motion to discharge the jury did not affect any substantial rights).

171. N.Y. C.P.L.R. 7002(b)(1)–(4) (McKinney 2013 & Supp. 2020). Note that if you are being held in a New York City detention center, you may also file with any justice of the supreme court of the county in which your charge is pending, in addition to the above-listed options. For example, a person being held on Rikers Island in the Bronx may file a writ of habeas corpus with a justice of the Supreme Court in New York County (Manhattan) if he has a charge pending there. N.Y. C.P.L.R. 7002(b)(5) (McKinney 2013 & Supp. 2020).

172. A mandate is a written order of the court directing the warden to enforce the sentence against you. N.Y. GEN. CONSTR. LAW § 28-a (McKinney 2018). Under N.Y. PUB. OFF. LAW § 89(3)(a) (McKinney 2008), the superintendent or warden of your prison should make the mandate available to you upon your written request.

173. You should support your claim that your imprisonment is illegal with as many facts as possible. If you merely state that your imprisonment is illegal without detailing why, a court will dismiss your petition. *See* People *ex rel.* Boyd v. LeFevre, 92 A.D.2d 1042, 1042, 461 N.Y.S.2d 667, 667 (3d Dept. 1983) (upholding dismissal of habeas corpus petition where the petition contained only bare, conclusory assertions that the defendant’s rights were violated without any facts alleged to support such claims).

174. If you fail to detail prior applications for a writ of habeas corpus, the court may dismiss your petition.

- (7) The facts that authorize the judge to act, if the petition is made to a county judge outside of the county where you are detained.

This is not a complete list. You should consult New York Civil Practice Law and Rules 7002(c) for other information that you must include in your habeas corpus petition. If you do not include the required information, a court will dismiss your petition, unless you can show some convincing reason why you could not include the required information.¹⁷⁵ For example, one reason might be that you were deprived of legal material and writing instruments.¹⁷⁶

Write out and then type a petition and a writ. Sign the petition in the presence of a *notary public*, who will put his seal on the papers. By “notarizing” the petition, you are swearing that all statements in the document are true.¹⁷⁷ Send the documents to the court specified above in Section 2, “Where to File.” Appendix II of the *JLM* provides the addresses for New York courts.

4. Your Right to Counsel for Your Petition

The U.S. Supreme Court has held that you have no federal constitutional right to counsel for state habeas corpus proceedings.¹⁷⁸ However, New York state law may provide you the right to counsel. If you lack the financial means to obtain your own lawyer, you often have the right to a court-appointed lawyer for a hearing on your habeas corpus petition, provided that you request that the court appoint a lawyer.¹⁷⁹ To do so, you must complete “poor person’s papers” (known as proceeding *in forma pauperis*). *JLM* Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” contains sample poor person’s papers in its Appendix A for use in obtaining a lawyer for an Article 78 proceeding. You may use the same forms to obtain a lawyer for a habeas corpus proceeding if you: (1) substitute “Article 70” wherever the forms say “Article 78,” (2) delete any references to the Attorney General, and (3) substitute “writ of habeas corpus” wherever the papers read “order to show cause” or “verified petition.”

You may also use poor person’s papers to request a reduction or waiver of the filing fees. You should read Part D of *JLM*, Chapter 22, on Article 78 for a detailed description of filing fees. Sentenced

See People ex rel. Christianson v. Berry, 165 A.D.2d 961, 961, 561 N.Y.S.2d 848, 849 (3d Dept. 1990) (citing N.Y. C.P.L.R. 7002(c)(6)) (denying petitioner’s application for writ of habeas corpus because it was fatally defective where, among other things, it failed to indicate the petitioner’s previous applications for habeas corpus relief). If you have already petitioned for habeas corpus unsuccessfully and your current petition does not contain any new grounds for relief, a court will only issue a writ in the extremely rare circumstances when the “ends of justice” require it. N.Y. C.P.L.R. 7003(b) (McKinney 2013); *see People ex rel. Taylor v. Jones*, 171 A.D.2d 906, 906, 566 N.Y.S.2d 779, 780 (3d Dept. 1991) (denying petitioner’s application for writ of habeas corpus because it failed to indicate his previous applications for such relief).

175. *See Matter of Tullis v. Kelly*, 154 A.D.2d 926, 926, 547 N.Y.S.2d 259, 259 (4th Dept. 1989) (dismissing habeas corpus petition because it failed to comply with the procedural requirements of N.Y. C.P.L.R. 7002(c)); *People ex rel. Kagan v. La Vallee*, 49 A.D.2d 986, 986, 374 N.Y.S.2d 408, 408 (3d Dept. 1975) (affirming dismissal of a habeas corpus petition where the application did not comply with the provisions of N.Y. C.P.L.R. 7002(c) and was therefore insufficient on its face).

176. *See People ex rel. La Rocca v. Conboy*, 40 A.D.2d 736, 736, 336 N.Y.S.2d 724, 725 (3d Dept. 1972) (noting that “deficiencies in the petition might be overlooked where compelling reasons appeared from the papers,” such as “a deprivation of legal material and writing material.”).

177. Notarizing your petition satisfies the “verification” requirement. *See* N.Y. C.P.L.R. 7002(c) (McKinney 2013); N.Y. EXEC. LAW § 135 (McKinney 2018) (explaining that a notary has the power to take acknowledgements wherein they verify having positively identified a document signer who personally appeared and admitted having signed the document).

178. *See Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545 (1987) (“[T]he right to appointed counsel extends to the first appeal of right, and no further.”).

179. *See People ex rel. Brock v. La Vallee*, 42 A.D.2d 629, 629–30, 344 N.Y.S.2d 513, 515 (3d Dept. 1973) (holding that at any hearing in connection with a habeas corpus petition filed by an “indigent prisoner” seeking to be released from custody, “the prisoner shall be entitled, upon request, to the assignment of counsel to represent him upon such hearing.”); *see also People ex rel. Ferguson v. Campbell*, 186 A.D.2d 319, 319, 587 N.Y.S.2d 798, 799 (3d Dept. 1992) (noting that the court did not abuse its discretion by not appointing counsel because the petitioner indicated that he did not want legal representation).

incarcerated people must usually pay between \$15 and \$50 of the filing fees to proceed with their claims.¹⁸⁰

If you have not been sentenced (for example, if you are filing a habeas corpus petition to challenge excessive bail), you should still be able to receive a full filing fee waiver under New York law if you are unable to pay the costs.¹⁸¹ To request a waiver of filing fees, you should replace all references to N.Y. C.P.L.R. 1101(f) in the poor person's papers with N.Y. C.P.L.R. 1101(d) and make sure the papers request a waiver, not a reduction, of the filing fees.

5. What to Expect After You File

A court will not issue a writ of habeas corpus if (1) it appears from your petition that your claim is plainly without merit, or (2) your petition does not contain any claim that was not already decided against you in a previous petition.¹⁸² However, if the court believes that your claim may have some merit, the court will issue you a writ.¹⁸³

After the court issues the writ, you must *serve* (deliver) the writ and a copy of your petition upon the warden.¹⁸⁴ Upon being served, the warden must respond by affidavit to the claims made in your petition within twenty-four hours.¹⁸⁵ The warden's response is known as the "return of the writ."¹⁸⁶ The warden should provide you with a copy of the return.¹⁸⁷ You have the right to make a reply to the return in order to deny any statements in the return or to state additional facts that support your claim.¹⁸⁸

The writ may specify a time and place for a hearing to which the warden must take you to determine whether you are being imprisoned illegally. If the writ orders a hearing, you must inform the District Attorneys of both the county in which you are imprisoned and the county in which you were convicted of the date and time of the hearing, in writing, at least eight days prior to the hearing.¹⁸⁹ Appendix III of the *JLM* provides the addresses of all the District Attorneys in New York. At the hearing, the court will consider your petition, the return, and your reply to the return. You will be allowed to produce evidence to support your claim and to cross-examine any witnesses against you.¹⁹⁰

6. Your Right to Appeal

If the judge hands down a judgment refusing to issue a writ of habeas corpus or denying your claim after a hearing or return of the writ, you may appeal the judgment to an intermediate appellate

180. N.Y. C.P.L.R. 1101(f)(2) (McKinney 2012) (expiring Sept. 1, 2021).

181. N.Y. C.P.L.R. 1101(d) (McKinney 2012) (effective Sept. 1, 2020).

182. Your petition must state one of the valid grounds for relief supported by factual allegations. If your petition does not contain both the grounds for relief and supporting facts, then it will be dismissed. N.Y. C.P.L.R. 7003(a)–(b) (McKinney 2013); *see also* *People ex rel. Sanchez v. Hoke*, 132 A.D.2d 861, 862, 518 N.Y.S.2d 69, 70 (3d Dept. 1987) (dismissing habeas corpus petition without a hearing where the petition raised no new matter that had not already been raised and resolved against the petitioner).

183. N.Y. C.P.L.R. 7003(a) (McKinney 2013).

184. N.Y. C.P.L.R. 7005 (McKinney 2013).

185. N.Y. C.P.L.R. 7006(a) (McKinney 2013); N.Y. C.P.L.R. 7008(a) (McKinney 2013).

186. *See, e.g., People ex rel. Delia v. Munsey*, 26 N.Y.3d 124, 137, 41 N.E.3d 1119, 1127–1128, 20 N.Y.S.3d 304, 313–314 (2015) (Abdus-Salaam, J., dissenting) (challenging the majority's decision to affirm the release of a mentally ill patient upon "return of the writ" without a hearing to determine the status of his mental disability).

187. *See* Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. 7008 (McKinney 2013) (noting that "the court presumably will require service by personal delivery on the petitioner" because of the timeframe's urgency).

188. N.Y. C.P.L.R. 7009(b) (McKinney 2013).

189. N.Y. C.P.L.R. 7009(a)(3) (McKinney 2013). If you file poor person's papers, which is also known as proceeding *in forma pauperis*, a court officer will inform the District Attorneys for you.

190. *See People ex rel. Cole v. Johnston*, 22 A.D.2d 893, 255 N.Y.S.2d 388, 390 (2d Dept. 1964) (finding reversible error where the petitioner "was not allowed to produce evidence in his behalf or to cross-examine the only witness against him.").

court.¹⁹¹ In New York, this court is called the Appellate Division and is divided into four different Departments.¹⁹² The highest court in New York is called the Court of Appeals.

D. Michigan

This part explains some of the basic rules for filing a habeas corpus petition in Michigan.

1. Requirements

The Michigan writ of habeas corpus rules can be found in Chapter 43 of the Revised Judicature Act, as codified in state law 600.4301–4387, and in Rule 3.303 of the Michigan Court Rules of 1985.¹⁹³

(a) Custody

If you have been released from prison, a Michigan court cannot grant a writ of habeas corpus.¹⁹⁴ However, if you are in prison because of an alleged parole violation, you are eligible for habeas corpus.¹⁹⁵ You are also eligible for habeas corpus if you are being civilly confined in a mental institution.¹⁹⁶

(b) Immediate Release

If your habeas petition is successful, you may be released immediately.¹⁹⁷ However, Michigan courts may grant you a conditional writ of habeas corpus that will require your release from prison only if the state does not start new proceedings within a time period set by the court.¹⁹⁸ If this time period passes, Michigan is still allowed to arrest you again for the same crime.¹⁹⁹

(c) Incarcerated Within the State

You must be an incarcerated person in Michigan.²⁰⁰

(d) No Other Options

A Michigan court will not grant your petition for a writ of habeas corpus if there are other procedures available.²⁰¹ For example, a writ of habeas corpus cannot be used when a writ of error or a

191. N.Y. C.P.L.R. 7011 (McKinney 2013). The rules that govern civil appeals, rather than criminal appeals, govern habeas corpus proceedings because habeas corpus is considered a civil remedy.

192. See *JLM*, Chapter 2, “An Introduction to Legal Research,” for a description of New York courts.

193. Revised Judicature Act of 1961. MICH. COMP. LAWS ANN. § 600.4301–4387 (West 2000). MICH. CT. RULES OF 1985, Rule 3.303.

194. MICH. COMP. LAWS ANN. § 600.4322 (West 2000).

195. See *Triplett v. Deputy Warden, Jackson Prison*, 371 N.W.2d 862, 865, 142 Mich. App. 774, 779 (Mich. Ct. App. 1985) (“[R]eview of a parole revocation decision is permissible upon a complaint for habeas corpus.”).

196. See MICH. COMP. LAWS ANN. § 600.4322 (West 2000); see also *Silvers v. People*, 176 N.W.2d 702, 703, 22 Mich. App. 1, 3 (Mich. Ct. App. 1970) (holding that the Michigan circuit court is an appropriate venue to adjudicate the question of whether not receiving adequate treatment at a mental health facility is a violation of habeas corpus).

197. *Ex parte Sawyer*, 19 N.W.2d 113, 113, 311 Mich. 602, 604 (Mi. 1945) (providing that an order for release may be entered upon granting of a habeas petition).

198. See *People v. Scott*, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007) (finding that the conditional writ of habeas corpus granted to the defendant, stating that he be retried in 90 days or released, was legitimate, but that the state does not lose its right to re-prosecute if it does not retry within the allotted time).

199. See *People v. Scott*, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007) (“[I]n a typical case in which an incarcerated person is released because a state fails to retry the incarcerated person by the deadline set in a conditional writ, the state is not precluded from rearresting [the] petitioner and retrying him under the same indictment, unless . . . the state’s delay prejudices the petitioner’s ability to defend himself.”) (internal quotation marks omitted) (alteration in original) (quoting *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006)).

200. MICH. COMP. LAWS ANN. § 600.4307 (West 2000).

201. See *In re Abbott*, 255 N.W. 603, 603, 267 Mich. 703, 704 (Mich. 1934) (finding that the court could not

writ of *certiorari* would be more appropriate.²⁰² The writ of habeas corpus is only used to raise defects so radical that will they render the conviction absolutely void and allow you to be released from prison.²⁰³

2. What You Can Complain About in Your Habeas Petition

(a) Before Trial

(i) Extradition

In Michigan, you have the right to challenge your extradition through the writ of habeas corpus.²⁰⁴ The court will only engage in a very limited review in these cases.²⁰⁵ The court will take the Governor's warrant and supporting papers as *prima facie* evidence supporting your extradition.²⁰⁶ The court will only look at whether the papers are in order, whether you have been charged with a crime in the demanding state, whether you are the person named in the request for extradition, and whether you are a fugitive.²⁰⁷ Once you are outside of Michigan, you have no right to habeas review in a Michigan court.²⁰⁸

(ii) Bail

You may ask for habeas relief on the ground that you were denied bail or that the bail you were granted is excessive.²⁰⁹ The court will be reluctant to second-guess the judge that denied bail, and the petition will only be granted if the judge acted in an arbitrary, unjust, or oppressive manner, or if the judge was clearly wrong.²¹⁰

(b) After Your Conviction

(i) Confinement Beyond Sentence

You may petition for habeas corpus relief if you have already served your sentence and are still being detained.²¹¹ As explained in Part A(2)(b) of this Chapter, you must be eligible for immediate release if your petition is granted. If you believe that the sentence imposed on you was incorrect or

hear the petitioner's writ for habeas corpus since he could have filed a writ of error or *certiorari* instead).

202. See *In re Abbott*, 255 N.W. 603, 603, 267 Mich. 703, 705 (Mich. 1934) (“[H]abeas corpus may not be employed to serve in any instance where review could and should have been had by writ of error or *certiorari*.”).

203. See *Triplett v. Deputy Warden, Jackson Prison*, 371 N.W.2d 862, 866, 142 Mich. App. 774, 780 (Mich. Ct. App. 1985) (outlining that habeas corpus only deals with such radical defects in a decision, and that incorrect judgments are only subject to review on appeal).

204. MICH. COMP. LAWS. ANN. § 780.9 (West 2007).

205. *People v. Wendt*, 309 N.W.2d 230, 233, 107 Mich. App. 269, 273 (Mich. Ct. App. 1981) (“The court in an asylum state has limited scope of review after the governor of the state has granted extradition”).

206. *People v. Wendt*, 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981).

207. *People v. Wendt*, 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981) (quoting *Michigan v. Doran*, 439 U.S. 282, 289, 99 S. Ct. 530, 535, 58 L. Ed. 2d 521 (1978)) (stating that a court may only look at these readily verifiable historical facts).

208. See *Trayer v. Kent County Sheriff*, 304 N.W.2d 11, 12, 104 Mich. App. 32, 34–35 (Mich. Ct. App. 1981) (finding that even though petitioner had been granted a writ of habeas corpus, the writ was rendered moot as the petitioner had been moved out of Michigan and into Pennsylvania and was therefore subject to Pennsylvania's jurisdiction).

209. See *In re Peoples*, 14 N.W. 112, 116, 47 Mich. 626, 633 (Mich. 1882) (finding that a defendant denied bail warranted, under these circumstances, granting the writ of habeas corpus).

210. *In re Tubbs*, 102 N.W. 626, 626, 139 Mich. 102, 103 (Mich. 1905) (holding that appellate courts will generally not interfere with a lower court's decision to deny bail, except when the refusal is made in an unjust manner or is obviously erroneous).

211. See *Cross v. Dept. of Corr.*, 303 N.W.2d 218, 220–221, 103 Mich. App. 409, 415–416 (Mich. Ct. App. 1981) (finding that a plaintiff whose state sentence was to run concurrently with his federal sentence, upon being released from federal prison, should not have been re-incarcerated in Michigan prison).

excessive, you are not entitled to habeas review, but you may challenge the sentence on appeal or in a writ of error.²¹²

(ii) Fundamental Rights

Michigan courts do not use the language of fundamental rights. Instead, the courts refer to “radical defects rendering a judgment or proceeding absolutely void.”²¹³ If the court finds that your fundamental rights have been violated in your trial or sentencing, they may find that the judgment or proceeding is void and grant your habeas petition. For example, when a defendant was not given an opportunity to present his case, the court found that habeas corpus was the proper remedy to inquire into the reason of the detention.²¹⁴

(iii) Ineffective Counsel

You may petition the court for habeas relief on the ground that your lawyer was ineffective.²¹⁵ Proving a claim of ineffective assistance of counsel is very difficult. The court will only grant relief when “the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.”²¹⁶

(iv) New Evidence

In Michigan, if you wish to raise the issue of new evidence, you must file a motion for a new trial. Habeas relief will not be granted because of new evidence.

(c) Probation or Parole

Michigan courts have held that habeas corpus is the correct procedure by which you can challenge errors in parole revocation proceedings.²¹⁷ However, if you are accused of a parole violation and a fact-finding hearing (a process similar to a trial) on the charge is not held within forty-five days, as required by law, habeas corpus is not available to you.²¹⁸ Instead, you should apply for a writ of *mandamus* to force the government to give you your hearing.²¹⁹

212. See *In re Franks*, 297 N.W. 521, 522, 297 Mich. 353, 355 (Mich. 1941) (holding that a petitioner challenging the length of his sentence and the method of sentencing should have appealed instead of having filed a writ of habeas corpus). But see *Ex parte Wall*, 47 N.W.2d 682, 685, 330 Mich. 430, 435 (Mich. 1951) (finding that while a petitioner should normally challenge a sentence length through other means, habeas corpus was appropriate here because the trial court sentenced for longer than the statutory maximum).

213. *Triplett v. Deputy Warden, Jackson Prison*, 371 N.W.2d 862, 866, 142 Mich. App. 774, 780 (Mich. Ct. App. 1985) (outlining that habeas corpus only deals with radical defects that render a decision void, whereas judgments that are merely incorrect can only be reviewed on appeal).

214. *In re Bobowski*, 21 N.W.2d 838, 839, 313 Mich. 521, 522 (Mich. 1946) (holding that where the defendant was not allowed to make his case, habeas corpus was the correct method to look at the reason for the detention).

215. See *People v. Wynn*, 165 N.W.2d 493, 495, 14 Mich. App. 268, 269 (Mich. Ct. App. 1968) (quoting *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965)) (outlining the requirements for a habeas challenge based on ineffective counsel).

216. See *People v. Wynn*, 165 N.W.2d 493, 495, 14 Mich. App. 268, 269 (Mich. Ct. App. 1968) (quoting *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965)).

217. *Triplett v. Deputy Warden, Jackson Prison*, 371 N.W.2d 862, 865, 142 Mich. App. 774, 779 (Mich. Ct. App. 1985) (holding that “review of a parole revocation decision is permissible upon a complaint for habeas corpus”).

218. *Jones v. Dept. of Corr.*, 664 N.W.2d 717, 721–722, 468 Mich. 646, 653–655 (Mich. 2003) (holding that the appropriate procedure is to file a writ of mandamus in a situation where a fact-finding hearing failed to occur within the allotted 45 days).

219. *Jones v. Dept. of Corr.*, 664 N.W.2d 717, 724, 468 Mich. 646, 658 (Mich. 2003).

(d) Subject Matter Jurisdiction

Habeas corpus is available when “the convicting court was without jurisdiction to try the defendant for the crime in question.”²²⁰ This defect of lacking jurisdiction must be “radical” such that it would render a conviction void.²²¹ However, if you have been convicted of a crime by a court which had jurisdiction and did not abuse its power, habeas corpus is not available to you.²²²

3. How to File Your Petition

(a) When to File

In Michigan, before you file your petition, be sure that you cannot appeal your conviction or apply for administrative relief. If there are other options for redress, the court will generally not consider your habeas corpus petition.²²³

(b) Where to File

In Michigan, you may petition any of the following courts or judges for a writ of habeas corpus:

- (1) The supreme court, or a justice of that court;
- (2) The courts of appeals, or a judge of those courts;
- (3) The circuit courts, or a judge of those courts;
- (4) The municipal courts of record, including (but not limited to) the recorder’s court of the city of Detroit, common pleas court, or a judge of those courts; or
- (5) The district courts, or a judge of those courts.²²⁴

You must file with the judge or court in the county where you are detained.²²⁵ However, if there is no judge in that county capable of issuing the writ, or if the judge has refused to issue the writ, you can apply for habeas corpus at the court of appeals.²²⁶ You may file with either the judge or the court, but if you file with a judge you must later file the petition with the court.²²⁷

(c) What to Include in Your Petition

The petition for habeas corpus (also known as the complaint) must state:

- (1) that you (the incarcerated person) are restrained of your liberty;
- (2) your name, or if the petition is being written on the behalf of someone else and his name is not known, you can provide a description of the incarcerated person;
- (3) the name, if known, or the description of the officer or person by whom the incarcerated person is restrained;
- (4) the place of restraint, if known;
- (5) that you or your representative is not barred from seeking habeas corpus;
- (6) the cause or pretense of the restraint, according to your best knowledge and belief; and

220. *People v. Price*, 179 N.W.2d 177, 180, 23 Mich. App. 663, 670 (Mich. Ct. App. 1970).

221. *People v. Price*, 179 N.W.2d 177, 180, 23 Mich. App. 663, 671 (Mich. Ct. App. 1970) (defining a “radical defect in jurisdiction” as “an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission”).

222. *See Krause v. Weideman*, 80 N.W.2d 481, 483, 347 Mich. 567, 572 (Mich. 1957) (“[Habeas corpus] is not available to one convicted of a crime and committed by a court which has acquired jurisdiction and has not abused its power.”).

223. *See In re Abbott*, 255 N.W. 603, 603, 267 Mich. 703, 705 (Mich. 1934) (finding that the court could not hear the petitioner’s writ for habeas corpus since he did not exhaust all his other options such as a writ of error or *certiorari* instead). *But see Walls v. Dir. of Institutional Servs. Maxie Boy’s Training Sch.*, 269 N.W.2d 599, 601, 84 Mich. App. 355, 357 (Mich. Ct. App. 1978) (finding that though there were other avenues the juvenile could have taken to seek redress, there was a “radical defect in jurisdiction” and so filing a habeas petition was warranted).

224. MICH. COMP. LAWS ANN. § 600.4304 (West 2011).

225. MICH. CT. RULES OF 1985, Rule 3.303(A)(2).

226. MICH. CT. RULES OF 1985, Rule 3.303(A)(2).

227. MICH. CT. RULES OF 1985, Rule 3.303(F)(3).

(7) why the restraint is illegal.²²⁸

(d) How to File

After you have created your petition for habeas corpus including all the items in Part (C)(3)(c) of this Chapter, “What to Include in Your Petition,” you should send your petition and any supporting documents to the court specified above in Part (C)(3)(b) of this Chapter, “Where to File.” You can file the petition yourself, or someone may file the petition on your behalf.²²⁹

4. Your Right to Counsel for Your Petition

The U.S. Supreme Court has held that you have no federal constitutional right to be provided counsel in state habeas corpus proceedings.²³⁰ However, in Michigan, the state law entitles you to counsel at your habeas corpus hearing.²³¹ In addition, if you are applying for relief because you are about to be extradited (to be handed over to a foreign state for criminal prosecution), you do have a further, limited, right to counsel.²³²

5. What to Expect After You File

In Michigan, the court may issue a preliminary writ of habeas corpus (or an order to show cause) which would entitle you to release, unless the party applying is not entitled to the writ.²³³ When the court issues the preliminary writ (or an order to show cause), it may set a date and place for a hearing where the person who has you in custody must take you to determine whether you are being imprisoned illegally.²³⁴

After the court issues the writ, you must serve (deliver to) the person who has you in custody with the writ and a copy of your petition.²³⁵ Upon the service of the writ and the petition, the person who has you in custody must follow the writ unless you are too sick to be moved.²³⁶ If you are too sick to be moved, the person who has you in custody should state that in the answer to your complaint.²³⁷ The person who has you in custody must file an answer to the writ, in which he will tell the judge why he thinks you should be in custody.²³⁸ You may respond to the answer, either in a written reply on oath or in the hearing on your petition.²³⁹

At the hearing, the court will consider your petition, the return, and your reply to the return. The defendant, or the person holding you in custody, will be allowed to provide evidence to support the cause of detention.²⁴⁰ The judge will then rule on your petition based on his assessment of the truth of your complaint and the sufficiency of the answer (to your complaint) from the person who has you in custody.²⁴¹

228. MICH. CT. RULES OF 1985, Rule 3.303(C).

229. MICH. CT. RULES OF 1985, Rule 3.303(B).

230. *See* *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545 (1987) (“[T]he right to appointed counsel extends to the first appeal of right, and no further.”).

231. MICH. CT. RULES OF 1985, Rule 3.303(Q)(3).

232. MICH. COMP. LAWS § 780.9 (West 2011). *But see* *People v. Donaldson*, 302 N.W.2d 592, 595, 103 Mich. App. 42, 48–49 (Mich. Ct. App. 1981) (limiting application of the Uniform Criminal Extradition Act by excluding the right to counsel at an initial arraignment on a fugitive warrant and at a hearing before the governor because they are not considered critical stages of the proceedings).

233. MICH. COMP. LAWS § 600.4316 (West 2011).

234. MICH. COMP. LAWS § 600.4304 (West 2011) (granting certain court the power to issue the writ); MICH. COMP. LAWS § 600.4325 (West 2011) (requiring production of person in custody).

235. MICH. CT. RULES OF 1985, Rule 3.303(I)(1).

236. MICH. COMP. LAWS § 600.4325–4328 (West 2011).

237. MICH. COMP. LAWS § 600.4328 (West 2011).

238. MICH. CT. RULES OF 1985, Rule 3.303(N).

239. MICH. CT. RULES OF 1985, Rule 3.303(O).

240. MICH. CT. RULES OF 1985, Rule 3.303(Q)(2)(b).

241. MICH. CT. RULES OF 1985, Rule 3.303(Q).

6. Your Right to Appeal

In Michigan, if your habeas petition is successful, you have the right to be released immediately. However, if the petition is not successful, you may appeal the denial of your writ of habeas corpus.²⁴² If you do so, you must make sure that the writ has been properly filed with the court where you originally brought the petition. You may also bring a new petition for habeas corpus to an appellate court or the Supreme Court of Michigan.

E. Conclusion

You must meet certain elements in your petition for a writ of habeas corpus to be granted. These include custody (confinement by the state), entitlement to immediate release, imprisonment by the state, and lack of other available procedures, such as administrative and grievance procedures. Your petition can complain about a variety of issues post-conviction, parole or probation revocation, or jurisdiction. Remember that the details of this process vary from state to state. You should research the rules in the state where you are imprisoned before petitioning for a writ of state habeas corpus.

242. *See* *People v. Wendt*, 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981) (finding that the denial of the writ of habeas corpus is reviewable though the scope of review is limited).

CHAPTER 22

HOW TO CHALLENGE ADMINISTRATIVE DECISIONS USING ARTICLE 78 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES*

A. Introduction

This Chapter is about a New York State law that provides a procedure for you to challenge decisions that were made by a New York State official or administrative body. The law is called Article 78 because it can be found starting at Section 7801 of the New York Civil Practice Law and Rules.² This Chapter explains when and how to bring an Article 78 proceeding. There are very strict rules and time limits when bringing an Article 78 proceeding, so please read the requirements carefully.

Part B of this Chapter explains what you can complain about in an Article 78 petition. Part C describes when you can get relief under Article 78. Part D explains the procedure for filing an Article 78 petition. Part E describes how to bring an Article 78 proceeding, and the Appendix has a sample Article 78 petition and supporting papers.

Article 78 is New York State law, and it does not apply in other states. Some other states have similar laws to review decisions of officials and administrative agencies. But, if you are in another state, you will have to research what your state's law is and how it differs from New York's Article 78.

1. What is an Article 78 Proceeding?

In an Article 78 proceeding, you ask a state court to review a decision or action of a New York state official or administrative agency that you believe was unlawful. An example of a New York state official is a prison official. An example of an administrative agency is the Board of Parole. You can use Article 78, for example, to attack the state's calculation of your good time, a decision to place you in solitary confinement, or a decision to deny you parole. In addition to claiming a violation of a law or regulation in an Article 78 petition, you must also explain how you were injured by the action or inaction you are challenging. For example, if you were denied parole, your injury would be that you are suffering a longer incarceration. If you were not given a fair disciplinary hearing, your injury would be the punishment you received and the record of your alleged violation. If you were wrongfully denied medication, your injury would be pain or sickness.

On the other hand, you cannot challenge your conviction and sentence in an Article 78 proceeding.³ For information on challenging convictions and sentences, see Chapter 9 of the *JLM* ("Appealing Your

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2. N.Y. C.P.L.R. § 7801 (McKinney 2008). The standard way of citing this statute, which you may use when you are writing a legal paper and do not want to write "New York Civil Practice Law and Rules," is: N.Y. C.P.L.R. § 7801 (the number indicates the section or rule to which you are referring). Article 78 can be found in §§ 7801–7806 of the N.Y. C.P.L.R. You should also look at §§ 401–411 of the N.Y. C.P.L.R., which describe some of the rules for "special proceedings," because Article 78 is a type of special proceeding.

3. N.Y. C.P.L.R. § 7801(2) (McKinney 2008). Article 78 may also be used to prevent a judge from hearing a case, or prevent a public prosecutor from taking certain actions, if it is beyond his authority to do so. *See* *Schumer v. Holtzman*, 60 N.Y.2d 46, 51, 454 N.E.2d 522, 524, 467 N.Y.S.2d 182, 184 (1983) (holding that a remedy of prohibition under Article 78 is only available "to prevent or control a body or officer acting in a judicial or quasi-judicial capacity from proceeding or threatening to proceed without or in excess of its jurisdiction [citations omitted] and then only when the clear legal right to relief appears and, in the court's discretion, the remedy is

Conviction or Sentence”); Chapter 20 of the *JLM* (“Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence”); Chapter 13 of the *JLM* (“Federal Habeas Corpus”); and Chapter 21 of the *JLM* (“State Habeas Corpus”).

You start an Article 78 proceeding by filing a petition. Therefore, throughout the proceeding you are referred to as the “petitioner.” Your petition will name the agency or official whose decision you are challenging as the “respondent,” and will state why you are complaining about the decision and what you would like the court to do about it. (Note that you can name more than one respondent in the same petition.) After the agency or official files its “answer” responding to the claims you make in your petition, you can file another document called the “reply.”⁴

2. Who Hears Article 78 Proceedings?

Article 78 petitions are heard by New York Supreme Courts,⁵ which are the trial courts in New York.⁶ Some Article 78 cases that begin in a supreme court will eventually be transferred by that court to the appellate division (the next highest court) if they involve a question of “substantial evidence.”⁷ Generally, a question of substantial evidence means the original decision you are asking the court to review was not supported by enough evidence.⁸ This will be explained in greater detail in Part B(3).

After the judge reads the papers that you and the respondent (state agency or official) have submitted, he will make a decision.⁹ Although Article 78 permits the judge to hold a hearing, this is extremely rare. As a result, incarcerated people who file Article 78 actions almost never actually appear in court. It is very likely that the judge will make his decision based on the papers that you and the respondent (state agency or official) file with the judge.

You should note that the law gives agencies a great deal of discretion (freedom to use their own judgment). This means a judge needs a very good reason to overturn a decision by a state agency or official. You (as the person challenging the decision) will lose when it is unclear if you or the respondent has a better argument.

3. What Can You Ask the Court to Do in an Article 78 Proceeding?

When you prepare your Article 78 petition, you can only ask the court to consider the following types of issues:

- (1) Whether the state official or agency failed to perform a duty that is required by law;
- (2) Whether the state official or agency acted beyond its authority or violated the law; or
- (3) Whether a decision made by the officer or agency was (a) obviously incorrect or unreasonable, (b) based upon an error of law, or (c) based upon insufficient evidence.¹⁰

If you are successful in your Article 78 challenge, the original decision will be annulled (declared invalid) either entirely or partially. The court may also modify, or change, the original decision or order the respondent (the agency or official you are challenging) to act (or not act) in specific ways.¹¹ The court will sometimes send an administrative decision back to the agency or officer for more review.¹² You should be aware that in Article 78 proceedings, money damages are generally not

warranted [citations omitted].”). In other words, it is not available to correct common procedural or substantive errors.

4. N.Y. C.P.L.R. § 7804(c) (McKinney 2008).

5. N.Y. C.P.L.R. § 7804(b) (McKinney 2008).

6. For a list of the addresses of the supreme courts in each county, see Appendix II at the end of the *JLM*.

7. N.Y. C.P.L.R. § 7804(g) (McKinney 2008).

8. N.Y. C.P.L.R. § 7803(4) (McKinney’s 2008 & Supp. 2018).

9. N.Y. C.P.L.R. § 7806 (McKinney 2008).

10. N.Y. C.P.L.R. § 7803 (McKinney 2008).

11. N.Y. C.P.L.R. § 7806 (McKinney 2008).

12. *See* Police Benevolent Ass’n of the New York State Troopers, Inc. v. Vacco, 253 A.D.2d 920, 921, 677 N.Y.S.2d 808, 809 (3d Dept. 1998) (holding that the court retains the right to remit (send back) a decision for further proceedings if “further agency action is necessary to cure deficiencies in the record”).

awarded. The law states that money damages will only be awarded in Article 78 proceedings if they are “incidental” (secondary) to the main remedy (what you want the court to do).¹³

There are some kinds of relief (solutions) you can ask the court to give you even before it hears your Article 78 petition. You may ask the court to stop the official or agency from taking further action until your Article 78 petition has been heard and decided by the court.¹⁴ For example, if you are challenging a decision that would result in you being placed in maximum security or being transferred to another institution, the court might order the official or agency to leave you where you are until the court has made its decision on your Article 78 petition.

However, you should be aware that courts normally do not grant such delays in proceedings (further actions). Courts will only “stay” (delay) the proceedings if you can show three things: (1) you are likely to win, (2) you will suffer permanent harm if the court does not delay the proceedings, and (3) the harm you will suffer is greater than the benefits of continuing with the proceedings.¹⁵

B. What You Can Complain About Under Article 78

In an Article 78 proceeding, you can raise only certain specific complaints about the state agency or official's action or failure to act. Possible complaints include the following:

- (1) that the agency or official failed to do something the law requires;¹⁶
- (2) that the agency or official did something, is doing something, or is about to do something that is beyond its lawful authority;¹⁷
- (3) that the agency or official made a decision that was unreasonable and irrational, did not follow the law, or did not follow lawful procedure;¹⁸ or
- (4) that the agency or official made a decision at a hearing that was not based on substantial evidence.¹⁹

You can choose to bring one claim or more than one claim at a time. If you make more than one claim in the same Article 78 proceeding, you may want to distinguish procedural claims (claims about the established or official way of doing something) from other types of claims. If you can show that an agency has failed to follow its own procedures, you may be successful in your Article 78 proceeding. You might challenge a parole decision or sentence calculation or the action of a Work Assignment Committee or Time Allowance Committee. It may also be helpful to read New York Civil Practice Law and Rules § 7803 (to see what the law says you can challenge using Article 78), and the annotated version of New York Civil Practice Law and Rules § 7803 in McKinney's,²⁰ which lists the decisions of Article 78 cases, including cases regarding incarcerated people.²¹

In the documents you file with the court, you do not need to identify which type of claim or claims (also called “action” or “actions”) you are filing. Historically, you simply need to state that it is an Article 78 action.²² Of course, the more detailed your petition is, the easier it will be for the court to

13. N.Y. C.P.L.R. § 7806 (McKinney 2008) (stating that “[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner”). *See* Gross v. Perales, 72 N.Y.2d 231, 236, 527 N.E.2d 1205, 1207, 532 N.Y.S.2d 68, 70–71 (1988) (holding that a claim for damages was incidental where damages were required by law once petitioner won his or her Article 78 claim; “[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case”); David D. Siegel & Patrick M. Connors, New York Practice 1093–1094 (6th ed. 2018); N.Y. C.P.L.R. 7806, Practice Commentaries (McKinney 2008).

14. N.Y. C.P.L.R. § 7805 (McKinney 2008).

15. You have to show that you will suffer immediate and serious harm if the stay is not granted. The court will only grant a stay if it decides that the harm you face is greater than the cost of granting the stay. *See* N.Y. C.P.L.R. 7805, Practice Commentaries (McKinney 2008).

16. N.Y. C.P.L.R. § 7803(1) (McKinney 2008).

17. N.Y. C.P.L.R. § 7803(2) (McKinney 2008).

18. N.Y. C.P.L.R. § 7803(3) (McKinney 2008).

19. N.Y. C.P.L.R. § 7803(4) (McKinney 2008).

20. *See* Chapter 2 of the *JLM*, “Introduction to Legal Research,” for an explanation of McKinney's.

21. N.Y. C.P.L.R. § 7803 (McKinney 2012 & Supp. 2018).

22. David D. Siegel & Patrick M. Connors, New York Practice 1066 (6th ed. 2018).

understand the reasons you seek legal relief. The following Sections address the different types of claims that are allowed in Article 78 proceedings.

1. Compel Required Action (Mandamus to Compel)

The first type of action you can bring occurs when an official has failed to do something that is required by law. This action is called a “*mandamus* to compel.” When you bring this type of action, you are asking the court to order an official to do something that is his duty to do.²³ In this type of action, the duty to be performed must be required by the law and may not be “discretionary” (meaning that the official can decide whether to perform that duty).²⁴ This type of Article 78 proceeding is very important because it can force officials to follow the regulations that protect your rights as a person who is either incarcerated or on parole. For example, you can bring an Article 78 proceeding to challenge improper restrictions on your mail,²⁵ to correct inaccurate or unfair disciplinary records,²⁶ or to make the State Board of Parole act on your application for parole when the Board is required to act on it but has ignored it.²⁷ You can also bring an Article 78 proceeding to make the Board of Parole give you the reasons why your parole was denied.²⁸ Note that in this last type of proceeding, the remedy, or solution, provided by the court would be to order the Board of Parole to decide your parole application,²⁹ or to make the Board give you the reasons for denying your parole.³⁰ Since the authority to grant parole is given to the Board of Parole, a court cannot order a certain result or decision.³¹

23. See *Gore v. Corwin*, 185 Misc. 2d 825, 826, 714 N.Y.S.2d 427, 428 (Sup. Ct. Ulster County 2000) (“Mandamus is a proceeding to compel a public body or officer to act in accordance with the law”).

24. See *Citywide Factors, Inc. v. N.Y. City Sch. Constr. Auth.*, 228 A.D.2d 499, 500, 644 N.Y.S.2d 62, 63 (2d Dept. 1996) (“Mandamus relief is appropriate only where the right to relief is clear, and the duty sought to be compelled is the performance of an act which is required by law and involves no exercise of discretion”).

25. See *Hicks v. Russi*, 219 A.D.2d 851, 851, 632 N.Y.S.2d 341, 342–343 (4th Dept. 1995) (reversing lower court’s dismissal of parolee’s Article 78 petition and holding that parole authorities could not prevent parolee from advertising or selling his book to prison inmates by mail and replying to mail orders or acting as a paralegal on criminal cases since these activities do not place the parolee in the “company” of known criminals or constitute fraternization with criminals). But see *Raqiyb v. Goord*, 28 A.D.3d 892, 893–894, 813 N.Y.S.2d 251, 253 (3d Dept. 2006) (refusing an incarcerated person’s claim that regulation of his mail correspondence with his incarcerated nephew and opening of his outbound mail with insufficient postage was improper).

26. See *Hilton v. Dalsheim*, 81 A.D.2d 887, 887–888, 439 N.Y.S.2d 157, 157–159 (2d Dept. 1981) (granting incarcerated person’s Article 78 motion to compel the removal from his disciplinary record of an alleged disciplinary violation, which was decided in a proceeding where he was not provided assistance in investigating the claim made against him and the hearing officer did not interview witnesses, both required by regulations, and because he was not given a written statement from the hearing officer outlining the evidence she relied upon and the reason for the actions she took, which violated his due process rights). For an example of mixed petition for *mandamus* to review and to compel, see *McDermott v. Coughlin*, 135 Misc. 2d 659, 661–662, 516 N.Y.S.2d 834, 836–837 (Sup. Ct. Chemung County 1987) (granting an Article 78 motion to void a disciplinary hearing which decided that an incarcerated person had violated disciplinary rules when those rules were not yet filed with the New York Secretary of State at the time of the incident, giving back the privileges and good behavior allowances to the incarcerated person, and removing the disciplinary action from his record).

27. See *Hines v. State Bd. of Parole*, 267 A.D. 99, 101, 44 N.Y.S.2d 655, 656–657 (3d Dept. 1943) (noting that an application for a *mandamus* to compel was the proper remedy to force the State Board of Parole to take action on incarcerated person’s application for parole); see also *Utica Cheese v. Barber*, 49 N.Y.2d 1028, 1030, 406 N.E.2d 1342, 1343, 429 N.Y.S.2d 405, 406 (1980) (granting an Article 78 claim to force an agency to hold a hearing, as required by law, to decide petitioner’s application for a license).

28. See *Van Luven v. Henderson*, 52 A.D.2d 1042, 1042, 384 N.Y.S.2d 898, 899 (4th Dept. 1976) (noting that an Article 78 proceeding is the proper remedy when the Board of Parole does not give the incarcerated person the reasons for denial of parole); see also *People ex rel. Cender v. Henderson*, 51 A.D.2d 683, 683, 378 N.Y.S.2d 205, 206 (4th Dept. 1976) (holding that an Article 78 proceeding is the proper remedy to force the Board of Parole to provide an incarcerated person with the reasons why his parole was denied).

29. See *Vulpis v. Dept. of Corr.*, 154 Misc. 2d 625, 629, 585 N.Y.S.2d 954, 956 (Sup. Ct. Kings County 1992) (ordering Department of Correction to release an incarcerated person who had been denied parole after approving his temporary release or to process his application with “all due speed” if additional approvals were needed for his release).

30. See *Van Luven v. Henderson*, 52 A.D.2d 1042, 1042, 384 N.Y.S.2d 898, 898–899 (4th Dept. 1976) (ordering Board to notify an incarcerated person of the reasons for denying him parole).

31. *Hines v. State Bd. of Parole*, 181 Misc. 280, 282, 46 N.Y.S.2d 569, 570–571 (Sup. Ct. Westchester County 1943) *aff’d*, *Hines v. State Bd. Of Parole*, 267 A.D. 881, 46 N.Y.S.2d 572 (2d Dept. 1944) (“The authority to release on parole has been confided to the Board of Parole and not to the courts. Parole cannot be compelled by a

Another example of a proceeding to compel action would be claiming that you are entitled to credit against the length of your sentence for time you spent in custody.³² In such a case you would be asking the court to order the agency (if you are in a New York State prison, this would be the Department of Corrections and Community Supervision) to recalculate your sentence.³³

When you bring this type of proceeding, if possible, you should state in your petition the law, regulation, or case you believe states the official's duty. If you seek relief because the agency did not follow proper procedures, you should try to show that the mistakes led to or helped lead to the agency's decision(s). If you do not show this connection, the court might rule that the failure to follow appropriate procedures was only *harmless error* (meaning the agency's decision would have been the same even if it had followed proper procedures).

2. Review of Discretionary Administrative Decision—"Arbitrary and Capricious" Standard (*Mandamus* to Review)

A second type of action under Article 78 is a claim that asks the court to review a discretionary administrative decision or action (as opposed to the failure of an official to do something required by law, explained above in Part B(1)). If you want the court to review a discretionary administrative action or decision, you will have to claim it was against the law because the action or decision was made without a sound, or good, reason. The law calls such decisions and actions "arbitrary and capricious."³⁴ An arbitrary and capricious decision or action is one taken "without sound basis in reason and ... without regard to the facts."³⁵

The arbitrary and capricious standard can be used to challenge decisions made by agency officials. It can be used, for example, to challenge a disciplinary decision that was made without following the procedures required by law.³⁶ If an agency harmed you by violating its own legally required procedures (the law or their own regulations) in making an administrative decision, you can argue that such an action is arbitrary and capricious.³⁷

mandatory order").

32. See *People v. Pugh*, 51 A.D.2d 1047, 1048, 381 N.Y.S.2d 417, 419 (2d Dept. 1976) (noting that an Article 78 proceeding is the proper course by which a defendant can obtain credit against his sentence for time spent in custody prior to sentencing); see also *People v. Searor*, 163 A.D.2d 824, 824, 559 N.Y.S.2d 840, 840–841 (4th Dept. 1990) (noting that an Article 78 proceeding is the proper way to challenge the prison authorities' calculation of jail time credit); *People v. Blake*, 39 A.D.2d 587, 587, 331 N.Y.S.2d 851, 852 (2d Dept. 1972) (noting that if the Department of Correctional Services miscalculated defendant's jail term, his proper remedy would be an Article 78 proceeding); *People v. Person*, 256 A.D.2d 1232, 1233, 685 N.Y.S.2d 367, 368 (4th Dept. 1998) (noting that an Article 78 proceeding is the proper way to review the prison authorities' calculation of defendant's jail time credit).

33. See, e.g., *Maccio v. Goord*, 194 Misc. 2d 805, 808, 756 N.Y.S.2d 412, 414–415 (Sup. Ct. Albany County 2003), *aff'd*, *Maccio v. Goord*, 4 A.D.3d 688, 772 N.Y.S.2d 745 (3d Dept. 2004) (granting in part an incarcerated person's Article 78 petition and directing the Department of Correctional Services to credit him with jail time served); *Grier v. Flood*, 84 Misc. 2d 4, 8, 375 N.Y.S.2d 506, 509 (Sup. Ct. Nassau County 1975) (granting an incarcerated person's Article 78 petition and directing the Department of Correctional Services to credit him with jail time served).

34. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974) (discussing standards of judicial review of administrative agencies).

35. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974).

36. See *Proctor v. Goord*, 10 Misc. 3d 229, 232–233, 801 N.Y.S.2d 517, 519–520 (Sup. Ct. Albany County 2005) (holding that the Department of Corrections' action was "arbitrary and capricious" when it failed to remove from an incarcerated person's inmate record an "unusual incident report" for an alleged violation that he was later found not to have committed).

37. See *People ex rel. Furde v. N.Y. City Dept. of Corr.*, 9 Misc. 3d 268, 274, 796 N.Y.S.2d 891, 896 (Sup. Ct. Bronx County 2005) ("Where an agency promulgates rules and extends greater due process rights than may be required by the Federal Constitution, it is without question that state law mandates that the agency follow its own rules. ... To do otherwise is to act arbitrarily and capriciously"); see, e.g., *Liner v. Miles*, 133 A.D.2d 962, 962, 520 N.Y.S.2d 470, 470 (3d Dept. 1987) (granting Article 78 petition and finding that the determination of the Commissioner of Correctional Facilities that the incarcerated individual did not follow a disciplinary rule was not supported by substantial evidence); *Nesbitt v. Goord*, 12 Misc. 3d 702, 705–706, 813 N.Y.S.2d 897, 900 (Sup. Ct. Albany County 2006) (granting Article 78 petition and requiring the Department of Correctional Services to follow its own rules in reviewing requests to award Temporary Work Release); *People ex rel. Furde v. N.Y. City Dept. of Corr.*, 9 Misc.3d 268, 273–274, 796 N.Y.S.2d 891, 895 (Sup. Ct. Bronx County 2005) (holding that the Department of Corrections acted arbitrarily and capriciously in confining a pretrial detainee to his cell for 23 hours a day, and

Keep in mind that generally courts believe that administrative officials are in the best position to make decisions regarding incarcerated people. Thus, it is very difficult to prove that an agency or official acted arbitrarily or capriciously in making a decision that is left up to its, or his or her, judgment. The court will not substitute its own judgment for that of the official, unless you can show that the decision was so unreasonable as to require that it be overturned.³⁸

You can challenge as arbitrary and capricious most day-to-day prison decisions, such as decisions regarding furlough and temporary release,³⁹ appearances at disciplinary proceedings,⁴⁰ access to evidence,⁴¹ visitation rights, mail access, and transfers. But your chance of successfully challenging a transfer is very small because New York law gives the Commissioner of Corrections “almost unbridled authority to transfer inmates from one facility to another.”⁴² “Unbridled authority” means the complete power to take an action without interference by others (this means the courts cannot get involved). Challenges to transfers, however, were successful where: (1) an incarcerated person’s request for an appropriate transfer for medical reasons is unreasonably denied;⁴³ (2) an incarcerated person requires rehabilitative treatment that has been completely withheld;⁴⁴ and (3) a member of an inmate grievance committee, who represents other incarcerated people and abides by the rules of the institution, is transferred without a hearing or compelling emergency.⁴⁵

ordering that detainee be released into general prison population); *Martinez v. Baker*, 180 Misc. 2d 334, 336, 688 N.Y.S.2d 877, 879 (Sup. Ct. Albany County 1999) (finding that the Department of Correctional Services acted arbitrarily and capriciously in denying an incarcerated Spanish-speaking person participation in a family reunion program because he did not complete an alcohol and substance abuse program, even though he did not have access to a bilingual program or a translator for the existing program).

38. *See Bd. of Visitors-Marcy Psychiatric Ctr. v. Coughlin*, 60 N.Y.2d 14, 20, 453 N.E.2d 1085, 1088, 466 N.Y.S.2d 668, 671 (1983) (noting that the standard of judicial review of a determination by Commissioner of Department of Correctional Services is not whether the court would come to the same determination itself but instead whether the determination was irrational, arbitrary, or capricious).

39. *See Lopez v. Coughlin*, 139 Misc. 2d 851, 853, 529 N.Y.S.2d 247, 249 (Sup. Ct. Albany County 1988) (holding that the Department of Correctional Services’ decision to disapprove an application of an incarcerated person with AIDS for participation in a temporary release program was not rationally related to the Department’s interest in the health of incarcerated people).

40. *See Boodro v. Coughlin*, 142 A.D.2d 820, 822–823, 530 N.Y.S.2d 337, 339–340 (3d Dept. 1988) (holding that the Hearing Officer acted arbitrarily and capriciously in removing the incarcerated person from his disciplinary hearing because the Hearing Officer’s reasons for excluding him due to misbehavior were not supported by the record). *But see Grant v. Senkowski*, 146 A.D.2d 948, 950, 537 N.Y.S.2d 323, 325 (3d Dept. 1989) (affirming the dismissal of an Article 78 petition because removing the incarcerated person from the disciplinary hearing was not arbitrary or capricious because the removal was due to individual’s misbehavior and occurred only after warnings).

41. *See Coleman v. Coombe*, 65 N.Y.2d 777, 780, 482 N.E.2d 562, 562, 492 N.Y.S.2d 944, 944 (1985) (holding that where prison regulations allowed an incarcerated person to call witnesses on his behalf in disciplinary proceedings, and calling witness did not threaten safety or correction goals, the incarcerated person had the right to call his brother as a witness to give testimony to try to reduce the penalty to be imposed); *see also Wilson v. Coughlin*, 186 A.D.2d 1090, 1090–1091, 590 N.Y.S.2d 798, 798 (4th Dept. 1992) (granting an incarcerated person’s request to cancel the effect of an official’s determination in a disciplinary hearing because he had not been allowed to offer evidence of mitigating circumstances, which is a factor considered in prison disciplinary hearings). “Mitigating circumstance” means a fact or event that does not excuse behavior but may decrease the degree of punishment.

42. *Johnson v. Ward*, 64 A.D.2d 186, 188, 409 N.Y.S.2d 670, 672 (3d Dept. 1978); *see also* N.Y. Correct. Law § 23(1) (McKinney 2017) (“The commissioner shall have the power to transfer inmates from one correctional facility to another.”). *But see Salahuddin v. Coughlin*, 202 A.D.2d 835, 836, 609 N.Y.S.2d 105, 106 (3d Dept. 1994) (noting that the broad authority to transfer does not permit transfers that are made to deny an incarcerated person a constitutional right or in response to the exercise of such a right).

43. *See Barnett v. Metz*, 55 A.D.2d 997, 998, 390 N.Y.S.2d 701, 701–702 (3d Dept. 1977) (holding that while decisions about transfers are generally left to the agency’s discretion, where an incarcerated person could show that the prison arbitrarily abused this discretion by failing to consider medical evidence, the decision could be challenged through Article 78).

44. *See People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649, 291 N.Y.S.2d 200, 201–202 (1st Dept. 1968) (holding that where a person sentenced to an institution for rehabilitation claims that he has not been given any rehabilitative treatment, the court should look into that claim).

45. *See Johnson v. Ward*, 64 A.D.2d 186, 189–190, 409 N.Y.S.2d 670, 673 (3d Dept. 1978) (holding that an incarcerated person serving as a member of the Inmate Grievance Resolution Committee may not be transferred to another facility without a prior hearing unless the member’s presence or conduct creates an emergency and

You can also file an Article 78 petition to claim that an agency abused its discretion by giving you a punishment that is too severe (because such punishments are usually the result of administrative hearings). These petitions claim an “abuse of discretion ... as to the measure or mode of penalty or discipline imposed.”⁴⁶ The court will only rule in your favor (and reject the agency’s punishment) if it is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.”⁴⁷ As a result, these Article 78 petitions are very hard to win.⁴⁸

The examples mentioned above challenge an agency’s or official’s decision. But you can also file a petition claiming that the agency or official gave “arbitrary and capricious” reasons when it originally made the decision. If the official’s original reasons are arbitrary and capricious, the court reviewing your Article 78 petition may rule in your favor (and reject the official’s decision) even though the official offers different reasons later on in the proceedings.⁴⁹

3. Review of Hearing Board Decision—“Substantial Evidence Test” (Certiorari to Review)

A third type of Article 78 action allows you to claim that a hearing board made a decision that was not supported by substantial evidence (“substantial evidence” is explained in more detail in the paragraphs below). In these cases, you challenge decisions that were made in hearings or in other formal, court-like settings. If you believe the evidence produced at the hearing was not enough to support the decision, you can use an Article 78 petition to ask a court to review the decision. A court can review the record (an official written report) from the hearing to see whether it supports the decision. You can challenge any sort of disciplinary hearing or parole board decision that is based on evidence and a record if there was not enough evidence to support the decision.⁵⁰ By bringing this type of claim, you are asking the court to review the record that the agency or official used for the decision.

When the court reviews an Article 78 challenge to agency decisions made after administrative hearings, they use a standard called the “substantial evidence test.” “Substantial” means there must be enough evidence that a reasonable person could make the same decision the agency made. This means that the court will look to see if there was enough evidence in the record for the agency official to decide as he did. It does not mean that most of the evidence supports the decision made by the agency. It also does not mean that the court will determine whether the official made the right decision. You cannot argue that the decision was wrong, because the court will not substitute its judgment for the agency’s judgment. Instead, you need to argue that the official did not have enough evidence to make its decision. If there were mistakes or errors in the evidence against you, the court may overturn the decision.

For example, some incarcerated people have successfully challenged disciplinary decisions where, during the hearing, a corrections officer used misbehavior reports that were based on “hearsay.”⁵¹

transfer is immediately necessary to protect the facility or its personnel, in which event, the hearing on his transfer shall be held as soon as practicable at the receiving facility).

46. N.Y. C.P.L.R. § 7803(3) (McKinney 2018).

47. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 233, 313 N.E.2d 321, 326, 356 N.Y.S.2d 833, 841 (1974) (quoting *Stolz v. Bd. of Regents*, 4 A.D.2d 361, 364, 165 N.Y.S.2d 179, 182 (3d Dept. 1957)).

48. *See, e.g., Regan v. Coughlin*, 86 A.D.2d 913, 913, 448 N.Y.S.2d 258, 259 (3d Dept. 1982) (concluding that punishment of 60 days of keeplock and loss of commissary privileges, loss of 30 days of good time, and 80 days of restricted visits was not disproportionate for an incarcerated person who threw a handkerchief to a visitor in the visiting room because there was substantial evidence that the individual violated the rules and the penalty was not so disproportionate as to be “shocking to [the court’s] sense of fairness”).

49. *See Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv.*, 77 N.Y.2d 753, 759, 573 N.E.2d 562, 567, 570 N.Y.S.2d 474, 479 (1991) (holding that the reasons an agency later offered for dismissing an employee could not be used because its original dismissal was based on arbitrary and capricious reasons); *see also Tamulinas v. Bd. of Educ. of Jericho*, 279 A.D.2d 527, 529, 719 N.Y.S. 2d 660, 662 (2d Dept. 2001) (holding that reliance on the forms was arbitrary and capricious, and did not consider the additional reasons given because “determination is limited to the ground invoked by the administrative body at the time of the decision.”)

50. *See* Chapter 18 of the *JLM* for an explanation of disciplinary proceedings, and Chapter 32 of the *JLM* for an explanation of parole.

51. *See Rodriguez v. Coughlin*, 176 A.D.2d 1234, 1234, 577 N.Y.S.2d 190, 191 (4th Dept. 1991) (finding that

Hearsay is a type of evidence that comes from someone who did not actually see the event or action that he is describing. For example, if the only evidence the hearing officer uses to support a disciplinary decision against you comes from reports by people who did not actually see the behavior or activity they describe, the court may say that this hearsay evidence is not enough to support the finding of misconduct.

Many incarcerated people also challenge disciplinary decisions that use reports by informants. In general, courts recognize that it is important to protect informants' confidentiality, and will agree with decisions based on information from informants even where the incarcerated person has not been allowed to see or to cross-examine the informants. In a decision by the highest court of New York, an incarcerated person challenged a disciplinary hearing decision by arguing that the hearing officer should be required to interview the informants personally in order to determine their credibility.⁵² (Determining credibility means deciding how much to trust what an informant or witness says. If an informant is "credible," that means they are likely to tell the truth and their statements can be trusted.) The court rejected the individual's challenge, and said that even though a hearing officer must determine the informants' credibility, a face-to-face interview is not required.⁵³ Recently, incarcerated people have successfully challenged hearing decisions by arguing that corrections officers' reports of informants' statements were not detailed and specific enough for the hearing officer to determine the credibility of the informants.⁵⁴

Incarcerated people have also used Article 78 to challenge hearing decisions related to drug violations.⁵⁵ Some incarcerated people have successfully challenged drug-related decisions by showing that a drug test was not reliable or accurate enough to support the hearing decision, or the drug test was not conducted properly.⁵⁶

misbehavior reports did not provide substantial evidence to support findings that an incarcerated person was guilty because reports did not show that correction officers who signed them had personal knowledge of facts in the reports); *see also* *Deresky v. Scully*, 156 A.D.2d 362, 363, 548 N.Y.S.2d 318, 319 (2d Dept. 1989) (finding that the prison's conclusion that the incarcerated person started a fire in the cell of another individual was not sufficiently supported by evidence where the only evidence of guilt was hearsay testimony of an officer who was not present, and the incarcerated person offered credible testimony that contradicted such hearsay).

52. *Abdur-Raheem v. Mann*, 85 N.Y.2d 113, 118, 647 N.E.2d 1266, 1269, 623 N.Y.S.2d 758, 761 (1995).

53. *Abdur-Raheem v. Mann*, 85 N.Y.2d 113, 121, 647 N.E.2d 1266, 1271, 623 N.Y.S.2d 758, 763 (1995).

54. *Milland v. Goord*, 264 A.D.2d 846, 846–47, 698 N.Y.S.2d 245, 246 (2d Dept. 1999) (holding that a determination must be annulled because "testimony of the correction officer who interviewed the confidential informants was not sufficiently detailed and specific to enable the Hearing Officer to independently assess the credibility and reliability of the informants"); *see also* *Agosto v. Goord*, 264 A.D.2d 840, 698 N.Y.S.2d 244 (2d Dept. 1999) (holding that a determination must be annulled because "testimony of the correction officer who interviewed the confidential informants was not sufficiently detailed and specific to enable the Hearing Officer to independently assess the credibility and the reliability of the informants"). *But see* *Medina v. Goord*, 253 A.D.2d 973, 973, 678 N.Y.S.2d 919, 919 (3d Dept. 1998) (upholding the hearing officer's determination as supported by "sufficiently detailed information from which [the hearing officer] could independently assess [the informants'] reliability"); *Valentin v. Goord*, 259 A.D.2d 911, 912, 687 N.Y.S.2d 208, 208 (3d Dept. 1999) (upholding the hearing officer's determination as supported by "sufficiently detailed information from which [the hearing officer] could properly assess [the informants'] reliability").

55. *See* *Venegas v. Irvin*, 249 A.D.2d 982, 982, 672 N.Y.S.2d 200, 201 (4th Dept. 1998) (holding there was substantial evidence for determining that an incarcerated person possessed drugs, where the misbehavior report included correction officer's statement that he saw the individual throw a marijuana cigarette on the floor and that the cigarette later tested positive for marijuana, despite questions around when the cigarette was tested and when the report was filed); *see also* *Rollison v. Scully*, 181 A.D.2d 734, 735, 580 N.Y.S.2d 480, 480 (2d Dept. 1992) (holding that the Department of Corrections failed to produce substantial evidence that the wife of an incarcerated person had brought cocaine to the correctional facility because the Department had not introduced the required documents into evidence as required by regulations).

56. *See* *Wisniewski v. Smith*, 133 A.D.2d 541, 541, 519 N.Y.S.2d 908, 909 (4th Dept. 1987) (holding that correctional facility superintendent's determination that individual violated institutional rule by using marijuana was not supported by substantial evidence because the finding was based on tests that were not established as reliable on the record); *see also* *Kalish v. Keane*, 256 A.D.2d 343, 344, 681 N.Y.S.2d 336, 337 (2d Dept. 1998) (finding that there was no substantial evidence for drug violation by an incarcerated person where the person produced evidence that he was on prescription medication that could produce false positive drug tests. Hearing officer consulted with a representative of manufacturer of a different urine test than the one used by the prison, and representative did not know whether the medication at issue could cause a false positive test result); *Kincaide v. Coughlin*, 86 A.D.2d 893, 893, 447 N.Y.S.2d 521, 522 (2d Dept. 1982) (finding that there was not substantial

Also, in at least one case, an incarcerated person successfully challenged a determination that he had been in possession of a weapon because he showed that the evidence on the record was insufficient to support the decision.⁵⁷ In that case, the court ruled that there was not enough evidence to show that a weapon found in a cell belonged to an individual who had just been transferred to that cell.⁵⁸

Courts treat substantial evidence claims differently than other Article 78 claims. If you bring a substantial evidence claim, the state Supreme Court will first check to see whether there are other reasons to end your court proceeding.⁵⁹ For example, the court will check to see whether your claim is within the statute of limitations, which is the period of time between when the event occurred and when you must bring your claim. If you did not file your claim within that time limit, your claim will be dismissed. If the court does not dismiss your claim, it will transfer your case to the appellate court, which is called the Supreme Court, Appellate Division. This is unlike other Article 78 proceedings, which are heard in Supreme Court. This means that your substantial evidence claims will probably take longer to be decided than other Article 78 claims.

4. Challenge Legal Authority for State Action (Prohibition)

The fourth type of Article 78 proceeding arises when you challenge the state as acting beyond its lawful authority. In this type of proceeding, you ask the court to stop an official from acting beyond his authority or jurisdiction. This type of case is difficult to prove and rarely successful in court. Nevertheless, if you feel that an official is going to act in a way that will hurt or injure you, and the official is not allowed by law to act in such a way, this type of Article 78 proceeding can be a way to prevent the action.⁶⁰

C. When You Can Obtain Relief Under Article 78

There are three important limitations on the use of Article 78 that you should keep in mind, or your case may be dismissed. They are described below.

evidence to support superintendent's determination regarding an incarcerated person's marijuana possession because correction officer's testimony that a test showed substance to be marijuana did not include description of nature of the test or the procedures used); *Moss v. Scully*, 152 A.D.2d 577, 577–578, 543 N.Y.S.2d 161, 162 (2d Dept. 1989) (giving examples of how a test may be flawed, specifically, where there was no evidence introduced that (1) the breathalyzer and the ampoules used with it had been tested within a reasonable time in relation to the incarcerated person's test and found to be properly calibrated and in working order when the test was administered; (2) the chemicals used in conducting the test were of the proper kind and mixed in the proper portions; and (3) the breathalyzer was operated properly during the test). *But see* *Holmes v. Coughlin*, 182 A.D.2d 1121, 1121–1122, 583 N.Y.S.2d 703, 704 (4th Dept. 1992) (upholding superintendent's determination that the incarcerated person used illegal drugs as sufficiently supported by two positive Syva EMIT Drug Detection System Tests, and commenting on the tests' scientific reliability and validity).

57. *Varela v. Coughlin*, 203 A.D.2d 630, 631–632, 610 N.Y.S.2d 103, 104 (3d Dept. 1994) (holding that there was insufficient evidence to determine that a weapon hidden in an incarcerated person's cell was under the control of that person where he had been recently transferred to the facility, spent no more than six days in his cell (and some of that in keeplock), and there was no evidence his cell had been searched prior to his arrival or he had an opportunity to acquire the weapon). *But see* *Patterson v. Senkowski*, 204 A.D.2d 831, 832–833, 612 N.Y.S.2d 84, 85 (3d Dept. 1994) (finding that written misbehavior report by officer who searched an incarcerated person's jacket in a communal area was sufficient evidence to support finding by superintendent that the incarcerated person possessed a weapon, and that his claim that the jacket was not his merely created issue of credibility for the hearing officer to determine); *Swindell v. Coughlin*, 215 A.D.2d 855, 855, 626 N.Y.S.2d 329, 329 (3d Dept. 1995) (concluding that evidence of six ball bearings hidden in a dental floss container in an incarcerated person's cell substantially supported determination that he was guilty of possessing contraband classified as a weapon; the incarcerated person's claim that he found the ball bearings during his work detail and was waiting to turn them over to his supervisor was not supported by the supervisor, and was not enough to raise a doubt as to the sufficiency of the evidence supporting the decision).

58. *Varela v. Coughlin*, 203 A.D.2d 630, 631, 610 N.Y.S.2d 103, 103–104 (3d Dept. 1994). *But see* *Torres v. Coughlin*, 213 A.D.2d 861, 861, 624 N.Y.S.2d 67, 68 (3d Dept. 1995) (distinguishing *Varela* and holding that there was sufficient evidence that an incarcerated person possessed a weapon when he had been in the facility for 20 days and had been in the living area where the weapon was found for eight days).

59. N.Y. C.P.L.R. 7804(g) (McKinney 2018).

60. *See* *Schumer v. Holtzman*, 60 N.Y.2d 46, 51, 454 N.E.2d 522, 524, 467 N.Y.S.2d 182, 184 (1983) (noting that a request for prohibition under Article 78 is only appropriate if you are asking the court to prevent an official from acting beyond his or her authority).

1. You May Only Challenge Administrative Decisions

You can only use Article 78 to challenge administrative determinations of a New York state officer or agency. You generally cannot use it to challenge the decisions of a judge or a court, such as criminal convictions or criminal sentences. However, you can use Article 78 to challenge some types of actions by a judge, such as a punishment given by a judge for contempt of court.⁶¹ You can also use Article 78 if the judge made a decision that exceeded his authority (this is called “prohibition”—see Part B(4) above), or the judge failed to act in some way that was legally required (called “*mandamus*”—see Part B(1) above).

2. You Must Exhaust All Administrative Remedies

The administrative determination that you challenge must be final.⁶² This means that a decision-maker must have caused you an actual injury of some sort.⁶³ There have been many cases dealing with the question of what kinds of decisions are considered final. If possible, you should read the Practice Commentary and Notes of Decisions of Section 217 of N.Y. C.P.L.R. to see how courts have decided the issue.

In addition to the decision being final, there must be no way for you to appeal the decision any further within the administrative agency.⁶⁴ If it is possible for you to appeal the decision to a higher state officer in the prison system, you must do so before using Article 78. In other words, you must go through every normally available step in the administrative process before using Article 78. This is called “exhaustion of remedies.” If you have failed to follow the normal administrative procedure to the fullest extent possible, the court may refuse to hear your Article 78 petition.⁶⁵ This means that it is important to be aware of the ways you can challenge or appeal the decisions of prison officials within the prison or corrections system.⁶⁶

There are specific time limits for bringing appeals at each level of the administrative appeals process. You should be aware that many administrative appeals require you to act quickly. For example, you must bring a grievance within twenty-one days of the event that gives rise to the grievance.⁶⁷ For more information on Inmate Grievance Procedures, see Chapter 15 of the *JLM*. If you

61. *See Williams v. Cornelius*, 76 N.Y.2d 542, 546, 563 N.E.2d 15, 17, 561 N.Y.S.2d 701, 703 (1990) (holding that Article 78 petitions may be used to challenge a summary contempt order, where a summary contempt order is one in which there is no “right to an evidentiary hearing, the right to counsel, or the opportunity for adjournment to prepare a defense.” This challenge to a summary contempt order may only be issued when the actions giving rise to the contempt order take place in the “immediate view and presence” of the judge and the action disrupts the court proceeding); *see also Loeber v. Teresi*, 256 A.D.2d 747, 748–749, 681 N.Y.S.2d 416, 418 (3d Dept. 1998) (holding that an Article 78 petition can be used to challenge a judge’s summary contempt order).

62. N.Y. C.P.L.R. 7801(1) (McKinney 2018).

63. *See, e.g. Matter of Adirondack Wild: Friends of The Forest Preserve v. New York State Adirondack Park Agency*, 161 A.D.3d 169, 75 N.Y.S.3d 681 (3d Dept. 2018) (referring to an Article 78 proceeding and stating that “[w]e have previously held that an administrative action is final and ripe for review only when a pragmatic evaluation reveals that the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury”) (citing *Matter of Adirondack Council, Inc. v Adirondack Park Agency*, 92 AD3d 188, 190, 936 NYS2d 766 (2012)).

64. *See Essex County v. Zagata*, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998) (holding under New York Civil Practice Law and Rules 7801 that an agency determination is final when: (1) the agency’s position is definitive; (2) the position inflicts actual injury; and (3) no further agency action can remove or lessen the injury).

65. *See Alamin v. N.Y. State Dept. of Corr. Services*, 241 A.D.2d 586, 587, 660 N.Y.S.2d 746, 747 (3d Dept. 1997) (dismissing Article 78 petition because petitioner had not exhausted administrative remedies available under Public Health Law); *McCloud v. Coughlin*, 102 A.D.2d 854, 854, 476 N.Y.S.2d 630, 631 (2d Dept. 1984) (dismissing Article 78 petition because petitioner had not appealed superintendent’s disciplinary ruling to the Commissioner of the Department of Correctional Services).

66. *See Farinaro v. Leonardo*, 143 A.D.2d 492, 492–493, 532 N.Y.S.2d 601, 602 (3d Dept. 1988) (holding that an incarcerated person who was informed of the proper administrative procedure to challenge the decision of prison officials to withhold a martial arts catalog from him, and who did not follow that procedure, had failed to exhaust administrative remedies and could not obtain judicial relief).

67. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(1) (2018).

are appealing the outcome of a disciplinary hearing, you must submit an appeal in writing to the superintendent within seventy-two hours of the decision, and the superintendent must then issue a decision within fifteen days of receiving the appeal.⁶⁸ If you are appealing a superintendent's hearing decision, you must appeal to the Commissioner within thirty days of the decision, and the Commissioner must issue a decision on your appeal within sixty days.⁶⁹

If you fail to meet a deadline for an appeal, you may be prevented from bringing an Article 78 petition on the same claim. If you do not receive a response by the time limit, you can proceed to the next level of appeal.⁷⁰

There are a couple of exceptions to the general rule that requires you to exhaust all administrative remedies before you can bring an Article 78 petition. Because the courts rarely grant these exceptions, you should not rely on them. Instead, you should assume that you must first exhaust all administrative remedies.

The first possible exception is when your appeal for an administrative remedy would have no chance of succeeding. In one New York state case, the court said that the finality requirement of N.Y. C.P.L.R. 7801(1) may be relaxed if trying to obtain an administrative remedy "reasonably appears to be futile."⁷¹ But you should be aware that it is not common for courts to find that an appeal "reasonably appears to be futile," or unlikely to succeed.

The second possible exception is when an order is made that could harm you without the court stepping in to protect you. This is when a "non-final order" will result in "irreparable harm" without court intervention (without the court taking some kind of action).⁷² "Irreparable harm" is harm that cannot be changed or reversed after it happens. A "non-final order" is a court order that does not end or get rid of a case or issue. If irreparable harm from a non-final order is going to happen before you can try to appeal, you can ask the court to step in under Article 78. For example, if a decision by the disciplinary board was going to take place before you could appeal it, the court could intervene by taking you out of your facility. Or if you were not receiving medical benefits that should be provided under state or federal law, the court could intervene before the appeal by providing those benefits to you (to avoid "unnecessary hardship" on "poor, needy individuals" in the words of one court).⁷³

The third possible exception is when an agency does something that is unconstitutional or does something it does not have the power to do.⁷⁴ This exception is a limited one and, as one court has pointed out, "[t]he mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide the requested relief."⁷⁵ This means that you cannot simply claim that something is unconstitutional to try to get around the requirement of exhausting the remedies available from the administrative agency. It also could be a problem to bring a constitutional claim that would require the court to review facts made on the record by the administrative agency. In one case the court declined the exception for this reason.⁷⁶

68. N.Y. COMP. CODES R. & REGS. tit. 7, § 253.8 (2018).

69. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2018).

70. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.4(c) (2018) (if you appeal a parole decision and the appeal unit does not issue its findings within four months of receiving your appeal, you are considered to have exhausted your administrative remedies and may bring your appeal to the courts through an Article 78 petition).

71. *Martin v. Ambach*, 85 A.D.2d 869, 870, 446 N.Y.S.2d 468, 470 (3d Dept. 1981) (noting that the lower court had relied upon such reasoning).

72. *Martin v. Ambach*, 85 A.D.2d 869, 871, 446 N.Y.S.2d 468, 470 (3d Dept. 1981).

73. *See Lutsky v. Shuart*, 74 Misc.2d 436, 438, 342 N.Y.S.2d 709, 712 n.2 (Sup. Ct. Nassau County 1973), *aff'd*, 43 A.D.2d 1016, 351 N.Y.S.2d 946 (2d Dept. 1974) (holding that welfare recipient seeking medical benefits does not have to exhaust administrative remedies before bringing an Article 78 petition); *see also Valdes v. Kirby*, 92 Misc.2d 367, 371, 399 N.Y.S.2d 972, 974–975 (Sup. Ct. Suffolk County 1977) (holding exhaustion not required for petitioner seeking housing shelter allowance and facing possible eviction before proceedings).

74. *Dineen v. Borghard*, 100 A.D.2d 547, 548, 473 N.Y.S.2d 247, 249 (2d Dept. 1984) (holding plaintiff was not required to exhaust administrative remedies since he was alleging violations of his statutory and constitutional rights).

75. *Levine v. Bd. of Educ. of N.Y.*, 186 A.D.2d 743, 744, 589 N.Y.S.2d 181, 183 (2d Dept. 1992).

76. *Levine v. Bd. of Educ. of N.Y.*, 186 A.D.2d 743, 744, 589 N.Y.S.2d 181, 183 (2d Dept. 1992); *see also Timber Ridge Homes at Brookhaven v. State of N.Y.*, 223 A.D.2d 635, 636, 637 N.Y.S.2d 179, 180 (2d Dept. 1996)

So, it is possible that a court might allow you to proceed with an Article 78 motion even if you have not exhausted all of the administrative remedies if you can demonstrate: (1) your appeal for an administrative remedy has no chance of succeeding, (2) you would suffer irreparable harm without some judicial (court) intervention, or (3) an unconstitutional action or action beyond an agency's powers is taken against you. Remember that these exceptions rarely work, and it is safest to pursue all possible appeals within the agency or prison system before filing an Article 78 proceeding in court.

3. Your Article 78 Petition Must Be Filed Within Four Months After the Administrative Decision Becomes Final

Your Article 78 petition must be filed with the court no later than four months after the date that the administrative determination that you want to challenge becomes final.⁷⁷ This four-month period is called the "statute of limitations." As soon as you have exhausted your administrative appeals, you should get to work on writing and filing your petition. If you wait longer than four months to do this, the court will dismiss your petition. Part D(8) explains how you can file and serve your petition.

To find out the deadline for filing your papers, you must first determine when the decision you are challenging became final. The statute of limitations will usually run from the date when you receive notice of the determination you are challenging. It will not begin to run until you receive final notice from the highest possible administrative authority. Sometimes the authority may not notify you. If the authority has not notified you and the time when you were supposed to be notified has passed, you can assume your appeal has been denied.⁷⁸

If you apply for a rehearing (instead of another appeal) by the highest agency or prison board, the courts will not extend the statute of limitations period to cover the rehearing application period (unless the law gives you the right to a rehearing).⁷⁹ So, unless a rehearing is required by law, you should treat the notice of the final appeal decision as the time when the four-month statute of limitations period begins. The law on statute of limitations is complicated. If you are confused about when you need to file your papers, it is a good idea to plan on filing them within four months of the date you receive the order or decision about which you are complaining.⁸⁰

Following "service" (delivery of the papers to the Attorney General and the respondents), be sure to send "proof of service" to the court clerk. Proof of service should include an affidavit of service (which states that the papers were served on the Attorney General, the Attorney General's Office, and the respondents).

D. Procedures for Filing an Article 78 Petition

In the past few years, New York State has changed its civil procedure law (the law that tells you when, where, and how to file claims). Even though the new rules are similar to the Federal Rules of Civil Procedure, there are still significant differences. Even if you are familiar with the Federal Rules, you should still review New York's rules carefully.⁸¹

(holding that constitutional challenge that depends on the facts cannot be brought until the factual record is developed by the agency).

77. N.Y. C.P.L.R. 217(1) (McKinney 2007 & Supp. 2013).

78. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.4(c) (if an appeal of a parole decision does not result in the appeal unit issuing its findings within four months of receiving the appeal, administrative remedies are deemed to have been exhausted and an appeal may be brought before the courts).

79. *See De Milio v. Borghard*, 55 N.Y.2d 216, 220, 433 N.E.2d 506, 507–508, 448 N.Y.S.2d 441, 442–443 (1982) (holding that the four-month statute of limitations in an Article 78 action brought by a government employee to challenge his discharge (firing) from work begins to run on the termination date or effective termination date of his employment and not on the later date when his request for reconsideration of discharge was denied); *see also Loughlin v. Ross*, 208 A.D.2d 631, 631, 618 N.Y.S.2d 231, 232 (2d Dept. 1994) (finding that in an Article 78 proceeding to review a Commissioner's determination following disciplinary hearing, the statute of limitations began to run when the determination sustaining the disciplinary charges against the incarcerated person was affirmed on administrative appeal; the attempt by the petitioner to secure a reconsideration of the determination did not extend the statute of limitations).

80. N.Y. C.P.L.R. 7801: 7 Practice Commentary (McKinney 2008).

81. If you are going to look through the procedure code yourself, remember the rules are applicable to special

The Appendix of this Chapter contains examples of the legal papers that you must file with the court in order to use Article 78. This Chapter provides the essential information that you will need to use these legal papers. ***Do not tear the papers out of the book.*** Copy the printed language on your own paper, fill in the blanks, and replace any italicized words with the facts that apply to your case. The court might reject your papers if you tear them out of this book.

Under the current law, you need to send *an original copy and one extra copy* of each of the following (explained below) to the county supreme court clerk, the respondents, and the Attorney General of the state:

- (1) A Notice of Petition or an Order to Show Cause;
- (2) A Verified Petition;
- (3) All exhibits and supporting affidavits attached to the petition;
- (4) Either the full filing fee or a reduced fee with an affidavit that supports your claim that you are too poor to pay the full filing fee.⁸² The full filing fee is \$190.⁸³ **Caution:** If you fail to enclose either the fee, or the poor person's motion and affidavit, you will ***not*** get an index number. Without the index number, you cannot proceed with your claim;
- (5) A "Request for Judicial Intervention" ("RJI");⁸⁴ and
- (6) A "Request for an Index Number."

If possible, you should try to keep a copy yourself of all papers you file during the Article 78 proceeding.

1. Starting the Proceeding

You begin an Article 78 proceeding by filing either a Notice of Petition or an Order to Show Cause (described below). Whichever you choose, you will also need to file supporting affidavit(s), a Verified Petition, the filing fee, the Request for Judicial Intervention, and the Request for an Index Number.⁸⁵ The following sections will explain how to do each of these steps.

"Filing" in an Article 78 proceeding means delivery of the Verified Petition to the court clerk with the required fee.⁸⁶

You should file your Article 78 petition in the supreme court for the county where either: the administrative decision you are challenging was made, the administrative appeal was decided, the material events took place, or the respondent has his main office (this is usually Albany County).⁸⁷ This rule applies even if you have been transferred or released. See Appendix II at the end of the *JLM* for a list of the addresses of the supreme courts for all of the counties.

By filing, you begin the proceeding and automatically "interpose" the claim. This means that if you file before the statute of limitations runs out, the respondent cannot later argue that it took you too long to file successfully. You must file within four months of a final decision.

There are still some drawbacks at this stage, even if you file within the statute of limitations. Your case can still be dismissed unless service is completed and proof of service is filed within four months and fifteen days after you receive the challenged decision.

Filing your petition will get you an index number.

proceedings such as Article 78 proceedings through the definitional section of N.Y. C.P.L.R. 105(b), unless another section provides otherwise.

82. N.Y. C.P.L.R. 1101 (McKinney 2012); N.Y. C.P.L.R. 8018 (McKinney 1981).

83. N.Y. C.P.L.R. 8018 (McKinney 1981).

84. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.6. See Appendix A of this Chapter for a sample of a Request for Judicial Intervention.

85. N.Y. C.P.L.R. 7804 (McKinney 2008 & Supp. 2012); N.Y. C.P.L.R. 304 (McKinney 2010 and Supp. 2014); N.Y. C.P.L.R. 8018 (McKinney 1981 and Supp. 2012).

86. N.Y. C.P.L.R. 304 (McKinney 2010 and Supp. 2014).

87. N.Y. C.P.L.R. 506(b) (McKinney 2006).

2. Notice of Petition or Order to Show Cause

(a) Notice of Petition

A Notice of Petition gives notice to the all parties. It includes the name of the respondents (the opposite parties), the nature of your claim (the type of claim you are bringing forward), and the date and place of the hearing where you want your petition heard. It should be directed (addressed) to the respondent and clearly identify who he is. The Notice of Petition should state where and when it is to be submitted to a judge. It should also identify all the papers the Article 78 challenge is based upon.

A Notice of Petition must be served (delivered) in person to the respondents and the Attorney General's Office, or the case may be dismissed. Unlike an Order to Show Cause, if you file a Notice of Petition, you must serve it at least twenty days before the date you put down as the date of the hearing.⁸⁸ Note that if you are serving by mail, you must file an Order to Show Cause, not a Notice of Petition. See the example of a "Notice of Petition" in Appendix A to this Chapter.

(b) Order to Show Cause

An Order to Show Cause also gives notice to all parties, but differs slightly. It is different from a Notice of Petition because it is presented to a judge and signed by him before it is served (delivered or mailed) to other parties to the case. You might use it because you need an immediate hearing or because you cannot physically serve a Notice of Petition. (Since you are in prison, you would need someone else like a friend, relative, or a private service to help you serve a Notice of Petition in person.) Note that an Order to Show Cause pauses an official threatened action until your claim is heard.

An Order to Show Cause is an order signed by the judge directing that a petition be heard. Normally, a period of twenty days (advance notice) is given to the respondent before a hearing can happen. With an Order to Show Cause, the judge can speed up the hearing date so that it happens in less than the usual twenty days—it can even happen immediately.

In your Order to Show Cause, you should ask the court to allow you to serve the respondents and the Attorney General by mail. Be sure to include this request.

You should also explain why you need an Order to Show Cause in the affidavit (sworn written statement) attached to your Order to Show Cause. The reason can be because you are in prison and cannot carry out "personal service," meaning that you cannot deliver your petition directly to the respondent in person. Another reason you could list is that the situation that your Article 78 petition is trying to prevent is likely to happen in the next twenty days. For example, if you are scheduled to be removed from a work release program in less than twenty days, you may want to use an Order to Show Cause to try to stop this from happening. See the example of an "Order to Show Cause" in Appendix A of this Chapter.

To give notice to government agencies, papers should be served to either: the county attorney (County), the corporation counsel (City), or to any person designated to receive service in a writing. The papers should also be filed in the County Clerk's Office.

You should attach a copy of your petition to the Order to Show Cause or Notice of Petition (as appropriate). The petition should contain a written statement explaining the facts and your reasons for requesting the relief you seek. For more information on writing your petition, see below.

(c) The Return Date

If you file an Order to Show Cause, the court will set the "return date." This is the date when the case will be heard by the court. The court will sign the Order and mail it to you, and it will have the return date.

You can pick a date for the hearing when you send the Order to the court. You should pick a date that will be a week or two from the date on which you think the court will receive your papers. If the

88. N.Y. C.P.L.R. 7804(c) (McKinney 2008 & Supp. 2012). You should send your papers to the Attorney General by sending it to the address of the assistant attorney general in the county in which the court sits. Your prison library should have the address; otherwise, you should write to the Court Clerk.

court cannot schedule a hearing on that day, the court clerk will cross out the date that you selected and write another one on the Order. The clerk will let you know if this has happened.

In your Order to Show Cause, you must indicate the date by which you will serve (deliver or mail) copies of the papers to the respondent and to the appropriate Attorney General's office. You should give the respondent two to three weeks between the date on which he receives the papers and the date that you set for the court appearance. You should consider the time that it will take for the papers to go through the mail after you send them out.

If you file a Notice of Petition, you must specify the return date (the date when the case will be heard by the court). The return date must normally be at least twenty days after the date on which the respondent has been served.⁸⁹ Therefore, you should choose a date that is more than twenty days from the date by which you will have served the respondents. If the court wants to hear your Article 78 action on another day, it can change the date. The court should notify you if it changes the return date. If you forget to provide a return date on your Notice of Petition, the court should give you a chance to correct the mistake or disregard it if neither party is hurt by the mistake.⁹⁰ Remember, an Order to Show Cause can speed up the hearing date so that your case can be heard in less than 20 days.

(d) The Respondents

You should name as the respondent the official or agency whose action or inaction you are challenging. If you name the official, you should also include his or her formal title. You will need to substitute the name of a new official if someone new takes that job.⁹¹ If your case involves prison records, you may want to name the Commissioner of the Department of Correctional Services ("DOCS") as a respondent.

Bear in mind that you will have to serve documents on all of the parties you list as respondents. The more parties you list as respondents, the more parties you have to serve with documents. Thus, it is generally wise only to list the officials involved and the Commissioner of the Department of Correctional Services. For example, in cases challenging disciplinary actions, it is usually enough to name the Commissioner of the Department of Correctional Services, the superintendent of the facility where the hearing was held, or the state director of disciplinary programs (the person responsible for reviewing administrative appeals).

(e) Stay

If you request a stay against the respondent (a pause in the proceedings) and the judge grants it, then your petition has to be heard before the decision you are challenging can be enforced.⁹² For example, if you are challenging a decision to place you in solitary confinement, you might ask the judge for an Order that you not be placed there while you are waiting for a decision on your petition. If you want a stay, you must ask for it in the Order to Show Cause that you send to the court, like the sample order at the end of this Chapter.

89. N.Y. C.P.L.R. 7804(c) (McKinney 2008 & Supp. 2012).

90. N.Y. C.P.L.R. 2001 (McKinney 2012); *see also* Matter of Oneida Pub. Library Dist. v. Town Bd. of the Town of Verona, 153 A.D.3d 127, 129–30, 59 N.Y.S.3d 524, 526 (3d Dept. 2017) (holding that the latest version of C.P.L.R. 2001 was specifically changed so that courts would no longer dismiss petitions for mistakes like forgetting to put a return date on the Notice of Petition). Your petition may still be dismissed for larger mistakes like not serving a Notice of Petition at all. *See* Grover v. Wing, 246 A.D.2d 813, 814, 667 N.Y.S.2d 785, 786 (3d Dept. 1998) (determining that a petition was an Article 78 claim, and that failure to serve defendants with a Notice of Petition or Order to show cause without a proper return date made dismissal appropriate).

91. N.Y. C.P.L.R. 1019 (McKinney 2012 & Supp. 2012).

92. N.Y. C.P.L.R. 7805 (McKinney 2008 & Supp. 2012). Section 7805 states: "On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review..."

3. Article 78 Petition

The core of your Article 78 papers is the petition. The petition identifies the parties, explains the basis for “venue” in a particular county (the place where the lawsuit is filed or heard), and states the facts of your case, your legal claims, and the relief you are asking the court to give you. Relief simply means what you are asking the judge to do. You should submit an affidavit (a sworn statement by you or another person) to support the facts in the petition. You can also attach copies of documents relating to your case.

Be sure that you think carefully in advance and make the strongest arguments possible when you draft your petition. For example, if the Board of Parole has treated you differently from other incarcerated people, emphasize that it is unfair for the Board to treat you differently. Also, if there are standard procedures or regulations that you know were not followed in your case, you should point that out. If you claim that the agency did not follow its procedures, you should also claim that the decision the agency reached may be wrong because of this.

4. Verification of Petition

Your petition must also include a “verification.” A verification is a short statement in which you swear to the truth of the statements in your petition. It must include the statement that what is written in your petition “is true ... except as to those matters alleged on information and belief and that as to those matters [insert your name] believes them to be true.”⁹³ You should use this exact language and sign your petition in front of a notary. You can find a sample verification in the Appendix at the end of this Chapter.

5. Discovery: Use of the “Notice to Admit”

An Article 78 proceeding usually does not involve discovery (the part of a lawsuit where the parties exchange facts). Formal discovery tools, such as “depositions” (official interviews of people) and “interrogatories” (written questions submitted to people who may have relevant information), can only be used if the court gives you permission. If the court finds there are issues of fact that need to be resolved, it may grant you permission to carry out discovery. An example of an issue of fact is a dispute over whether someone was present at the administrative hearing. See Chapter 8 of the *JLM*, “Obtaining Information to Prepare Your Case: The Process of Discovery,” for more information on discovery.

The one form of discovery that you can use without getting permission from the court is the “Notice to Admit.” It can be used only if the respondent is an individual, not the state. You can use a Notice to Admit to ask the respondent to admit:

- (1) The genuineness of any paper or document,
- (2) The correctness or accuracy of a photograph, or
- (3) The truth of any matters of fact about which you believe there can be no dispute and which are within the knowledge of the respondent or can easily be found by him on reasonable inquiry.⁹⁴

The Notice to Admit is particularly useful in cases where you are making factual allegations or where no transcript of the administrative proceedings exists. The Notice to Admit should be a separate document. This document should be a list of questions. Each question should be divided into short parts answerable with yes or no. Do not write long questions with many parts because then the respondent could say false to all of them, even though most or part of a question was true. Also, be sure to list and number your questions. You should send these questions to the respondent, the Attorney General’s Office, and the court with your petition.

93. N.Y. C.P.L.R. 3020(a) (McKinney 2010 & Supp. 2012).

94. N.Y. C.P.L.R. 3123(a) (McKinney 2018) (stating that the Notice to Admit may be served at any time after service of the answer, but not later than 20 days before trial).

6. Filing Fees

Before December 1999, incarcerated people could file for poor person status (“*in forma pauperis*”) in New York State courts, which meant they did not have to pay filing fees for claims made in state court. In 1999, the State Legislature made changes to the New York Civil Practice Law and Rules. Now incarcerated people must pay filing fees whenever they bring claims in state courts.⁹⁵ So, even if you or someone you know once filed an Article 78 proceeding without paying a filing fee, or if you have looked at a prior edition of the *JLM* that reflects the old law, *you now will most likely be required to pay a filing fee in order to begin your Article 78 proceeding and receive your index number*.⁹⁶ The only exception is for incarcerated people bringing Article 78 petitions in relation to jail time credit. If you are filing this kind of Article 78 petition, you do not have to pay a filing fee.⁹⁷

Incarcerated people are eligible for a reduced filing fee, which may be between fifteen and fifty dollars⁹⁸ (the full filing fee is \$190).⁹⁹ In order to get the reduced filing fee, you must submit an affidavit (sworn statement) to the court stating why you cannot afford the full filing fee and asking for a reduced filing fee.¹⁰⁰ If you are not able to pay the full filing fee, you should include as much detailed information as possible about your financial situation in your affidavit. For example, you should tell the court if you cannot work because you are medically or mentally ill, because you are in protective custody due to danger, or because no jobs are available to you. Also, explain any outstanding obligations you have such as child support or restitution. See Appendix A for a sample affidavit to request a reduced filing fee. If the court denies your request for the reduced filing fee, it will notify you. You will then have 120 days to pay the full fee (\$190) or your case will be dismissed.¹⁰¹ If you win your case, the court will refund any filing fee that you have paid.

In the affidavit, you must provide the name and mailing address of the facility where you are currently confined as well as all other facilities you have been confined in during the last six months.¹⁰² The court will then get a copy of your inmate trust fund account statement for the six months before you filed the affidavit. If you have been incarcerated in the same facility for six months before you filed the affidavit, the court will get a copy of your inmate trust fund account from the prison superintendent of your facility. If you have been confined for less than six months at that facility at the time you file

95. The requirements that all inmates pay at least a small filing fee can be found in N.Y. C.P.L.R. 1101(d) and N.Y. C.P.L.R. 1101(f) (McKinney 2012). The fees for each piece of the application can be found on the NY courts website. *See Filing Fees*, NYCOURTS.GOV, <https://www.nycourts.gov/forms/filingfees.shtml> (last visited Feb. 23, 2020). As explained above in Part D, to file an Article 78 motion you need to file a Request for Judicial Intervention (RJI) and a Request for an Index Number. Both of these documents come with a fee. If you make an application to file as a poor person (poor person relief) and your application is granted, the fee for the RJI will be waived, meaning you do not have to pay it. The fee to get an index number will not be fully waived but it may be reduced. Based on the evidence of your inability to pay that you give to the court in your application for poor person relief, the court will decide how much you have to pay to file and get an index number. This amount will be between fifteen and fifty dollars. There is no fee associated with the request to proceed as a poor person (referred to above and in general as fee waiver application, application to proceed as a poor person, poor person relief, or motion to proceed in forma pauperis. All of these phrases mean the same thing.).

96. *Gomez v. Evangelista*, 290 A.D.2d 351, 352, 736 N.Y.S.2d 365, 366 (1st Dept. 2002) (holding that the requirement that incarcerated people pay a non-waivable fee of at least \$15, while other non-incarcerated people can get their fees completely waived, does not violate the Equal Protection Clause of the 14th Amendment, and is therefore constitutional); *see also Berrian v. Selsky*, 306 A.D.2d 771, 772, 763 N.Y.S.2d 111, 113 (3d Dept. 2003) (holding that the fee requirement for an Article 78 challenge “is rationally related to the legitimate governmental interest of deterring frivolous prisoner litigation”); *Bonez v. McGinnis*, 305 A.D.2d 814, 815, 758 N.Y.S.2d 543, 544 (3d Dept. 2003) (same holding as *Berrian*). N.Y. C.P.L.R. 1101(d) (effective Sept. 1, 2015, a plaintiff may seek to commence an action without payment of the fee required by filing the form affidavit, attesting that he is unable to pay the costs, fees and expenses necessary for the action, and if the court denies the application and does not grant a fee waiver, the case will be dismissed if the fee is not paid within 120 days of the date of the order).

97. N.Y. C.P.L.R. 1101(f)(5) (McKinney 2012).

98. N.Y. C.P.L.R. 1101(f)(2) (McKinney 2012).

99. N.Y. C.P.L.R. 8018(a) (McKinney 1981). In addition, \$125 may be charged if a trial or inquest (hearing) is scheduled. The charge is called a “Request for Judicial Intervention” fee. N.Y. C.P.L.R. 8020(a) (McKinney 1981).

100. N.Y. C.P.L.R. 1101(d) (McKinney 2012), 1999 N.Y. SESS. LAWS 412 Pt. D. § 1 (McKinney 2000).

101. N.Y. C.P.L.R. 1101(d) (McKinney 2012); 1999 N.Y. SESS. LAWS 412 Pt. D. § 1 (McKinney 2000).

102. N.Y. C.P.L.R. 1101(f)(1) (McKinney 2012).

your affidavit, the court will either: (1) get an inmate trust fund account statement for the last six months from the Central Office of DOCS in Albany if you are a person incarcerated by the state who was transferred from another state correctional facility; or (2) get an inmate trust fund statement from a federal or local correctional facility if you were transferred from such a facility.¹⁰³ If the court decides that you cannot afford to pay the full filing fee, it may allow you to pay a reduced filing fee that is no less than fifteen and no more than fifty dollars.¹⁰⁴ The court will then require you to pay an initial part of the reduced filing fee that you can reasonably afford.¹⁰⁵ Only in exceptional circumstances may the court decide that you do not have to pay this initial filing fee.¹⁰⁶ The rest of the reduced filing fee (the difference between the total amount of the reduced filing fee and the amount paid as the initial part of the filing fee) will be collected by your facility.¹⁰⁷ This means that if you are a person incarcerated by the state, DOCS will collect a portion of your weekly wages and outside receipts until the reduced filing fee is fully paid.

7. The Index Number and Filing Date

The court will tell you your index number after you file the documents listed in Part E(2) below. Once the court tells you the index number, you must write it on the line next to where it says “Index No.”, on all the documents that you serve to the respondent or submit to the court.¹⁰⁸ If you serve your Notice of Petition or Order to Show Cause and Verified Petition without an index number or filing date (for example, because filing has not occurred), the paper has no legal weight. The court will act as if you never did anything. However, the court might allow you to fix your petition if you made a mistake in the filing process (for example, if you purchased the index number but forgot to put it on your other documents).¹⁰⁹ On the other hand, if you make a mistake in the filing process, the court might dismiss the entire proceeding. You could still refile, but only after obtaining a new index number. You can do this either by filing a new motion for poor person status or paying the fee again. If you must refile, you should be aware of statute of limitations concerns. See Part C(3) above for a discussion of statute of limitations.

8. Serving the Respondents and the Attorney General

“Serving” means giving the respondents and the Attorney General’s Office a copy of every document and exhibit that you sent to the court clerk. Remember that for Article 78 proceedings, you must serve both the official (person or people) or agency you have named AND the correct office of the New York State Attorney General. Unless the court directs otherwise, the Attorney General must be served by personal service and the official or agency by personal service or certified mail, return receipt requested, with “URGENT LEGAL MAIL” written on the front of the envelope in capital letters.

You may not serve the respondents until you receive an index number from the court. You must write the index number and the court’s designated date of filing (which you can find in the information that the clerk sends you) on the first page of every item that you send to the respondents. You must also tell the Attorney General the name of the judge and the date of the hearing if available. You should include the date of the hearing and the name of the judge on every paper that you send to the respondent if the court clerk sends you this information.

103. N.Y.C.P.L.R. 1101(f)(1) (McKinney 2012).

104. N.Y. C.P.L.R. 1101(f)(2) (McKinney 2012).

105. N.Y. C.P.L.R. 1101(f)(2) (McKinney 2011).

106. However, please note that the statute states that “in no event shall an inmate be prohibited from proceeding for the reason that the inmate has no assets and no means by which to pay the initial partial filing fee.” N.Y. C.P.L.R. 1101(f)(2)(ii) (McKinney 2011).

107. N.Y. C.P.L.R. 1101(2) (McKinney 2012).

108. N.Y. C.P.L.R. 2101(c) (McKinney 2012).

109. N.Y. C.P.L.R. 2001 (McKinney 2010); N.Y. C.P.L.R. 305(c) (McKinney 2010) (“At any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.”). In other words, if fixing a mistake would not be unfair to the other party’s ability to present their argument against you, then you will most likely be able to amend the mistake.

You must be careful to serve your petition on the official or agency you have named as respondent and to the New York State Attorney General.¹¹⁰ (The Attorney General will represent the state in the proceeding.)

To recap, if you are using an Order to Show Cause, the respondents must receive these items before the time specified by the court in the Order to Show Cause when the judge signs and mails it back to you. If you are using a Notice of Petition, the respondents must receive these items at least twenty days before the court date.¹¹¹ A Verified Petition, supporting affidavits, and either an Order to Show Cause or a Notice of Petition must be served within four months and fifteen days after you receive the decision.¹¹² It is important to serve papers far enough ahead so that there is time to complete the proof of service requirement, which also must be completed in four months and fifteen days.¹¹³ You must serve the Attorney General by personal service unless you get special permission to do otherwise.¹¹⁴ You can get this special permission by making a request for it in your Order to Show Cause. If you are serving a state agency, you can serve either the chief executive officer or a person assigned by him to receive service. You have two options for serving the state officer: personal delivery or certified mail, return receipt requested. If you choose certified mail, you must write “URGENT LEGAL MAIL” on the front of the envelope in capital letters.¹¹⁵ Service is not complete until the certified mail is received by the agency to which it is sent.

While incarcerated, you may have a great deal of trouble accomplishing service. The two most common means of service are personal service and mail.¹¹⁶ Each can cause problems for incarcerated people.

(f) Personal Service

Personal service is when someone (the “server”) actually approaches, identifies, and personally hands a person the paperwork. The server then describes and swears in an affidavit to exactly what she did, and this affidavit is turned over to the court to demonstrate proof of service. An incarcerated person could serve the agency personally either by asking anyone on the outside who is not a party and is over eighteen years of age to hand over the paperwork, or by hiring a professional service agency (which can be expensive).¹¹⁷

(g) Service by Mail

Service by mail is allowed in many situations, but not when suing the government. For example, you are required to personally serve the Attorney general. If you are not able to personally serve the Attorney General, you should include an Order to Show Cause requesting authorization to serve on the Attorney General by mail the material that you originally send the court.¹¹⁸ If you cannot serve the state agency by certified mail, you should also include an Order to Show Cause asking to serve the

110. N.Y. C.P.L.R. 7804(c) (McKinney 2008).

111. N.Y. C.P.L.R. 7804(c) (McKinney 2008).

112. N.Y. C.P.L.R. 306-b (McKinney 2010) (effectively sets time limit for service); N.Y. C.P.L.R. 7804(c) (McKinney 2008) (stating that Notice of Petition, petition, and supporting affidavits all need to be served); *see also* Long Island Citizens Campaign, Inc. v. Cnty. of Nassau, 165 A.D.2d 52, 55, 565 N.Y.S.2d 852, 855 (2d Dept. 1991) (holding that the petition must be served along with the Notice of Petition or Order to Show Cause).

113. N.Y. C.P.L.R. 306-b (McKinney 2010).

114. N.Y. C.P.L.R. 307(1) (McKinney 2010); *see also* Lowrance v. Coughlin, 190 A.D.2d 915, 915, 593 N.Y.S.2d 597, 598 (3d Dept. 1993) (holding that without a court order, personal jurisdiction may not be obtained over an Attorney General by serving him or her via mail).

115. N.Y. C.P.L.R. 307(2) (McKinney 2010 & Supp. 2014).

116. Electronic means and overnight delivery service have also become possibilities in some circumstances. *See* N.Y. C.P.L.R. 2103(b)(6)–(7) (McKinney 2012 & Supp. 2014).

117. N.Y. C.P.L.R. 2103(a) (McKinney 2012 & Supp. 2014).

118. *Onorato v. Scully*, 170 A.D.2d 803, 805, 566 N.Y.S.2d 408, 409 (3d Dept. 1991) (noting that “service by mail, absent issuance of an order to show cause authorizing service by mail in lieu of personal service, is jurisdictionally defective”) (quoting *Matter of Dello v. Selsky*, 135 A.D.2d 994, 995, 522 N.Y.S.2d 716, 717 (3d Dept. 1987)). *See* Appendix A at the end of this Chapter for a general example of an Order to Show Cause. Model your request on the example.

state agency in an alternative manner. In the Order to Show Cause, you should specifically explain the process you must go through at your institution to mail the documents so that the court will authorize that particular process. If there are any other difficulties in serving process that make it very difficult or impossible to accomplish in time, tell the court right away and ask for additional time.¹¹⁹ In the past, courts have allowed incarcerated people to use whatever mail services are available to them. In fact, courts sometimes give incarcerated people special permission to use mail to serve the Attorney General, who normally must be served by personal service.¹²⁰ It is very important that you ask the court clerk about serving process and describe the procedure for mailing at your institution. Write a note asking the clerk to provide specific instructions on exactly what you have to do to serve.

(h) Service by Filing

A final possibility is to ask if you can serve by filing pursuant to New York Civil Practice Law and Rules 2103(d).¹²¹ This rule is basically a catchall provision that says if no other means are available, service can be fulfilled by filing the documents you need to serve by mailing them to the court clerk. Just being in prison is not enough to trigger this provision. You would have to state a compelling reason why you could not serve in any other manner.

(i) Proof of Service

Proof of Service is evidence for the court that you have notified respondents that you are suing them. It is a form that you send the court stating that you served process. If someone else has served personally for you, that person must provide you with an “affidavit of service,” which is an affidavit explaining the time, date, and circumstances surrounding the event. Some professional servers may have a certificate that they send to you. If you serve by mail, you may have to sign an affidavit saying that you mailed it, or you may have to include a copy of the receipt from certified mail. If you are allowed to use regular mail, another possibility is to send the court a receipt signed by the respondent indicating that the respondent received the package. This is called an acknowledgment. Whatever proof of service you have, you should submit it to the court.

9. The “Answer” by the Government and Your “Reply”

The document that the administrative official or agency files with the court in opposition to your petition is called the answer. The answer is a document that replies to each point in your petition by admitting, denying, or claiming lack of knowledge about each point. With the answer, the respondent can also submit any affidavits or other documents to the court. The respondent is required to serve you with a copy of his answer and all attached documentary evidence no later than five days before the hearing date.¹²²

When you receive the answer, you should read it carefully to see what arguments the government is making in response to your claim. Usually, the Attorney General’s Office, rather than the

119. The main problem is that “mailing” has a specific legal definition under New York’s Civil Practice Law and Rules: “Mailing” means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person’s last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state N.Y. C.P.L.R. 2103(f)(1) (McKinney 2012 & Supp. 2014) (emphasis added). A person who is currently incarcerated generally does not have access to a depository under the exclusive care of the United States Postal Service and, therefore, cannot “mail” within the meaning of the statute. However, as noted above, courts commonly allow incarcerated people to serve by mail.

120. See *Onorato v. Scully*, 170 A.D.2d 803, 805, 566 N.Y.S.2d 408, 409 (3d Dept. 1991) (finding, in certain circumstances, a court may treat an incarcerated person’s letter as an application to permit alternative service even where there is no order to show cause authorizing service by mail); *Matter of Hanson v. Coughlin*, 103 A.D.2d 949, 949, 479 N.Y.S.2d 767, 768 (3d Dept. 1984) (interpreting an incarcerated person’s attempt to mail petition as an application for an order permitting alternative service, and remitting the case to the trial court such that the incarcerated person could submit an order to show cause).

121. N.Y. C.P.L.R. 2103(d) (McKinney 2012 & Supp. 2014).

122. N.Y. C.P.L.R. 7804(c), (e) (McKinney 2008).

respondent(s), writes the answer. If the respondent fails to file an answer within the allowed time, you can ask the court to rule in your favor.

You might want to submit an additional document, called a reply, once you read the government's answer. If you think the transcript or other documents submitted by the respondent were inaccurate, you will want to say that in a reply. If the respondent has added allegations about you that were not included in your petition, you will need to address those in the reply by either denying them or saying you do not know whether they are true. If you do not, the court can view those facts as if you have admitted that they are true.¹²³ And, if the respondent has made a claim against you (a counterclaim) you will want to address this claim against you in a reply. You must serve the respondent with your reply at least one day before the hearing.¹²⁴

If you are seeking review of a discretionary decision made by an official or agency after a hearing, the respondent is required to submit a copy of the transcript of the hearing to the court with its answer. While the respondent is not required to serve you with a copy of the transcript, several courts have ruled against respondents who failed to provide the courts with administrative hearings transcripts.¹²⁵

E. How to Bring an Article 78 Proceeding

To bring an Article 78 proceeding, you must complete the following steps before the deadlines:

- (1) File the items listed below with the clerk of the court where you are bringing the proceeding;
- (2) Serve the respondent and the Attorney General's Office; and
- (3) File proof of service with the court during the appropriate time period.

1. Deadlines

Four-month deadline for filing in court (step 1 above): You must file with the court within the statute of limitations period. If you do not, you will automatically lose your case. Remember, you cannot serve the respondent (step 2) until you receive an index number. The court sends you an index number after you have completed step 1. Plan your time accordingly.

Deadline for service and filing proof of service (steps 2 and 3 above): You must serve both the respondent(s) and the Attorney General and file "proof of service" with the appropriate court within four months and fifteen days after you receive the decision you are challenging. It will take some time to file proof of service, so remember to leave enough time after service to get this accomplished.

Example: If you receive a decision on December 1, 2018, you must file your appeal with the appropriate court before April 1, 2019. You must serve the respondent(s) and the Attorney General's Office and file proof of service with the court before April 16, 2019.

2. Procedure

(a) Filing with the Court

As mentioned above, you need to send to the county Supreme Court clerk one original and one copy of each of the following:

- (1) A Notice of Petition or an Order to Show Cause;
- (2) A Verified Petition;
- (3) All exhibits and supporting affidavits attached to the petition;

123. N.Y. C.P.L.R. 3018(a) (McKinney 2010).

124. N.Y. C.P.L.R. 7804(c) (McKinney 2008 & Supp. 2014).

125. *See* Gittens v. Sullivan, 151 A.D.2d 481, 481, 542 N.Y.S.2d 272, 273 (2d Dept. 1989) (ordering respondent to produce transcript of disciplinary hearing, and if no transcript existed, agency's determination had to be voided and a new administrative hearing conducted); *Matter of Arnot-Ogden Memorial Hosp. v. Axelrod*, 95 A.D.2d 947, 948-49, 463 N.Y.S.2d 927, 929-930 (3d Dept. 1983) (holding that default judgment was proper, as respondent had repeatedly failed to produce transcript as ordered by the court).

- (4) the full filing fee of \$190 or an affidavit that supports your claim that you cannot afford to pay the full filing fee. See discussion in Part D(6) above. Starting on September 1, 2019, if the court approves your request, it will not charge you anything;

Caution: If you fail to enclose either the full fee or the poor person's motion and affidavit, you will not get an index number. Without the index number, you cannot proceed with your claim.

- (5) A "Request for Judicial Intervention" ("RJI"). Different courts apply different rules on these, so check with your court clerk to make sure you have complied with the RJI rules for your court;¹²⁶ and
- (6) A "Request for an Index Number."

Mail these items to the correct court clerk and wait for an index number. After you receive the number, serve the respondents and Attorney General with the proper paperwork. You can make the copies by hand.

(b) Serving the Respondents and the Attorney General's Office

If you are using an Order to Show Cause, the respondent(s) must receive these items before the time specified in the Order. If you are using a Notice of Petition, the respondent(s) must receive the items at least twenty days before the court date. NOTE: If you are permitted to serve papers by mail, you must add five days to the deadline. So, you would mail your papers at least twenty-five days before the court date.¹²⁷

(c) Proof of Service

It is important that you file proof of service on each respondent and the Attorney General on time. Without a timely filing, the court will dismiss your case.

(d) Refiling Your Petition

If your case is dismissed because you did not file proof of service on time, you have fifteen days from the date of dismissal to refile your petition and serve the respondents and the Attorney General. Note that, not only will you have to pay the filing fee again, but you will also have to repeat the entire process.

3. How to Get Help from a Lawyer

Courts have the power, under Section 1102(a) of the New York Civil Practice Law and Rules, to appoint a lawyer for you, but they do not have to.¹²⁸ If you would like a lawyer, include a request for a court-appointed attorney in your request for a fee reduction or waiver. You can also contact the agencies in *JLM*, Appendix IV, to see if they know a lawyer who will represent you for free. You should also read Chapter 4 of the *JLM*, "How to Find a Lawyer."

4. The Judgment

The court's decision about your Article 78 petition is called a judgment. The court has the power to render any judgment that it feels is appropriate. It can modify the decision of the administrative body, cancel it, make an entirely different decision, or send the case back to the administrative agency for a new hearing or decision (this is called a remand to the administrative agency).¹²⁹

126. See, e.g., N.Y. CT. RULES § 202.6(c) (describing procedures for judicial intervention in counties in New York City). For the general procedure on Requests for Judicial Intervention in New York, see N.Y. COMP. CODES R. & REGS. tit. 22, § 202.6 (2013 & Supp. 2014).

127. N.Y. C.P.L.R. 2103 (b)(2) (McKinney 2012 & Supp. 2014).

128. N.Y. C.P.L.R. 1102(a) (McKinney 2012 & Supp. 2014).

129. N.Y. C.P.L.R. 7806 (McKinney 2008 & Supp. 2014).

F. How to Appeal Your Article 78 Decision

The Appellate Division of the New York Supreme Court has four departments. Each of these departments covers a different portion of New York State. Your appeal will take place in the department of the Appellate Division that contains the county where your Article 78 petition was decided against you.¹³⁰ Each of the four departments can have specific rules about the time limits and process of filing and proceeding on an Article 78 appeal, so you must be sure to find out what, if any, specific documents or actions are required by your department for each step of your appeals process.¹³¹

1. Filing a Notice of Appeal (“Taking the Appeal”)

Your first step in appealing an Article 78 decision is serving a Notice of Appeal on the Attorney General and filing the Notice of Appeal with the Clerk of the county where your judgment was decided, with proof of service upon the Attorney General.

In your notice, you must explain five important things:

- (1) The decision that you are appealing;
- (2) Which judge made the decision;
- (3) The date on which the decision was made;
- (4) What date the judgment was filed with the County Clerk; and
- (5) What parts of the decision you want to appeal (you can appeal part of or the whole decision).¹³²

A filing fee of \$315 may be required to file your notice, but you can request a reduced fee if you are unable to pay in full.¹³³ (You may serve your Notice of Appeal to the court and the Attorney General by mail; see Part D(8) above for information on serving documents.) Remember, you generally must serve and file the notice of appeal within thirty days of your petition’s denial, or the decision will be final and you will not be able to appeal.¹³⁴

2. Putting Together Your Record

In order for your appeal to go forward, you will need a record of your case so far. The record will include all of the information that has been filed in your case, except for any briefs that were filed. A record will likely have your original Article 78 petition, the answer from the Attorney General, your reply, if any, the evidence for both parties, and all decisions and judgments made by the court that heard your case. It may also contain the transcript of the proceedings.

You will also need to add a statement including the following information:

- (1) The index number of your case;
- (2) The full names of the original parties and any change in parties;
- (3) The court and county in which the proceeding began;

130. The four departments are as follows: 1st Department—Bronx, New York (Manhattan); 2nd Department—Dutchess, Kings (Brooklyn), Nassau, Orange, Putnam, Queens, Richmond (Staten Island), Rockland, Suffolk, Westchester; 3rd Department—Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington; 4th Department—Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, Yates. *Appellate Courts – Appellate Divisions*, NYCOURTS.GOV (last visited Oct. 12, 2020), available at <https://www.nycourts.gov/courts/appellatedivisions.shtml>.

131. You can find this information by looking up your court and department rules in McKinney’s New York Rules of Court (2012). The relevant parts of the rules are as follows: N.Y. Ct. Rules Part 600 (1st Dept.); Part 670 (2nd Dept.); Part 850 (3rd Dept.); Parts 1000 (4th Dept.). You should also consult Part 1250 for general rules.

132. N.Y. C.P.L.R. 5515 (McKinney 2014).

133. N.Y. C.P.L.R. 8022(b) (McKinney 1981 & Supp. 2007). See N.Y. C.P.L.R. 1101(f) (McKinney 2012) and Part D(6) of this chapter for more information about requesting a reduced filing fee. The rules are different for each department.

134. N.Y. C.P.L.R. §§ 5513 (rules about the time in which you need to file your notice of appeal), 5515 (procedure for how to file a notice of appeal) (McKinney 2014).

- (4) The date the proceeding started and the dates when you served your pleadings;
- (5) A brief description of what you are trying to do (appeal the decision in your case) and why;
- (6) Whether the appeal is from a judgment, an order, or both, the dates of whatever judgments or orders you are appealing from, and the name of the judge who made the decision; and
- (7) A statement about which method of appeal you are using, either a full-record appeal or an original record appeal (which means you will not have to put together the record for your case yourself).¹³⁵

While each of the four departments has adopted a uniform, statewide set of rules to handle appeals, you should also check their additional supplements to ensure that you have what is needed to be in the record for an appeal.¹³⁶ Generally, you should follow these two steps. First, assemble all documents listed above. Then, request the Appellate Court to subpoena your record from the lower court. (Though not all appellate courts are willing to obtain original records from the lower court, a court will usually do this for a pro se incarcerated person with poor person status.) Otherwise, you can read and follow the court rules for the specific department you are in.

3. Writing Your Brief

To proceed with your appeal, you will also have to write a brief, a document including all the legal reasons the court should not have decided against you in your Article 78 petition. You must be as specific as possible about your reasons and should cite the statutes, regulations, and cases supporting your decision. You must also be specific about why the judge made the wrong decision in your case. Your brief will likely need to contain a cover page with information about your case (such as the case name, docket number, lower court, and appellate court), as well as your name and address.¹³⁷ You are required to send the same number of copies of your brief and the record to the court and Attorney General.

4. “Perfecting the Appeal”: Submitting All Necessary Documents

To proceed in your appeal, you must do what is called “perfecting the appeal,” which means submitting every document required by the court in which you are appealing, including the record, brief, and any other document your department requires. Each department has a time limit to complete perfecting the appeal.¹³⁸

5. The Reply to Your Appeal

Once your brief is filed, the court will tell you when your case will be heard. When the court requires the Attorney General to file a brief on your case, you may file a reply brief, usually within a few days of receiving the Attorney General’s brief.¹³⁹ You only need to file a reply brief if there are any issues raised by the Attorney General’s brief that your first brief did not cover, or to show why the arguments and cases used by the Attorney General are weaker than your own. You do not need to restate the points you raised in your original brief. Some weeks after you have filed your reply brief, the court will inform you of its decision.

135. N.Y. C.P.L.R. 5531 (McKinney 2014).

136. See McKinney’s New York Rules of Court for general filing requirements: N.Y. Ct. Rules § 1250.3; each department’s additional particular rules: N.Y. Ct. Rules Part 600 (McKinney 2020); N.Y. Ct. Rules Part 670, (McKinney 2020); N.Y. Ct. Rules Part 850 (McKinney 2020); and N.Y. Ct. Rules Part 1000 (McKinney 2020).

137. For information and requirements for your brief, see McKinney’s New York Rules of Court. N.Y. Ct. Rules § 1250.8 (Form and content of briefs).

138. N.Y. CT. RULES § 1250.9 (McKinney 2020) (Time, number and manner of filing of records, appendices and briefs).

139. N.Y. CT. RULES § 1250.9(d) (McKinney 2020). You have ten days to file your reply unless you are within the First Judicial Department in which case you should check the court’s published term calendar.

G. Conclusion

Article 78 is available to appeal decisions by state officials or agencies but not courts. You may use it only when you have exhausted other remedies. Since Article 78 petitions are your last chance to challenge administrative decisions, pay attention to Part A's requirements and Part D's procedures for filing or appealing a petition. Remember, you can only challenge decisions or actions you think are illegal, not just unfair. If you are unsure what type of petition is available, read Part B's possible complaints and actions, and Part C's limits on what you can challenge. Appendix A's sample forms and instructions will help you prepare a petition.

APPENDIX A

SAMPLE ARTICLE 78 PETITIONS AND SUPPORTING PAPERS

This Appendix A contains the following documents:

A-1: Order to Show Cause

A-2: Affidavit in Support of Order to Show Cause

A-3: Notice of Petition

A-4: Article 78 Petition

A-5: Verification of Petition

A-6: Request for Judicial Intervention

A-7: Application for an Index Number

A-8: Affidavit in Support of Request for Reduction/Waiver of Fees

These documents are intended to guide you when you file your own petition. **DO NOT TEAR THESE FORMS FROM THE JLM** Copy them on your own paper and fill them out according to the facts of the administrative decision you are challenging.

A-1. ORDER TO SHOW CAUSE

At a Term of the Supreme Court of the State of New York, held in and for the County of _____ on the ____th day of _____, 20.¹⁴⁰

Present: Hon. _____, Justice¹⁴¹

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

	X	
In the Matter of the Application of	:	
	:	
_____	:	
Petitioner,	:	
	:	ORDER TO SHOW CAUSE
- against -	:	
	:	Index No. _
_____	:	
Respondent,	:	
	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules	:	
_____	X	

140. Name of the county in which the case will be filed, in all capital letters. When filling in county names, note that each borough of New York City is a county of New York State, but some of them have different names: Manhattan is New York County; Brooklyn is Kings County; and Staten Island is Richmond County. See N.Y. C.P.L.R. 506(b) (McKinney 2006). The court clerk will fill in the date. All roman numerals (small letters in superscript) throughout this Section refer to instructions for filling out documents. These instructions are provided after matching roman numerals presented at the end of this Chapter.

141. The clerk or judge will fill this in. You should leave this blank.

Upon the annexed affidavit in support of an Order to Show Cause of _____,¹⁴² verified on the ___th day of __, 20__,¹⁴³ the Verified Petition,¹⁴⁴ and _____¹⁴⁵ sworn to on the ___th day of __, 20__,¹⁴⁶ it is ORDERED that respondent _____¹⁴⁷ show cause at a Term of this Court, to be held in the County of _____¹⁴⁸ on the ___th day of __, 20__,¹⁴⁹ or as soon thereafter as counsel may be heard, why a judgment should not be made and entered in this matter pursuant to Article 78 of the Civil Practice Law and Rules:

VACATING and setting aside Respondent's determination of [mm/dd/yyyy] [assigning petitioner to 120 days confinement in the Special Housing Unit (solitary confinement, "SHU")] because [the underlying Superintendent's Hearing is null and void];¹⁵⁰

DIRECTING Respondent to [expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner's records and restore petitioner in all respects to the status he enjoyed prior to the commencement of said Superintendent's Hearing];¹⁵¹

GRANTING such other and further relief as the Court may deem just and proper. It is further

ORDERED that pending the hearing of this special proceeding and pursuant to section 7805 of the N.Y. Civil Practice Law and Rules, Respondent and all other officers, employees, agents, attorneys and persons working in active concert or participation with Respondent are stayed and prohibited from taking action related to or enforcing Respondent's determination of ____, 20__.¹⁵² It is further

ORDERED that service of a copy of this order, together with the papers upon which it is granted, upon both the Respondent _____¹⁵³ and the Attorney General, by mail, on or before _____, 20__,¹⁵⁴ shall be deemed sufficient.

ENTER:

_____¹⁵⁵
JUSTICE OF THE SUPREME COURT

142. Your name.

143. Here, you should give the date the petition was approved/verified. See Appendix A-4 for a sample petition and Appendix A-5 for a sample verification.

144. A sample petition is contained in Appendix A-4.

145. Insert any other papers you are submitting with this Order.

146. The date you signed your documents in front of a notary.

147. Print or type in all capital letters the name of the respondent.

148. County in which you are filing the petition.

149. Leave this blank. The judge will fill in the information about the date.

150. Do not copy the bracketed material. You should briefly explain in your own words exactly what the respondent did to you and why you think it was incorrect. You should also replace mm/dd/yyyy with the date of the determination you are challenging.

151. Do not copy the bracketed language. Explain in your own words what you want the court to do for you or what you want the court to make the respondent do.

152. This paragraph is the "stay" described in Part D. The "stay" will be in effect until the hearing date. The date you insert here is the date of the administrative decision you disagree with and want the court to reverse. Until the court decides your case, this order will prevent the respondent from enforcing the administrative decision you are challenging.

153. Respondent's name.

154. Leave this blank. The judge will fill in the date.

155. Leave this blank. The judge will sign on the line.

A-2. AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

<p>_____ X</p> <p>In the Matter of the Application of :</p> <p style="text-align: center;">:</p> <p>_____, :</p> <p style="padding-left: 40px;">Petitioner, :</p> <p style="padding-left: 40px;">- against - :</p> <p>_____, :</p> <p style="padding-left: 40px;">Respondent, :</p> <p style="text-align: center;">:</p> <p>For a Judgment Pursuant to Article 78 :</p> <p>of the Civil Practice Law and Rules :</p> <p>_____ X</p>	<p>AFFIDAVIT IN</p> <p>SUPPORT OF ORDER</p> <p>TO SHOW CAUSE</p> <p>Index No. _</p>
---	---

STATE OF NEW YORK)
COUNTY OF _____¹⁵⁶ ss:)

I, _____,¹⁵⁷ being duly sworn, depose and say:

1. I am the petitioner in the above-entitled proceeding.
2. I make this affidavit in support of my annexed application for an Order to Show Cause to prosecute the attached petition pursuant to Article 78 of the Civil Practice Law and Rules which challenges _____.¹⁵⁸
3. _¹⁵⁹

^{156.} Name of the county in which you are making this affidavit. This can be different than the county in which you are filing your appeal. Write in the county where you physically are while you are writing the affidavit.

^{157.} Your name.

^{158.} Write in the decision you are complaining about and the date of the decision.

^{159.} This paragraph should state the relevant facts and why the decision you disagree with is wrong. It should explain the statement of the claims you made in the Order to Show Cause. If there are many issues, organize your statements and arguments into several paragraphs, each dealing with a separate issue. Remember: this is a sworn statement, and it is a crime to include anything you know is a lie. If you want to include a statement you think is true, but you are not completely sure about it, you can say that you are making the statement "upon information and belief."

4. Petitioner seeks to proceed by Order to Show Cause rather than by Notice of Petition because _____.¹⁶⁰

5. Petitioner, being incarcerated, also cannot effect personal service of the within papers and respectfully requests that timely service by mail be deemed sufficient.

6. Petitioner designates _____¹⁶¹ County as the place of venue.

7. No previous application for the relief requested herein has been made.¹⁶²

8. I have moved by the annexed affidavit for a reduction/waiver of the filing fees.¹⁶³

WHEREFORE, petitioner respectfully requests that this Court enter an order directing Respondent to show cause why a judgment should not be made and entered pursuant to Article 78 of the Civil Practice Law and Rules __¹⁶⁴ and granting such other and further relief as the Court may deem just and proper.

_____¹⁶⁵

_____¹⁶⁶

Sworn to before me this

__th day of _____, 20__

_____¹⁶⁷

NOTARY PUBLIC

160. This paragraph should state why you are using an Order to Show Cause instead of a Notice of Petition. (See Part D(2) on the difference between an Order to Show Cause and Notice of Petition and the requirements for proceeding by Order to Show Cause.) You should be sure to explain: (1) why a hearing is needed as soon as possible, but within 20 days (for example, you may be worried about being placed in solitary confinement before 20 days are up); and (2) why a stay is needed (for example, you do not want to wrongfully be placed in solitary confinement before you have a chance for the court to review your case).

The reasons for these requests may be similar (as they are in the examples above), but you should explain them both. It is a good practice to argue that you will be “irreparably injured” if the court does not grant a stay and a speedy hearing—this means that you will be hurt in a way that the court will not be able to fix later if the officer’s or agency’s decision takes effect before you have had a chance to contest it in the hearing.

161. Name of the county in which you are filing.

162. Make sure you include this statement only if this is the first time you have asked for a review of the decision. If you have applied for similar relief, explain why it was inadequate or why changed circumstances have caused you to bring this action.

163. Include this statement if you are attaching an application to request for a reduction or waiver of fees. See Appendix A-8, Affidavit in Support of Request for Reduction/Waiver of Fees.

164. This paragraph basically states what you would like the court to do for you. You should copy the language of the paragraphs numbered 1 and 2 of the Order to Show Cause. See Appendix A-1. You can write them out as part of this sentence without separating them into paragraphs.

165. Sign your name here in the presence of a notary public.

166. Print or type your name and address.

167. This is where the notary public notarizes the affidavit by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another incarcerated person witness your signature. (Use this technique only as a last resort.) If another incarcerated person is your witness, you should add at the bottom of the affidavit:

I declare that I have not been able to have this [affidavit] notarized according to law because [explain here your efforts to get the affidavit notarized]. I therefore declare under penalty of perjury that all of the statements made in this [affidavit] are true to my own knowledge, and I pray leave of the Court to allow this [affidavit] to be filed without notarization.

[Your signature]

A-3. NOTICE OF PETITION

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____	X
In the Matter of the Application of	:
	:
_____	:
Petitioner,	:
	:
	: NOTICE OF PETITION
- against -	:
	:
	: Index No. _
_____	:
Respondent,	:
	:
For a Judgment Pursuant to Article 78	:
of the Civil Practice Law and Rules	:
_____	X

To _____;¹⁶⁸

PLEASE TAKE NOTICE that upon the annexed petition of _____,¹⁶⁹ verified the [th day of [Month], [year]]¹⁷⁰ and the annexed affidavit of [NAME],¹⁷¹ sworn to on the [th day of Month], [year],¹⁷² petitioner will apply to this Court on the [th day of [Month], [year]],¹⁷³ or as soon thereafter as counsel may be heard, for a judgment granting the relief requested in the annexed Petition.

PLEASE TAKE FURTHER NOTICE that you must serve a verified answer, any supporting affidavits and documents, and a certified transcript of the record of the proceeding at least five days before this application is made.¹⁷⁴

168. Respondent's name in capital letters.

169. Your name.

170. Give the date you sign your petition.

171. List each affidavit (sworn statement) included in your papers. You can, for example, ask witnesses to the facts of your case to make affidavits to strengthen your petition.

172. This is the date on which the witness signed the affidavit.

173. Set a court date far enough ahead so that the respondent will have 20 days notice by the time he or she receives the Notice of Petition and petition.

174. The respondent is required to submit a certified transcript (written record) of any administrative hearing that was held. If you are seeking review of an official's or agency's failure to act or perform an

Petitioner designates _____ County as the place of trial. The basis of venue is _____

175

176

[Sign your name]

[Print your name]

Dated: __, 20__.

administrative duty, then there will be no transcript, so do not include the demand for one.

175. Here you should write in the name of the county that the court is in. You should also briefly explain why you chose this court. Generally all you need to say is you are filing in this county because the decision you are challenging was made in this county. “Venue” simply refers to the location of the court. *See* N.Y. C.P.L.R. 506(b) (McKinney 2003).

176. Sign here and print your name clearly underneath.

A-4. ARTICLE 78 PETITION

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____	X	
In the Matter of the Application of	:	
	:	
_____	:	
Petitioner,	:	
	:	PETITION
- against -	:	
	:	Index No. _
_____	:	
Respondent,	:	
	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules	:	
_____	X	

To THE SUPREME COURT OF THE STATE OF NEW YORK FOR
_____ COUNTY:

The petition of _____,¹⁷⁷ complaining of the Respondent _____,¹⁷⁸ respectfully alleges:

1. Petitioner _____¹⁷⁹ is an inmate at _____,¹⁸⁰ _____,¹⁸¹ New York.
2. Respondent [Ronald R. Roe, Superintendent of Ossining Correctional Facility, is petitioner's legal custodian and is charged with the overall supervision and administration of Ossining].¹⁸²

177. Your name in capital letters.

178. Respondent's name(s) in capital letters.

179. Your name.

180. Name of prison in which you are incarcerated.

181. Address of prison.

182. Do not copy the bracketed words. Write the respondent's name and state his or her, or its duties that resulted in the decision or action you are challenging. If the respondent is the Board of Parole, for example, you could state that the New York State Board of Parole is responsible for deciding whether or not to parole an incarcerated person.

3. This petition challenges [disciplinary action taken on June 15, 2000], when respondent, [pursuant to a Superintendent's Hearing,] had determined to [place him in the Special Housing Unit ("SHU," solitary confinement) for a period of 120 days].¹⁸³

4. The within proceeding is brought pursuant to C.P.L.R. Article 78 to challenge the final determination of __, dated ____.¹⁸⁴

5. [On June 9, 2000, while confined to a private room/cell in the infirmary at Ossining Correctional Facility, petitioner began to feel claustrophobic and believed he was suffering from an asthmatic episode.]¹⁸⁵

6. [Corrections Officers Smith and Brown were called to the infirmary to restrain petitioner so that he could be given an injection to subdue him.]

7. [Petitioner was in an agitated state because he believed that he was going to be given a dose of anti-psychotic medication.]

8. [Once the officers arrived, they ordered petitioner to stand to the side of the room. He did not comply with this order.]

9. [Once the officers were in petitioner's room, he raised his hands and spoke to the officers to indicate that he did not want to receive medication. The officers reported, however, that when petitioner raised his hands, his fists were clenched.]

10. [The officers then grabbed petitioner and held him while the nurse administered an injection. Then they escorted petitioner to the Mental Health Unit where he was placed in a special observation cell ("dry cell").]

11. [On June 10, 2000, while in the observation cell, petitioner was served with a misbehavior report, charging him with violation of the following inmate rules: 100.11 (attempted assault) and 106.10 (refusing a direct order). A copy of the misbehavior report is attached as Exhibit 1.]

12. [The Superintendent's Hearing was commenced on June 15, 2000, while petitioner was still confined in the Mental Health Unit. Petitioner pleaded not guilty to the charges.]

13. [The hearing officer read into the record reports written by Correction Officers Smith and Brown. Neither report alleged that petitioner had attempted to assault either of the officers. (Copies of these reports are attached as Exhibits 2 and 3.)]

14. [The hearing officer then found petitioner guilty of both charges and imposed a penalty of 120 days confinement in the SHU, finding that the raising of hands with fists clenched constituted an attempt to assault.]

15. [Petitioner did not attempt to strike either officer, however. Neither officer's report said anything different. The reports only concluded that petitioner "raised his fists in an attempt to strike" the officers. Without further clarification or follow-up, this statement is insufficient to conclude that petitioner attempted to assault either officer. Petitioner was not given an opportunity to present witnesses on his behalf.]

16. [Furthermore, the hearing officer did not ask about petitioner's mental state at the time of the incident or at the time of the hearing, even though the incident arose because the staff had decided petitioner was out of control and would have to be medicated by force, and even though petitioner was

183. Again, do not copy the bracketed words. You should give the date when you were told about the decision that you are complaining of and briefly describe the decision. If you are requesting that the court order the respondent to do something required by law, you should explain that the respondent has not performed its duty.

184. In this paragraph, you should state how your administrative remedies have been exhausted.

185. Again, do not copy the bracketed words. State what happened in your own words, and be sure to include all of the facts the court might think are important. Then state why you think the decision was incorrectly made. If you know of a specific law that applies, you should include it in your statement. This section will usually run for several paragraphs; separate each issue or argument into different paragraphs to make your petition more understandable.

The sample facts and argument in this and following paragraphs have been shortened for reasons of space and clarity. You will want to go into more detail than is given here.

housed in the Mental Health Unit at the time of the hearing. Petitioner's mental state affected his responsibility for his actions and his ability to proceed at the hearing.]

17. Respondent's determination was [arbitrary, capricious, and an abuse of discretion] because [the hearing was held at a time when petitioner was incompetent to proceed on his own behalf, petitioner had no opportunity to present witnesses on his behalf, and respondent failed to determine petitioner's mental state. Because petitioner had suffered a claustrophobic attack and sudden involuntary medication, he cannot be held responsible for refusing the direct order.]¹⁸⁶

18. [No previous application has been made for the requested relief.]¹⁸⁷

WHEREFORE, petitioner respectfully requests that judgment be entered pursuant to Article 78 of the Civil Practice Law and Rules:

1. VACATING and setting aside Respondent's determination of June 15, 2000, assigning petitioner to 120 days confinement in the Special Housing Unit (solitary confinement, "SHU") because the underlying Superintendent's Hearing is null and void;

2. DIRECTING Respondent to expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner's records and restore petitioner in all respects to the status he enjoyed prior to the commencement of said Superintendent's Hearing;

3. GRANTING such other and further relief as the Court may deem just and proper.]¹⁸⁸

_____¹⁸⁹

[your name]

Petitioner, pro se.¹⁹⁰

Dated: _____¹⁹¹

186. Here you should state the particular legal mistake that the respondent made in making the determination that you are challenging. Refer to Part B of this Chapter for a description of the basic legal reasons why decisions may be challenged in an Article 78 proceeding. They are:

- (1) That the respondent failed or refused to perform a duty required by law (this would include constitutional violations and violations of Department of Correctional Services regulations);
- (2) That the respondent exceeded his or her legal authority;
- (3) That the respondent's determination was arbitrary, capricious, or an abuse of discretion; or
- (4) That the respondent's determination was not supported by substantial evidence.

You can change these words to fit your case's facts, as long as your complaint falls within one of the Part B categories.

187. In this line, you should state whether you have or have not filed a previous challenge to the administrative determination that you want the court to review.

188. Here you should state what you want the court to do to correct the respondent's mistake. Be sure to request the court to declare the determination that you are challenging void (without legal force). You should also specifically request what needs to be done to set the situation right and undo the mistake, or prevent it from taking effect. For example, you could request that the court issue an order "DIRECTING respondent to restore petitioner's good-time credit," "ENJOINING (prohibiting) respondent from transferring petitioner to any other facility" (if your transfer has not yet taken place), etc.

189. Sign your name here and print your name underneath.

190. "Pro se" means that you are appearing by yourself, without a lawyer.

191. Write the date when you are signing the papers, followed by your complete mailing address. You must also include a verification, a sample of which follows.

A-5. VERIFICATION OF PETITION

VERIFICATION¹⁹²

STATE OF NEW YORK)

COUNTY OF _____¹⁹³ ss.:)

_____,¹⁹⁴ being duly sworn, deposes and says that deponent is the petitioner in the above-encaptioned proceeding, that [he/she] has read the foregoing petition and knows the contents thereof, that the same is true to deponent's own knowledge, except as to matters therein stated upon information and belief, which matters deponent believes to be true.

_____¹⁹⁵

Sworn to before me this

__th day of ___, 20__

NOTARY PUBLIC ¹⁹⁶

192. A verification is a brief affidavit in which you swear to the truth of the statements you make in a legal paper, such as an Article 78 petition. Your petition will not be accepted without a verification.

193. Name of the county in which the affidavit is signed, in capital letters.

194. Your name.

195. Sign your name here in the presence of a notary public.

196. This is where the notary public notarizes the affidavit by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another incarcerated person witness your signature. (Use this technique only as a last resort.) If another incarcerated person is your witness, you should add at the bottom of the affidavit:

I declare that I have not been able to have this [verification] notarized according to law because [explain here your efforts to get the verification notarized]. I therefore declare under penalty of perjury that all of the statements made in this [verification] are true to my own knowledge, and I pray leave of the Court to allow this [verification] to be filed without notarization.

[Your signature]

A-6. REQUEST FOR JUDICIAL INTERVENTION (RJI)

REQUEST FOR JUDICIAL INTERVENTION

Index No. ¹⁹⁷

Supreme Court ¹⁹⁸ County

Date Purchased

PLAINTIFF(S):¹⁹⁹

IAS entry date: ²⁰⁰

Judge Assigned: ²⁰¹

DEFENDANTS(S):²⁰²

RJI Date: ²⁰³

NATURE OF JUDICIAL INTERVENTION:

☐²⁰⁴ Order to Show Cause

(Clerk enter return date)²⁰⁵

☐²⁰⁶ Notice of Petition (return)²⁰⁷

NATURE OF ACTION OR PROCEEDING

SPECIAL PROCEEDINGS

☐ Art. 78

Is this proceeding against a:

[Yes/No] Municipality: ²⁰⁸ [Yes/No] Public Authority: ²⁰⁹

[Yes/No] Does this proceeding seek equitable relief?²¹⁰

[Yes/No] Does this proceeding seek recovery for personal injury?²¹¹

[Yes/No] Does this proceeding seek recovery for property damage?²¹²

Estimated time period for case to be ready for trial: 0-12 months

Attorney for Plaintiff(s):

Name²¹³

Address

Phone

197. The court will fill in this blank.

198. Write the name of the county where you are bringing the action.

199. Write your name.

200. "IAS" is the Individual Assignment System, where a single judge is randomly assigned to supervise each part of the case. The court will fill in this blank.

201. The court will fill in this blank.

202. Write the name of the respondents (the people/institutions you are suing).

203. "RJI" stands for Request for Judicial Intervention. This is the date that you submit the request. The court will fill in this blank.

204. If you are filing an Order to Show Cause, check this box.

205. If you are filing an Order to Show Cause, write the date you suggest the case be heard.

206. If you are filing a Notice of Petition, check this box.

207. If you are filing a Notice of Petition, write the date you suggest the case be heard.

208. Write "no" unless you are suing a city.

209. Write "yes" if you are suing any public officials or government agencies.

210. Write "yes" if you are seeking to prevent an agency or official from acting in a way which is harmful to you.

211. Write "yes" if you want to recover for injuries suffered by you.

212. Write "yes" if you want to recover for property damage. If not, write "no."

213. Write your name and address.

Attorney for Defendant(s):

Name²¹⁴ Address Phone

RELATED CASES:

Title²¹⁵ Index Number Court Nature of Relationship

I affirm under penalty of perjury that, to my knowledge, other than as noted above, there are and have been no related actions or proceedings, nor has a request for judicial intervention previously been filed in this proceeding.

Dated: _____²¹⁶

(Signature)

(Print Name)

214. Write the name and address of the respondents.

215. If you have previously brought an Article 78 proceeding that is related to the Article 78 proceeding you are currently bringing, write the title, index number, court and nature of relationship of that proceeding.

216. Write the date.

A-7. APPLICATION FOR AN INDEX NUMBER

INDEX NUMBER

Application for INDEX NUMBER

Pursuant to section 8018, New York Civil Practice Law & Rules

Title of Action: ARTICLE 78²¹⁷

[David Smith

v.

William Jones, Commissioner of the Department of Correctional Services]

Name and address of Attorney for Plaintiff or Petitioner Telephone No.²¹⁸ (PRO SE)

Name and address of Attorney for Defendant or Respondent Telephone No.²¹⁹

A. Nature of Special Proceeding Article 78 Proceeding

B. Application for Index Number filed by: Plaintiff Defendant

C. Was a previous Third Party Action filed? Yes No

COMPLETE

Do Not Detach THIS STUB

Supreme Court, _____²²⁰ County

_____ ²²¹

v.

_____ ²²² INDEX NUMBER:²²³

217. Write the name of your action.

218. Write your name and address.

219. Write the name and address of the respondent (the person/institution you are suing).

220. Write the name of the county in which you are bringing the action.

221. Write your name as the petitioner.

222. Write the name and official title of the respondent or respondents.

223. Leave this blank. Do not write a number.

A-8. AFFIDAVIT IN SUPPORT OF REQUEST FOR REDUCTION/WAIVER OF FEES

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____	X
In the Matter of the Application of _____,	:
	:
Petitioner,	:
	:
- against -	:
	:
_____	:
Respondent,	:
	:
For a Judgment Pursuant to Article 78	:
of the Civil Practice Law and Rules	:
_____	X

I, _____,²²⁴ being duly sworn, hereby declare as follows:

1. I am the petitioner in the above-entitled proceeding, I am an inmate in a state correctional facility [place of incarceration: _____]²²⁵, and I submit this affidavit in support of my application for a reduction of the filing fees pursuant to N.Y. C.P.L.R. 1101(f) (and that an attorney be assigned to represent me).²²⁶

2. I currently receive income from the following sources, exclusive of correctional facility wages:
_____.

3. I own the following valuable property (other than miscellaneous personal property):

[List property:]	[Value:]
------------------	----------

_____	_____
-------	-------

224. Your name.

225. Name and address of your correctional facility.

226. Include this part of the sentence if you would like to request that a lawyer represent you.

4. I have no savings, property, assets, or income other than as set forth herein.

5. I am unable to pay the filing fee necessary to prosecute this proceeding.

6. No other person who is able to pay the filing fee has a beneficial interest in the result of this proceeding.

7. The facts of my case are described in my claim and other papers filed with the court.

8. I have made no prior request for this relief in this case.

(signature)

Sworn to before me

this ____ day of ___, 20__.

227

NOTARY PUBLIC AUTHORIZATION

I, _____, ²²⁸ inmate number _____, ²²⁹ request and authorize the agency holding me in custody to send to the Clerk of the Court certified copies of the correctional facility trust fund account statement (or the institutional equivalent) for the past six months.

I further request and authorize the agency holding me in custody to deduct the filing fee from my correctional facility trust fund account (or the institutional equivalent) and to disburse those amounts as instructed by the Court. This authorization is furnished in connection with the above entitled case and shall apply to any agency into whose custody I may be transferred.

I UNDERSTAND THAT I MAY HAVE TO PAY THE ENTIRE FEE IF THE COURT DENIES MY REQUEST FOR A FEE REDUCTION. MOREOVER, I UNDERSTAND THAT THE FEE DETERMINED BY THE COURT WILL BE PAID IN INSTALLMENTS BY AUTOMATIC DEDUCTIONS FROM MY CORRECTIONAL FACILITY TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.

230

(signature)

227. This is where the notary public notarizes the affidavit by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another incarcerated person witness your signature. (Use this technique only as a last resort.) If another incarcerated person is your witness, you should add at the bottom of the affidavit:

I declare that I have not been able to have this [affidavit] notarized according to law because [explain here your efforts to get the affidavit notarized]. I therefore declare under penalty of perjury that all of the statements made in this [affidavit] are true to my own knowledge, and I pray leave of the Court to allow this [affidavit] to be filed without notarization.

[Your signature].

228. Your name.

229. Your inmate number.

230. Your signature. By signing this section, you give permission for your facility to send the Court copies of your trust fund account statement. You also authorize the facility to withdraw the filing fee from your account and to send it to the Court. The entire filing fee will be withdrawn automatically from your account even if your case is dismissed.

CHAPTER 23

YOUR RIGHT TO ADEQUATE MEDICAL CARE*

A. Introduction

The U.S. Constitution requires prison officials to provide all state and federal incarcerated people, as well as pretrial detainees (people in jail waiting for trial,) with adequate medical care.¹ If you think your right to medical care has been violated, this Chapter will help you determine whether you have a legal claim for which you can get relief.

Part B of this Chapter explains your right to medical care under the U.S. Constitution and state law. Part C provides specific examples of when you may have medical care rights. Some examples include: when you have a diagnosed medical condition, when you want an elective procedure (a voluntary, non-emergency operation), when you need psychiatric care, when you are exposed to second-hand smoke, and when you need dental care. Part D is about special medical issues for women who are incarcerated, including the right to basic medical and gynecological care, abortions, and accommodations for pregnant women. Part E talks about your right to receive information about your medical treatment before being treated and your right to keep your medical information confidential in prison. Part F explains the possible ways to seek relief in state and federal courts if your rights have been violated.

This Chapter will focus on federal law and some New York state laws. If you are incarcerated in a state prison, your right to adequate medical care might also be protected by your state's statutes, regulations, and tort law.² The New York Correction Law and the Official Compilation of Codes, Rules, and Regulations of the State of New York explain the right to adequate medical care for people incarcerated in the state of New York.³ If you are in prison in another state, be sure to research the law in that state.

The rights of incarcerated people with mental illnesses, infectious diseases, or disabilities present special issues which are not included in this Chapter. For more information about the rights of incarcerated people with mental health concerns, see Chapter 29 of the *JLM*, "Special Issues for Incarcerated People with Mental Illness." For more information about the rights of incarcerated people with infectious diseases (and the rights of incarcerated people to avoid exposure to infectious diseases), see Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prisons." For more information on the rights of incarcerated people with disabilities, see Chapter 28 of the *JLM*, "Rights of Incarcerated People with Disabilities."

It is important that you speak up about any medical issue that you have while you are in prison and keep records of your requests for medical care. If you end up going to court to pursue your right to adequate medical care, a judge will ask for evidence that you tried to obtain medical care in a variety of ways within the prison first. Usually, you must prove "exhaustion" by showing that you went

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1. See *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) ("These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration.").

2. As a person incarcerated in a state prison, you may bring a lawsuit under either state law or federal law. See Part F(1) of this Chapter for a discussion of your options.

3. N.Y. CORRECT. LAW § 45(3) (McKinney 2014) (detailing the responsibilities of the Commission of Corrections, including the duty to "visit, and inspect correctional facilities . . . and appraise the management of such correctional facilities with specific attention to matters such as safety, security, health of inmates, sanitary conditions" and other things that affect an incarcerated person's well-being).

through the grievance procedures of your prison system before going to court. It is a good idea to keep a record of all of your requests for medical care and complaints to guards and medical professionals. A record of your requests and complaints can help prove that prison officials ignored your medical needs, which can be important if you bring a claim of “deliberate indifference” (discussed in Part B(1)). Keeping a record will also allow you to show that prison officials were aware of your medical problems (the “subjective part,” discussed in Part B(1)(b)). In summary, be sure to tell the prison officials around you about your health concerns as soon as they come up and keep a log of everything you did to get the medical care you need.

If, after reading this Chapter, you think you are not receiving adequate medical care, you should first try to protect your rights through the administrative grievance procedures that your prison has set up for grievances (complaints). Courts are likely to dismiss your case if you do not “exhaust” (use up) all of the options available through your institution first.⁴ To learn more about inmate grievance procedures and the exhaustion requirement, see Chapter 15 of the *JLM*, “Inmate Grievance Procedures.” If you do not receive a favorable result through inmate grievance procedures, you can then do one of several things. You can bring a lawsuit under Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983); you can file a tort action in state court (or in the New York Court of Claims if you are in New York); or you can file an Article 78 petition in state court if you are in New York. More information on all of these types of cases can be found in Chapter 5 of the *JLM*, “Choosing a Court and a Lawsuit,” Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law,” Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” and Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules.”

If you decide to pursue any claim in federal court, you **MUST** read Chapter 14 of the *JLM* on the Prison Litigation Reform Act (“PLRA”). You should also be aware of the negative consequences of filing lawsuits that are deemed “frivolous” or “malicious” (lawsuits which are based on lies or filed for the sole purpose of harassing someone) under Section 1932 of Title 28 of the United States Code (28 U.S.C. § 1932).⁵

B. The Right to Adequate Medical Care

1. Constitutional Law

The Eighth Amendment of the Constitution protects incarcerated people from “cruel and unusual punishment.”⁶ In 1976, the Supreme Court said in *Estelle v. Gamble* that a prison staff’s “deliberate indifference” to the “serious medical needs” of incarcerated people is “cruel and unusual punishment”

4. *Porter v. Nussle*, 534 U.S. 516, 520–523, 122 S. Ct. 983, 985–987, 152 L. Ed. 2d 12, 18–20 (2002) (finding all complaints about conditions and incidents in a correctional facility must first be taken through the administrative remedy procedure available at the facility before being brought to court); *see also* *Booth v. Churner*, 532 U.S. 731, 739–741, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958, 966–967 (2001) (finding that it is mandatory to bring civil rights claims through the correctional institution’s administrative procedures before bringing the claim to court); *Custis v. Davis*, 851 F.3d 358, 361 (4th Cir. 2017) (finding that prison officials may defend themselves from an incarcerated person’s suit by showing that the incarcerated person failed to exhaust their administrative remedies, and noting that a court may dismiss a complaint when the alleged facts in the complaint prove that the incarcerated person failed to exhaust his administrative remedies). Regardless of whether your complaint is about one incident, many incidents, or an ongoing condition, the court will not hear it if your prison’s grievance procedure provides a remedy for your problem but you have not used it.

5. 28 U.S.C. § 1932 states that for any civil action brought by an incarcerated person, the court may revoke earned good-time credit if the court finds that “(1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testifies falsely or knowingly presents false evidence or information to the court.”

6. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

forbidden by the Eighth Amendment.⁷ Therefore, if prison officials treated your serious medical needs with “deliberate indifference,” they violated your constitutional right to be free from cruel and unusual punishment.

You must prove two things to show that prison officials treated your serious medical needs with “deliberate indifference” (and therefore violated your constitutional rights). You must first prove that your medical needs were sufficiently serious (the “objective” part).⁸ Second, you must prove that prison officials knew about and ignored “an excessive risk to [your] health or safety” (the “subjective” part).⁹ Since deciding *Estelle*, courts have tried to clarify how incarcerated people can prove these two things.¹⁰ This Chapter explains each part separately below.

Note that the Constitution does not guarantee comfortable prisons; prison conditions may be “restrictive and even harsh.”¹¹ However, the medical care you receive should meet an acceptable standard of care in terms of modern medicine and beliefs about human decency.¹²

(a) The Objective Part: “Sufficiently Serious” Medical Need

To establish the first part (the “objective” part) of an Eighth Amendment claim based on prison officials’ deliberate indifference to your medical needs, you must show that your medical needs were sufficiently serious. Courts define “serious medical need” as “one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily

7. *Estelle v. Gamble*, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the [8th] Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”).

8. *Wilson v. Seiter*, 501 U.S. 294, 303–304, 111 S. Ct. 2321, 2326–2327, 115 L. Ed. 2d 271, 282–283 (1991) (holding that an incarcerated person can bring an 8th Amendment claim by applying the deliberate indifference standard to a condition of confinement that denies an obvious human need, such as “food, warmth or exercise,” and proving that a prison official was deliberately indifferent to that “identifiable human need”).

9. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (deciding that for a prison official to violate the 8th Amendment, he must 1) know why a substantial risk of serious harm to an incarcerated person exists and 2) ignore that risk).

10. In 2011, the Second Circuit confirmed what an incarcerated person must show to establish deliberate indifference, and therefore, a violation of the Constitution. *Cole v. Fischer*, 416 F. App’x 111, 113 (2d Cir. 2011) (*unpublished*) (“Deliberate indifference has two necessary components, one objective and the other subjective.”). The Second Circuit also has defined a serious medical need as “a condition of urgency, one that may produce death, degeneration, or extreme pain.” *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994) (quoting *Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)). However, in *Brock* the Second Circuit rejected the notion that “only ‘extreme pain’ or a degenerative condition” meets the legal standard since “the [8th] Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain.” *Brock v. Wright*, 315 F.3d 158, 163 (2d Cir. 2003) (quoting *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977)). More recently however, the court reemphasized the “death, degeneration, or extreme pain” formula. *Johnson v. Wright*, 412 F.3d 398, 403 (2d Cir. 2005). Still, the *Brock* standard for seriousness remains the law of the Second Circuit. For additional guidance, see *Berry v. City of Muskogee*, 900 F.2d 1489, 1495–1496 (10th Cir. 1990) (holding that deliberate indifference requires more than negligence, but less than intentional and malicious infliction of injury); *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985) (finding that a policy of inadequate staffing of medical personnel may raise a question of deliberate indifference); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) (determining deliberate indifference by weighing the seriousness of an incarcerated person’s mental illness and the length of his incarceration against the availability and expense of psychiatric care).

11. *Rhodes v. Chapman*, 452 U.S. 337, 347–349, 101 S. Ct. 2392, 2399–2400, 69 L. Ed. 2d 59, 69–70 (1981) (stating that placing two incarcerated people in a cell does not deprive incarcerated people of essential human needs or inflict needless pain such that the 8th Amendment would be violated).

12. *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (“Thus, we have held repugnant to the [8th] Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’”) (citing *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, 642 (1958)).

recognize the necessity of a doctor's attention."¹³ To decide if a medical need is serious, the Second Circuit (the federal court which governs New York, Connecticut, and Vermont) considers several factors including, but not limited to, the following:

- whether a reasonable doctor or patient would perceive the medical need in question as "important and worthy of comment or treatment," whether the medical condition significantly affects daily activities, and
- whether "chronic and substantial pain" exists.¹⁴

Under the Prison Litigation Reform Act ("PLRA"), a medical need is only sufficiently serious if it involves physical injury.¹⁵ For example, in one case a patient with HIV was denied his medication for several days.¹⁶ His illness was clearly serious, but it was determined that missing a few days of medication caused him no physical harm. Generally, though, if your medical condition is extremely painful, your medical need could be considered "sufficiently serious." For example, in *Hemmings v. Gorczyk*, prison medical staff diagnosed a ruptured tendon as a sprain and, for two months, refused to send the incarcerated person to a specially trained doctor; however, the Second Circuit later found that the incarcerated person's condition was painful enough to be "sufficiently serious."¹⁷ The general trend seems to be that the courts will consider injuries to be sufficiently serious if they significantly change an incarcerated person's quality of life. The Second Circuit has held that the denial of care has to be objectively serious enough to create "a condition of urgency"—a situation where death, permanent injury, or extreme pain appears likely to occur or has occurred.¹⁸ Other circuits have similarly high requirements for what counts as a serious injury or denial of care.¹⁹

13. *Brown v. Johnson*, 387 F.3d 1344, 1350–1352 (11th Cir. 2004) (holding HIV and hepatitis are serious needs) (citing and quoting *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir.1994)); *see also* *Carnell v. Grimm*, 872 F. Supp. 746, 755 (D. Haw. 1994) ("A 'serious' medical need exists if the failure to treat the need could result in further significant injury or 'unnecessary and wanton infliction of pain.'" (quoting *Estelle v. Gamble* 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)), *appeal dismissed in part, aff'd in part*, *Carnell v. Grimm*, 74 F.3d 977 (9th Cir. 1996)).

14. *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003) (citing and quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059–1060 (9th Cir. 1992)). The Second Circuit defined a serious medical need as "a condition of urgency, one that may produce death, degeneration, or extreme pain." *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994) (quoting *Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)). However, in *Brock*, the court rejected the notion that "only 'extreme pain' or a degenerative condition" meets the legal standard, since "the [8th] Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain." *Brock v. Wright*, 315 F.3d 158, 163 (2d Cir. 2003) (citing *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977)). More recently, the court repeated the "death, degeneration, or extreme pain" formula. *Johnson v. Wright*, 412 F.3d 398, 403 (2d Cir. 2005). However, the *Brock* holding still seems to be the law of the Second Circuit.

15. See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the limits the PLRA imposes on your ability to bring a lawsuit while in prison.

16. *Smith v. Carpenter*, 316 F.3d 178, 181 (2d Cir. 2003) (holding that a jury may consider the lack of adverse medical effects to the incarcerated person in determining whether a denial of medical care meets the objective serious medical need requirement).

17. *Hemmings v. Gorczyk*, 134 F.3d 104, 109 (2d Cir. 1998) (holding that incarcerated person's Eighth Amendment claim of "deliberate indifference" to his serious medical needs warranted further factual development).

18. See *Brock v. Wright*, 315 F.3d 158, 163–164 (2d Cir. 2003) (finding that failing to adequately examine painful swollen tissue from a knife wound could constitute deliberate indifference); *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974) (finding possible deliberate indifference when a portion of an incarcerated person's ear had been cut off during a fight and prison officials merely stitched a stump of the incarcerated person's ear instead of attempting to suture the severed portion back on); *see also* *Salahuddin v. Goord*, 467 F.3d 263, 280 (2d Cir. 2006) (defining sufficiently serious as "whether 'a reasonable doctor or patient would find it important and worthy of comment,' whether the condition 'significantly affects an individual's daily activities,' and whether it causes 'chronic and substantial pain'" (quoting *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998))).

19. The Ninth Circuit held in *Hunt v. Dental Dept.*, 865 F.2d 198, 200–201 (9th Cir. 1989), that failure to put an incarcerated person, who lost his dentures and suffered from bleeding and infected gums, on a soft food diet could be sufficient to state a claim of deliberate medical indifference. In *Weeks v. Chaboudy*, 984 F.2d 185,

Recent court decisions have emphasized pain and disability when evaluating incarcerated people's medical needs.²⁰ Drug or alcohol withdrawal is a serious medical need.²¹ Gender dysphoria has been recognized as a serious medical need in some cases.²² There might also be a "serious cumulative effect from the repeated denial of care" for minor problems.²³ Where medical treatment is delayed, courts

187 (6th Cir. 1993), the Sixth Circuit held that refusal to admit a paraplegic incarcerated person into an infirmary where he could use his wheelchair constituted deliberate indifference. The Fourth Circuit has held that the treatment must be so grossly incompetent, inadequate, or excessive that it shocks the conscience or is intolerable to fundamental fairness. *See Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990). The Seventh Circuit, in considering whether a medical need is "serious," considers such factors as the severity of the medical problem, the potential for harm if medical care is denied or delayed, and whether any such harm actually resulted from the lack of medical attention. *See Gutierrez v. Peters*, 111 F.3d 1364, 1370 (7th Cir. 1997). *See also Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999), *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991).

20. Numerous courts have cited pain as an appropriate reason for finding that an incarcerated person's medical needs are serious. *See, e.g., Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 899–900 (6th Cir. 2004) (holding that a two-day delay in treatment of appendicitis caused pain sufficient to pose serious risk of harm, even though the appendix did not in fact rupture); *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004) (holding that a claim alleging a back condition that resulted in pain so serious it caused the incarcerated person to fall down sufficiently created a serious need); *Farrow v. West*, 320 F.3d 1235, 1244–1245 (11th Cir. 2003) (holding that pain, bleeding, and swollen gums of an incarcerated person who needed dentures helped show serious medical need); *Boretta v. Wiscomb*, 930 F.2d 1150, 1154 (6th Cir. 1991) (holding that needless pain that does not lead to permanent injury is still actionable); *Moreland v. Wharton*, 899 F.2d 1168, 1170 (11th Cir. 1989) (finding that an allegation of a "significant and uncomfortable health problem" was a serious need); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1055 (8th Cir. 1989) (holding that delay in medical care for a condition that is "painful in nature" is actionable). *Miller v. King*, 384 F.3d 1248, 1261 (11th Cir. 2004) (holding that paraplegia with inability to control passing urine is a serious medical need), *vacated and superseded on other grounds*, *Miller v. King*, 449 F.3d 1149 (11th Cir. 2006); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (finding that loss of vision may not be "pain" but it is "suffering"); *Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir. 1989) (determining that prison must provide treatment when a "substantial disability" exists); *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (finding that medical need is serious if it imposes a "life-long handicap or permanent loss").

21. *See Stefan v. Olson*, 497 F. App'x 568, 577 (6th Cir. 2012) (*unpublished*) ("[Plaintiff's] extremely elevated .349 blood-alcohol level and verbal communication of a history of alcoholism accompanied by withdrawal seizures communicated an objectively serious medical need possessing the 'sufficiently imminent danger' that is 'actionable under the [8th] Amendment'"); *Morrison v. Washington Cnty.*, 700 F.2d 678, 686 (11th Cir. 1983) (referring to patient who died after experiencing alcohol withdrawal as "seriously ill"); *Kelley v. Cnty. of Wayne*, 325 F. Supp. 2d 788, 791–792 (E.D. Mich. 2004) (finding that heroin withdrawal is a "serious medical condition").

22. Gender dysphoria ("GD") is distress because your gender identity does not match your biological sex. Gender Dysphoria, American Psychiatric Association, *available at* <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited November 6, 2020); *see also Maggart v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997). Many older cases will not use the term "gender dysphoria," but will state that "transsexualism" or "gender identity disorder" are serious medical needs. *See, e.g., Praylor v. Tex. Dept. of Crim. Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (assuming that "transsexualism" constitutes a serious medical need but deciding the case on other grounds); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (assuming that "transsexualism" constitutes a serious medical need but deciding the case on other grounds). Note, however, that courts differ over the extent of prison officials' obligations to provide hormone therapy and surgery. *See Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011) (finding that an incarcerated person who attempted to castrate herself due to prison officials prolonged failure to provide hormone therapy was entitled to relief); *Praylor v. Tex. Dept. of Crim. Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (determining that denial of hormone therapy was not deliberate indifference under the circumstances); *De'Lonta v. Angelone*, 330 F.3d 630, 635–636 (4th Cir. 2003) (finding that an incarcerated person with "Gender Identity Disorder" was entitled to treatment for compulsion to self-mutilate after her hormone treatment was stopped); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 193 (D. Mass. 2002) (finding that the 8th Amendment requires that treatment decisions for an incarcerated person with "Gender Identity Disorder" be based on individualized medical evaluation rather than a general treatment policy). Even though these cases do not use up to date language, they can help you argue for trans-affirming medical care.

23. *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 898 (6th Cir. 2004) (citing *Napier v. Madison Cnty., Ky.*, 238 F.3d 739, 742 (6th Cir. 2001) (A "plaintiff's 'deliberate indifference' claim is based on the prison's failure to treat a condition adequately, or where the prisoner's affliction is seemingly minor or non-obvious. In such circumstances, medical proof is necessary to assess whether the delay caused a serious medical injury."); *Jones v.*

look at whether the *effects* of the delay or interruption—not the underlying medical condition—are objectively serious enough to present an Eighth Amendment question.²⁴ Whether a medical need is “serious” should be determined on a case-by-case basis and not only by a prison’s “serious need list.”²⁵ Prisons are not allowed to have a rigid list of serious medical needs without allowing some flexibility in individual evaluations of incarcerated people.²⁶ In addition, a treatment that a hospital or prison considers to be elective (voluntary and non-emergency) may still be a “serious medical need.”²⁷

(b) The Subjective Part (Prison Officials “Knew of and Disregarded a Risk”)

After proving that your medical need was sufficiently serious, you must also prove that prison officials purposely allowed you to go without necessary medical help.²⁸ This is the second part of your Eighth Amendment claim (the “subjective” part). It is difficult to prove that prison officials knew about your serious medical need and meant to deny you necessary medical care. Section 3 of this Chapter explains the different ways you can prove that prison officials knew about and disregarded your serious medical need.

You have to prove two things to show that a prison official knew about and disregarded your serious medical need. First, the official has to have **known** facts that could have shown or proven that your health was in danger.²⁹ Second, after the official was aware of the threat to your health, the official must actually have **believed** that your health was in danger.³⁰ Courts have struggled to determine exactly how much knowledge a prison official must have in order to meet this standard. In general, the standard is very high, as you will see from the cases discussed below.

(c) The Deference Problem

It can be difficult to win a deliberate indifference claim when the incarcerated person and the prison officials have different opinions about what medical treatment is best for the incarcerated person. For example, a prison doctor might give an incarcerated person X medication for his medical condition, but the incarcerated person believes Y medication is better. As long as both X and Y

Evans, 544 F. Supp. 769, 775 n.4 (N.D. Ga. 1982) (finding that confiscating an incarcerated person’s medically prescribed back brace might have serious enough effects to constitute an 8th Amendment violation).

24. Kikumura v. Osagie, 461 F.3d 1269, 1292, 1295–1296 (10th Cir. 2006), *overruled on other grounds as stated in* Robbins v. Oklahoma, 519 F.3d 1242 (10th Cir. 2008) (holding delay must be shown to have caused “substantial harm” and that pain caused by delay can amount to substantial harm); Spann v. Roper, 453 F.3d 1007, 1008–1009 (8th Cir. 2006) (holding that no medical evidence was needed for a jury to find that a three-hour delay in treating an overdose was objectively serious).

25. Martin v. DeBruyn, 880 F. Supp. 610, 614 (N.D. Ind. 1995) (holding that “[c]ourts determine what constitutes a serious medical need on a case-by-case basis” and that incarcerated person’s ulcers were “serious” even though prison did not include ulcers in a list of serious medical needs).

26. Martin v. DeBruyn, 880 F.Supp. 610, 616 (N.D. Ind. 1995) (refusing to accept “an inelastic list of conditions which [a prison] considers ‘serious medical needs’” because “the definition of such a need is necessarily elastic”).

27. Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (holding that a hospital’s “gratuitous classification” of a surgery as “elective” does not remove prison’s duty “to promptly provide necessary medical treatment”).

28. See Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (“We hold instead that a prison official cannot be found liable under the [8th] Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.”).

29. See Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that an inhumane treatment claim under the 8th Amendment requires that a prison official “*knows of* and disregards an excessive risk to inmate health or safety”) (emphasis added).

30. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (“[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”).

medications are approved for treating the incarcerated person's disease, the incarcerated person will probably not win in court because the court will defer to (respect) the prison doctor's professional medical judgment that X was best for the incarcerated person. Even if you have your own outside doctor who says something different from the prison doctor, prison officials may rely upon their own doctor's judgment.³¹

A difference in opinion over medical treatment, or even an error in medical judgment, is not likely to win a case.³² But that does not mean that you can never challenge a prison doctor's decisions; "a medical professional's erroneous treatment decision can lead to deliberate indifference liability if the decision was made in the absence of professional judgment."³³ Thus, the prison health official must actually use legitimate medical judgment.³⁴

While general prison medical procedures might be fine for most incarcerated people, forcing some incarcerated people to follow those procedures might establish deliberate indifference to those *particular* incarcerated people's medical conditions. For example, the Second Circuit has held that a statewide prison medical policy that denied Hepatitis C treatment to incarcerated people with any substance abuse problems within the past two years might lead to deliberate indifference if applied to a particular incarcerated person. The prison followed the policy despite "the unanimous, express, and repeated recommendations of plaintiff's treating physicians, including prison physicians," to move away from the policy in the plaintiff's particular case.³⁵

(d) Common Types of Deliberate Indifference

Listed below are some common situations in which courts have found prison medical staff to be deliberately indifferent to incarcerated people's serious medical needs. They include:

- (1) Ignoring obvious conditions;
- (2) Failing to provide treatment for diagnosed conditions;
- (3) Failing to investigate enough to make an informed judgment;
- (4) Delaying treatment;
- (5) Interfering with access to treatment;
- (6) Making medical decisions based on non-medical factors; and
- (7) Making a medical judgment so bad it falls below professional medical standards.

31. *Vaughan v. Lacey*, 49 F.3d 1344, 1346 (8th Cir. 1995) (holding that prison authorities can rely on prison doctors even where an incarcerated person's private physician holds a different medical opinion about appropriate treatment).

32. *See Flores v. Okoye*, 196 F. App'x 235, 236 (5th Cir. 2006) (*unpublished*) (per curiam) ("A doctor's failure to follow the advice of another doctor suggests nothing more than a difference in opinion . . . and is not evidence of deliberate indifference."); *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir. 2003) (noting that "not every lapse in prison medical care will rise to the level of a constitutional violation").

33. *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006); *see also Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005) (finding that medical staff's stubborn refusal to change an incarcerated person's treatment, despite his reports that his medication was not working and his condition was worsening, could constitute deliberate indifference); *McElligott v. Foley*, 182 F.3d 1248, 1256–1257 (11th Cir. 1999) (finding that failure to inquire further into and treat severe pain, along with repeated delays in seeing the patient, could permit a jury to find deliberate indifference); *Hunt v. Uphoff*, 199 F.3d 1220, 1223–1224 (10th Cir. 1999) (finding that a doctor's denial of insulin and other treatments recommended by another doctor could constitute more than a mere difference of medical opinion, and that the incarcerated person could potentially prove deliberate indifference).

34. *See Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261–262 (7th Cir. 1996) ("[D]eliberate indifference may be inferred based upon a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.").

35. *Johnson v. Wright*, 412 F.3d 398, 404, 406 (2d Cir. 2005) (noting that "a deliberate indifference claim can lie where prison officials deliberately ignore the medical recommendations of a prisoner's treating physicians") (citing *Gill v. Mooney*, 824 F.2d 192, 196 (2d Cir. 1987)).

(i) Ignoring Obvious Conditions

One way to prove that prison officials were deliberately indifferent to your serious medical needs is to show that the problem was so obvious that they should have been aware of a serious and substantial risk to your health. Even if the prison official did not notice the risk (injury, disease, physical condition, etc.), the official can be held liable (responsible) if the risk to the incarcerated person was very obvious. In *Brice v. Virginia Beach Correction Center*, the court found that a prison guard may have ignored a serious and substantial risk (and thus may have been deliberately indifferent) when an incarcerated person received no medical care after a fight, even though the incarcerated person's mouth was bleeding and he complained of horrible pain.³⁶ In *Phelps v. Kapnolas*, the court said that a prison official disregarded an obvious risk by putting an incarcerated person in solitary confinement with inadequate food. The court said the official should have known that not having enough food would cause pain and distress.³⁷

In *Phillips v. Roane County, Tenn.*, the Sixth Circuit ruled that correctional officers at the Roane County Jail were responsible for the death of a female incarcerated person. Medical examiners testified that the incarcerated person died from untreated diabetes. According to the court, prison authorities were aware of her deteriorating condition during the two weeks before her death, as she complained of vomiting, chest pain, fatigue, nausea, and constipation. Their failure to take her to a hospital was considered deliberate indifference to her medical needs.³⁸

The risk to the incarcerated person must be very obvious because courts frequently find that the prison official is not responsible when he did not know enough about an incarcerated person's condition. In *Reeves v. Collins*, prison guards were not liable when they forced an incarcerated person to work, even after he had warned them that he had a previous back injury, was doubled over, and was complaining of excessive pain.³⁹ He was later taken to the infirmary and diagnosed with a double hernia. The court decided that the guards had not disregarded a substantial risk because even if the guards had checked the incarcerated person medical records (which they did not), they would not have learned of the incarcerated person's history of hernias due to a mistake in the records.

In *Sanderfer v. Nichols*, the court found that a prison doctor was not responsible for her failure to treat a patient's hypertension (even though the incarcerated person later died of a heart attack).⁴⁰ Although the plaintiff's medical records included a history of hypertension, the doctor was not liable because the plaintiff complained only of bronchitis when he met with the doctor. The incarcerated person never told the doctor that hypertension was a problem for him, and his blood pressure later was checked on three occasions and was normal. This means that it is very important that you speak up and tell prison officials about all of your health problems.

If you are making an Eighth Amendment claim that prison officials were deliberately indifferent to your serious medical needs, you should tell the court all of the reasons your medical needs should have been obvious to prison officials.

(ii) Failing to Provide Treatment for Diagnosed Conditions

The easiest way to establish prison officials' deliberate indifference to your medical needs is to prove that a prison doctor diagnosed you with a serious medical condition and prescribed treatment for you, but you never received that treatment. In *Hudson v. McHugh*, an incarcerated person was transferred from a halfway house to a county jail but was not given his medicine.⁴¹ After eleven days without it, despite repeated requests to the jail's medical personnel, he had a seizure. The Seventh

36. *Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101, 103–106 (4th Cir. 1995).

37. *Phelps v. Kapnolas*, 308 F.3d 180, 186–187 (2d Cir. 2002).

38. *Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 540–541 (6th Cir. 2008).

39. *Reeves v. Collins*, 27 F.3d 174, 176–177 (5th Cir. 1994).

40. *Sanderfer v. Nichols*, 62 F.3d 151, 155 (6th Cir. 1995) (finding that even though the doctor probably should have checked the incarcerated person's medical records, her failure to do so was at most negligence, not deliberate indifference).

41. *Hudson v. McHugh*, 148 F.3d 859, 861 (7th Cir. 1998).

Circuit held that this was the most obvious kind of case in which an incarcerated person could raise a claim: “[T]his is the prototypical case of deliberate indifference, an inmate with a potentially serious problem repeatedly requesting medical aid, receiving none, and then suffering a serious injury.”⁴² It is important to note that not only was the incarcerated person denied his medicine, but he also requested it several times before he became dangerously ill. *If you are making an Eighth Amendment claim that prison officials were deliberately indifferent to your serious medical needs, you should tell the court about your requests for medical treatment to show that officials knew of your needs.*

(iii) Failing to Investigate Enough to Make an Informed Judgment

If a court finds that prison officials never made an informed decision about your medical care, you may be able to establish an Eighth Amendment claim of deliberate indifference to your medical needs.⁴³ Prison officials may not have made an informed decision about your medical care if, in response to your complaints of a medical problem, they did not properly treat you, did not investigate the cause of your medical condition, did not order diagnostic tests, did not send you to a specialist, or did not consult your medical records before stopping medication.⁴⁴

(iv) Delaying Treatment

You can also establish an Eighth Amendment claim of deliberate indifference to your serious medical needs by proving that (1) prison officials delayed your treatment, and (2) that delay caused serious consequences. Whether or not to delay treatment is sometimes an issue of professional opinion, but some delays are very serious and may prove deliberate indifference. If you suffered from a serious injury that prison officials knew about, but you had to wait a very long time before getting medical treatment, you may be able to bring a claim. Denial of or delay in access to medical personnel, or in providing treatment, can be deliberate indifference.⁴⁵ In determining whether or not a delay constitutes deliberate indifference, two factors are taken into account:

42. *Hudson v. McHugh*, 148 F.3d 859, 864 (7th Cir. 1998); *see also* *Erickson v. Pardus*, 551 U.S. 89, 92–95, 127 S. Ct. 2197, 2199–2200, 167 L. Ed. 2d 1081, 1085–1086 (2007) (holding that refusal to continue prescribed treatment because of alleged theft of syringe used for the treatment could amount to deliberate indifference).

43. *Tillery v. Owens*, 719 F. Supp. 1256, 1308 (W.D. Pa. 1989) *aff’d*, *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990) (holding that if an informed judgment has not been made, the court may find an 8th Amendment claim). The 8th Amendment protects you from cruel and unusual punishment. U.S. CONST. amend. VIII (“[N]or [shall] cruel and unusual punishments [be] inflicted.”).

44. *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011) (holding that failure to properly treat plaintiff’s hernia can constitute deliberate indifference if refusing surgery substantially departs from professional judgment); *Arnett v. Webster*, 658 F.3d 742, 754 (7th Cir. 2011) (holding that a doctor choosing an easier and less effective treatment can reflect deliberate indifference, even though the doctor didn’t prescribe the proper medication for the medical condition because it wasn’t available); *McElligott v. Foley*, 182 F.3d 1248, 1252, 1256–1257 (11th Cir. 1999) (finding that failure to inquire about and treat plaintiff’s severe pain, and the doctor’s repeated delays in seeing the patient, could constitute deliberate indifference). *Greeno v. Daley*, 414 F.3d 645, 653–654 (7th Cir. 2005) (finding that a failure to investigate the cause of incarcerated person’s medical condition and the reasons why current treatment was not working could be deliberate indifference). *See* *Perez v. Anderson*, 350 F. App’x 959, 961–962 (5th Cir. 2009) (*unpublished*) (finding that deliberate indifference could exist where an incarcerated person didn’t receive pain relief or x-rays for several months despite repeated requests after a severe beating from a fellow incarcerated person); *Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990) (finding that deliberate indifference could exist where doctor failed to perform tests for cardiac disease on incarcerated person with symptoms that called for such tests). *See* *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (finding that a doctor could be deliberately indifferent for refusing to send an incarcerated person to a specialist or to order an endoscopy despite the incarcerated person’s complaints of severe pain, and noting that the doctor could not rely on lack of “objective evidence” since often there is no objective evidence of pain). *See* *Steele v. Shah*, No. 93-3396, 1996 U.S. App. LEXIS 23301 at *2–*4 (11th Cir. 1996) (*unpublished*) (denying summary judgment to prison doctor who discontinued psychiatric medication for an incarcerated person the doctor knew was at risk for suicide based on a cursory interview, without reviewing medical records).

45. *See* *Tyler v. Smith*, 458 F. App’x 597, 598 (9th Cir. 2011) (*unpublished*) (finding sufficient facts to allege deliberate indifference where an official knew of incarcerated person’s pain and mobility problems but delayed in referring him to an orthopedist); *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005) (noting that

- (1) the seriousness of the incarcerated person's medical need,⁴⁶ and
- (2) whether the delay was objectively serious enough to present an Eighth Amendment question.⁴⁷

Remember that prison officials may have had a valid reason for delaying your non-emergency medical treatment. For example, if no prison official who could properly take care of your non-emergency medical needs was on duty, a judge would probably find the delay justified.

A judge might also find that security concerns justify denying your request for a particular medical treatment. For instance, in *Schmidt v. Odell*, the court rejected the plaintiff's claim that failure to provide him with a wheelchair was a constitutional violation. The court found that having a wheelchair among the jail's population could pose a legitimate security risk. The court concluded that this was sufficient to show that the refusal to provide a wheelchair did not alone violate the Eighth Amendment.⁴⁸ However, the court noted that the prison's delay in providing a *shower* chair "appears to have resulted not only in the unnecessary infliction of pain, but also in a needless indignity that a jury could find was inconsistent with the Eighth Amendment."⁴⁹

an official who knew incarcerated person was exhibiting "the classic symptoms of a heart attack" and did not arrange transportation to a hospital could be found deliberately indifferent because of the immediate threat of the symptoms); *Johnson v. Karnes*, 398 F.3d 868, 875–876 (6th Cir. 2005) (finding that prison doctor's failure to schedule surgery for severed tendons despite knowing they were severed could constitute deliberate indifference); *McElligott v. Foley*, 182 F.3d 1248, 1256–1257 (11th Cir. 1999) (finding that a doctor's repeated delays in seeing a patient with constant severe pain, combined with a decision to continue ineffective medications and the doctor's failure to order diagnostic tests, could constitute deliberate indifference); *Murphy v. Walker*, 51 F.3d 714, 719 (7th Cir. 1995) (holding that a two-month failure to allow an incarcerated person with a head injury to see a doctor stated a sufficient claim for deliberate indifference); *Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003) (holding that delaying HIV medicine to an HIV-positive incarcerated person could state an 8th Amendment claim when the temporary interruption of medication causes significant harm). *Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir. 2012) (holding that a delay of more than one year for treatment of a diagnosed hernia due to the doctor's refusal to make a referral for surgery could amount to deliberate indifference); *Cordero v. Ahsan*, 452 F. App'x 150, 153–154 (3d Cir. 2011) (*unpublished*) (holding that deliberate indifference could exist where a doctor refuses to refer an incarcerated person to a specialist or to get an MRI, after the incarcerated person felt a "pop" in his shoulder); *Spann v. Roper*, 453 F.3d 1007, 1008–1009 (8th Cir. 2006) (finding that a nurse could be deliberately indifferent for leaving an incarcerated person in his cell for three hours when she knew he had taken an overdose of mental health medications intended for another); *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (holding that an extended delay in starting hepatitis C treatment constituted a valid claim of deliberate indifference).

46. See *Gomez v. Randle*, 680 F.3d 859, 865 (7th Cir. 2012) (holding that a condition is considered serious, even if not life threatening, if a lack of treatment would result in "further significant injury or unnecessary and wanton infliction of pain") (citation omitted); *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011) (holding that a medical condition is considered sufficiently serious if it has been diagnosed by a doctor as requiring treatment or if it is obvious to a layperson that a doctor's attention is needed)(citation omitted); *Kikumura v. Osagie*, 461 F.3d 1269, 1292 (10th Cir. 2006) (explaining that delay must be shown to have caused "substantial harm," including pain suffered while awaiting treatment), *overruled on other grounds as stated in* *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008).

47. *Snow v. McDaniel*, 681 F.3d 978, 990 (9th Cir. 2012) (holding that for a condition to be sufficiently serious, the plaintiff must show that the delay in treatment of his hip injury led to further injury), *overruled on other grounds as stated in* *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014); *McClure v. Foster*, 465 F. App'x 373, 375 (5th Cir. 2012) (*unpublished*) (holding that even if the incarcerated person could show deliberate indifference to his need for medical care for his cut wrist, the injury was not sufficiently serious nor did the delay cause sufficient injury to state a claim); *Smith v. Knox Cnty. Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012) (holding that "even a few days' delay in addressing a severely painful but readily treatable condition suffices to state a claim of deliberate indifference"); *Spann v. Roper*, 453 F.3d 1007, 1008–1009 (8th Cir. 2006) (holding that a jury could find a three-hour delay in addressing a medication overdose to be objectively sufficiently serious). But see *Smith v. Carpenter*, 316 F.3d 178, 186–187 (2d Cir. 2003) (determining that brief interruptions of HIV medications, with no discernible adverse effects, did not present serious medical needs).

48. *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1029 (D. Kan. 1999).

49. *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1031 (D. Kan. 1999); see also *Vines v. Buchler*, No. 96-1677, 1996 U.S. App. LEXIS 28693, at *3–5 (7th Cir. Oct. 31, 1996) (*unpublished*) (explaining that an incarcerated

Even when there is no apparent reason for delay in treatment, a court might not find that officials acted with deliberate indifference if the delay does not cause a great deal of harm. In *Smith v. Carpenter*, the court said that it was proper for a jury to consider the fact that an incarcerated person did not suffer any bad effects after officials refused to give him treatment for his HIV-related illness for periods of five and seven days; the jury found no deliberate indifference.⁵⁰ In *Jolly v. Badgett*, the incarcerated person had epilepsy, a condition that causes seizures and high blood pressure. He took medication to prevent the life-threatening consequences of this disease, but officials refused to allow the incarcerated person to leave his cell to get water to take his medication until two hours after his prescribed time. The court found that officials did not act with deliberate indifference because there was no evidence that the officials knew the delay would have a dangerous effect.⁵¹

In general, if there is a reason for a delay in your treatment, or if you cannot prove officials knew that the treatment needed to be given to you immediately, you will have a hard time establishing deliberate indifference on the basis of delayed treatment.

(v) Interfering with Access to Treatment

You can also establish an Eighth Amendment claim of deliberate indifference to your serious medical needs by showing that prison officials interfered with your ability to obtain medical treatment. Prison guards and/or prison medical staff can prevent incarcerated people from getting treatment in many different ways, including:

- (1) Denying you access to medical specialists who are qualified to address your health problem;⁵²
- (2) Allowing you to see a specialist but then refusing to carry out the specialist's recommendations (or refusing to carry out the recommendations of a specialist who directed treatment before you were incarcerated);⁵³ or
- (3) Refusing to carry out or simply ignoring medical orders.⁵⁴

person who was denied his back brace for seven weeks and required to perform work on a sod-laying crew failed to show that prison officials were deliberately indifferent to his medical condition, since the back brace was prohibited for security reasons and prison officials did their due diligence to accommodate his health needs).

50. *Smith v. Carpenter*, 316 F.3d 178, 180, 189 (2d Cir. 2003).

51. *Jolly v. Badgett*, 144 F.3d 573, 573 (8th Cir. 1998).

52. *See Mata v. Saiz*, 427 F.3d 745, 756–759 (10th Cir. 2005) (finding that nurse's failure to refer an incarcerated person to a doctor after the incarcerated person showed symptoms of cardiac emergency could be deliberate indifference); *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (finding refusal to refer incarcerated person to a specialist or order an endoscopy for two years despite intense abdominal pain could be deliberate indifference); *Hartsfield v. Colburn*, 371 F.3d 454, 457–458 (8th Cir. 2004) (holding that six weeks' delay in sending an incarcerated person to a dentist that resulted in infection and loss of teeth raised an 8th Amendment claim); *LeMarbe v. Wisneski*, 266 F.3d 429, 440 (6th Cir. 2001) (determining that failure to make timely referral to a specialist or tell the patient to seek one out was deliberate indifference); *Mandel v. Doe*, 888 F.2d 783, 789–795 (11th Cir. 1989) (affirming an award of damages where a physician's assistant failed to diagnose a broken hip, refused to order an x-ray, and prevented the incarcerated person from seeing a doctor).

53. *See Gil v. Reed*, 535 F.3d 551, 557 (7th Cir. 2008) (finding that an incarcerated person stated a valid claim for deliberate indifference when prison staff prescribed the same medication that a prison specialist had warned against him taking); *Miller v. Schoenen*, 75 F.3d 1305, 1311 (8th Cir. 1996) (finding that prison officials not providing medical care that an outside doctor and outside hospitals said the incarcerated person needed supported a deliberate indifference claim); *Starbeck v. Linn County Jail*, 871 F. Supp. 1129, 1146–1147 (N.D. Iowa 1994) (explaining that when outside doctors had recommended surgery, prison officials who failed to provide the surgery must present evidence why they did not follow the outside doctors' recommendations).

54. *Estelle v. Gamble*, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (holding that "intentionally interfering with the treatment once prescribed" can constitute an 8th Amendment claim); *see Lawson v. Dallas County*, 286 F.3d 257, 263 (5th Cir. 2002) (affirming that disregard for follow-up care instructions for a paraplegic incarcerated person could be deliberate indifference); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (holding denial of prescription eyeglasses needed to avoid double vision and loss of depth perception that resulted from prior head injury enough to allege deliberate indifference); *Erickson v. Holloway*, 77 F.3d 1078, 1080–1081 (8th Cir. 1996) (finding that an officer's denial of an emergency room doctor's request to admit the incarcerated person and take x-rays could show deliberate indifference); *Boretti v. Wiscomb*, 930 F.2d

For example, in *Brown v. Coleman*, the court found deliberate indifference because, although the prison medical staff repeatedly recommended surgery for an incarcerated person, officials with no medical training ignored the recommendations.⁵⁵ In *Martinez v. Mancusi*, the court found that the incarcerated person could bring a claim against prison officials who had used force to remove him from a hospital where he was recovering from leg surgery.⁵⁶ Prison officials ignored the doctor's instructions that the incarcerated person could not walk and removed the incarcerated person, who was partially paralyzed, without the doctor's permission. This caused the surgery to be unsuccessful. The incarcerated person was also denied the pain medication his surgeon prescribed him, and thus was left in constant pain. In *Woodall v. Foti*, an incarcerated person with suicidal tendencies had received treatment for manic depression before being incarcerated.⁵⁷ The incarcerated person's diagnosis was confirmed by the prison doctor. The incarcerated person claimed his condition worsened when he was denied treatment by the sheriff, who placed him in solitary confinement. On appeal, the court found that if these facts were true, the sheriff's actions could establish deliberate indifference because he interfered with the incarcerated person's access to medical treatment.

Refusing to treat an incarcerated person unless the incarcerated person complies with an official's order can also be considered deliberate indifference. In *Harrison v. Barkley*, a prison dentist refused to fill an incarcerated person's cavity unless the incarcerated person allowed the dentist to pull another one of the incarcerated person's teeth because the policy of the prison was to pull teeth that were in poor condition. Although the tooth was rotten, the incarcerated person did not want it removed because it was not painful and he only had a few teeth left.⁵⁸ The court said that in a situation like this one, the dentist's actions constituted deliberate indifference.⁵⁹ Similarly, in *Benter v. Peck*, a district court in Iowa found that doctors treating incarcerated people have a responsibility to provide them the medical care that they need.⁶⁰ In that case, the doctor had allowed the prison to withhold eyeglasses from an incarcerated person who could not function without them in order to force him to pay for the glasses. The court held that withholding the prescription glasses from the incarcerated person rose to the standard of deliberate indifference.

(vi) Making Medical Decisions Based on Non-Medical Factors

If the prison health staff is making medical decisions about you based on non-medical factors, you may also be able to establish an Eighth Amendment claim of deliberate indifference to your serious medical needs.⁶¹ Prisons should not decide what medical treatment you get based on factors like the prison's lack of staff or lack of interpreters, the prison's budgetary restrictions, because you are about to be released, or because they want to punish you.⁶² In particular, widespread "deficiencies in staffing,

1150, 1156 (6th Cir. 1991) (finding a prison nurse's refusal after several direct requests to change the incarcerated person's wound dressings raised "a genuine issue" for trial); *McCorkle v. Walker*, 871 F. Supp. 555, 558 (N.D.N.Y. 1995) (finding the allegation that prison officials failed to obey a medical order to house an asthmatic incarcerated person on a lower tier was sufficient to state a claim).

55. *Brown v. Coleman*, No. 94-7183, 1995 U.S. App. LEXIS 16928, at *4-5 (10th Cir. July 12, 1995) (*unpublished*).

56. *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1970).

57. *Woodall v. Foti*, 648 F.2d 268, 271-272 (5th Cir. 1981).

58. *Harrison v. Barkley*, 219 F.3d 132, 134 (2d Cir. 2000).

59. *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir. 2000).

60. *Benter v. Peck*, 825 F. Supp. 1411, 1417 (S.D. Iowa 1993). *But see* *Martin v. DeBruyn*, 880 F. Supp. 610, 614 (N.D. Ind. 1995) (determining that the 8th Amendment does not require the state to provide an incarcerated person with a necessary commodity that would not be free outside of the prison and which the incarcerated person has sufficient funds to purchase).

61. *See* *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (finding that withholding a dental referral for incarcerated person's behavioral problems could be deliberate indifference); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) (finding prison's refusal to provide treatment without a court order was deliberate indifference).

62. *Casey v. Lewis*, 834 F. Supp. 1477, 1547-1548 (D. Ariz. 1993) (finding that a lack of staff to "diagnose and treat the serious mental health needs" of an incarcerated person constituted deliberate indifference).

facilities, or procedures [that] make unnecessary suffering inevitable” may support a finding of deliberate indifference.⁶³ In other words, you can establish that prison officials were deliberately indifferent to your medical needs even if they ignored your needs because of problems that were part of the prison system (its staffing, facilities, or other non-medical policies). Interestingly, a San Francisco judge refused to send a convicted robber to jail, citing the poor medical care the man would receive and equating a prison sentence to a death sentence.⁶⁴ While this was an extremely unusual situation, the case law may still help you develop a lawsuit based on problems that are affecting everyone’s medical care at your prison.

(vii) “Medical” Judgment So Bad It’s Not Medically Acceptable

You also can establish that prison officials were deliberately indifferent to your serious medical needs if you believe that your prison’s health staff is making medical decisions that are so bad that no trained health professional would ever make the same decisions.⁶⁵ For example, in 2004, a federal court in California ordered a prison to arrange for a medical evaluation of an incarcerated person’s eligibility for a liver transplant. Prison officials had refused to allow the evaluation, but the incarcerated person would die without a transplant. The court stated that the prison’s failure to identify any alternative treatment that would save the incarcerated person’s life supported the incarcerated person’s deliberate indifference claim.⁶⁶ The court noted that:

In order to prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the course of treatment the doctors chose was medically unacceptable in light of the circumstances and that they chose this course in conscious disregard of an excessive risk to plaintiff’s health.⁶⁷

Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1994), *opinion amended on denial of reh’g*, Anderson v. County of Kern, 75 F.3d 448 (9th Cir. 1995) (explaining that failure to provide a translator for medical encounters can constitute deliberate indifference). Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (holding that budget constraints could not justify deliberate indifference to an incarcerated person’s serious medical needs); Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014) (this case limits *Jones* by holding that only budgetary officials can be held accountable for indifference to an incarcerated person’s medical needs); Starbeck v. Linn Cnty. Jail, 871 F. Supp. 1129, 1146 (N.D. Iowa 1994) (holding that refusal to allow an incarcerated person surgery because the State of Iowa did not want to pay the costs of guards during the incarcerated person’s recovery could rise to deliberate indifference to the incarcerated person’s serious medical need). McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) (holding that an allegation that an incarcerated person was “denied urgently needed treatment for a serious disease because he might be released within twelve months of starting the treatment” was enough for a claim of deliberate indifference). Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (finding that withholding a necessary dental referral because of an incarcerated person’s behavioral problems could give rise to a finding of deliberate indifference).

63. *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977) (citing *Bishop v. Stoneman*, 508 F.2d 1224, 1226 (2d Cir. 1974)); *see also Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (“In institutional level challenges to prison health care . . . systemic deficiencies can provide the basis for a finding of deliberate indifference.”); *DeGidio v. Pung*, 920 F.2d 525, 529 (8th Cir. 1990) (holding that lack of “adequate organization and control in the administration of health services” could constitute an 8th Amendment violation); *see also Marcotte v. Monroe Corr. Complex*, 394 F. Supp. 2d 1289, 1298 (W.D. Wash. 2005) (explaining that failure to remedy deficient infirmity nursing procedures and other health department citations, of which the prison was aware, was deliberate indifference).

64. Andy Furillo, *Ill. Man’s Prison Term Blocked, S.F. Judge Cites Findings of Poor Medical Care, Says Move from Local Jail Could Equal a Death Sentence*, *Sacramento Bee*, Mar. 20, 2007, at A3; *United States v. Kulwant Singh Sandhu*, No. 2:15-cr-0231-GEB, 2016 U.S. Dist. LEXIS 105840, at *1 (E.D. Cal. Aug. 10, 2016) (*unpublished*).

65. *See Estate of Cole v. Fromm*, 94 F.3d 254, 261–262 (7th Cir. 1996) (“[D]eliberate indifference may be inferred based upon a medical professional’s erroneous treatment decision only when the medical professional’s decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.”).

66. *Rosado v. Alameida*, 349 F. Supp. 2d 1340, 1346 (S.D. Cal. 2004).

67. *Rosado v. Alameida*, 349 F. Supp. 2d 1340, 1344–1345 (S.D. Cal. 2004) (emphasis added).

A “medically unacceptable” treatment may be “an easier and less [effective] treatment” or simply no treatment at all.⁶⁸ Showing that prison health staff failed to follow professional medical standards or prison medical care procedures can help you make this deliberate indifference claim. These standards or protocols can serve as evidence that the prison official knew of the risk posed by particular symptoms or conditions and deliberately ignored that risk.⁶⁹

2. Medical Negligence

(a) Medical Negligence Is Not Unconstitutional

You cannot win a federal constitutional claim of deliberate indifference by alleging only that prison medical staff acted negligently, no matter how often or repeatedly they were negligent. However, you still may be able to make a state tort claim of negligence, which is described in the next Subsection. “Negligence” is when a person fails to exercise care that a “reasonable person” would exercise to protect someone at risk.⁷⁰ Medical negligence is often called medical “malpractice.” Again, “the Eighth Amendment does not protect prisoners from medical *malpractice*.”⁷¹

At one time, negligence was grounds for liability.⁷² After the Supreme Court’s holding in *Farmer v. Brennan*, however, negligence—even repeated negligence—cannot by itself constitute deliberate indifference.⁷³ Therefore, in a class action suit brought by incarcerated people in Ohio, the court held that if the incarcerated people could only prove the prison doctor was repeatedly negligent in his treatment, but not that he was “subjectively aware of a substantial risk of serious harm,” then the

68. *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974) (holding that refusing an incarcerated person’s request to reattach his ear and instead only sewing up the stump may constitute indifference if the procedure was medically possible); see also *McElligott v. Foley*, 182 F.3d 1248, 1256–1257 (11th Cir. 1999) (determining that medical staff’s failure to examine and treat patient’s severe pain, and repeated delays in examination of the patient, could support a finding of deliberate indifference).

69. *Mata v. Saiz*, 427 F.3d 745, 757 (10th Cir. 2005) (explaining that violation of prison medical protocols was circumstantial evidence that the nurse “knew of a substantial risk of serious harm”).

70. See *Negligence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining negligence as the “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation”).

71. *Rosado v. Alameida*, 349 F. Supp. 2d 1340, 1344 (S.D. Cal. 2004) (emphasis added). This proposition was suggested earlier by *Estelle v. Gamble*, 429 U.S. 97, 105–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976). But note that an allegation of medical malpractice does not prevent a finding of deliberate indifference. *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996).

72. For example, in *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977), the court held that “while a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment [indicate] a deliberate indifference by prison authorities.” There are also three pre-*Farmer* cases finding that repeated negligence can indicate deliberate indifference: *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (noting that although “[m]ere incidents of negligence or malpractice do not rise to the level of constitutional violations . . . systemic deficiencies can provide the basis for a finding of deliberate indifference”); *DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990) (holding that a “consistent pattern of reckless or negligent conduct” establishes deliberate indifference); *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (observing that in class action suits, “deliberate indifference to inmates’ health needs may be shown [either] by proving repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff . . . or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care”). For more information, see Part B(1)(d)(vi) of this Chapter, “Making Medical Decisions Based on Non-Medical Factors.”

73. *Farmer v. Brennan*, 511 U.S. 825, 835–837, 114 S. Ct. 1970, 1977–1979, 128 L. Ed. 2d 811, 824–825 (1994) (holding deliberate indifference does not include negligence, even repeated acts of negligence, and to prove deliberate indifference, an incarcerated person must show the prison official actually knew about a “substantial risk of serious harm”). This proposition was suggested earlier by *Estelle v. Gamble*, 429 U.S. 97, 105–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) (stating that “a complaint that a physician has been negligent” does not support an 8th Amendment claim and that “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to medical needs”).

incarcerated person had not stated an Eighth Amendment claim.⁷⁴ Even if it is possible that an official's action led to the death of a incarcerated person, negligence alone is not enough to bring a federal constitutional claim.⁷⁵ Repeated acts of negligence can be evidence that a prison official is ignoring a substantial risk, but acts of negligence by themselves, without any other claim, cannot count as deliberate indifference.⁷⁶

(b) State Law Negligence Claims Are Possible

If you believe that you were injured because prison medical staff acted negligently, you cannot make an Eighth Amendment deliberate indifference claim, but you can still make a negligence claim under state law. To prove negligence under state law, you must prove that (1) the defendant (your prison) owed a duty of care to you; and (2) that this duty was “breached,” meaning that the prison was responsible for some aspect of your well-being and did not honor its responsibility.⁷⁷ Therefore, you must ask whether the prison's medical practitioner did for you what a reasonable health professional would have done for you in the same circumstances.⁷⁸

You can find many of the duties a prison owes its incarcerated people listed in state laws. Thus, a person incarcerated in New York could use the state corrections law to prove that New York prisons have a duty to “provide reasonable and adequate medical care to incarcerated people.”⁷⁹ State case law also provides clear definitions of what duties a prison owes to people who are incarcerated in that facility. In New York, in order to prove a medical malpractice claim, the incarcerated person must prove a departure from accepted practice and that this departure was the “proximate cause” of the injury. To prove proximate cause, you must show that the injury would not have occurred without the departure from accepted practice.⁸⁰ The court of claims also recognizes medical negligence as a cause of action. A state may be liable for “ministerial neglect” if employees fail to comply with the prison's

74. *Brooks v. Celeste*, 39 F.3d 125, 129 (6th Cir. 1994) (making a clear distinction between the doctor being “merely repeatedly negligent” and acting with “deliberate indifference”); *see also* *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994)) (“Deliberate indifference requires more than negligence . . . [A] prison official does not act in a deliberately indifferent manner unless that official ‘knows of and disregards an excessive risk to inmate health or safety’”).

75. *Howard v. Calhoun Cnty.*, 148 F. Supp. 2d 883, 889–890 (W.D. Mich. 2001) (concluding that although it was possible that the official was negligent in the way she handled the collapse of an incarcerated person who then died of a heart attack, negligence alone did not meet the standard of deliberate indifference).

76. Judge Posner offers a long discussion of the difference in *Sellers v. Henman*, explaining, “[i]t is vital to keep negligence and deliberate indifference apart. It may be . . . that repeated acts of negligence are some evidence of deliberate indifference.” Thus, “[t]he more negligent acts [prison officials] commit in a circumscribed interval, the likelier it is that they know they are creating *some* risk, and if the negligence is sufficiently widespread relative to the prison population[,] the cumulative risk to an individual prisoner may be excessive.” Despite this, “the presence of multiple acts of negligence [merely offers some evidence to support a claim]; it is not an alternative theory of liability.” *Sellers v. Henman*, 41 F.3d 1100, 1102–1103 (7th Cir. 1994); *see also* *Brooks v. Celeste*, 39 F.3d 125, 128 (6th Cir. 1994) (“[R]epeated acts, viewed singly and in isolation, would appear to be mere negligence; however, viewed together and as a pattern, the acts show . . . that *each act* was committed with deliberate indifference.”).

77. *See* Part B(2) of Chapter 17 of the *JLM*, “The State's Duty to Protect You and Your Property: Tort Actions,” to learn more about negligence and negligence-based torts.

78. *See Negligence*, Black's Law Dictionary (11th ed. 2019) (defining negligence as the “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation”).

79. N.Y. CORRECT. LAW § 70(2)(c) (McKinney 2014) (stating that correctional facilities must be established and maintained with due regard to the “health and safety of every person in the custody of the department.”); N.Y. CORRECT. LAW § 23(2) (McKinney 2014) (permitting transfer of incarcerated people to outside hospital facilities for medical care); *see also* *Rivers v. State*, 159 A.D.2d 788, 789, 552 N.Y.S.2d 189, 189 (3d Dept. 1990) (noting that the state has a duty to provide reasonable and adequate medical care to incarcerated people); *La Rocca v. Dalsheim*, 120 Misc. 2d 697, 708, 467 N.Y.S.2d 302, 310 (Sup. Ct. Dutchess Cnty. 1983) (noting that the state has a duty to “provide a safe and humane place of confinement for its inmates”).

80. *Brown v. State*, 192 A.D.2d 936, 938, 596 N.Y.S.2d 882, 884 (3d Dept. 1993) (emphasizing that plaintiff must establish that his injuries were “*caused*” by the prison's negligence).

own administrative procedures for providing medical care to incarcerated people.⁸¹ If you want to make a state tort claim of medical negligence or medical malpractice, see Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions.” You should note there is a difference between medical negligence and medical malpractice claims. A medical malpractice claim means a person believes their injury was a medical practitioner’s fault. A medical negligence claim means a person had a prior injury or medical problem that was not treated or was not treated properly.

C. Specific Health Care Rights

This Part covers different situations in which you may have a right to medical treatment and includes examples of cases that might be useful to you. If you have specific questions about the rights of incarcerated people with mental illnesses or infectious diseases, make sure you also look at Chapter 29 of the *JLM*, “Special Issues for Incarcerated People with Mental Illness” and Chapter 26 of the *JLM*, “Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prisons.” If you need to learn more about disability discrimination, see Chapter 28 of the *JLM*, “Rights of Incarcerated People with Disabilities.”

1. Treatment for Diagnosed Conditions

Whether you have a viable (winnable) Eighth Amendment claim for lack of treatment for diagnosed medical illnesses and conditions depends on several factors. As discussed above, you must prove both the objective and subjective parts of “deliberate indifference.” For the objective requirement, you must prove that your medical condition was “sufficiently serious.” For the subjective requirement, you must prove that prison officials knew about the risk to your health and ignored it.

In the following examples, courts found that diagnosed medical conditions were “sufficiently serious.” In *Montalvo v. Koehler*, the court found that a prison’s failure to provide shower and sleeping facilities to an incarcerated person confined to a wheelchair was sufficiently serious. This was sufficiently serious because it posed a risk of serious bodily injury to the incarcerated person.⁸² In *Koehl v. Dalsheim*, the court ruled that prison officials acted with deliberately indifference when they confiscated an incarcerated person’s eyeglasses.⁸³ The double vision, headaches, and severe pain that the incarcerated person experienced without his eyeglasses were sufficiently serious. Failure to treat a serious hip condition requiring surgery, an infected and impacted wisdom tooth, and a hernia have all been found to establish a prison’s deliberate indifference to incarcerated people’s serious medical needs.⁸⁴

The following are examples of harm that the courts did **not** consider to be sufficiently serious. In *Holmes v. Fell*, the court held that an incarcerated person’s allergic reaction to a tuberculosis test, which caused swelling and a scar on the incarcerated person’s arm, was not “sufficiently serious.”⁸⁵ In fact, simple exposure to tuberculosis does not meet the standard when there is no reason to believe that the incarcerated person will actually catch the disease.⁸⁶ In *McGann v. Coombe*, the court ruled

81. *Kagan v. State*, 221 A.D.2d 7, 9-10, 646 N.Y.S.2d 336, 337-338 (2d Dept. 1996) (finding that the prison’s breach of protocols governing medical standards caused the incarcerated person to lose her hearing and constituted ministerial neglect).

82. *Montalvo v. Koehler*, No. 90 Civ. 5218 (LJF), 1993 U.S. Dist. LEXIS 11785, at *4 (S.D.N.Y. Aug. 20, 1993) (*unpublished*). Note, however, that this incarcerated person lost his case because he failed to meet the subjective standard for deliberate indifference.

83. *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996).

84. *Hathaway v. Coughlin*, 37 F.3d 63, 67 (2d Cir. 1994). *Boyd v. Knox*, 47 F.3d 966, 968-969 (8th Cir. 1995) (explaining that not all dental work meets the sufficiently serious standard, but in this case, the incarcerated person’s mouth was so infected that “he could barely open it” and “pus regularly oozed from the infection”). *Brown v. Coleman*, 60 F.3d 837, 837 (10th Cir. 1995), *opinion reported in full at Brown v. Coleman*, No. 94-7183, 1995 U.S. App. LEXIS 16928, at *4-5 (10th Cir. July 12, 1995) (*unpublished*).

85. *Holmes v. Fell*, 856 F. Supp. 181, 183 (S.D.N.Y. 1994).

86. *McCorkle v. Walker*, 871 F. Supp. 555, 558 (N.D.N.Y. 1995) (noting that the incarcerated person “has not suffered” and was “unlikely . . . to suffer, an active case of TB” because he received preventive medication

that prison officials were not deliberately indifferent for prescribing medication for a condition that caused arthritis and gout in an incarcerated person's feet, even though they refused to provide orthopedic footwear.⁸⁷ In addition, courts have ruled that incarcerated people do not have Eighth Amendment claims when prison officials refuse to treat penile warts⁸⁸ or an old injury that has healed but still causes pain.⁸⁹

2. Elective Procedures

Generally, you cannot win a claim that prison officials violated your Eighth Amendment rights based on their refusal to perform an elective procedure on you.⁹⁰ An elective procedure is an optional procedure. Although you would benefit from an elective procedure, it is not immediately necessary for your survival or relative well-being. The Supreme Court has held that the Constitution does not promise comfortable prisons and that conditions may be “restrictive and even harsh.”⁹¹

However, prison officials cannot call a necessary procedure “elective” to avoid having to provide it.⁹² Furthermore, if your condition gives you continual pain or discomfort for a long period of time, you may be able to bring a claim that your condition is sufficiently serious to warrant an elective procedure, even though the condition may not require immediate attention. Lengthy delays in providing incarcerated people with elective surgery for certain medical conditions can be unacceptable.⁹³ Courts recognize that there are some situations that are too serious to be considered elective, even though they are not serious enough to be considered emergencies. However, you may have to get a court order before you are allowed to be treated in such a situation.⁹⁴

after exposure).

87. *McGann v. Coombe*, decision reported at 131 F.3d 131, 131 (2d Cir. 1997), opinion reported in full at *McGann v. Coombe*, No. 97-2139, 1997 WL 738569, at *2 (2d Cir. Nov. 21, 1997) (*unpublished*).

88. *Stubbs v. Wilkinson*, decision reported at 52 F.3d 326, 326 (6th Cir. 1995), opinion reported in full at *Stubbs v. Wilkinson*, No. 94-3620, 1995 U.S. App. LEXIS 9471, at *6 (6th Cir. Apr. 20, 1995) (*unpublished*).

89. *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995) (finding that although the incarcerated person's work boots hurt his ankle, his medical report identified an “Old Ankle Injury” that doctors did not expect to produce very much pain, and x-rays proved that the bone was not broken or deformed and therefore the injury was not sufficiently serious).

90. *See Grundy v. Norris*, 26 F. App'x 588, 588-589 (8th Cir. 2001) (per curiam) (*unpublished*) (holding prison officials were not deliberately indifferent in delaying surgery for incarcerated person's injured shoulder in part because medical evidence showed the surgery was elective); *Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 601 (E.D. La. 2002) (holding that a “non-therapeutic abortion sought due to financial and emotional reasons” rather than medical necessity is *not* a “serious medical need” for 8th Amendment purposes), *aff'd*, *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004).

91. *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981).

92. *Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir. 1989) (“The hospital's gratuitous classification of [the prisoner's] surgery as ‘elective’ . . . does not abrogate the prison's duty, or power, to promptly provide necessary medical treatment for prisoners.”) (internal citation omitted); *Baker v. Blanchette*, 186 F. Supp. 2d 100, 105 n.4 (D. Conn. 2001) (stating that although the incarcerated person could wait to have surgery, merely classifying the surgery as elective does not abolish the prison's duty to provide treatment for a serious medical need); *Delker v. Maass*, 843 F. Supp. 1390, 1399 (D. Or. 1994) (holding that prison officials may not simply characterize a surgery as elective in order to avoid performing the procedure).

93. *See Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir. 1989) (holding that an incarcerated person who had to wait nine years for elective arm surgery had suffered a constitutional violation); *West v. Keve*, 541 F. Supp. 534, 539-540 (D. Del. 1982) (finding that a 17-month delay between recommendation and performance of elective surgery was unacceptable, but that defendants were not ultimately liable since their actions were in good faith).

94. *See Victoria W. v. Larpenter*, 369 F.3d 475, 484-485 (5th Cir. 2004) (upholding policy of requiring incarcerated people to obtain a court order to receive an elective medical procedure because the policy was “reasonably related to a legitimate penological interest”). Note this case involved seeking an abortion, which has its own case law—see Section D(1)(a) below.

3. Exposure to Second-Hand Smoke

Incarcerated people have the right to be free from exposure to *excessive* second-hand smoke.⁹⁵ Previously, courts rejected incarcerated people's claims for exposure to environmental tobacco smoke ("ETS").⁹⁶ The courts noted that the incarcerated people had not yet suffered serious injuries. However, in *Helling v. McKinney*, the Supreme Court rejected the argument that "only deliberate indifference to *current* serious health problems of inmates is actionable under the Eighth Amendment" by comparing forced exposure to ETS to live electrical wires, or communicable diseases.⁹⁷ The Court concluded that prison officials may violate the Eighth Amendment's prohibition of cruel and unusual punishment if they deliberately expose incarcerated people to high levels of ETS.⁹⁸

To satisfy the objective requirement in a claim for a violation of the Eighth Amendment under *Helling* ("objective part" is discussed above, in Part B(1)(a)), you will have to show you are exposed to ETS levels that "pose an unreasonable risk of serious damage to [your] future health."⁹⁹ The ETS levels must violate contemporary standards of decency.¹⁰⁰ To obtain an injunction against further ETS exposure, you do not need to demonstrate any actual physical injury.¹⁰¹

Note that claiming prison officials are deliberately indifferent to the risk of future harm is different from claiming deliberate indifference to a current, ongoing harm.¹⁰² You can claim that ETS exposure affects your current health, but you have to prove that the exposure is making a serious medical problem worse.¹⁰³ In *Talal v. White*, the Sixth Circuit ruled that a state prison violated the objective component of the *Helling* test by forcing a non-smoking incarcerated person with a serious medical need to share a cell with an incarcerated person who smoked.¹⁰⁴ However, the non-smoking incarcerated person had to provide a lot of evidence. For example, he documented that he suffered

95. *Helling v. McKinney*, 509 U.S. 25, 34–35, 113 S. Ct. 2475, 2481–2482, 125 L. Ed. 2d 22, 32–33 (1993) (holding that an incarcerated person may prove that his involuntary exposure to environmental tobacco smoke is significant enough that his future health is unreasonably endangered).

96. *See Grant v. Coughlin*, No. 91 Civ. 3433 (RWS), 1992 U.S. Dist. LEXIS 8003, at *9 (S.D.N.Y. June 9, 1992) (*unpublished*) (explaining that throat and lung irritation and a risk of serious medical harm do not meet the serious medical requirement necessary for an 8th Amendment violation).

97. *Helling v. McKinney*, 509 U.S. 25, 33–34, 113 S. Ct. 2475, 2480–2481, 125 L. Ed. 2d 22, 31–32 (1993) (emphasis added).

98. *Helling v. McKinney*, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 33 (1993).

99. *Helling v. McKinney*, 509 U.S. 25, 35–36, 113 S. Ct. 2475, 2481–2482 125 L. Ed. 2d 22, 32–33 (1993) (finding that an incarcerated person whose cellmate smoked five packs of cigarettes a day, stated an 8th Amendment deliberate indifference cause of action against prison officials by alleging they "exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health"). Note that *Helling* provides for injunctive relief, not monetary damages; *see also Fontroy v. Owens*, 150 F.3d 239, 244 (3d Cir. 1998) (holding that no damages are available "for emotional distress allegedly caused by exposure to asbestos without proof of physical injury").

100. *Helling v. McKinney*, 509 U.S. 25, 32, 113 S. Ct. 2475, 2480, 125 L. Ed. 2d 22, 29 (1993).

101. *Shepherd v. Hogan*, 181 F. App'x 93, 95 (2d Cir. 2006) (*unpublished*) (finding that future risk can constitute a substantial risk of serious harm, even if no symptoms are currently present); *Smith v. Carpenter*, 316 F.3d 178, 188 (2d Cir. 2003) ("[A]n Eighth Amendment claim may be based on . . . exposing an inmate to an unreasonable risk of future harm and . . . actual physical injury is not necessary in order to demonstrate an Eighth Amendment violation.").

102. *Lehn v. Holmes*, No. 99-919-GPM, 2005 U.S. Dist. LEXIS 22653, at *11–13 (S.D. Ill. Sept. 28, 2005) (*unpublished*) (noting that the incarcerated person's ongoing symptoms, headaches, and burning eyes would be insufficient to meet the objective standard in a claim for current injury, but sufficient in a claim for future harm).

103. *Goffman v. Gross*, 59 F.3d 668, 671–672 (7th Cir. 1995) (ruling that prison officials had not acted with deliberately indifferent when they refused to give an incarcerated person a non-smoking cellmate because the incarcerated person had not shown a serious medical condition made worse by exposure to second-hand smoke—even though he had only one lung because of lung cancer); *Grant v. Coughlin*, No. 91 Civ. 3433 (RWS), 1992 U.S. Dist. LEXIS 8003, at *9 (S.D.N.Y. June 9, 1992) (*unpublished*) (holding that irritation of the throat and lungs caused by ETS was not a serious medical condition).

104. *Talal v. White*, 403 F.3d 423, 427 (6th Cir. 2005).

from ETS allergy, sinus problems, and dizziness.¹⁰⁵ Additionally, he showed that the prison medical staff had recommended that he have a non-smoking cell partner.¹⁰⁶ Two issues relevant to the subjective standard of deliberate indifference are whether your prison has adopted a smoking policy and how that policy is administered.¹⁰⁷

4. Other Environmental Health and Safety Cases

Courts have ruled that other environmental and safety conditions can violate the Eighth Amendment. For example, courts have ruled that inadequate ventilation and deprivation of outdoor exercise can be unconstitutional.¹⁰⁸ In addition, courts have found that excessive heat, excessive cold, polluted water, toxic or noxious fumes, exposure to sewage, lack of fire safety, inadequate food or unsanitary food service, inadequate lighting or constant lighting, exposure to insects, rodents and other vermin, exposure to asbestos, and exposure to the extreme behavior of severely mentally ill incarcerated people violate incarcerated people's Eighth Amendment rights.¹⁰⁹

105. Talal v. White, 403 F.3d 423, 427 (6th Cir. 2005).

106. Talal v. White, 403 F.3d 423, 427 (6th Cir. 2005); *but see* Henderson v. Sheahan, 196 F.3d 839, 846 (7th Cir. 1999) (ruling that the plaintiff did not show a serious medical need when he alleged the "relatively minor" injuries of "breathing problems, chest pains, dizziness, sinus problems, headaches and a loss of energy").

107. Helling v. McKinney, 509 U.S. 25, 35–36, 113 S. Ct. 2475, 2481–2482, 125 L. Ed. 2d 22, 33–34 (1993) (ruling that an incarcerated person whose cellmate smoked five packs of cigarettes per day could have a cognizable claim under the 8th Amendment and that the subjective element of the claim (deliberate indifference) should be evaluated in light of prison policies on smoking); *see also* Shepherd v. Hogan, 181 F. App'x 93, 95 (2d Cir. 2006) (*unpublished*) (ruling that an incarcerated person sharing a room with a chain smoker for a month, a situation that was inappropriate under prison procedures and which the prison grievance committee condemned, was sufficient grounds for a reasonable jury to find a constitutional violation).

108. Keenan v. Hall, 83 F.3d 1083, 1089–1090 (9th Cir. 1996), *opinion amended on denial of reh'g*, Keenan v. Hall, 135 F.3d 1318 (9th Cir. 1998) (finding that depriving an incarcerated person of outdoor exercise for six months violated the 8th Amendment).

109. Gates v. Cook, 376 F.3d 323, 334, 339–340 (5th Cir. 2004) (ruling that a high probability of heat-related illness can provide the basis for an 8th Amendment claim); Gaston v. Coughlin, 249 F.3d 156, 164–166 (2d Cir. 2001) (finding that exposure to freezing and sub-zero temperatures due to a broken window can provide the basis for an 8th Amendment claim); Palmer v. Johnson, 193 F.3d 346, 352–353 (5th Cir. 1999) (finding outdoor and overnight confinement sufficient for a constitutional violation); Dixon v. Godinez, 114 F.3d 640, 643–644 (7th Cir. 1997) (ruling that prison officials' deliberate indifference to cold temperatures in an incarcerated person's cell and an incarcerated person's extended exposure to cold temperatures can provide the basis for a claim); Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (ruling that an incarcerated person may have a claim for black worms in drinking water); Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989) (holding that a claim alleging polluted drinking water was not frivolous); Johnson-El v. Schoemehl, 878 F.2d 1043, 1054–1055 (8th Cir. 1989) (finding that spraying pesticides into housing units can provide the basis for a claim); Ramos v. Lamm, 639 F.2d 559, 569–570 (10th Cir. 1980) (finding that the plaintiff can base a claim on inadequate ventilation causing mold and fungus growth); Cody v. Hillard, 599 F. Supp. 1025, 1032, 1048 (D.S.D. 1984) (finding that the incarcerated people could base a claim on inadequate ventilation of toxic fumes in their workplaces), *aff'd in part and rev'd in part on other grounds*, Cody v. Hillard, 830 F.2d 912 (8th Cir. 1987) (en banc). *But see* Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (finding that there was no 8th Amendment violation where an incarcerated person suffered migraine headaches as a result of noise and fumes during three-week long housing unit renovation); DeSpain v. Uphoff, 264 F.3d 965, 977 (10th Cir. 2001) (finding that exposure to flooding and human waste can provide the basis for an 8th Amendment claim); McCord v. Maggio, 927 F.2d 844, 846–847 (5th Cir. 1991) (finding that backup of sewage in living spaces can provide the basis an 8th Amendment claim); Hoptowit v. Spellman, 753 F.2d 779, 783–784 (9th Cir. 1985) (holding that substandard fire prevention and other safety hazards that expose incarcerated people to an unreasonable threat of injury provide the basis for a claim); Phelps v. Kapnolas, 308 F.3d 180, 185–187 (2d Cir. 2002) (finding that providing a nutritionally inadequate diet to an incarcerated person, despite knowing that such a diet cause pain to the incarcerated person, can provide the basis for a claim); Gates v. Cook, 376 F.3d 323, 334–335 (5th Cir. 2004) (finding that inadequate lighting can provide the basis for an 8th Amendment claim); Keenan v. Hall, 83 F.3d 1083, 1090–1091 (9th Cir. 1996), *opinion amended on denial of reh'g*, Keenan v. Hall, 135 F.3d 1318 (9th Cir. 1998) (finding that constant illumination can provide the basis for an 8th Amendment claim); Gates v. Cook, 376 F.3d 323, 334 (5th Cir. 2004) (finding that mosquito infestation combined with filthy cells and too much heat can provide the basis for an 8th Amendment claim); Gaston v. Coughlin, 249 F.3d 156, 165–166 (2d Cir. 2001) (finding that the incarcerated person properly stated an 8th

5. An Incarcerated Person's Right to Psychiatric Care

This Section briefly summarizes your right to psychiatric (mental health) care. This includes your right to refuse treatment. For more information, read Chapter 29 of the *JLM*, "Special Issues for Incarcerated People with Mental Illness."

You have the same right to mental health care that you have to physical health care. Most courts recognize that there is no difference between an incarcerated person's right to physical and mental health treatment.¹¹⁰ However, your right to mental health care may include only necessary treatment that does not cost an unreasonable amount or take an unreasonable amount of time.¹¹¹ Nonetheless, some courts have held that an increased level of care is necessary for mental health patients. For example, courts may require a minimum number of acute-care (active, short-term care for a severe injury or illness), intermediate-care beds, and specialized physicians on staff at all times.¹¹² In 2011, the Supreme Court upheld a "remedial order" (a court order requiring someone to comply with a duty) issued by a California court that requires prisons to provide adequate resources to incarcerated people with mental disorders.¹¹³

If you believe the prison has violated your right to mental health care, you can make a claim against prison officials for deliberate indifference to your Eighth Amendment rights. For example, in one case, the relatives of a person incarcerated in Georgia who committed suicide sued the state for deliberate indifference.¹¹⁴ The incarcerated person had a history of mental illness and took anti-depressants, but the prison psychiatrist stopped his medications.¹¹⁵ When a prison official learned that the incarcerated person was thinking about suicide, he did not do anything. The court found that these events could establish deliberate indifference to the incarcerated person's health in violation of the Eighth Amendment.

Amendment claim based on mice constantly entering cell, combined with freezing temperatures and occasional exposure to sewage water); *Powell v. Lennon*, 914 F.2d 1459, 1463–1464 (11th Cir. 1990) (finding that exposure to asbestos provide the basis for an 8th Amendment claim); *compare with* *McNeil v. Lane*, 16 F.3d 123, 125 (7th Cir. 1993) (holding that exposure to "moderate levels of asbestos" could not provide the basis for a claim); *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (noting that exposure to the constant screaming and feces-smearing of mentally ill incarcerated people "contributes to the problems of uncleanness and sleep deprivation, and by extension mental health problems, for the other inmates").

110. *See* *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (denying that there is a difference between the right to mental and physical treatment); *see also* *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979) (holding that seriously mentally ill incarcerated people have a right to adequate treatment and that psychiatric and psychological treatment should be held to the same standard as medical treatment for physical illnesses).

111. *Bowring v. Godwin*, 551 F.2d 44, 47–48 (4th Cir. 1977) (creating a three-part test for the provision of mental health services. The requirements are as follows. First, the incarcerated person's symptoms must show a serious disease or injury. Second, such a disease or injury must be curable or able to be substantially alleviated. And, third, there must be potential for substantial harm to the incarcerated person because of a delay or denial of care).

112. *Laaman v. Helgemoe*, 437 F. Supp. 269, 327 (D.N.H. 1977) (holding that incarcerated people were not being given adequate medical or mental health care, and ordering that the New Hampshire State Prison medical staff "consist of a full-time physician and five licensed nurses or qualified paramedics"; that at least two medical staffers be male; that emergency medical care be available "on a twenty-four hour basis, seven days a week"; and that a member of the medical staff be present at the prison "at all times").

113. *Brown v. Plata*, 563 U.S. 493, 493–498, 131 S. Ct. 1910, 1917–1920, 170 L. Ed. 2d 969, 976–979 (2011) (upholding the remedial order because (1) a shortage of prison medical and mental healthcare staff was causing significant delays in treatment, (2) overcrowding and unsanitary conditions made it difficult to deliver proper medical and mental healthcare, and (3) overcrowding promoted unrest and violence potentially detrimental to an incarcerated person's mental illness).

114. *Greason v. Kemp*, 891 F.2d 829, 834 (11th Cir. 1990) (holding that deliberate indifference to inadequate psychiatric care resulting in a suicide could be a violation of the 8th Amendment).

115. *Greason v. Kemp*, 891 F.2d 829, 835 (11th Cir. 1990).

6. Right to Refuse Psychiatric Treatment

You also have a limited right to refuse mental health treatment. In *Washington v. Harper*, the Supreme Court used a “rational basis test” (a test to determine whether the government’s action was reasonably related to a legitimate goal)¹¹⁶ to decide whether a prison could require an incarcerated person to undergo psychiatric treatment.¹¹⁷ The Court held that if the prison’s actions are reasonably related to legitimate prison interests, then the action is proper. “[G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat an incarcerated person who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.”¹¹⁸

If you refuse to take drugs prescribed for your mental illness, the prison must go through certain procedures before they can force you to take the medication. The Court held that the following procedures satisfies the Due Process Clause:

[A] medical finding, that a mental disorder exists which is likely to cause harm if not treated . . . [and] the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, [which] ensures that the treatment in question will be ordered only if it is in the prisoner’s medical interest.¹¹⁹

In other words, before a prison can give you medication against your will, a psychiatrist must prescribe medication. Additionally, a second psychiatrist must agree that you need the medication and that your mental disorder is likely dangerous if untreated.

In *Washington v. Harper*, the Court held the state’s policy of medicating unwilling patients was constitutional because it met these requirements.¹²⁰ In *Washington*, the state regulation required that any decision to administer drugs against a patient’s will must be made by a committee.¹²¹ This committee was required to include a neutral psychiatrist and a neutral psychologist, neither of whom were currently treating the incarcerated person.¹²² The prison superintendent could accept or reject the committee’s decision, and the incarcerated person had the option to ask a court to review the committee’s decision.¹²³

You are also entitled to certain due process protections. These protections include a hearing, and must take place before prison authorities can transfer you to a psychiatric hospital.¹²⁴ In *Vitek v. Jones*, the Supreme Court ruled that it is unconstitutional to subject an incarcerated person to behavior modification treatment without a legitimate reason.¹²⁵

In addition, different psychiatric programs are used to treat incarcerated people who were convicted of sex offenses. Sometimes, incarcerated people who have not been convicted of sex offenses can still be classified as “sex offenders.” In some cases, prison officials can prevent these incarcerated people from getting paroled by claiming that the incarcerated people did not complete a required

116. Black’s Law Dictionary 592 (9th ed. 2009).

117. *Washington v. Harper*, 494 U.S. 210, 224–225, 110 S. Ct. 1028, 1038, 108 L. Ed. 2d 178, 200 (1990).

118. *Washington v. Harper*, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–1040, 108 L. Ed. 2d 178, 201–202 (1990).

119. *Washington v. Harper*, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990).

120. *Washington v. Harper*, 494 U.S. 210, 236, 110 S. Ct. 1028, 1044, 108 L. Ed. 2d 178, 207 (1990).

121. *Washington v. Harper*, 494 U.S. 210, 215, 110 S. Ct. 1028, 1033–1034, 108 L. Ed. 2d 178, 183 (1990).

122. *Washington v. Harper*, 494 U.S. 210, 215, 110 S. Ct. 1028, 1033–1034, 108 L. Ed. 2d 178, 183 (1990).

123. *Washington v. Harper*, 494 U.S. 210, 229, 110 S. Ct. 1028, 1040, 108 L. Ed. 2d 178, 203 (1990).

124. *Vitek v. Jones*, 445 U.S. 480, 494–495, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 566 (1980) (holding that before an incarcerated person is transferred to a mental facility, he should receive written and timely notice, legal counsel, a hearing before an independent decisionmaker with the opportunity to present and confront witnesses, and a written decision).

125. *Vitek v. Jones*, 445 U.S. 480, 493–494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565–566 (1980); see also *Clonce v. Richardson*, 379 F. Supp. 338, 348–350 (W.D. Mo. 1974) (ruling that defendant is entitled to a pre-transfer hearing before the prison can subject him to a behavior modification treatment program).

therapeutic program. Courts disagree on whether a hearing is required before prison officials can make this classification.¹²⁶ See Chapter 36 of the *JLM*, “Special Considerations for Sex Offenders,” for more information on mandatory sex offender programs.

7. Right to Dental Care

In some cases, the right to adequate medical care includes dental care.¹²⁷ The Second Circuit has ruled that a “claim regarding inadequate dental care, like one involving medical care, can be based on various factors, such as the pain suffered by the plaintiff, . . . the deterioration of the teeth due to a lack of treatment, . . . or the inability to engage in normal activities.”¹²⁸ Furthermore, because of a federal class action lawsuit, the California Department of Corrections and Rehabilitation (“CDCR”) agreed to provide dental care to all incarcerated people.¹²⁹

Like inadequate medical care, dental care is also governed by the deliberate indifference/serious needs analysis.¹³⁰ To prove an Eighth Amendment claim of inadequate dental care, you have to show both deliberate indifference, like in other inadequate medical care claims,¹³¹ *and* that the denial caused you “substantial harm.”¹³²

In practice, courts often distinguish between preventive dental care, such as cleanings or fluoride treatments, and dental emergencies, such as cavities. In *Dean v. Coughlin*, the court held that prison officials had violated the Eighth Amendment when they refused to provide serious dental treatments such as fillings and crowns.¹³³ However, the court also found that incarcerated people had no right to

126. *Compare* Neal v. Shimoda, 131 F.3d 818, 831 (9th Cir. 1997) (requiring the prison to conduct a hearing before classifying an incarcerated person who was not convicted of a sex offense as a “sex offender”), *with* Grennier v. Frank, 453 F.3d 442, 446 (7th Cir. 2006) (holding that a prison can label an incarcerated person as a “sex offender” without a hearing).

127. *See, e.g.*, Board v. Farnham, 394 F.3d 469, 480–482 (7th Cir. 2005) (finding that breaking off teeth rather than extracting them and denial of toothpaste for protracted periods support an 8th Amendment claim); Hartsfield v. Colburn, 371 F.3d 454, 457–458 (8th Cir. 2004) (finding that six weeks’ delay in seeing a dentist, resulting in infection and loss of teeth, raised an 8th Amendment claim); Farrow v. West, 320 F.3d 1235, 1244–1247 (11th Cir. 2003) (holding that an incarcerated person with only two lower teeth who suffered pain, continual bleeding, swollen gums, and weight loss had a serious medical need, and that a delay of 18 months before the incarcerated person received dentures raised an issue concerning whether there was deliberate indifference); Boyd v. Knox, 47 F.3d 966, 969 (8th Cir. 1995) (finding that a three-week delay in dental care, coupled with knowledge of the incarcerated person’s suffering, can support a finding of “deliberate indifference”).

128. *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998).

129. *Perez v. Tilton*, 2006 No. C 05-05241 JSW, 2006 U.S. Dist. LEXIS 63318, at *2 (N.D. Cal. Aug. 21, 2006) (*unpublished*).

130. *See, e.g.*, Board v. Farnham, 394 F.3d 469, 481–482 (7th Cir. 2005) (finding that there could be deliberate indifference when an incarcerated person asked for dental supplies 15 times and was repeatedly ignored); Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (holding that extreme pain and swelling caused by infected teeth would have been obvious to a layperson and thus submission of verifying medical evidence was unnecessary); Farrow v. West, 320 F.3d 1235, 1244–1247 (11th Cir. 2003) (finding that some medical conditions are serious enough that even a few hours delay in treatment could constitute deliberate indifference); Harrison v. Barkley, 219 F.3d 132, 137–139 (2d Cir. 2000) (finding that refusal to treat incarcerated person’s tooth cavity led to a sufficiently serious medical condition because it was a degenerative condition that could cause acute infections and pain).

131. *See* Clifton v. Robinson, 500 F. Supp. 30, 35 (E.D. Pa. 1980) (holding that because the incarcerated person claiming denial of dental care did not allege “substantial harm,” the claim failed to show “deliberate indifference”).

132. *See* Hunt v. Dental Dep’t, 865 F.2d 198, 199–200 (9th Cir. 1989) (holding that a three-month delay in replacing dentures caused gum disease and possibly weight loss, constituting substantial harm).

133. *Dean v. Coughlin*, 623 F. Supp. 392, 404 (S.D.N.Y. 1985), *vacated in part and remanded on other grounds*, *Dean v. Coughlin*, 804 F.2d 207, 216 (2d Cir. 1986).

preventive care.¹³⁴ It is constitutional for the prison to require you to pay for preventative care yourself.¹³⁵

But, note that in some circumstances, limiting care to pulling teeth that could be saved may be unconstitutional.¹³⁶ In *Chance v. Armstrong*, the court ruled that it was unconstitutional for the prison to pull an incarcerated person's teeth rather than repair them to save money.¹³⁷ The court emphasized that because of the prison's decision, the incarcerated person was in great pain for six months, could not chew properly, and lost his teeth.¹³⁸

D. Medical Care for Female Incarcerated People

1. Accessing Medical Care

Like male incarcerated people, female incarcerated people have an Eighth Amendment constitutional right to medical care.¹³⁹ Female incarcerated people should read this entire Chapter, not only this Part, to understand prison health care rights. This Part of the Chapter only explains special medical issues and procedures for women, such as gynecological examinations, abortion, and pregnancy.

Though state and federal laws guarantee a right to the medical services described in this Part, prisons do not always provide these services.¹⁴⁰ As a result, it is important to know your rights. You should consult your prison's regulations about medical care, as well as federal and state law. For New York, the regulations about prison health care are found in Part 7651 of Title 9 (Executive) of the Codes, Rules and Regulations.¹⁴¹ If your prison or the corrections department in your state does not have such regulations, you should find out if your institution has a health care manual or if your state's corrections department has an operation manual. In Texas, every correctional facility must have a written Health Services Plan describing procedures for regularly scheduled sick calls, emergency services, long-term care, and other medical services.¹⁴² In California, health care provisions are found in Chapter Nine of the Department Operations Manual of the California Department of Corrections.¹⁴³

134. See *Dean v. Coughlin*, 623 F. Supp. 392, 404 (S.D.N.Y. 1985). Specifically, the court held: “[A] prisoner is entitled to treatment only for conditions that cause pain, discomfort, or threat to good health, not treatment to ward off such conditions.” With regard to preventative dentistry, the court stated that “[a]lthough [it] would probably save the clinic time in the long run, the Constitution does not require wise dentistry, only dentistry which responds to inmates’ pain and discomfort.” See also *Grubbs v. Bradley*, 552 F. Supp. 1052, 1129 (M.D. Tenn. 1982) (holding that delaying an incarcerated person’s access to routine and preventive dental care is not “deliberate indifference”).

135. See *Taylor v. Garbutt*, 185 F.3d 869, 869 (9th Cir. 1999) (finding that a prison regulation requiring a co-payment for dental services that the incarcerated person requested does not violate the 8th Amendment); *Hogan v. Russ*, 890 F. Supp. 146, 149 (N.D.N.Y. 1995) (“Defendants did not deny plaintiff the ability to obtain specialized medical attention [with a periodontist]. They merely stated that it was not prison policy to pay for such specialized care and that such care would be made available to plaintiff at his own expense.”).

136. *Chance v. Armstrong*, 143 F.3d 698, 703–704 (2d Cir. 1998) (ruling that pulling teeth because it was cheaper than saving them violated the 8th Amendment).

137. *Chance v. Armstrong*, 143 F.3d 698, 703–704 (2d Cir. 1998).

138. *Chance v. Armstrong*, 143 F.3d 698, 703–704 (2d Cir. 1998).

139. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (holding that deliberate indifference to the serious medical needs of incarcerated people is banned by the 8th Amendment because it constitutes an “unnecessary and wanton infliction of pain”) (citation omitted).

140. See 28 C.F.R. § 522.20 (2020) (requiring federal prisons to conduct health screenings on new incarcerated people); 28 C.F.R. § 549.10 (2020) (requiring federal prisons to manage and treat infectious disease); N.Y. CORRECT. LAW § 137(6)(c) (McKinney 2014) (directing that incarcerated people in solitary confinement must have a daily health check).

141. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 7651.1–7651.33 (2020).

142. 37 TEX. ADMIN. CODE § 273.2 (2020).

143. Cal. Dept. of Corr. and Rehab. Adult Institutions, Programs, and Parole, Operations Manual, ch. 9 (2018), *available at* https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2019/07/Ch_9_2019_DOM.pdf (last visited Oct. 13, 2020).

Many woman who are incarcerated have an increased risk of chronic health problems, such as HIV, hepatitis, asthma, gynecological diseases, nutrition problems, and convulsive seizure disorders.¹⁴⁴ Federal law requires all federal incarcerated people to receive a medical examination within twenty-four hours of arriving at the prison.¹⁴⁵ During this exam, you should be tested for sexually transmitted infections (“STIs”) and tuberculosis (“TB”). Some courts have ruled that these tests are also required at certain state prisons.¹⁴⁶ Many states have TB screening plans, which require screening of incarcerated people in facilities of certain sizes or after an incarcerated person has been held for a certain period of time.¹⁴⁷ Read Chapter 26 of the *JLM*, “Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison,” for more information. Many female incarcerated people do not receive a medical exam after being admitted, even though prisons have a duty to perform these exams.¹⁴⁸ You should also receive check-ups and diagnostic tests. However, some prisons do not follow the law.¹⁴⁹

(a) Abortion

According to *Roe v. Wade*, every woman has the right to decide whether to have an abortion or to go forward with a pregnancy.¹⁵⁰ However, states are allowed to place restrictions or limitations on a woman’s right to an abortion, like requiring parental consent for minors, as long as they do not place an “undue burden” on a woman’s right to choose.¹⁵¹ Courts decide what kind of obstacles might count as an undue burden.

If you are a pregnant and incarcerated in federal prison, federal regulations require that prison officials offer you medical, religious, and social counseling before you have an abortion.¹⁵² You may accept or decline this counseling, and officials should allow you to make the final decision on whether or not to have an abortion.¹⁵³ Once you have received the offer of counseling, and have notified the prison in writing that you wish to have an abortion, the prison must arrange for the abortion.¹⁵⁴

If you are a pregnant and incarcerated in state prison, your rights will mostly depend on the abortion laws in your state. In New York, abortions are allowed if a doctor has a “reasonable belief that [the abortion] is necessary to preserve [your] life” or the abortion occurs in the first “twenty-four weeks . . . of [the] pregnancy.”¹⁵⁵

144. See Amnesty Int’l, *Not Part of My Sentence: Violations of the Human Rights of Women in Custody* (1999), available at <https://www.amnesty.org/download/Documents/144000/amr510191999en.pdf> (last visited Oct. 13, 2020).

145. See 28 C.F.R. § 522.20 (2020) (requiring federal prisons to conduct health screenings on new incarcerated people).

146. See, e.g., *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (noting that lack of screening for infectious diseases resulted in a serious threat to incarcerated people’s well-being); *Feliciano v. Gonzalez*, 13 F. Supp. 2d 151, 208 (D.P.R. 1998) (holding that not screening incoming incarcerated people for infectious diseases, including TB, is unconstitutional); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 867 (D.D.C. 1989) (holding lack of syphilis and TB testing to be a systemic failure showing deliberate indifference).

147. See, e.g., 37 TEX. ADMIN. CODE § 273.7 (2020); CAL. PENAL CODE § 7573(b) (West 2011).

148. See Amnesty Int’l, *“Not Part of My Sentence”: Violations of the Human Rights of Women in Custody* (1999), available at <https://www.amnesty.org/download/Documents/144000/amr510191999en.pdf> (last visited Oct. 13, 2020).

149. See *Women Prisoners of the D.C. Dept. of Corr. v. District of Columbia*, 968 F. Supp. 744, 747 (D.D.C. 1997) (holding that female incarcerated people have a right to diagnostic evaluations similar to those provided for men).

150. *Roe v. Wade*, 410 U.S. 113, 153–154, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177–178 (1973).

151. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876–877, 112 S. Ct. 2791, 2820–2821, 120 L. Ed. 2d 674, 714–715 (1992) (explaining the restrictions that could constitute an “undue burden”).

152. 28 C.F.R. § 551.23(b) (2020).

153. 28 C.F.R. § 551.23(a)–(b) (2020).

154. 28 C.F.R. § 551.23(c) (2020).

155. N.Y. PENAL LAW § 125.05(3) (McKinney 2020).

Some states, like California and New York, have codes that say that woman who are incarcerated have the same right to an abortion as any other woman in the state.¹⁵⁶ In other states, there may be additional restrictions on incarcerated people seeking abortions. You should first look at your state code or prison regulations. Few courts have ruled on the issue of whether prisons may treat female incarcerated people differently than other women in the state when it comes to the right to get an abortion. The Third Circuit has held that female incarcerated people have the same right to an abortion as non-incarcerated women in the same state.¹⁵⁷ The court found that requiring a woman to get a court-ordered release for an elective abortion was an undue burden on her constitutionally-protected right to have an abortion, as well as a violation of her Eighth Amendment right to medical treatment in prison. The court classified an elective abortion as a “serious medical need” where denial or undue delay in providing the procedure could cause the incarcerated person’s condition to become “irreparable.”¹⁵⁸ The court also found that a prison is not required to pay for an incarcerated person’s abortion, but if you request an abortion and are entitled to one under state law, then a prison official is required to transport you to a clinic.¹⁵⁹

Some courts have decided that restrictions on elective abortions violate the Fourteenth Amendment, but not the Eighth Amendment.¹⁶⁰ In one case, the Eighth Circuit considered the constitutionality of a Missouri Department of Corrections (“MDC”) policy prohibiting transportation of pregnant incarcerated people off-site for elective, non-therapeutic abortions. The court found that the MDC policy was unconstitutional under the Fourteenth Amendment, and that incarcerated women do not lose their right to abortions once incarcerated.¹⁶¹ However, in a different case, the Fifth Circuit upheld a prison policy requiring incarcerated people to get a court order for abortions because the policy was implemented reasonably and was “rationally connected to the legitimate penological objectives [prison security] served.”¹⁶²

Note that if you ask for an abortion but never get one because of prison officials’ negligence, you probably do not have a constitutional claim. In one case, a pretrial detainee requested an abortion, but because of administrative inefficiency and unreasonable delays by prison officials the abortion was scheduled too late to be performed.¹⁶³ The court found that the prison officials were not deliberately indifferent, only negligent, so their conduct was not in violation of the Eighth Amendment.¹⁶⁴ In a

156. CAL. PENAL CODE § 4028 (West 2011); N.Y. COMP. CODES R. & REGS. tit. 14, § 27.6(c) (2020).

157. *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 343–345 (3d Cir. 1987) (holding abortion restrictions were not justified by state’s interest in childbirth because the interest does not further rehabilitation, security, or deterrence); *see also Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999) (holding that a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability).

158. *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 349 (3d Cir. 1987); *see also Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991) (finding that an abortion qualifies as a serious medical need).

159. *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 341–342 (3d Cir. 1987); *see also Roe v. Crawford*, 514 F.3d 789, 797 (8th Cir. 2008) (holding that by completely eliminating any alternative means of obtaining an elective abortion, the prison’s policy “represent[ed] precisely the ‘exaggerated response to . . . security objectives’” forbidden by case law) (citation omitted). *But see Victoria W. v. Larpenter*, 369 F.3d 475, 487 (5th Cir. 2004) (deeming a prison policy that required incarcerated people to obtain court orders before they could leave the prison for elective medical procedures “rationally connected to the legitimate penological objectives served”).

160. *Roe v. Crawford*, 514 F.3d 789, 796–797, 801 (8th Cir. 2008) (holding that refusal to provide an incarcerated person access to an elective, non-therapeutic abortion does not constitute an 8th Amendment violation, but that “an elective abortion . . . is a liberty interest protected under the Fourteenth Amendment”).

161. *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008).

162. *Victoria W. v. Larpenter*, 369 F.3d 475, 487 (5th Cir. 2004). Note that, because the right to have an abortion is a constitutional right, any prison policy that restricts that right must be “reasonably related to legitimate penological interests.” *See, e.g., Doe v. Arpaio*, 214 Ariz. 237, 241, 150 P.3d 1258, 1262 (Ariz. Ct. App. 2007).

163. *Bryant v. Maffucci*, 923 F.2d 979, 980–982 (2d Cir. 1991).

164. *Bryant v. Maffucci*, 923 F.2d 979, 986 (2d Cir. 1991) (holding that prison officials’ negligent failure to provide an abortion did not violate incarcerated person’s rights).

similar case, the Sixth Circuit found that prison officials were merely negligent when they incorrectly estimated the due date of a pregnant incarcerated person and thus denied her access to abortion facilities.¹⁶⁵

(b) Pregnancy

Your treatment during pregnancy is important.¹⁶⁶ Prisons should (but might not) have policies and procedures for risk assessment and treatment of pregnant incarcerated people, diet and nutrition, prenatal care, and counseling.

In New York State, you have a right to “comprehensive prenatal care . . . which shall include, but is not limited to, regular medical examinations, advice on appropriate levels of activity and safety precautions, nutritional guidance, and HIV education.”¹⁶⁷ Shortly before you are about to give birth, you should be moved from the jail or prison to some other location “a reasonable time before the anticipated birth of [your] child,” and “provided with comfortable accommodations, maintenance and medical care.”¹⁶⁸ You will be returned to the prison or jail “as soon after the birth of [your] child as the state of [your] health will permit.”¹⁶⁹ In California, a pregnant person incarcerated in a local (city, county, or regional) detention facility has a right to receive necessary medical services from the physician of her choice, but that individual must pay for any private doctors.¹⁷⁰ California recently amended its state regulations concerning incarcerated people who are pregnant. The new rules provide for routine physical examinations as well as mandatory nutritional guidelines to be followed by prison facilities when caring for incarcerated people who are pregnant.¹⁷¹ In particular, the use of leg and waist restraints is subject to stringent requirements.¹⁷²

In determining whether prison officials violated your Eighth Amendment rights by denying you medical care, courts generally consider the amount of time left before you reach the full term of your pregnancy, the symptoms of labor that you have exhibited, any previous or potential complications with your pregnancy, and the reaction of prison officials to your condition and requests.¹⁷³ In a federal case in Wisconsin, a woman who was incarcerated charged prison nurses with violating her Eighth Amendment rights by failing to bring her to the hospital when she was in labor.¹⁷⁴ The incarcerated person gave birth in her prison cell.¹⁷⁵ The court denied summary judgment and held that a reasonable jury could conclude that the nurses had shown “deliberate indifference” toward the pregnant incarcerated person because the nurses ignored the incarcerated person’s request to go to the hospital and they “only examined [her] through the small tray slot in the cell door, rather than conducting a more comprehensive exam.”¹⁷⁶

Incarcerated people who are pregnant have also had some success in lawsuits alleging negligence against prisons. One court found a prison liable for the wrongful death of a premature baby born to an incarcerated person because the prison was negligent. Prison officials did not follow the prison’s

165. Gibson v. Matthews, 926 F.2d 532, 536–537 (6th Cir. 1991).

166. Books can help you learn to care for yourself while pregnant. One good resource is *What To Expect When You're Expecting* by Heidi E. Murkoff and Sharon Mazel (Workman Publishing Company 2008) (1984). If you do not have access to books like this one, consult a medical professional at your facility regarding questions you might have about your pregnancy. You can also find information online at websites like “What to Expect,” available at <http://www.whattoexpect.com> (last visited Oct. 13, 2020).

167. N.Y. COMP. CODES R. & REGS. tit. 9, § 7651.17(a) (2020).

168. N.Y. CORRECT. LAW § 611(1)(a) (McKinney 2014).

169. N.Y. CORRECT. LAW § 611(1)(c) (McKinney 2014).

170. CAL. PENAL CODE § 4023.6 (West 2011).

171. CAL. PENAL CODE §§ 3403, 3406, 3424 (West 2011).

172. CAL. PENAL CODE § 3407 (West 2011).

173. Webb v. Jessamine Cty. Fiscal Court, 802 F. Supp. 2d 870, 880 (E.D. Ky. 2011).

174. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1005 (E.D. Wis. 2003).

175. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1007 (E.D. Wis. 2003).

176. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1009 (E.D. Wis. 2003); see also Webb v. Jessamine Cty. Fiscal Court, 802 F. Supp. 2d 870 (E.D. Ky. 2011) (rejecting summary judgment for the defendant).

procedures, failed to diagnose the labor despite complaints of bleeding and abdominal pain, and did not bring the incarcerated person to a hospital until it may have been too late to prevent the premature birth.¹⁷⁷

Shackling incarcerated people in labor is unfortunately still common, and many departments of corrections and the Federal Bureau of Prisons allow the use of restraints during labor.¹⁷⁸ This may be changing, however. California has banned shackling you by the wrists or ankles during labor, delivery, and recovery, unless it is necessary for the safety and security of you, the staff, or the public.¹⁷⁹ Similarly, New York does not allow the use of restraints on you during delivery.¹⁸⁰ A D.C. court has struck down a practice of shackling women in their third trimester with leg shackles, handcuffs, a belly chain, and a box that connects the handcuffs and belly chain.¹⁸¹ The court held these practices violated the Eighth Amendment; leg shackles alone provide sufficient security during the third trimester and even these must be removed during labor and for a short period thereafter.¹⁸² The Eighth Circuit also ruled that that a reasonable jury could find that a prison officer violated the Eighth Amendment by shackling an incarcerated person after she went into labor.¹⁸³ According to the court, a jury could infer that the officer “recognized that the shackles interfered with [the incarcerated person’s] medical care, could be an obstacle in the event of a medical emergency, and caused unnecessary suffering at a time when [the incarcerated person] would have likely been physically unable to flee.”¹⁸⁴ The court also wrote in a footnote that a jury could determine the officer was aware of the risks involved in labor because they were obvious.¹⁸⁵

E. Your Right to Informed Consent and Medical Privacy

1. Informed Consent

Before you are treated, you should ask your doctor or other prison health staff what to expect from a medical procedure and its risks and alternatives. Depending on your state, you may have both a statutory and constitutional right to receive this information and agree to treatment *before* you are treated. Giving “informed consent” means that you agree to your particular medical treatment after your doctor has told you about the purpose of the treatment, its possible side effects, and other alternative treatments.¹⁸⁶

177. *Calloway v. City of New Orleans*, 524 So. 2d 182, 187 (La. Ct. App. 1988); *see also Wells v. La. Dept. of Pub. Safety & Corr.*, 72 So. 3d 910 (La. App. 2 Cir. 2011) (holding that the standard of care imposed upon a confining authority in providing for the medical needs of inmates is that the services be reasonable).

178. ACLU REPRODUCTIVE FREEDOM PROJECT & ACLU NAT’L PRISON PROJECT, *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails, & Detention Centers* (2013) available at https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf (last visited Oct. 13, 2020).

179. CAL. PENAL CODE § 3407(b) (West 2018) (“A pregnant [incarcerated person] in labor, during delivery, or in recovery after delivery, shall not be restrained by the wrists, ankles, or both, unless deemed necessary for the safety and security of the inmate, the staff, or the public.”).

180. N.Y. CORRECT. LAW § 611(1)(c) (McKinney 2014) (“No restraints of any kind shall be used when [an incarcerated] woman is in labor, admitted to a hospital, institution or clinic for delivery, or recovering after giving birth.”).

181. *Women Prisoners of D.C. Dept. of Corr. v. District of Columbia*, 877 F. Supp. 634, 646 (D.D.C. 1994), *vacated in part and remanded on other grounds*, *Women Prisoners of D.C. Dept. of Corr. v. District of Columbia*, 93 F.3d 910, 920–923 (D.C. Cir. 1996).

182. *Women Prisoners of D.C. Dept. of Corr. v. District of Columbia*, 877 F. Supp. 634, 668–669 (D.D.C. 1994), *vacated in part and remanded on other grounds*, *Women Prisoners of D.C. Dept. of Corr. v. District of Columbia*, 93 F.3d 910, 920–923 (D.C. Cir. 1996); *see also Women Prisoners of D.C. Dept. of Corr. v. District of Columbia*, 968 F. Supp. 744 (D.D.C. 1997) (describing settlement after appellate proceedings).

183. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 530–532 (8th Cir. 2009).

184. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 530 (8th Cir. 2009).

185. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 530 n.5 (8th Cir. 2009).

186. To learn more about informed consent issues for incarcerated people with mental illness, see Chapter 29 of the *JLM*, “Special Issues for Incarcerated People with Mental Illness.”

In New York, if you did not give informed consent before you received a medical treatment (meaning that you did not agree to the treatment or were never fully told of the treatment's risks and alternatives), you can bring a state law claim against your doctor or other prison officials for acting without your informed consent.¹⁸⁷ To prove that you did not give your informed consent, you must show (1) that your doctor did not tell you about the risks of the treatment and the alternative treatments available, (2) that a reasonable patient in your position would not have agreed to the treatment if he had been fully informed, and (3) that the lack of consent caused your injury.¹⁸⁸ You must have been injured as a result of the lack of informed consent in order for your claim to succeed.

You may also be able to bring a similar constitutional claim. The Second Circuit held that your constitutionally protected interest in refusing medical treatment under the Fourteenth Amendment includes the related "right to such information as a reasonable patient would deem necessary to make an informed decision regarding medical treatment."¹⁸⁹ In order to succeed on this claim, you must meet a different test. Specifically, you will have to show (1) that government officials failed to provide you with the kind of information that a reasonable patient would need to make an informed decision, (2) that you would have refused the medical treatment if you had been so informed, and (3) that the officials showed deliberate indifference to your right to refuse medical treatment when they failure to provide you with information about the treatment.¹⁹⁰ However, a prison official can still forcibly give you medical treatment even if you do not consent as long as the official reasonably determines that it "furthers a legitimate penological purpose"—for example, one related to prison security.¹⁹¹

2. Medical Privacy

You have constitutional privacy rights protecting your medical information.¹⁹² You are entitled to confidentiality of information about your medical condition and treatment.¹⁹³ But like all incarcerated

187. N.Y. PUB. HEALTH LAW § 2805-d(2) (McKinney 2012) ("The right of action to recover for . . . malpractice based on lack of informed consent is limited to . . . either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body.").

188. N.Y. PUB. HEALTH LAW § 2805-d (McKinney 2012); *see also* Foote v. Rajadhyax, 268 A.D.2d 745, 745, 702 N.Y.S.2d 153, 154 (3d Dept. 2000) (granting an incarcerated person a new trial to show that she had not consented to a root canal).

189. *Pabon v. Wright*, 459 F.3d 241, 246 (2d Cir. 2006) (finding a constitutionally protected interest, but affirming the grant of summary judgment to prison officials because of qualified immunity); *see also* *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir. 1990) ("Prisoners have a right [under the 14th Amendment] to such information as is reasonably necessary to make an informed decision to accept or reject proposed treatment."); *Benson v. Terhune*, 304 F.3d 874, 884–885 (9th Cir. 2002) (explaining that the recognition of the right to medical information is a "reasonable application of Supreme Court precedent").

190. *Pabon v. Wright*, 459 F.3d 241, 246 (2d Cir. 2006).

191. *Pabon v. Wright*, 459 F.3d 241, 246 (2d Cir. 2006).

192. *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("[T]he right to confidentiality includes the right to protection regarding information about the state of one's health . . . [because] . . . there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over.") (quoting *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)); *see also* *Hunnicut v. Armstrong*, No. 04-1565-pr, 152 F. App'x. 34, 35–36 (2d Cir. Oct. 13, 2005) (*unpublished*) (finding that an incarcerated person stated a constitutional privacy claim where the incarcerated person alleged prison publicly discussed his mental health issues in front of other incarcerated people and "allowed non-health staff access to [incarcerated people's] confidential health records").

193. *Doe v. Delie*, 257 F.3d 309, 315–317 (3d Cir. 2001) (noting that a right to privacy in medical information extends to prescription medications and is "particularly strong" for HIV status); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (finding a right to privacy in "transsexuality"); *O'Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) ("Medical information in general, and information about a person's psychiatric health and substance-abuse history in particular, is information of the most intimate kind."); *Hunnicut v. Armstrong*, No. 04-1565-pr, 152 F. App'x. 34, 35–36 (2d Cir. Oct. 13, 2005) (*unpublished*) (finding an allegation that an incarcerated person's mental health consultations in a housing unit within earshot of other incarcerated people stated a constitutional privacy claim).

people's rights, your privacy rights are limited by the needs of prison administration and depend on the circumstances.¹⁹⁴

Courts have “long recognized the general right to privacy in one’s medical information: ‘There can be no question that . . . medical records, which may contain intimate facts of a personal nature, are well within the [scope] of materials entitled to privacy protection.’”¹⁹⁵ The Third Circuit has held that you have a Fourteenth Amendment privacy interest in your medical information because it is among those rights that “are not inconsistent with [your] status as [a] prisoner or with the legitimate penological objectives of the corrections system.”¹⁹⁶ Similarly, the Second Circuit held that you have a constitutional right to keep previously undisclosed medical information confidential as long as the disclosure “is *not* reasonably related to a legitimate penological interest.”¹⁹⁷

In 1996, Congress passed the Health Insurance Portability and Accountability Act (“HIPAA”), which contains significant protections for incarcerated people’s medical privacy rights.¹⁹⁸ Under the final HIPAA privacy rule, identifiable health information pertaining to you has been deemed “protected health information,” or “PHI.” A hospital providing prison health care may disclose PHI to a “correctional institution” or a law enforcement official having lawful custody of an incarcerated person if the correctional institution or law enforcement official represents that disclosing such protected health information is necessary for:

- (1) the provision of health care to such individuals;
- (2) the health and safety of such individual or other incarcerated people;
- (3) the health and safety of officers, employees, or others at the correctional institution;
- (4) the health and safety of such individuals and officers or other persons responsible for the transport of incarcerated people or their transfer from one institution, facility, or setting to another;
- (5) the health and safety of law enforcement on the premises of the correctional institution; or
- (6) the administration and maintenance of the safety, security, and good order of the correctional institution.¹⁹⁹

A prison hospital is allowed to share PHI to entities outside the hospital if the entity says that the information is necessary for any of the purposes listed above. Furthermore, a prison hospital may reasonably rely upon any such representations from public officials regarding your health. However, when you are released from custody—including probation, parole, and supervised release—you are no longer categorized as an “inmate,” and these permitted use and disclosure provisions no longer apply.²⁰⁰

You should also note that some courts have held prison officials liable for disclosing an incarcerated person’s confidential medical information, not because they violated the incarcerated person’s privacy rights but because by disclosing the information, the officials put the incarcerated person in danger.

194. *See generally* Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 403 (1984) (explaining that an incarcerated person’s expectation of privacy is reasonable only when the incarcerated person’s interest in having privacy is greater than the interest of the prison).

195. Doe v. Delie, 257 F.3d 309, 315 (3d Cir. 2001) (quoting United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980)).

196. Doe v. Delie, 257 F.3d 309, 315–317 (3d Cir. 2001) (quoting Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501 (1974)).

197. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) (concluding that “the gratuitous disclosure of [an incarcerated person’s] confidential medical information as humor or gossip” is not reasonably related to penological interests and violates the prisoner’s constitutional right to privacy). The court noted that “disclosure of an inmate’s HIV-positive status [could] further legitimate penological interests” when, for example, a prison needs to segregate HIV-positive incarcerated people or when prison officials need “to warn prison officials and inmates who otherwise may be exposed to contagion.” Powell v. Schriver, 175 F.3d 107, 112–113 (2d Cir. 1999).

198. 45 C.F.R. §§ 160, 162, 164 (2020).

199. 45 C.F.R. § 164.512(k)(5)(i) (2020).

200. 45 C.F.R. § 164.512(k)(5)(iii) (2020) (stating that there is “[n]o application [of this section] after release [from custody]” because “an individual is no longer an inmate when released on parole, probation, supervised release, or otherwise is no longer in lawful custody”).

For example, the Seventh Circuit indicated that prison employees would violate an incarcerated person's Eighth Amendment rights against cruel and unusual punishment if, "knowing that an inmate identified as HIV positive was a likely target of violence by other inmates yet indifferent to his fate, [the employees] gratuitously revealed his HIV status to other inmates and a violent attack upon him ensued."²⁰¹

F. Actions You Can Bring When You Are Denied Medical Care

Now that you know your rights, it is important to be able to enforce them. This Part describes the actions you can bring when your right to adequate medical care is violated. Remember that in almost every instance, your case will be helped by attempting to go through your institution's complaint process. For more information on doing so, see Chapter 15 of the *JLM*, "Inmate Grievance Procedures."

1. Remedies for People Incarcerated by the State

(a) 42 U.S.C. § 1983 Actions

Section 1983 is a federal statute that allows you to bring a lawsuit when your federal constitutional rights have been violated. When persons acting under state authority (for example, prison guards, prison doctors, and prison administrators) violate your right to adequate medical care, you may use Section 1983 to bring a lawsuit in federal court. For a discussion of Section 1983 actions, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

(b) Tort Actions

As discussed in Part B of this Chapter, the federal constitutional standard established by *Wilson* and *Farmer* cannot be proven by claiming only negligence.²⁰² If the facts of your case are not enough to prove a constitutional violation, but only show negligence, you may want to consider bringing a tort action against state officials instead of a constitutional claim. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," to learn how to do so.

To succeed on a negligence claim you must prove three things:

- (1) "Duty of Care"—that the defendants had a duty of care towards you;
- (2) "Breach of Duty"—that the defendants failed to meet that duty; and
- (3) "Injury"—that you were injured as a result of that failure.²⁰³

There are several ways to prove that the prison has a duty of care towards you. First, as discussed above, *Estelle v. Gamble* held that prison officials have a duty to provide adequate medical care.²⁰⁴ Second, a state statute may declare, or require, a prison's duty of care. Many states have statutes that

201. *Anderson v. Romero*, 72 F.3d 518, 523 (7th Cir. 1995).

202. *See Sanderfer v. Nichols*, 62 F.3d 151, 155 (6th Cir. 1995) (finding that even though the doctor probably should have checked the incarcerated person's medical records, her failure to do so was at most negligence, not deliberate indifference); *see also Flint v. Kentucky Dept. of Corr.*, 270 F.3d 340, 354 (6th Cir. 2001) (finding that prison officials violated an incarcerated person's 8th Amendment rights after they failed to take action to protect the incarcerated person from death threats made by another incarcerated person because the prison officials were aware the murdered incarcerated person's life was in danger and "did not have to undertake any further investigation, or draw any inferences . . . to conclude that a risk to [the incarcerated person's] health and safety existed").

203. *Brown v. Sheridan*, 894 F. Supp. 66, 69–72 (N.D.N.Y. 1995) (finding that prison officials were not negligent for failing to treat an incarcerated person's broken leg because the officials were not told by the incarcerated person of his injury and it was not unreasonable for the officials to not have discovered the injury: "the record shows that these [officials] took reasonable steps to ascertain and monitor plaintiff's condition, and that when plaintiff disclosed his injury to them he received prompt medical attention.").

204. *Estelle v. Gamble*, 429 U.S. 97, 103–106, 97 S. Ct. 285, 290–292, 50 L. Ed. 2d 251, 259–261 (1976). Note that the Court in *Estelle v. Gamble* found that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," and that a proper claim for breach of this duty must include allegations of "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976).

require prison officials to provide adequate medical care. For example, in New York, Section 70(2)(c) of the New York State Correction Law directs Department of Corrections and Community Supervision officials to maintain and operate correctional facilities “with due regard to . . . [t]he health and safety of every person in the custody of the Department.”²⁰⁵ There are also common law (law made through judge’s opinions, rather than by statute) claims of medical malpractice and negligence actions that you may bring.

The most common method of proving that a defendant breached a duty is to have an expert provide testimony that the defendant did not use the usually accepted procedures. For example, in *Stanback v. State*, the plaintiff’s expert testified that an x-ray of plaintiff’s knee would have revealed his torn ligament. However, prison doctors only offered ace bandages, braces, and painkillers and did not x-ray the knee for over three years.²⁰⁶ Expert testimony is not always necessary. In *Rivers v. State*, the court held that “[a] medical expert’s testimony is not required where a lay person, relying on common knowledge and experience, can find that the harm would not have occurred in the absence of negligence.”²⁰⁷ In other words, if an ordinary person could have used common sense to find out that negligence must have occurred, you do not need an expert witness. Thus, no expert testimony was necessary in *Rivers* to prove that a doctor was negligent when he performed a hernia operation on an incarcerated person’s right side, even though the patient required the operation on his left side and the hernia was visible on the left side.²⁰⁸ As previously noted in Part B of this Chapter, there are differences between medical malpractice and medical negligence claims. The need for an expert is linked to this distinction: if you decide to file a medical malpractice claim, you may need an expert witness to support your claim that a reasonable medical practitioner would not have caused the injury you claim was caused.

Finally, you must prove that the breach of duty was the direct cause of your injury. This element is not usually difficult to prove, but if you interfere with your treatment in any way, you may fail to prove direct causation. For example, in *Brown v. Sheridan*, the plaintiff lost his case when the court found that he did not receive immediate treatment because of his own failure to disclose the nature of his injury, and that defendants “took reasonable steps to ascertain and monitor plaintiff’s condition.”²⁰⁹ The court noted that the incarcerated person did not openly display symptoms of his injury, and refused to cooperate with psychiatric care that could have aided defendants in discovering and treating his injury sooner.²¹⁰ Also, in *Marchione v. State*, the plaintiff, who was given medication for hypertension and became permanently impotent as a result, lost on his negligence claim because he did not report his symptoms in time.²¹¹ At trial, medical experts found that the impotence would have occurred if not treated within eight hours after the onset of symptoms. Although the incarcerated person noticed the symptoms by ten o’clock in the morning, he did not indicate his situation was an emergency and delayed making a specific report of his symptoms until the evening.²¹²

An advantage to filing a state tort claim is that you only need to establish negligence, which is easier than establishing deliberate indifference. A disadvantage to filing a state tort claim is that you can only get money damages, while Section 1983 claims provide both “declaratory relief” (a judgment that is binding on both parties in the present and the future) and “injunctive relief” (a court order that

205. N.Y. CORRECT. LAW § 70(2)(c) (McKinney 2014).

206. *Stanback v. State*, 163 A.D.2d 298, 298–299, 557 N.Y.S.2d 433, 433–434 (2d Dept. 1990); *see also* *Kagan v. State*, 221 A.D.2d 7, 16–18, 646 N.Y.S.2d 336, 342–343 (2d Dept. 1996) (upholding a damage award for an incarcerated person who repeatedly complained of ear pain caused by a respiratory infection but was not seen by a doctor until she had lost all hearing in her ear).

207. *Rivers v. State*, 142 Misc. 2d 563, 567, 537 N.Y.S.2d 968, 971 (N.Y. Ct. Cl. 1989), *rev’d on other grounds*, *Rivers v. State*, 159 A.D.2d 788, 552 N.Y.S.2d 189 (3d Dept. 1990).

208. *Rivers v. State*, 142 Misc. 2d 563, 567, 537 N.Y.S.2d 968, 971 (N.Y. Ct. Cl. 1989), *rev’d on other grounds*, *Rivers v. State*, 159 A.D.2d 788, 552 N.Y.S.2d 189 (3d Dept. 1990).

209. *Brown v. Sheridan*, 894 F. Supp. 66, 72 (N.D.N.Y. 1995).

210. *Brown v. Sheridan*, 894 F. Supp. 66, 71 (N.D.N.Y. 1995).

211. *Marchione v. State*, 194 A.D.2d 851, 855, 598 N.Y.S.2d 592, 594–595 (3d Dept. 1993).

212. *Marchione v. State*, 194 A.D.2d 851, 855, 598 N.Y.S.2d 592, 595 (3d Dept. 1993).

prohibits or commands action to undo some wrong or injury) in addition to money damages. Furthermore, a negligence action may only be filed in state court, while a Section 1983 claim can be filed in either federal or state court.

(c) Article 78 Proceedings in New York State

In New York, there is a legal procedure called an Article 78 proceeding that allows you to challenge a decision made by a state official.²¹³ If you are denied medical care, you can bring a complaint under Article 78 to require the prison to provide that care. In an Article 78 proceeding, you can recover only limited money damages.²¹⁴ To be successful, you must be able to show that the prison authorities were deliberately indifferent to your serious medical needs.²¹⁵ The statute of limitations requires that the proceeding be brought within four months of the denial or you cannot bring the claim.²¹⁶ Administrative remedies must be exhausted before beginning an Article 78 proceeding. See Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” for more information on Article 78 proceedings in New York.

2. Remedies for People Incarcerated by the Federal Government

(a) *Bivens* Actions Under 28 U.S.C. § 1331

A *Bivens* action is the federal incarcerated person's equivalent to a state incarcerated person's Section 1983 action, and this action can be brought after all available administrative remedies are used.²¹⁷ In a *Bivens* action, you must prove that the prison doctor or official showed deliberate indifference to your serious medical needs. For more on *Bivens* actions, see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

(b) Federal Tort Claims Act

Under the Federal Tort Claims Act (“FTCA”),²¹⁸ you can obtain relief if a prison doctor or official was negligent.²¹⁹ In other words, you can sue the federal government if something a government

213. N.Y. C.P.L.R. § 7801 (McKinney 2008).

214. Money damages are limited to those “incidental to the primary relief sought,” and must be such “as [the plaintiff] might otherwise recover on the same set of facts in a separate action . . . in the supreme court against the same body or officer in its or his official capacity.” N.Y. C.P.L.R. § 7806 (McKinney 2008).

215. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) (holding that an incarcerated person needs to show “deliberate indifference to serious medical needs” in order to show a violation of the 8th Amendment); *Wooley v. N.Y. State Dept. of Corr. Servs.*, 15 N.Y.3d 275, 282–283, 934 N.E.2d 310, 316, 907 N.Y.S.2d 741, 747 (2010) (finding no deliberate indifference in refusal to treat chronic viral infection with method not approved by federal government when other approved methods are used); *Scott v. Goord*, 32 A.D.3d 638, 638–639, 819 N.Y.S.2d 618, 619–620 (3d Dept. 2006) (finding no deliberate indifference when prison officials permitted incarcerated person to undergo surgery to alleviate pain in hurt arm, but refused to permit a different surgery to fix the injury); *Hernandez v. City of New York*, 8 Misc.3d 758, 761, 799 N.Y.S.2d 369, 371 (Sup. Ct. N.Y. County 2005) (noting that medical malpractice or the failure to pursue alternative treatments alone does not violate the Constitution).

216. N.Y. C.P.L.R. § 217(1) (McKinney 2019).

217. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); see also *Porter v. Nussle*, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (holding that an incarcerated person wishing to bring a *Bivens* suit must use all available administrative remedies first); *Ross v. Blake*, 136 S. Ct. 1850, 1858–1860 (2016) (holding that incarcerated people seeking to bring a lawsuit only need to exhaust the administrative remedies that are available to them, but do not need to exhaust an administrative process when (1) the administrative process has no potential to provide relief, (2) no ordinary incarcerated person can discern or navigate the process, or (3) prison officials prevent incarcerated people from using the process); see also Chapter 14 of the *JLM* “The Prison Litigation Reform Act.”

218. 28 U.S.C. §§ 1346(b), 2671–2680.

219. See *United States v. Muniz*, 374 U.S. 150, 150–152, 163–164, 83 S. Ct. 1850, 1852, 1858, 10 L. Ed. 2d 805, 808–809, 815–816 (1963) (allowing suit under the FTCA in two cases: one based on incarcerated person's claim that the negligence of prison employees was responsible for the delay in diagnosis and removal of the tumor which caused incarcerated person's blindness, and another based on incarcerated person's claim that prison

employee did or failed to do while working for the government harmed you.²²⁰ Courts look to see whether the behavior would be a tort in the state where the behavior occurred.²²¹ If it is a tort in that state, you can sue the federal government.

If the injury was caused by intentional behavior, however, a claim cannot be brought under the FTCA.²²² For example, an allegation of assault and battery (considered purposeful behavior under the law) could not be brought as an FTCA claim. If the act or omission that caused your injury arose from a discretionary duty, you cannot sue under the FTCA.

If you do meet FTCA suit requirements, you must bring it against the United States, not the federal employees who caused your injury. If you name employees as defendants, the FTCA authorizes the court to substitute the United States as the sole defendant.²²³

(c) Choosing Between a *Bivens* Claim and an FTCA Action

If you are a federal incarcerated person, you may have the choice of bringing either a *Bivens* suit or an FTCA claim. While it is easier to bring a successful FTCA action because it allows suit for mere medical malpractice, there are several advantages to bringing a *Bivens* action not available under the FTCA. First, while you cannot bring an FTCA action for an intentional tort, you can bring a claim for an intentional tort in a *Bivens* suit against an individual. Second, under the FTCA you can only sue the federal government, while in a *Bivens* action you can sue the individuals who mistreated you. Third, under the FTCA you can only receive compensatory damages (money equal to the cost of repairing or compensating the actual injury you suffered), while in a *Bivens* suit you may receive punitive damages (extra money awarded as a penalty against the wrongdoer). Fourth, in an FTCA action, you cannot later sue the individuals who injured you, but in a *Bivens* action, if you are unable to collect on the judgment against the individual employees, you can bring a suit against the government. Finally, a judge hears an FTCA suit, but a jury hears a *Bivens* suit.

If your injury occurred because of a violation of your constitutional rights and also from a tort, you can bring both an FTCA and a *Bivens* action. If you do not wish to bring both, you can choose between them.

G. Conclusion

The Constitution and state law protect your right to adequate medical care. Part B explained what you need to prove to show you have been denied adequate medical care in violation of the Eighth Amendment. You must show that you suffered serious harm because you did not receive medical treatment (the objective test),²²⁴ and that the prison official who denied you treatment “[knew] of and

officials were negligent for failing to provide sufficient prison guards to prevent an assault on the incarcerated person that resulted in injury); *Moreno v. United States*, 387 F. App’x 159, 161 (3d Cir. 2010) (*per curiam*) (*unpublished*) (dismissing FTCA claim because surgeon was a contractor and not a federal official when a botched surgery allegedly caused an incarcerated person to go blind); *Kikumura v. Osagie*, 461 F.3d 1269, 1300 (10th Cir. 2006) (permitting action under the FTCA for alleged negligence when prison officials took hours to bring very sick incarcerated person to doctor).

220. For the FTCA, conduct is within the scope of the government agent’s “employment” where there is a “reasonable connection between the act and the agent’s duties and responsibilities” and where the act is not “manifestly or palpably beyond the agent’s authority.” *Celauro v. IRS*, 411 F. Supp. 2d 257, 266 (E.D.N.Y. 2006) (citing *Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d Cir. 1989)).

222. 28 U.S.C. §§ 1346(b), 2671–2680.

222. You can bring a *Bivens* action for intentional torts. You may also bring a state tort claim. See *JLM* Chapter 17, “The State’s Duty to Protect You and Your Property: Tort Actions,” for more information about state tort claims. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

223. See *Hui v. Castaneda*, 559 U.S. 799, 801, 130 S. Ct. 1845, 1848, 176 L. Ed. 2d 703, 708 (2010) (“When federal employees are sued for damages for harms caused in the course of their employment, the [FTCA] . . . generally authorizes substitution of the United States as the defendant.”).

224. *Wilson v. Seiter*, 501 U.S. 294, 303–305, 111 S. Ct. 2321, 2326–2328, 115 L. Ed. 2d 271, 282–283 (1991); see also *Rhodes v. Chapman*, 452 U.S. 337, 345–347, 101 S. Ct. 2392, 2398–2399, 69 L. Ed. 2d 59, 68–69

[ignored] an excessive risk to [your] health or safety” (the subjective test).²²⁵ Part C talked about how courts treat certain common incarcerated person health complaints. Part D explained specific health rights for incarcerated women. Part E explained your right to receive information before you are treated and your right to keep your medical records confidential. Part F talked about the different ways you can go to court if your rights have been violated. Because this Chapter focused on federal and New York state law, you will need to research the law in your own state if you are in a prison outside of New York. Also, read Chapters 26, 28, and 29 of the *JLM* for more information on your rights with respect to infectious diseases, disabilities, and mental illness.

If you believe you are not receiving adequate medical care, the first step is to assert your rights through your institution’s grievance procedure. If your problem is not addressed, you will have preserved your right to bring a lawsuit in court. You can only bring your lawsuit in federal court, or state court in New York (an Article 78 proceeding), after you are unsuccessful or do not receive a favorable result through the inmate grievance procedure. Read Chapter 15 of the *JLM* to learn about Inmate Grievance Procedures.

(1981) (noting that objective standards must be used as much as possible in determining whether incarcerated people suffered harm in violation of the 8th Amendment); *Mitchell v. Keane*, No. 98-2368, 1999 U.S. App. LEXIS 4363, at *5 (2d Cir. 1999) (*unpublished*) (noting that sewage dripping through ceiling, if due to prison official’s deliberate indifference, might satisfy the objective test); *Rodriguez v. City of New York*, 802 F. Supp. 2d 477, 482 (S.D.N.Y. 2011) (finding that a three-day delay in treatment for minor injuries resulting from a beating failed to satisfy the objective test).

225. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994); *see also* *Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009) (holding that the subjective test was not met when a prison official mistakenly thought no injury was imminent from alcohol withdrawal); *Williams v. Carbello*, 666 F. Supp. 2d 373, 380 (S.D.N.Y. 2009) (holding that the subjective test is not met when prison officials believed the bathroom was sanitary because it was steam-cleaned three times a day).

CHAPTER 24

YOUR RIGHT TO BE FREE FROM ASSAULT BY PRISON GUARDS AND OTHER INCARCERATED PEOPLE*

A. Introduction

The United States Constitution and state laws protect incarcerated people from certain acts of violence and harassment. This includes attacks, rapes, and other forms of assault. If you believe that a guard or another incarcerated person has assaulted you, this Chapter can help explain your legal options. Part B of this Chapter describes your legal right not to be assaulted. It also explains what you need to prove in order to sue under the Eighth Amendment. Part C discusses legal protections against sexual assault and rape. Part D outlines special issues for LGBTQ incarcerated people. Part E explains how to protect your right to be free from physical and sexual assaults.

Before starting your research, keep in mind that there are two types of laws that protect your rights in prison: (1) federal constitutional law and (2) state law. Federal constitutional law comes from the United States Constitution, which protects incarcerated people from certain assaults. The most important constitutional protections against assault are in the Fifth, Eighth, and Fourteenth Amendments. This Chapter will explain these Amendments in more detail. For example, this Chapter will help you figure out if prison officials have violated your Eighth Amendment right to be free from cruel and unusual punishment in prison.¹ For a full list of the Constitution's Amendments, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law."

To help explain your constitutional rights, this Chapter will describe federal constitutional law cases decided by the U.S. Supreme Court. These cases apply to you no matter where you are imprisoned. This Chapter will also describe cases decided by "Circuit Courts of Appeals." These are the federal appeals courts below the U.S. Supreme Court. Unlike Supreme Court cases, these cases do not set the law for the entire country. Instead, they only apply in the particular group of states that make up the circuit. Therefore, before reading further, you may want to first look up which circuit your state is in. For instance, if you are in New York State, you are in the Second Circuit. Once you know what circuit you are in, you can use the cases from that circuit to understand and make an argument based on federal constitutional law. You can also use cases from other circuits to help support your argument. But, a court in your circuit does not have to follow these cases. If you are confused, you should read Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on how the judicial system is organized.

This Chapter also describes New York State law. This means if you are in a prison outside of New York, you will need to research the specific laws of your state. You can still use this Chapter to understand federal constitutional law and how state laws work in general. But, don't forget that the laws in your state might be different. For diagrams of the state and federal court systems, see the inside front and back covers of the *JLM*.

To summarize: if a guard or another incarcerated person has assaulted you in prison, you may be able to make a (1) federal constitutional law claim (that is, a claim that your constitutional rights were violated) and/or (2) a state law claim (that is, a claim that a state law was violated). The specific state law claim that you bring will depend on the state where you are imprisoned.

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1. The 8th Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

Regardless of where you are imprisoned, you can bring a *civil* law claim. You cannot bring *criminal* law charges against your attacker. Only the government can bring charges under criminal law.² However, you do not have to wait for the government to bring a criminal charge against your attacker. If you have been assaulted and you want to sue your attacker in court, you can bring a civil suit even before the government charges your attacker with a crime. You can also bring a civil suit even if the government never charges your attacker at all.

State civil law includes many different areas of law. The area of state civil law you would use to file a claim after a prison assault is called “tort law.”³ Specifically, an assault is a type of tort. A tort is a wrongful act one person does to another. Tort law has developed in each state as a part of the “common law” (laws made by judges when they decide cases) rather than as “statutory law” (laws passed by the state legislature). This means that if you want to sue your attacker based on state law, you will need to read the cases decided in state courts to understand the laws that will apply to your case. In some states, the common law of torts has been “codified.” Codified means that the state legislature has organized the judicial case law on torts into “statutes” (written laws passed by the legislature).⁴ You should check to see whether your state legislature has codified tort law. If it has, you can find the definition of assault in the state statute. Tort law has *not* been codified in New York State. This means that it only exists as judge-made common law. If you are confused about tort law, you should read Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions.”

If you determine your rights have been violated under federal constitutional or state law, you will first need to follow the administrative grievance procedures your prison has set up before you can go to court. Filing a grievance is explained in Chapter 15 of the *JLM*, “Inmate Grievance Procedures.” If the grievance system does not help you, or if it does not help you enough, you can then file a suit in court. If you go to court, you must choose which court to go to and what type of lawsuit to bring. You can:

- (1) bring an action under Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983)⁵ in state or federal court,
- (2) file a tort action in state court (in the New York Court of Claims⁶ if you are in New York),

or

2. See *Lewis v. Gallivan*, 315 F. Supp. 2d 313, 316–317 (W.D.N.Y. 2004) (“[T]he law is well settled that no private citizen has a constitutional right to bring a criminal complaint against another individual.”).

3. Note that if you are an incarcerated person in a *federal* institution (a prison run by the federal government), you will need to sue for simple tort violations using the Federal Tort Claims Act (“FTCA”). The FTCA is a law that allows you to sue the federal government for negligent or harmful actions by its employees. Without the FTCA, you could not sue the federal government in tort because the federal government would be “immune” from this kind of suit (unable to be sued). It is important to note that “[u]nder the FTCA, courts apply the law of the state where the accident occurred.” *Robinson v. U.S. Bureau of Prisons*, 244 F. Supp. 2d 57, 64 (N.D.N.Y. 2003); see also 28 U.S.C. § 1346(b)(1) (stating that government officials can be sued “in accordance with the law of the place where the act or omission occurred”); Part E(4) of Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law.”

4. The general principles of tort law have also been organized into a “Restatement” by the American Law Institute. The Restatement is a useful resource for learning about tort law in general but is not itself binding law, meaning courts do not have to follow it.

5. Remember that “§” is the symbol for “section.” For example, § 1983 means “Section 1983.”

6. The New York Court of Claims is a specific New York State court that only hears claims for damages against the State of New York. If the person who injured you was a state official or employee, and you decide to file a tort action in state court in New York, you should file your claim in the New York Court of Claims. The Court of Claims can only award money damages; it cannot issue an *injunction*, or an order from a judge that prevents a person from beginning or continuing specific actions. See Chapter 5 of the *JLM*, “Choosing a Court & Lawsuit,” for more information on the Court of Claims. See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for more explanation of tort actions.

(3) file an Article 78⁷ petition in state court if you are in New York.

More information on all of these types of claims can be found in other chapters of the *JLM*, including Chapter 5, “Choosing a Court and a Lawsuit”; Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law”; Chapter 17, “The State’s Duty to Protect You and Your Property: Tort Actions”; and Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules.” If you decide to file a federal court claim, you **must first** read *JLM*, Chapter 14, “The Prison Litigation Reform Act,” on the Prison Litigation Reform Act (“PLRA”). If you do not follow the steps required by the PLRA, you might lose your right to sue (and possibly your good-time credit also).

B. Your Right to Be Free from Assault

This Part of the Chapter is organized into five different sections. Part B(1) explains the legal definition of assault. It also states which prison assaults are considered unlawful. Part B(2) discusses how the Eighth Amendment, which forbids cruel and unusual punishment, protects you against assaults by both prison guards and other incarcerated people. Part B(3) outlines your rights against harassment. Part B(4) explains why you should not use force to resist, even if you think an order, assault, or search by prison officials is illegal. Finally, Part B(5) explains how state laws and state constitutions protect you from assault.

1. The Legal Concept of Assault

Many people confuse the legal term “assault” with the legal term “battery.” They do not mean the same thing in legal language. “Battery” means a violent physical attack.⁸ “Assault” means any act—including a threat, verbal abuse, or harassment—that makes a person afraid of a physical attack from another person.⁹ For example, an assault and battery charge means you are charged with both making someone afraid that you will attack him (assault) as well as actually physically attacking him (battery). Both assault and battery are torts.

Outside prison, most threats, unwanted touching, and uses of force are torts. They are therefore illegal. But in prison, tort law allows (or “privileges”) prison staff to use some force that would not be allowed outside. Therefore, most courts will not find that prison officials violated your rights if they only threatened or harassed you with words. Courts will generally only find that an assault violated your rights (that the act against you was illegal and an actionable tort) if it was battery (you were physically attacked). For more on torts and assault under state tort law, see Part B of Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions.”

Constitutional law is similar to tort law in this respect. Verbal threats by prison staff generally do not violate the Constitution.¹⁰ But if a staff member says words or takes some action that makes you

7. An Article 78 petition is a petition using Article 78 of the New York Civil Practice Law. You cannot use Article 78 to seek damages for assault or other injury. Instead, you can use an Article 78 petition to go to court to challenge decisions made by New York State administrative bodies or officers, like the Department of Corrections and Community Supervision or prison employees, if you think the decision was illegal, arbitrary, or grossly unfair.

8. Battery is “[t]he use of force against another, resulting in harmful or offensive contact.” BLACK’S LAW DICTIONARY 173 (10th ed. 2014).

9. Assault is “[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear ... of an immediate battery ... [or] [a]n attempt to commit battery [with] the specific intent to cause physical injury.” BLACK’S LAW DICTIONARY 130 (10th ed. 2014).

10. See *Cole v. Fisher*, 379 Fed. Appx. 40, 43 (2d Cir. 2010) (“[V]erbal harassment, standing alone, does not amount to a constitutional deprivation”) (citing *Purcell v. Coughlin*, 790 F. 2d 263, 265 (2d Cir. 1986)) (internal citations omitted); *McBride v. Deer*, 240 F. 3d 1287, 1291, n.3 (10th Cir. 2001) (stating that threatening to spray with mace did not violate a constitutional right: “[A]cts or omissions resulting in an inmate being subjected to nothing more than threats and verbal taunts do not violate the Eighth Amendment”); *Adkins v. Rodriguez*, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that verbal sexual harassment by a prison guard did not violate a

believe that the person will seriously hurt you, courts might find a constitutional violation.¹¹ Even then, under the Prison Litigation Reform Act (“PLRA”), you cannot sue for compensatory damages¹² (and, in some circuits, punitive damages¹³) in federal court for mental or emotional injury unless you were also physically injured.¹⁴ See *JLM* Chapter 14, “The Prison Litigation Reform Act,” for information on the PLRA’s physical injury requirement.

(a) You Must Prove That Your Attacker Intended to Touch or Harm You

(i) State Torts and Intent

Assault and battery are state law torts. State courts use different tests to decide whether someone’s use of force against you was wrongful (whether that person has committed the torts of assault and battery against you).¹⁵ All states require you to show that the defendant meant to act against you in some way. They take different approaches to the other requirements. In some states, you will have to show that the defendant either acted unlawfully or meant to harm you.¹⁶ In others,

constitutional right); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (holding that prison official’s use of vulgarity [bad language] did not violate a constitutional right); *Mateo v. Fisher*, 682 F. Supp. 2d 423, 432 (S.D.N.Y. 2010) (finding that calling an incarcerated person “paranoid” and referring him to a mental health evaluation could be harassment but not serious enough to violate a constitutional right); *Govan v. Campbell*, 289 F. Supp. 2d 289, 299 (N.D.N.Y. 2003) (“A claim under 42 U.S.C. § 1983 is not designed to rectify harassment or verbal abuse.” (quoting *Gill v. Hoadley*, 261 F.Supp.2d 113, 129 (N.D.N.Y. 2003))); *Johnson v. Dellatifa*, 357 F.3d 539, 546 (6th Cir. 2004) (“[H]arassment and verbal abuse ... do not constitute the type of infliction of pain that the Eighth Amendment prohibits.”); *Graves v. N.D. State Penitentiary*, 325 F. Supp. 2d 1009, 1011–1012 (D.N.D. 2004) (finding that even though a guard’s racially derogatory language was “offensive, degrading, and reprehensible,” “the use of racially derogatory language will not, by itself, violate the 14th Amendment ‘unless it is pervasive or severe enough to amount to racial harassment’” (quoting *Blades v. Schuetzle*, 302 F.3d 801, 805 (8th Cir. 2002))).

11. See *Irving v. Dormire*, 519 F.3d 441, 448–449 (8th Cir. 2008) (finding that prison officer’s multiple death threats partially in response to the incarcerated person starting a lawsuit against officers were serious enough to implicate the 8th Amendment); *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (finding incarcerated person stated a § 1983 8th Amendment excessive force claim for psychological injuries when plain-clothed corrections officers surprised plaintiff on the street while he was out on work release and, without identifying themselves, threatened at gunpoint to kill him before taking him back to jail; the court held that although the incarcerated person was not physically injured, his alleged psychological injury was not insignificant because “convicted prisoners have a constitutional ‘right to be free from the terror of instant and unexpected death’ at the hands of their keepers” (citations omitted)); see also *Hudson v. McMillian*, 503 U.S. 1, 16–17, 112 S. Ct. 995, 1004, 117 L. Ed. 2d 156, 172 (1992) (Blackmun, J., concurring) (stating a “guard placing a revolver in an inmate’s mouth and threatening to blow [the] prisoner’s head off” would be an unnecessary and wanton infliction of pain—although psychological, not physical pain—amounting to an 8th Amendment excessive force violation).

12. Compensatory damages are money damages that try to “make you whole again” after your actual injury or to put you in the same position as you were before the injury occurred. These types of damages might include reimbursement for medical expenses or money for pain and suffering.

13. Punitive damages are damages awarded in addition to compensatory damages, and are meant to punish a defendant who was reckless or acted intentionally.

14. The PLRA prohibits all federal civil actions (constitutional and tort claims) brought in federal court by incarcerated people (convicted felons, misdemeanants, and pretrial detainees) for mental or emotional injury suffered while in custody where there was no related physical injury. 42 U.S.C. § 1997e(e). The Federal Tort Claims Act has a similar limitation for convicted felons (but not pretrial detainees or misdemeanants (person convicted of a misdemeanor)): no convicted felon can “bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act.” 28 U.S.C. § 1346(b)(2). See Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” for more information.

15. As described in the Introduction to this Chapter, the tests used by courts today come from past judicial decisions—called the common law—that some states have now made into statutes.

16. See, e.g., *Glowacki v. Moldtronics, Inc.*, 636 N.E.2d 1138, 1140, 264 Ill. App. 3d 19, 22 (Ill. App. 2d Dist. 1994) (dismissing plaintiff’s battery action after plaintiff failed to allege either (1) that defendants were involved in illegal activity or (2) that defendants specifically meant to harm him when they exposed him to chemicals at work).

you must show that the defendant deliberately ignored your rights.¹⁷ In a few states, you will only need to add that the defendant touched you without your permission.¹⁸ In New York, courts use the “intentional touching” standard.¹⁹

All state courts believe that sometimes prison officials have to use force in order to maintain safety and order in the prisons. Therefore, courts often think that a prison official’s choice to use physical force on an incarcerated person is not wrongful, even if the same use of force outside prison would be illegal.

In New York, to prove the tort of battery (physical assault), you must show that the defendant meant to do a certain action. But, you do not have to show that the defendant specifically meant to harm you.²⁰ For example, let’s say a prison official handcuffed you very tightly, permanently injuring your wrists and hands. To prove this was battery, you must show that the guard meant to handcuff you. But, you do not have to show that the guard meant to hurt you when he handcuffed you.

(ii) Constitutional Torts and Intent

Proving that an assault violated your constitutional rights under the Eighth Amendment is much more difficult than proving that the assault was a tort in most states. Using the previous example, to prove that an assault against you violated your constitutional rights, you must show that your attacker meant to both handcuff you *and* meant to hurt you. See Part B(2)(a)(i) below for a full description of what you need to prove to show that an assault violated your rights under the Eighth Amendment. Under state tort law, you could bring a successful claim of assault and battery if you were injured when prison staff intentionally touched you. You could bring this claim even if you could not prove that the official specifically meant to hurt you. But, if you think you can show the official intended to harm you, you can claim that the official committed both a constitutional violation and the state torts of assault and battery in your suit.

(b) Suing the Prison if You Were Assaulted by Other Incarcerated People

(i) State Tort of Negligence

If you were physically attacked by another incarcerated person and believe that prison officials were partly responsible for the attack, you may also be able to sue the prison and/or the prison officials. But here, you cannot claim assault and battery because the prison officials did not actually attack

17. *See, e.g.,* Ashcraft v. King, 228 Cal. App. 3d 604, 613, 278 Cal. Rptr. 900, 904 (Cal. App. 2d Dist. 1991) (“In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a ‘willful disregard’ for the plaintiff’s rights.” For example, a defendant disregards your rights in California if they give you one form of medical treatment when you specifically consented to another form).

18. *See, e.g.,* Hughes v. Farrey, 30 A.D.3d 244, 247, 817 N.Y.S.2d 25, 28 (1st Dept. 2006) (“To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff’s consent; the injury may be unintended, accidental or unforeseen.”) (quoting Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997)).

19. *See, e.g.,* Hughes v. Farrey, 30 A.D.3d 244, 247, 817 N.Y.S.2d 25, 28 (1st Dept. 2006) (“To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff’s consent; the injury may be unintended, accidental or unforeseen.”) (quoting Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997)); Allegany Co-Op Ins. Co. v. Kohorst, 254 A.D.2d 744, 744, 678 N.Y.S.2d 424, 425 (4th Dept. 1998) (“Accidental results can flow from intentional acts. The damage in question may be unintended even though the original act or acts leading to the damage were intentional.”) (quoting Salimbene v. Merchants Mut. Ins. Co., 217 A.D.2d 991, 994, 629 N.Y.S.2d 913, 915–916 (4th Dept 1995)).

20. *See, e.g.,* Hughes v. Farrey, 30 A.D.3d 244, 247, 817 N.Y.S.2d 25, 28 (1st Dept. 2006) (“To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff’s consent; the injury may be unintended, accidental or unforeseen.”) (quoting Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997)).

you.²¹ Instead, you can use the law of “negligence.”²² Negligence is different from assault and battery under state tort law. It means that a person did not do enough to fulfill his duty toward you, but not necessarily that he meant to hurt you.²³ If another incarcerated person is attacking you, prison officials are supposed to try to stop the attack. If they do not, you could sue them for negligence. To prove the prison officials’ negligence in such a situation, you must show the court that the officials “failed to exercise [or use] reasonable care” in allowing the attack to happen. In other words, you must show that the officials did not act like reasonably careful people to prevent the attack.²⁴ You will need evidence that: (1) the officials knew (or reasonably should have known) that you would be harmed or that there was a big (“substantial”) risk that you would be harmed,²⁵ and (2) the officials did not act to prevent it.²⁶

However, winning a negligence claim against prison officials for an assault by another incarcerated person is difficult.²⁷ Courts have found negligence in only a few situations: when the attacker is an incarcerated person whom officials knew or should have known was violent;²⁸ when officials placed the plaintiff (the incarcerated person bringing the suit) near a violent mentally ill incarcerated person;²⁹

21. If an officer participated in the attack along with the other incarcerated people, however, you can also claim assault and battery against the participating officer (in addition to your claim of negligence against the other officers who you believe allowed the attack to happen).

22. See Part B(2) of Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for more on negligence and negligent torts.

23. Negligence is “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others’ rights . . . [a] tort grounded in this failure, usually expressed in terms of the following elements: duty, breach of duty, causation, and damages.” BLACK’S LAW DICTIONARY 1133–1134 (10th ed. 2014).

24. The Restatement (Third) of Torts defines the general rule: “An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise in the scope of that relationship.” Its definition of a “special relationship” includes “a custodian with those in its custody, if: (a) the custodian is required by law to take custody or voluntarily takes custody of another; and (b) the custodian has a superior ability to protect the other.” Restatement (Third) of Torts § 40 (2012). The Restatement of Torts is published by the American Law Institute and presents the general principles of tort law.

25. See, e.g., *Sanchez v. City of New York*, 99 N.Y.2d 247, 255, 784 N.E.2d 675, 680, 754 N.Y.S.2d 621, 626 (N.Y. 2002) (holding that “the State owes a duty of care to inmates for foreseeable risks of harm; and that foreseeability is defined not simply by actual notice but by actual *or constructive* notice—by what the ‘State knew or had reason to know’ [or] ... what the State ‘is or should be aware’ of ... The requisite foreseeability is as to a ‘risk of harm’ ... or ‘risk of inmate-on-inmate attack’”; actual notice or “proof of specific notice of time, place or manner of the risk” is *not* required); see also *Newton v. State*, 283 A.D.2d 992, 993, 725 N.Y.S.2d 503, 504 (4th Dept. 2001) (denying plaintiff incarcerated person’s claim after finding it was not foreseeable that there would be an attack in one part of the prison because there had been an incident earlier that day in another part of the prison).

26. See, e.g., *Sanchez v. City of New York*, 99 N.Y.2d 247, 252, 784 N.E.2d 675, 678, 754 N.Y.S.2d 621, 624 (N.Y. 2002) (describing the requirements for a negligence action).

27. See, e.g., *Wilson v. State of New York*, 303 A.D.2d 678, 679, 760 N.Y.S.2d 51, 52 (2d Dept. 2003) (“While the State’s duty to an inmate encompasses protection from the foreseeable risk of harm at the hands of other prisoners ... the State is not an insurer of an inmate’s safety. The State will be liable in negligence for an assault by another inmate only upon a showing that it failed to exercise adequate care to prevent that which was reasonably foreseeable.”).

28. See, e.g., *Blake v. State*, 259 A.D.2d 878, 879, 686 N.Y.S.2d 219, 221 (3d Dept. 1999) (affirming the lower court’s finding that prison officials were liable for placing plaintiff in the same recreational yard as an incarcerated person who had assaulted another incarcerated person three months prior and with a sharp object that officers had never located) (citing *Littlejohn v. State*, 218 A.D.2d 833, 834, 630 N.Y.S.2d 407, 408 (3d Dept. 1995)).

29. See, e.g., *Bartlett v. Commonwealth*, 418 S.W.2d 225, 227–228 (Ky. 1967) (finding that the trial court erred in refusing to admit evidence showing that two incarcerated people who murdered a 15-year-old incarcerated person in a state juvenile facility had records of violence and mental and emotional disability; noting the general rule that the keeper of a prison must exercise ordinary care for the protection of his incarcerated people if there is

when officials placed the plaintiff near an armed incarcerated person;³⁰ when the plaintiff was exposed to a disturbed incarcerated person overseer or “trustee”;³¹ when the plaintiff was exposed to an incarcerated person who had a grudge against him or who had threatened him;³² or sometimes when the prison did not have enough supervisory staff on duty.³³

(ii) Constitutional “Tort” of Deliberate Indifference

If another incarcerated person assaulted you, you may be able to make a federal constitutional claim of “deliberate indifference” as well as a state tort claim of negligence. But, remember that constitutional violations are harder to prove than state tort claims. “Deliberate indifference” means that the prison officials’ actions or inactions were worse than negligence (carelessness). It also means that the actions or inactions were so bad that they violate the Eighth Amendment’s constitutional ban on cruel and unusual punishment. You will have to prove that the prison officials actually knew that you were going to be attacked but did nothing or too little to stop the attack (were “deliberately indifferent” to the danger). It is not enough to prove that the officials were negligent and “should have

reasonable grounds to foresee danger to the incarcerated person). *But see* *Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997) (finding no negligence on the part of an official who did not separate plaintiff from a mentally disturbed incarcerated person who was taking medication). For examples of courts finding “deliberate indifference” to be a constitutional violation in similar situations, see *Haley v. Gross*, 86 F.3d 630, 642–643 (7th Cir. 1996) (affirming liability for officials who failed to act during a heated argument between plaintiff and a mentally ill incarcerated person); *Glass v. Fields*, No. 04-71014, 2007 U.S. Dist. Lexis 37089, at *24 (E.D. Mich. 2007) (finding that the objective component—how serious the risk of harm was—of the deliberate indifference test was met when plaintiff was put in the same cell as a detainee who claimed to be insane and was noted as prone to be violent). *But see* *Hann v. State*, 137 Misc. 2d 605, 611, 521 N.Y.S.2d 973, 977 (N.Y. Ct. Cl. 1987) (finding that it was not foreseeable that incarcerated person with history of assaultive behavior and who was recently released from psychiatric hospital would attack fellow incarcerated person).

30. *See, e.g., Huertas v. State*, 84 A.D.2d 650, 650–651, 444 N.Y.S.2d 307, 308–309 (3d Dept. 1981) (finding negligence where, immediately before fatal assault, assailant left his work area with iron bar visible under his clothes, in plain view of five corrections officers); *Jackson v. Hollowell*, 714 F.2d 1372, 1373–1374 (5th Cir. 1983) (finding prison officials liable when incarcerated person was struck by a pellet that was fired by an armed prison trustee using a sawed-off shotgun). Prison trustees are “inmates ... armed with loaded shotguns and ... entrusted with the responsibility of guarding other inmates.” *Jackson v. Hollowell*, 714 F.2d 1372, 1373 n.2 (5th Cir. 1983).

31. *Jackson v. Mississippi*, 644 F.2d 1142, 1146 (5th Cir. 1981) (establishing a “constitutional right to be free from cruel and unusual punishment in the form of trusty shooters who were inadequately screened for mental, emotional, or other problems”), *aff’d*, *Jackson v. Hollowell*, 714 F.2d 1372, 1373 n.2, 1374 (5th Cir. 1983).

32. *See, e.g., Rangolan v. County of Nassau*, 51 F. Supp. 2d 236, 238 (E.D.N.Y. 1999) (upholding judgment that county jail was negligent as a matter of law for housing an incarcerated person in the same “jail pod” as another incarcerated person he had served as a confidential informant against and who subsequently beat him badly), *vacated in part on other grounds*, 370 F.3d 239 (2d Cir. 2004); *Ashford v. D.C.*, 306 F. Supp. 2d 8, 16 (D.D.C. 2004) (finding incarcerated person did state a common law negligence claim where incarcerated person was severely stabbed by a fellow incarcerated person against whom he had a permanent separation order after being transferred to a new prison not aware of the separation order).

33. Negligence is seldom found in such a case. For an unusual example, see *Laube v. Haley*, 234 F. Supp. 2d 1227, 1251 (M.D. Ala. 2002) (finding that defendants were liable for deliberate indifference because they had ignored the overcrowding and understaffing of the prison). *But see* *Robinson v. U.S. Bureau of Prisons*, 244 F. Supp. 2d 57, 65 (N.D.N.Y. 2003) (noting that, to determine the foreseeability of an attack, courts may look at evidence “including staffing levels, the ability of staff to monitor the inmates, past behavior of inmates and prison staff, state regulations regarding the staffing of correctional facilities and the monitoring of inmates, and expert testimony regarding the staffing levels at issue”); *Colon v. State*, 209 A.D.2d 842, 844, 620 N.Y.S.2d 1015, 1016 (3d Dept. 1994) (reversing court of claims judgment for incarcerated person who claimed the prison failed to provide adequate supervision after being attacked by a fellow incarcerated person in a prison engine repair shop during a supervisor’s brief absence. The court found instead that the State provided reasonable supervision and that “unremitting supervision ... was unnecessary and the fact that [the prison official was] not present at the time of the incident, in and of itself, is insufficient to support a finding that the State failed to exercise reasonable care”).

known” you were in danger. Part B(2)(a)(ii) below explains more about how to show prison officials’ deliberate indifference.³⁴

(c) Body Searches and Sexual Attacks As “Assault”

Violent physical attacks are not the only type of assault in prison. Forced sexual contact and illegal body cavity searches interfere with your body. They may also be considered assaults and batteries.³⁵ Courts use the same civil and constitutional tort laws (including the Eighth Amendment) to decide claims of sexual assault. Part C of this Chapter explains some special legal protections you have against sexual assault.

Courts typically use the Fourth Amendment, not the Eighth Amendment, to decide claims of illegal searches. The Fourth Amendment protects your right to be free from unreasonable searches and seizures.³⁶ Some illegal body cavity searches may also be a violation of the Eighth Amendment if a court feels the search is so extreme that it counts as cruel and unusual punishment.³⁷ However, if the official who searched you was acting in order to maintain security or discipline or another reason important to running a prison and the pain you suffered was a side effect, most courts will not find any constitutional wrongdoing.³⁸ See *JLM*, Chapter 25, “Your Right to Be Free From Illegal Body Searches,” for more information on when searches may violate the Eighth Amendment.

(d) When is Assault Prohibited by the Law?

As this Chapter explained above, not all physical touching or physical force is unlawful assault. The difference between lawful and unlawful assault is particularly important for incarcerated people. Actions that would be unlawful outside of prison may be allowed as “lawful force” in prison. For example, prison officers may use lawful force against incarcerated people to maintain order and to make sure rules are obeyed.³⁹

Also, because corrections officers are part of the government, they can use the defense of qualified immunity⁴⁰ when sued under Section 1983. This means even if you can prove you were assaulted, the

34. See *Farmer v. Brennan*, 511 U.S. 825, 829, 114 S. Ct. 1970, 1974, 128 L. Ed. 2d 811, 820 (1994) (announcing that deliberate indifference requires showing “the official was subjectively aware of the risk”); *Knowles v. N.Y. City Dept. of Corr.*, 904 F. Supp. 217, 222 (S.D.N.Y. 1995) (“Mere negligence, however, on the part of a prison official will not give rise to a claim under § 1983.”).

35. See, e.g., *Hammond v. Gordon County*, 316 F. Supp. 2d 1262, 1303 (N.D. Ga. 2002) (holding female plaintiff had sufficient evidence to claim assault and battery against male prison official who placed the plaintiff “in apprehension of an unlawful touch when [the guard] pointed a gun at plaintiff and attempted to engage in sexual conduct with her”; also recognizing second plaintiff’s claim for intentional infliction of emotional distress when another guard penetrated her vagina with his fingers).

36. The 4th Amendment states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV.

37. See, e.g., *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003) (stating a cross-gender strip search could violate the 8th Amendment if “the strip search in question was not merely a legitimate search conducted in the presence of female correctional officers, but instead a search conducted in a harassing manner intended to humiliate and inflict psychological pain”); *Dellamore v. Stenros*, 886 F. Supp. 349, 351 (S.D.N.Y. 1995) (finding that plaintiff subjected to body cavity search without a medical practitioner present stated a colorable claim under the 8th Amendment).

38. See *Whitman v. Nesic*, 368 F.3d 931, 935–936 (7th Cir. 2004) (finding no violation because while nudity during drug tests might be uncomfortable, the evidence did not show that the official had acted for any other purpose besides a legitimate interest in providing for the safety of incarcerated people and the community).

39. N.Y. CORRECT. LAW § 137(5) (McKinney 2014) (“When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees *shall use all suitable means* to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape.” (emphasis added)).

40. Qualified immunity is defined as “[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights.” BLACK’S LAW DICTIONARY 818 (10th ed. 2014).

officials may not be liable because of qualified immunity. For a detailed discussion of qualified immunity and Section 1983, see Part C(3)(c) (“Qualified Immunity”) and Part B (“Using 42 U.S.C. § 1983 to Challenge State or Local Government Action”) of Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law.”

2. Protection from Assault Under the Eighth Amendment

This Section is about the right of convicted state and federal incarcerated people to be free from assault under the Eighth Amendment.⁴¹ The Eighth Amendment prohibits “cruel and unusual punishment.”⁴² Under the Eighth Amendment, prison officials cannot use excessive physical force against you.⁴³ They also cannot purposely let someone else hurt you.⁴⁴

There are two parts of an Eighth Amendment claim. You must prove both of them to show that an assault against you violated the Eighth Amendment. First you must show what the prison official was thinking or knew at the time of the assault (the “subjective” part, explained in Part B(2)(b)). You must also show injuries (if any) you received from an assault by a prison official, or show how a prison official’s actions caused you to be in “substantial risk of serious harm” of being attacked by another incarcerated person (the “objective” part, explained in Part B(2)(b)).

To summarize, to show that an assault against you violated the Eighth Amendment, you must prove that the force used against you had two parts:

- (1) A subjective part—prison officials must have acted with a state of mind that is guilty enough;⁴⁵ and
- (2) An objective part—you must have been injured⁴⁶ or you must have had a big risk of serious injury.⁴⁷

41. This Chapter explains how the 8th Amendment of the U.S. Constitution can protect you from assaults and unreasonable body searches. But the 8th Amendment right to be free from cruel and unusual punishment can protect incarcerated people in other ways too, like from general prison conditions such as overcrowding and uncleanness (see Part B(2)(b) of Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law”), and lack of proper medical care (see Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care”).

42. U.S. CONST. amend. VIII.

43. See, e.g., *Smith v. Mensinger*, 293 F.3d 641, 648 (3d Cir. 2002) (stating that serious physical injury is not necessary for an excessive force claim under the 8th Amendment) (citing *Hudson v. McMillian*, 503 U.S. 1, 4, 112 S. Ct. 995, 997, 117 L. Ed. 2d 156, 164 (1992)).

44. See *Farmer v. Brennan*, 511 U.S. 825, 833–834, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (holding that prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement only if they know that inmates face substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it); see, e.g., *Bistrrian v. Levi*, 696 F.3d 352, 370–371 (3d Cir. 2012) (finding that plaintiff stated a constitutional claim against officials who had placed him in a recreational yard with other incarcerated people whom officials knew were likely to retaliate against plaintiff).

45. *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (“[T]he core judicial inquiry is ... whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”); *Sims v. Artuz*, 230 F.3d 14, 21 (2d Cir. 2000) (finding the subjective component of the claim to require a showing that the defendant had the necessary level of culpability, shown by actions characterized as wanton in light of the particular circumstances surrounding the challenged conduct (citations omitted)); *Wilkins v. Gaddy*, 559 U.S. 34, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010) (restating earlier cases).

46. See *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (“[T]he extent of injury suffered by a prisoner is one factor that may suggest ‘whether the use of force could plausibly have been thought necessary’ in a particular situation.” (quoting *Whitley v. Albers*, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261–262 (1986))).

47. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (holding that in a claim of failure to protect, “the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm”).

(a) Subjective Part—Culpable State of Mind

The subjective part of assault means you must show what the prison official was thinking or knew when you were assaulted. Courts use two different standards (the *Hudson* and *Farmer* standards) for the subjective part. The standard a court will use in your case depends on who assaulted you: a prison official or another incarcerated person. If a prison official hurt you, courts use the *Hudson* standard. This standard looks at whether the guard used force as part of his job to keep the prison safe and orderly, or whether the guard's force was meant to cruelly hurt you for no valid reason. If another incarcerated person hurts you, courts use the *Farmer* standard. This standard looks at whether the prison officials knew about the danger to you but did not stop or act to prevent the assault.⁴⁸

(i) Assault by a Prison Official—The *Hudson* Standard

If you are suing a prison official who injured you, a court will use the “malicious and sadistic” (evil and cruel) standard. This standard was created by the Supreme Court in *Hudson v. McMillian*⁴⁹ to determine whether the official's force against you was so bad (“excessive”) as to violate the Eighth Amendment.⁵⁰ In order to show a constitutional wrong under *Hudson*, an incarcerated person must show that the prison official's force was not “a good-faith effort to maintain or restore discipline,” but rather was used “maliciously and sadistically” to hurt the incarcerated person.⁵¹

Officials are not violating the Eighth Amendment if they use force for valid reasons.⁵² Prison officials are generally allowed to use force during a riot or other major prison violence.⁵³ They are also usually allowed to use force during smaller events when incarcerated people behave violently or

48. Note that if a prison official injured you in the presence of, or with the knowledge of, other officials, you could sue both the official who harmed you and also the officials and/or supervisors who knew about it and did nothing. The prison officials who knew about your assault but did nothing would be liable under the *Farmer* standard—not the *Hudson* “malicious and sadistic” standard. *See, e.g.,* Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999) (finding the deliberate indifference standard applied to prison supervisors if “after learning of the violation through a report or appeal,...[the supervisor] failed to remedy the wrong...created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue...[or] was grossly negligent in managing subordinates who caused the unlawful condition or event.” (citations omitted)); Buckner v. Hollins, 983 F.2d 119, 122 (8th Cir. 1993) (applying the deliberate indifference, or *Farmer*, standard, to a claim based on prison official's failure to act); Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) (“[S]upervisory liability may be imposed...when an official has actual or constructive notice of unconstitutional practices and demonstrates ‘gross negligence’ or ‘deliberate indifference’ by failing to act.”) (citations omitted); Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988) (“[P]rison administrators’ indifference to brutal behavior by guards toward inmates [is] sufficient to state an Eighth Amendment claim.”) (citations omitted); Pizzuto v. Nassau, 239 F. Supp. 2d 301, 311 (E.D.N.Y. 2003) (finding that prison supervisor was liable for standing by and watching while subordinates beat the incarcerated person).

49. *Hudson v. McMillian*, 503 U.S. 1, 24, 112 S. Ct. 995, 1008, 117 L. Ed. 2d 156, 177 (1992).

50. This section pertains specifically to claims brought by incarcerated people against prison officials who have violated their Eighth Amendment right against cruel and unusual punishment. If you are a pretrial detainee looking to make a claim, see Chapter 34, Part E of the *JLM*.

51. *Hudson v. McMillian*, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992).

52. *See Hudson v. McMillian*, 503 U.S. 1, 6, 112 S. Ct. 995, 998, 117 L. Ed. 2d 156, 165 (1992) (“[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.” (quoting *Whitley v. Albers*, 475 U.S. 312, 320–321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261 (1986)); *see also* *Skinner v. Cunningham*, 430 F.3d 483, 489 (1st Cir. 2005) (finding that prison officials used reasonable force in forcibly extricating the incarcerated person from his cell after he refused to be handcuffed during a cell search).

53. *Whitley v. Albers*, 475 U.S. 312, 326, 106 S. Ct. 1078, 1087, 89 L. Ed. 2d 251, 265 (1986) (finding no 8th Amendment violation where incarcerated person was shot as part of a good-faith effort to restore prison security); *see also* *Wright v. Goord*, 554 F.3d 255, 270 (2d Cir. 2009) (finding that although guard had placed one hand on incarcerated person's abdomen at the site of his colon surgery, there was no evidence that that placement was sadistic or malicious because prisoner did not testify that guard knew or had reason to know that his abdomen was unusually tender, nor did the record reveal any basis for inferring that guard would have been aware that it was a surgical site).

disruptively.⁵⁴ But, if the force has no purpose and is simply meant to harm the incarcerated person for no valid reason, then the official may be found to have used too much force.⁵⁵ In other words, if the official uses force for the purpose of harming you and not for returning order to the prison, then the official may be found to have used too much force.

To decide if the prison official intended to act maliciously and to harm you (to determine the official's "state of mind"), courts will look at:

- (1) the seriousness of your injuries,⁵⁶
- (2) if the force was necessary under the circumstances (why the official used force),
- (3) the relationship between the need to use force and the amount of force that was actually used,
- (4) the size of the threat as a prison official would reasonably see it, and
- (5) efforts made by prison guards to decrease the amount of force used.⁵⁷

You should think about each of these factors when you try to prove that prison officials meant to hurt you when they used violence. You need to remember that "not every push or shove, even if it may later seem unnecessary," violates your constitutional rights.⁵⁸ Even if an official used force, you may not be able to win in court. Nevertheless, some uses of force may be so extreme that they are unconstitutional, even in an emergency.⁵⁹

The Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) has said that you do not need to show that the officer meant to hurt or punish a specific individual.⁶⁰ This means even if the officer meant to hit someone else, he can still be found liable if he hit you instead. For instance, in *Robins v. Meecham*, an incarcerated person was injured by a birdshot a correction officer had fired at another incarcerated person.⁶¹ The court held that even though the officer did not mean to harm or punish Robins (the incarcerated person suing),

54. See *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 165 (1992) (finding that during a riot or a lesser disruption, "corrections officers must balance the need to maintain or restore discipline through force against the risk of injury to inmates"); see also *Bellotto v. County of Orange*, 248 Fed. Appx. 232, 235 (2d Cir. 2007) (finding that guards did not use excessive force in forcibly restraining and handcuffing female incarcerated person who was violently banging her head against the wall of her cell and refusing to stop).

55. See, e.g., *Estate of Davis by Ostfeld v. Delo*, 115 F.3d 1388, 1394–1395 (8th Cir. 1997) (finding an 8th Amendment excessive force violation when a corrections officer struck a non-resisting incarcerated person in the head and face 20 to 25 times while four other officers restrained his limbs, resulting in serious injury); *Locicero v. O'Connell*, 419 F. Supp. 2d 521, 428–29 (S.D.N.Y. 2006) (finding that an incarcerated person adequately stated a claim that his 8th amendment rights were violated when he was seriously assaulted by a prison officer, the incarcerated person did not provoke the assault, and the prison facility had prior notice of, but failed to act about, the officer's previous use of excessive force).

56. Courts will examine the extent of your injury to help determine whether an official's decision to use force in a particular situation was reasonable. See *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (citing *Whitley v. Albers*, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L.Ed.2d 251, 261 (1986)). Courts also look at the seriousness of your injuries in deciding the objective component of an 8th Amendment violation.

57. See *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (citing *Whitley v. Albers*, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L.Ed.2d 251, 261 (1986)).

58. *Johnson v. District of Columbia*, 528 F. 3d 969, 974 (D.C. Cir. 2008) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), distinguished on other grounds by *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

59. See *Jones v. Huff*, 789 F. Supp. 526, 535–536 (N.D.N.Y. 1992) (finding violations of incarcerated person's 8th Amendment rights when corrections officers slapped, punched, and kicked a handcuffed and naked incarcerated person).

60. See *Robins v. Meecham*, 60 F.3d 1436, 1439–1440 (9th Cir. 1995) ("[T]he Eighth Amendment does not require a specific intent to punish a specific individual. The basic threshold of the Eighth Amendment is that the offending conduct must be 'wanton.'").

61. *Robins v. Meecham*, 60 F.3d 1436, 1438 (9th Cir. 1995).

the officer did mean to harm a different incarcerated person.⁶² The court said that this was enough to fulfill the intent requirement.⁶³

Remember that the Prison Litigation Reform Act would probably also prevent you from making a similar claim because it requires a physical injury, not just a mental injury.⁶⁴

(ii) Assault by Another Incarcerated Person—The *Farmer* Standard

If you are suing a prison official who did not stop or act to prevent another incarcerated person from attacking you, the court will use the “deliberate indifference”⁶⁵ standard from *Farmer v. Brennan*.⁶⁶ The court will determine whether the prison official’s “deliberate indifference” toward you violated the Eighth Amendment.⁶⁷ Prison officials may be found liable under the deliberate indifference standard if they:

- (1) knew of a big risk of serious harm to the incarcerated person, and
- (2) ignored the risk and did not act or do enough to avoid the harm.⁶⁸

Because incarcerated people often cannot protect themselves, courts have decided that the government must take reasonable steps to protect them against violence by other incarcerated people.⁶⁹ The Eighth Amendment creates a constitutional right for incarcerated people to be protected from harm by fellow incarcerated people.⁷⁰ Courts have mainly used the “deliberate indifference” standard for cases where a prison official does not prevent an incarcerated person from assaulting another incarcerated person. But, courts have also used the standard for when a prison official does not prevent another official from attacking an incarcerated person.⁷¹ These types of lawsuits are also

62. *Robins v. Meecham*, 60 F.3d 1436, 1440 (9th Cir. 1995).

63. *Robins v. Meecham*, 60 F.3d 1436, 1440 (9th Cir. 1995).

64. 42 U.S.C. § 1997e(e). *See* Part F of Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” for more information on the PLRA’s limitations on actions for mental or emotional injury.

65. Note that “deliberate indifference” is also the legal standard for 8th Amendment violations regarding medical care and general prison conditions, in addition to incarcerated person-on-incarcerated person assaults.

66. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (“[A] prison official must have a ‘sufficiently culpable state of mind’ ... In prison-conditions cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety (internal citations omitted).”)

67. This section pertains specifically to claims brought by incarcerated people against prison officials who have violated their Eighth Amendment right against cruel and unusual punishment. If you are a pretrial detainee looking to make a claim, see Chapter 34 of the *JLM*.

68. *See Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

69. *See Bistran v. Levi*, 696 F.3d 352, 366 (3d Cir. 2012) (stating that prison officials have a duty to protect incarcerated people from violent actions of fellow incarcerated people) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)); *see also Berry v. City of Muskogee*, 900 F.2d 1489, 1496–1499 (10th Cir. 1990) (finding where incarcerated person was strangled to death in prison by two men whom he had identified as helping him commit the crime for which he was serving time, officials could have known of the danger based on the prior relationship and notification by victim’s wife); *Gangloff v. Poccia*, 888 F. Supp. 1549, 1555 (M.D. Fla. 1995) (“State officials have a duty, under the Eighth Amendment prohibition of cruel and unusual punishment, to protect inmates from each other. This duty, however, does not lead to absolute liability because the Eighth Amendment addresses only punishment”) (quoting *King v. Fairman*, 997 F.2d 259, 261 (7th Cir. 1993); *Fisher v. Koehler*, 692 F. Supp. 1519, 1559 (S.D.N.Y. 1988) (“Although the state is not obliged to insure an assault-free environment, a prisoner has a constitutional right to be protected from the unreasonable threat of violence from his fellow inmates.”) (citing *Morgan v. District of Columbia*, 263 U.S. App. D.C. 69, 824 F.2d 1049, 1057 (D.C. Cir. 1987)).

70. *See, e.g., Blaylock v. Borden*, 547 F. Supp. 2d 305, 310 (S.D.N.Y. 2008) (stating that prison officials have a duty to protect prisoners from other prisoners under the 8th Amendment).

71. *See Buckner v. Hollins*, 983 F.2d 119, 123 (8th Cir. 1993) (finding grounds for an 8th Amendment claim when state corrections officer failed to stop an assault by county corrections officer on naked, handcuffed incarcerated person in cell).

known as “failure-to-protect” claims. You can go to court to claim prison officials are ignoring unsafe conditions or a serious threat against you. You can do this even if you have not yet been assaulted.⁷²

In *Farmer v. Brennan*, the U.S. Supreme Court held that prison staff showed deliberate indifference when they did not do anything while knowing about a big risk⁷³ to an incarcerated person’s safety.⁷⁴ If you were assaulted by another incarcerated person (or prison guard) and believe prison officials’ deliberate indifference allowed the assault to happen, you will have to show that those specific officials knew of and ignored an excessive risk to your health and safety.⁷⁵ For each individual prison official, you will have to prove to the court that:

- (1) The prison official was aware of facts that would imply a substantial risk of serious harm exists; and
- (2) That specific prison official knew this implication.⁷⁶

Remember, courts also use the deliberate indifference standard in claims against supervisors who did not do enough to watch over and control their prison staff. Courts also use this standard against officers who stood by and watched an assault.⁷⁷

a. Proving a Substantial Risk to Your Safety

You must first show that there was or is a big (“substantial”) risk of serious harm to your safety from another incarcerated person to satisfy the objective part of the *Farmer* test (see Part B(2)(b)(ii) below).

b. Proving the Prison Officials Knew About This Risk

You must also provide evidence that the official knew of the big risk to your safety.⁷⁸ You do not have to prove that the official definitely knew you were going to be attacked. You only have to show that the official knew there was a big chance that you could get hurt.⁷⁹ You do not have to show that the officials knew you were personally at risk or that the risk came from a particular incarcerated person.⁸⁰

72. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 831, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994) (describing the alleged 8th Amendment claim as a failure to prevent harm); *Helling v. McKinney*, 509 U.S. 25, 34, 113 S. Ct. 2475, 2481, L. Ed. 2d 22, 32 (1993) (“[A] prisoner need not wait until he is actually assaulted before obtaining relief ... [T]he Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering.”).

73. *Farmer v. Brennan*, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) (“The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his future health,’ and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk” (internal citation omitted)).

74. *Farmer v. Brennan*, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994).

75. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

76. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

77. See, e.g., *Blyden v. Mancusi*, 186 F.3d 252, 265 (2d Cir. 1999) (holding correctional officers to a deliberate indifference standard for violence by subordinates).

78. See *Lewis v. Richards*, 107 F.3d 549, 553–554 (7th Cir. 1997) (finding no 8th Amendment violation where incarcerated person failed to present sufficient evidence that officials knew of risk to his safety and consciously disregarded that risk after the incarcerated person was subjected to three separate sexual assaults); *Davis v. Scott*, 94 F.3d 444, 446–47 (8th Cir. 1996) (finding no 8th Amendment violation where prison informant was attacked after his return to the general population, because there was no “solid evidence” that anyone in the general population posed an “identifiable serious risk” to his safety).

79. See *Whitston v. Stone County Jail*, 602 F.3d 920, 924–925 (8th Cir. 2010) (finding that prison officials could be liable for sexual assault by one incarcerated person against the other even if they did not know about the risk of that specific incarcerated person committing the assault, as long as they knew about the general risk).

80. See *Farmer v. Brennan*, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994); see also *Brown v. Budz*, 398 F.3d 904, 914–915 (7th Cir. 2005) (holding deliberate indifference can be established by

For an Eighth Amendment deliberate indifference claim, it is not enough to claim prison officials should have known about the big risk to your safety⁸¹ (although in that case you still may be able to make a state law negligence tort claim as described in Part (B)(1)(a)(i)). These claims require the prison officials to have actually known about the big risk to your safety.⁸²

You can show that the officials actually knew about this substantial risk by showing both direct evidence and circumstantial evidence of the threat.⁸³ Courts think that whether a prison official knew about the risk is a question of fact that depends on the situation.⁸⁴ For example, if you have evidence that the risk was around for a long time, something a lot of people knew about, or that the official must have known about the risk, then generally that evidence is enough to show that the official did in fact know about it.⁸⁵ You should expect prison officials to try to prove that they did not actually know about the facts showing you were in danger. Or, they may try to prove that even if they did know about it, they had good reason to believe that the risk was minor.⁸⁶ In addition to your own complaints about

knowledge either of a victim's vulnerability or of an assailant's predatory nature; both are not required); *Pierson v. Hartley*, 391 F.3d 898, 902–903 (7th Cir. 2004) (holding that an incarcerated person could recover for assault by a violent incarcerated person assigned to an open-air dormitory, which allowed unrestricted movement, in violation of prison policy, regardless of whether prison staff knew of the risk to the particular incarcerated person who was injured); *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (holding that a trans incarcerated person could recover for assault by a known “predatory inmate” either because leaving her in a unit containing high-security incarcerated people threatened her safety, or because placing the attacker in protective custody created a risk for the other occupants); *Lewis v. Siwicki*, 944 F.3d 427, 433–432 (2d Cir. 2019) (“The first Farmer factor, substantial risk of serious harm, depends not on the officials’ perception of the risk of harm, but solely on whether the facts, or at least those genuinely in dispute on a motion for summary judgment, show that the risk of serious harm was substantial”); *LaMarca v. Turner*, 995 F.2d 1526, 1535–1537 (11th Cir. 1993) (liability can be based on “general danger arising from a prison environment that both stimulated and condoned violence”); *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (risk of harm from systemic medical care deficiencies is obvious); *Abrams v. Hunter*, 910 F. Supp. 620, 624–625 (M.D. Fla. 1995) (acknowledging potential liability based on awareness of generalized, substantial risk of serious harm from incarcerated people violence), *aff’d*, 100 F.3d 971 (11th Cir. 1996); *Knowles v. N.Y. City Dept. of Corr.*, 904 F. Supp. 217, 221–222 (S.D.N.Y. 1995) (finding a valid claim where prison officials knew of an ethnic “war” among prisoners, that a Hispanic incarcerated person who had been cut had been transferred to plaintiff’s jail, and that plaintiff was part of a group at risk because of his accent and appearance).

81. *See Riccardio v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004) (“‘Deliberate indifference’ means subjective awareness. It is not enough, the Court held in *Farmer*, that the guard ought to have recognized the risk. Instead, ‘the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’” (citations omitted)); *Knowles v. N.Y. City Dept. of Corr.*, 904 F. Supp. 217, 222 (S.D.N.Y. 1995) (“Mere negligence, however, on the part of a prison official will not give rise to a claim under § 1983” (citing *Williams v. Vincent*, 508 F.2d 541, 546 (2d Cir. 1974))).

82. *See Carter v. Galloway*, 352 F.3d 1346, 1349–1350 (11th Cir. 2003) (per curiam) (dismissing medium-security incarcerated plaintiff’s claim for assault, after plaintiff was stabbed by his maximum-security cellmate, a known “problematic inmate,” after plaintiff complained his cellmate was “acting crazy” but had not specifically told prison officials his cellmate had threatened him as “[s]uch a generalized awareness of risk in these circumstances does not satisfy the subjective awareness requirement”).

83. *Johnson v. Johnson*, 385 F.3d 503, 524 (5th Cir. 2004) (“The official’s knowledge of the risk can be proven through circumstantial evidence, such as by showing that the risk was so obvious that the official must have known about it” (internal citation omitted)); *see also Farmer v. Brennan*, 511 U.S. 825, 840, 114 S. Ct. 1970, 1980, 128 L. Ed. 2d 811, 827 (1994) (stating that the “concept of constructive knowledge is familiar enough that the term ‘deliberate indifference’ would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk’s obviousness.”). In other words, a finder of fact, like a judge or a jury, may conclude that an official was aware of the risk if the risk was obvious.

84. *See Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994).

85. *See Farmer v. Brennan*, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1981–1982, 128 L. Ed. 2d 811, 828–829 (1994).

86. *See Johnson v. Johnson*, 385 F.3d 503, 525 (5th Cir. 2004) (noting prison officials defended themselves by trying to show that it was reasonable to believe, based on the information they had at the time, that there was no danger to the incarcerated person or that it was reasonable to disbelieve the incarcerated person’s repeated

the risk, you should try to present other evidence that you were in danger to show that the prison officials actually knew of the risk to your safety. Your complaints alone may not prove that prison officials knew about the risk. Courts do not expect guards to believe every protest or complaint an incarcerated person makes.⁸⁷

c. Proving that the Prison Officials Did Not Act Reasonably to Prevent or Stop Assault

Finally, you must prove that the official acted unreasonably or failed to act in a situation where the official knew that you were at a great risk of harm.⁸⁸ It is important to understand that even if a prison official knew of a substantial risk to your health and safety, that prison official may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not prevented.⁸⁹ For example, in the First Circuit case *Burrell v. Hampshire County*, the court found that the prison guards did not act unreasonably when they did not transfer an incarcerated person who was good at martial arts and who did not have any previous fights with his attacker. The court found this because the incarcerated person misrepresented himself to the officers as having proficiency in martial arts and the officers could not predict that the incarcerated person would be attacked.⁹⁰

d. Examples of *Farmer* Deliberate Indifference Cases

In a Fourth Circuit case, *Brown v. North Carolina Department of Corrections*, a prison staff member told Brown to enter an area to go get cleaning supplies.⁹¹ The staff member knew that another incarcerated person who had a grudge against Brown was in that area of the prison.⁹² That incarcerated person assaulted and beat Brown.⁹³ Based on these facts, the Fourth Circuit held that a reasonable person could say that prison officials had ignored a major risk to Brown.⁹⁴

New York courts have also dealt with claims that guards failed to protect an incarcerated person from other incarcerated people. In *Knowles v. New York City Department of Corrections*, another incarcerated person slashed Knowles in the face while they were in the recreation area.⁹⁵ Knowles sued prison officials stating that they had known of the risk to him and ignored it.⁹⁶ The guards had

complaints of sexual abuse); *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 830 (1994) (stating that prison officials can try to show that they “did not know of the underlying facts” or “believed (albeit unsoundly) that the risk ... was insubstantial or nonexistent.”)

87. See *Riccardo v. Rausch*, 375 F.3d 521, 527–528 (7th Cir. 2004) (stating that “[t]he Constitution does not oblige guards to believe whatever inmates say,” and that “a prisoner’s bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate’s assertion”).

88. See *Farmer v. Brennan*, 511 U.S. 825, 841–842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (holding that under the 8th Amendment, prison officials could not be liable for inhumane conditions of confinement unless the official had knowledge of the risk to the incarcerated person); see also *Leibach v. State*, 215 A.D.2d 978, 979–980, 627 N.Y.S.2d 463, 463–464 (3d Dept. 1995) (stating that where an attack was planned in secret, and correction staff was not aware of it, staff was not culpable). Please note that if you are a pretrial detainee you must prove that the purposeful force used by the prison official was objectively unreasonable. See *Kingsley v. Hendrickson*, 576 U.S. 389, 397, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015) (objective reasonableness turns on the facts and circumstances of each particular case and a court must make this determination from the perspective of an officer on the scene); see also Chapter 34 of the *JLM*, “The Rights of Pretrial Detainees”.

89. See *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–1983, 128 L. Ed. 2d 811, 830 (1994) (emphasizing that there is no 8th Amendment violation if the official “responded reasonably to the risk, even if the harm ultimately was not averted”); see also *Short v. Smoot*, 436 F.3d 422, 428 (4th Cir. 2006) (finding that officials who put a suicidal incarcerated person under video surveillance had acted reasonably and could not be liable under the 8th Amendment).

90. *Burrell v. Hampshire County*, 307 F.3d 1, 8–9 (1st Cir. 2002).

91. *Brown v. N.C. Dept. of Corr.*, 612 F.3d 720, 722 (4th Cir. 2010).

92. *Brown v. N.C. Dept. of Corr.*, 612 F.3d 720, 722 (4th Cir. 2010).

93. *Brown v. N.C. Dept. of Corr.*, 612 F.3d 720, 722 (4th Cir. 2010).

94. *Brown v. N.C. Dept. of Corr.*, 612 F.3d 720, 723 (4th Cir. 2010).

95. *Knowles v. N.Y. City Dept. of Corr.*, 904 F. Supp. 217, 219 (S.D.N.Y. 1995).

96. *Knowles v. N.Y. City Dept. of Corr.*, 904 F. Supp. 217, 218 (S.D.N.Y. 1995).

only patted down the incarcerated people when they had entered the recreation area, instead of going through the normal strip search procedures.⁹⁷ Furthermore, there was evidence that the prison officials knew about a “war” going on between Spanish-speaking and Jamaican incarcerated people. There was also evidence that they knew Knowles was one of the incarcerated people at risk because of the way that he looked and talked.⁹⁸ The court held that this was enough evidence to create uncertainty about whether or not the guards were deliberately indifferent to Knowles’ safety.⁹⁹

In sum, prison officials may be found liable under the *Farmer* deliberate indifference standard if they (1) know the incarcerated person is facing a substantial risk of serious harm, and (2) ignore the risk by not taking reasonable measures to avoid it. If they meet these requirements, officials may be liable if they do not act to stop another incarcerated person or prison official from attacking you. Prison officials may also be liable if there is a policy allowing a pattern of too much force.¹⁰⁰

(b) Objective Part

In addition to the subjective part discussed above, remember that you also have to prove a second, objective part. To prove this objective part of an Eighth Amendment violation, you must show either that you were actually injured (if assaulted by a prison official)¹⁰¹ or that the prison official’s actions or inaction put you at a “substantial risk of serious harm” from another incarcerated person, whether or not you were actually assaulted.

(c) Seriousness of Harm in Assaults by Prison Officials

To win a lawsuit against a prison official who assaulted you, you have to show that the attack was “cruel and unusual punishment” under the Eighth Amendment.¹⁰² You can show that a prison official violated your Eighth Amendment rights no matter whether your injury was big or small.¹⁰³ What matters most is whether the official used force against you as a way to try to keep order in the prison, or whether the purpose of the force was to hurt you.¹⁰⁴ However, a court will still look into how severe your injury was.¹⁰⁵ This is because the kind of injury you have can help a court figure out the strength of the force that the official used. The injury can also help a court figure out whether officials could have thought that the force was necessary to do their job in a certain situation.

Courts look to society’s standards of good behavior to decide whether the official’s actions were bad enough.¹⁰⁶ In general, prison officials violate society’s standards whenever they maliciously, evilly, or

97. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 218–219 (S.D.N.Y. 1995).

98. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995).

99. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995).

100. See *Matthews v. Crosby*, 480 F.3d 1265, 1270–1275 (11th Cir. 2007) (holding that a prison warden’s knowledge of the violent propensities of some of his prison guards and his failure to act to prevent them from assaulting prisoners could count as deliberate indifference); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1302 (S.D. Tex. 1980) (finding 8th Amendment violations where prison officials encouraged staff to indulge in excessive physical violence by rarely investigating reports of violence and failing to take corrective disciplinary action against officers whom they knew to have brutalized prisoners), *aff’d in part, rev’d in part*, 688 F.2d 266 (5th Cir. 1982), *and* 679 F.2d 1115 (5th Cir. 1982).

101. *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321, 2326, 2329, 1115 L. Ed. 2d 271, 278 (1991)); see also *Wright v. Goord*, 554 F.3d 255, 268–269 (2d Cir. 2009).

102. U.S. CONST. amend. VIII.

103. *Wilkins v. Gaddy*, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (citations omitted).

104. *Wilkins v. Gaddy*, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (citations omitted).

105. *Wilkins v. Gaddy*, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (citations omitted).

106. *Hudson v. McMillian*, 503 U.S. 1, 2, 25, 112 S. Ct. 995, 996, 1008, 117 L. Ed. 2d 156, 157, 178 (1992); *Estelle v. Gamble*, 429 U.S. 97, 102–103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976); see also *Wright v. Goord*, 554 F.3d 255, 268–269 (2d Cir. 2009).

cruelly use force to cause harm “whether or not significant injury is evident.”¹⁰⁷ But, “not ... every malevolent [cruel] touch by a prison guard [raises] a federal cause of action.”¹⁰⁸

The Supreme Court has said that “cruel and unusual punishment” does not include uses of very minor amounts of force. Courts have used the Latin phrase “*de minimis*” to describe this small amount of force. A small amount of force is not the same thing as a small injury.¹⁰⁹ “*De minimis*” means that a fact or thing is “so insignificant that a court may overlook it in deciding an issue or case.”¹¹⁰ Some examples of injuries courts have thought were *de minimis* are bumping, discomfort, sore wrists,¹¹¹ cuts and swelling to the wrists,¹¹² being slammed against a wall,¹¹³ and being hit by swinging keys.¹¹⁴ Some examples of force courts have called *de minimis* are hitting an incarcerated person once on the head,¹¹⁵ spraying an incarcerated person with water,¹¹⁶ pressing a fist against an incarcerated person’s neck,¹¹⁷ and bruising an incarcerated person’s ear during a routine search.¹¹⁸

Because what counts as a constitutional violation changes depending on the specific situation, courts have not defined exactly what type or degree of harm you need to show in order to win on an Eighth Amendment claim. The following cases will give you some examples of injuries courts have said do or do not go against the Eighth Amendment.

In *Hudson v. McMillian*, the incarcerated person suffered blows that caused “bruises, swelling, loosened teeth, and a cracked dental palate.”¹¹⁹ The Supreme Court found that the violence against

107. *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (internal quotations omitted).

108. *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992).

109. *Wilkins v. Gaddy*, 599 U.S. 34, 37–38, 130 S. Ct. 1175, 1178–1179, 175 L. Ed. 2d 995, 999 (2010) (“An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.”); *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (stating that coughing and shortage of oxygen, even if *de minimis*, is not enough to dismiss an 8th Amendment claim).

110. *De Minimus*, BLACK’S LAW DICTIONARY (10th ed. 2014).

111. *Fillmore v. Page*, 358 F.3d 496, 504–505 (7th Cir. 2004) (holding that incidental bumping, discomfort, and sore wrists were *de minimis* and do not meet the constitutional threshold).

112. *Watson v. Riggle*, 315 F. Supp. 2d 963, 969–970 (N.D. Ind. 2004) (holding injuries to incarcerated person’s wrists, including a cut and some swelling, caused when guards removed his handcuffs were *de minimis*); *cf. Liiv v. City of Coeur D’Alene*, 130 Fed. Appx. 848, 852 (9th Cir. 2005) (clarifying that while past cases, such as *Wall v. County of Orange*, 364 F.3d 1107, 1112 (9th Cir. 2004), have “recognized that excessively tight handcuffing can constitute a Fourth Amendment violation,” a finding of such violation requires either actual injury to the wrists or a complaint to the officers involved that the handcuffs were too tight).

113. *Govan v. Campbell*, 289 F. Supp. 2d 289, 300 (N.D.N.Y. 2003) (holding that incarcerated person’s claims guard slammed him against the wall and rubbed up against him was “*de minimis*” and insufficient to state a constitutional violation).

114. *Norman v. Taylor*, 25 F.3d 1259, 1263–1264 (4th Cir. 1994) (requiring incarcerated person to establish more than *de minimis* injury by deputy’s swinging of keys at the incarcerated person to maintain claim of excessive force); *White v. Holmes*, 21 F.3d 277, 281 (8th Cir. 1994) (requiring incarcerated person to establish more than *de minimis* injury caused by prison librarian throwing keys at prisoner and flailing her arms at prisoner’s head). *But see United States v. LaVallee*, 439 F.3d 670, 687–688 (10th Cir. 2006) (rejecting the view that *de minimis* injury is conclusive evidence that *de minimus* force was used).

115. *Olson v. Coleman*, 804 F. Supp. 148, 150–151 (D. Kan. 1992) (holding that single blow that struck incarcerated person on the head while he was handcuffed was not excessive use of force), *vacated on other grounds*, No. 92-3281, 1993 U.S. App. LEXIS 10086, at * 3 (D. Kan. April 28, 1993) (*unpublished*).

116. *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993) (holding that guard’s spraying incarcerated person with water because he started a fire was a *de minimis* use of physical force and was thus too trivial to make out a violation of 8th Amendment rights).

117. *Candelaria v. Coughlin*, 787 F. Supp. 368, 374–375 (S.D.N.Y. 1992) (finding that guard pressing his fist against incarcerated person’s neck, resulting in no physical injury, was *de minimis* force for 8th Amendment purposes), *aff’d*, 979 F.2d 845 (2d Cir. 1992).

118. *Siglar v. Hightower*, 112 F.3d 191, 193–194 (5th Cir. 1997) (finding no 8th Amendment violation where plaintiff suffered bruised ear during routine search; court deemed this a *de minimis* use of force).

119. *Hudson v. McMillian*, 503 U.S. 1, 4, 112 S. Ct. 995, 997, 117 L. Ed. 2d 156, 164 (1992).

Hudson and his injuries were serious enough to satisfy the “objective part” of the Eighth Amendment. This provided the basis for a constitutional claim. The Supreme Court, in finding a constitutional violation in *Hudson*, also thought that it was important that the officers meant to embarrass the incarcerated person.

Soon after the Supreme Court decided *Hudson*, a district court in New York used the *Hudson* guidelines to determine whether the force used by corrections officers was constitutional. In that case, corrections officers failed to stop other officers from unnecessarily beating an incarcerated person.¹²⁰ The beating badly bruised and injured the incarcerated person, including causing a fracture to his left eye. The same officers who did not stop the beating later ripped off the incarcerated person's clothes because they thought he was stripping too slowly. Even though the incarcerated person had originally disobeyed orders, the court found the officers liable for not trying to stop the other officers from beating the incarcerated person.¹²¹ The court looked at several incidents in this case. In one instance, the court said an officer was liable because he had kicked an incarcerated person in the buttocks for no reason.¹²² Again, as in *Hudson*, the court found a constitutional violation partly because the officers intended to humiliate the incarcerated person.

In a Third Circuit case, officers hit and kicked an incarcerated person, Giles, while he was restrained on the ground.¹²³ Giles had claimed that the officers continued to do this even after he had stopped resisting them.¹²⁴ The Third Circuit stated that if Giles' claim were true, the officers' actions would be an Eighth Amendment violation.¹²⁵

In *Lewis v. Downey*, a prison officer used a Taser gun after an incarcerated person did not respond to an order to get up from bed.¹²⁶ The Seventh Circuit stated that these facts were serious enough that a jury should decide about the officer's state of mind in using the Taser gun.¹²⁷ The Fourth Circuit decided that an incarcerated person sprayed with mace and then restrained on a bare-metal bed frame for over eight hours, without access to medical care or a toilet, had an Eighth Amendment claim.¹²⁸

You do not always need to have experienced a severe physical injury to bring a claim against a prison official. The Fifth Circuit has held that an incarcerated person who was beaten by corrections officers, resulting in a sprained ankle, suffered a serious enough injury to have a successful Eighth Amendment claim.¹²⁹ The court stated that there is no minimum injury required for Eighth Amendment claims of excessive force.¹³⁰ Even though a sprained ankle may not seem like a bad injury, in the Fifth Circuit decided it was serious enough not to be *de minimis*. Similarly, the Third Circuit has said that you could still have an Eighth Amendment claim even if your injury is not that serious.¹³¹

120. *Jones v. Huff*, 789 F. Supp. 526, 535–536 (N.D.N.Y. 1992).

121. *Jones v. Huff*, 789 F. Supp. 526, 535–536 (N.D.N.Y. 1992) (finding that kicks and punches were not part of a good-faith effort to restore discipline and could not have been thought necessary since the incarcerated person was already pinned down by two other officers, and that stripping the incarcerated person “was done maliciously with the intent to humiliate him”).

122. *Jones v. Huff*, 789 F. Supp. 526, 532, 536–537 (N.D.N.Y. 1992).

123. *Giles v. Kearney*, 571 F.3d 318, 327 (3d Cir. 2009).

124. *Giles v. Kearney*, 571 F.3d 318, 327 (3d Cir. 2009).

125. *Giles v. Kearney*, 571 F.3d 318, 327 (3d Cir. 2009).

126. *Lewis v. Downey*, 581 F.3d 467, 470 (7th Cir. 2009).

127. *Lewis v. Downey*, 581 F.3d 467, 478 (7th Cir. 2009).

128. *Williams v. Benjamin*, 77 F.3d 756, 764–765 (4th Cir. 1996).

129. *Flowers v. Phelps*, 956 F.2d 488, 489–490 (5th Cir. 1992), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992).

130. *Flowers v. Phelps*, 956 F.2d 488, 491 (5th Cir. 1992); *see also Bourne v. Gunnels*, 921 F.3d 484, 492 (5th Cir. 2019) (“An inmate need not establish a ‘significant injury’ to pursue an excessive force claim because [i]njury and force ... are only imperfectly correlated, and it is the latter that ultimately counts,”). *But see West v. United States*, 729 F. App'x 145, 148 (3d Cir. 2018) (holding that being “pushed out of a cell” was not a sufficient physical injury), *reh'g denied* (May 9, 2018).

131. *Brooks v. Kyler*, 204 F.3d 102, 108 (3d Cir. 2000) (“[T]he absence of significant resulting injury is not a per se reason for dismissing a claim based on alleged wanton and unnecessary use of force against a prisoner.”).

Mental and emotional injuries are different from physical ones. After the Prison Litigation Reform Act (“PLRA”), you can no longer bring claims in federal civil court for mental or emotional injuries that are not related to physical injury. This means that if you bring a claim in federal civil court for mental or emotional injury that did not happen in relation to physical injury, the PLRA requirements may now prevent you from getting compensatory damages (and in some courts, punitive damages as well).¹³²

(iii) Substantial Risk of Serious Harm from Other Incarcerated People

To prove the objective part in a *Farmer v. Brennan* deliberate indifference claim about an incarcerated person assault, you must show you faced an objective, “substantial risk of serious harm.” You can make a deliberate indifference claim even if you were never injured or attacked as long as you can show there was a big risk that you would get hurt. For a prison official’s actions (or failure to act) to be against the Eighth Amendment, “the deprivation alleged must be, objectively, ‘sufficiently serious.’” You also “must show that [you are] incarcerated under conditions posing a substantial risk of serious harm.”¹³³

It is important that you understand that prison officials will not be responsible anytime another incarcerated person hurts you.¹³⁴ In other words, if you never faced a big risk (or cannot prove you did), then you cannot prove prison officials were deliberately indifferent to that risk. For example, the Eighth Circuit decided that the plaintiff, an incarcerated person who was assaulted by his cellmate, did not have an Eighth Amendment failure-to-protect claim because no one, including the victim, thought that the cellmate was dangerous. Therefore, the court rejected the incarcerated person’s lawsuit because he had failed to show a “substantial risk of serious harm.”¹³⁵

In *Farmer*, the Court did not explain how serious the risk must be in order to be “substantial.”¹³⁶ Courts consider whether society thinks the risk that the incarcerated person complains of is so bad that it is against our society’s standards to make anyone take such a chance.¹³⁷ In other words, the incarcerated person must show that today’s society does not accept the risk he faced.¹³⁸ Courts do not consider the general, everyday risk of assault from other incarcerated people to be a “substantial risk” by itself.¹³⁹

132. See Part F of Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” for further information on the PLRA and its actual injury requirement.

133. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994).

134. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994).

135. *Berry v. Sherman*, 365 F.3d 631, 634–635 (8th Cir. 2004); see also *Riccardo v. Rausch*, 375 F.3d 521, 526–527 (7th Cir. 2004) (holding that the incarcerated person plaintiff had not faced a substantial risk from his cellmate, who later assaulted him, because while the incarcerated person was at risk of attack from the Latin Kings, his cellmate attacked him not for that reason but out of a personal fantasy: “The risk from which [the prisoner plaintiff] Riccardo sought protection was not realized; for all this record shows, the (objectively evaluated) risk to Riccardo of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner.”).

136. *Farmer v. Brennan*, 511 U.S. 825, 834 n.3, 114 S. Ct. 1970, 1977 n.3, 128 L. Ed. 2d 811, 823 n.3 (1994) (noting that the Court did not reach the question of “[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes”).

137. See *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (“[T]he Eighth Amendment’s prohibition of cruel and unusual punishments ‘draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,’ and so admits of few absolute limitations.”); *Wright v. Goord*, 554 F.3d 255, 268 (2d Cir. 2009) (“The objective component of a claim of cruel and unusual punishment focuses on the harm done, in light of ‘contemporary standards of decency.’”).

138. See, e.g., *Helling v. McKinney*, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993) (finding that being exposed to a cellmate who smoked five packs of cigarettes a day created, in theory, a potentially valid claim under the 8th Amendment due to unreasonable health risk).

139. *Jones v. Marshall*, 459 F. Supp. 2d 1002, 1008 (E.D. Cal. 2006) (“[T]he legal standard must not be applied

Remember that after you show you faced substantial risk of serious harm, you must show that prison officials knew about the risk but were ignored it (see Part B(2)(a)(ii)(3) and (4)).

3. Harassment by Prison Officials

This Section explains which different types of harassment violate the Eighth Amendment. Harassment can be verbal, physical, or sexual. Harassment may be about race, sex, disability, language, national origin, sexual orientation, or other characteristics. New York State defines harassment as “[e]mployee misconduct meant to annoy, intimidate, or harm an inmate.”¹⁴⁰ Generally, verbal harassment alone does not violate the Eighth Amendment unless you are also physically threatened at the same time. Sexual harassment is any unwanted sexual attention. Generally, sexual comments by themselves are not enough for an Eighth Amendment violation.¹⁴¹ If you are being harassed, you should first try to file a grievance through the inmate grievance system, discussed in *JLM* Chapter 15, “Inmate Grievance Procedures.”

(a) Verbal Harassment Alone

You cannot have an Eighth Amendment claim for verbal assault only.¹⁴² Courts do not think verbal abuse, including racial and sexual comments, is unconstitutional. For example, the Ninth Circuit has held that an incarcerated person did not have an Eighth Amendment claim when a guard verbally harassed the incarcerated person in a sexual and racial way and briefly exposed the guard’s genitals.¹⁴³ Similarly, the Sixth Circuit decided that an incarcerated person had no constitutional claim against a guard who banged his cell door, threw food trays, made aggravating and insulting comments, and behaved in a racially prejudicial manner because harassment and verbal abuse are not Eighth Amendment violations.¹⁴⁴

to an idealized vision of prison life, but to the prison as it exists.”) (quoting *Berg v. Kincheloe*, 794 F.2d 457, 462 (9th Cir. 1986)).

140. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(e) (2006).

141. *See Adkins v. Rodriguez*, 59 F.3d 1034, 1037–1038 (10th Cir. 1995) (finding prison official’s alleged verbal sexual harassment of incarcerated person did not violate the 8th Amendment because it was not objectively sufficiently serious and the prison official did not act with deliberate indifference to the incarcerated person’s health or safety). When other forms of harassment are combined with comments of a sexual nature, they may constitute cruel and unusual punishment in violation of the 8th Amendment. *See, e.g., Berry v. Oswalt*, 143 F.3d 1127, 1133 (8th Cir. 1998) (holding that allegations of attempted non-routine pat-downs combined with sexual comments and propositions that caused fear and frustration met the objective prong of the 8th Amendment claim). *See* Parts B(3)(a) and (c) of this Chapter for more information on verbal and sexual harassment.

142. *Webster v. City of New York*, 333 F. Supp. 2d 184, 201 (S.D.N.Y. 2004) (“Being subjected to verbally abusive language does not rise to the level of a constitutional claim in an Eighth Amendment context.”); *Minifield v. Butikofer*, 298 F. Supp. 2d 900, 904–905 (N.D. Cal. 2004) (holding incarcerated person did not state a constitutional claim for sexual harassment, where a prison official twice unzipped his pants and told incarcerated person to grab his penis, because the Ninth Circuit has “specifically differentiated between sexual harassment that involves verbal abuse and that which involves allegations of physical assault, finding the latter [sic] to be in violation of the constitution”; also noting the incarcerated person had not alleged any physical injury, and under the Prison Litigation Reform Act, “[f]ailure to allege and establish an appropriate physical injury is ground for dismissal” (citations omitted)); *Jones v. Brown*, 300 F. Supp. 2d 674, 681 (N.D. Ind. 2003) (holding pretrial detainee had no constitutional claim, where guard incorrectly told him criminal charges had been dismissed, when in fact they had been referred to the prosecutor and eventually became part of a plea bargain, because verbal abuse and harassment are not sufficient).

143. *Austin v. Terhune*, 367 F.3d 1167, 1171–1172 (9th Cir. 2004) (“Although prisoners have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards, the Eighth Amendment’s protections do not necessarily extend to mere verbal sexual harassment.” (citations omitted)).

144. *Johnson v. Dellatifa*, 357 F.3d 539, 546 (6th Cir. 2004) (“[T]he allegations, if true, demonstrate shameful and utterly unprofessional behavior [but] they are insufficient to establish an Eighth Amendment violation ... [H]arassment and verbal abuse ... do not constitute the type of infliction of pain that the Eighth Amendment prohibits.” (citation omitted)).

(b) Verbal Harassment With Physical Threats

Simple verbal harassment does not violate the Eighth Amendment. However, courts have held that when these assaults come along with very serious physical threats (such as believable death threats), you may have a claim for psychological injury.¹⁴⁵ However, the Prison Litigation Reform Act states that incarcerated people may not bring a federal civil action for mental or emotional injury suffered while in custody “without a prior showing of physical injury.”¹⁴⁶ Different courts define “physical injury” differently. But, typically they hold that “de minimus” injuries (very minor injuries, like a small cut or bruise) do not count as a “physical injury.”¹⁴⁷ Also, not all of these courts allow you to receive the same type of damages.¹⁴⁸ This means that if you can only show a psychological injury, you will not be able to get damages.¹⁴⁹ The court can still grant you injunctive relief (a court order to prevent officials or incarcerated people from harassing you) if you can show that this conduct is likely to happen again in the future.¹⁵⁰ For more information on injunctive relief, see Part L of Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

(c) Sexual Harassment

There is no single definition of sexual harassment in the prison context. However, the Bureau of Justice Statistics defines nonconsensual sexual acts as “unwanted contacts with another inmate or unwilling contacts with staff that involved oral sex anal sex, vaginal sex, handjobs, and other sexual acts.”¹⁵¹ Both men and women can be sexually harassed.¹⁵² Because prison officials have so much power over incarcerated people, a corrections officer may try to force an incarcerated person into sexual

145. See, e.g., *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (finding alleged death threats accompanied by the brandishing of lethal weapons would, if true, violate the 8th Amendment).

146. 42 U.S.C. § 1997e(e).

147. See generally *Pierre v. Padgett*, 808 F. App'x 838, 843 (11th Cir. 2020) (noting that “in order to satisfy section 1997e(e) the physical injury must be more than de minimis, but need not be significant.”); *West v. United States*, 729 F. App'x 145, 148 (3d Cir. 2018), *reh'g denied* (May 9, 2018) (finding that “more than a de minimis physical injury must be alleged as a predicate to allegations of mental or emotional injury.”); *McAdoo v. Martin*, 899 F.3d 521, 525 (8th Cir. 2018) (holding that a plaintiff can only receive damages if they have “more than a de minimis injury”).

148. See generally *Pierre v. Padgett*, 808 F. App'x 838, 843 (11th Cir. 2020) (finding that only nominal damages are available in suits involving psychological injury, but not other kinds of damages); *Small v. Brock*, 963 F.3d 539, 543 (6th Cir. 2020) (noting that Section 1997e(e) of the PLRA only prevents recovery of compensatory damages). But see *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013) (quoting *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir. 2002) (“Because Section 1997e(e) is a limitation on recovery of damages for mental and emotional injury in the absence of a showing of physical injury, it does not restrict a plaintiff’s ability to recover compensatory damages for actual injury, nominal or punitive damages, or injunctive and declaratory relief.”).

149. For a more detailed explanation about the types of damages that various courts allow one to receive for psychological injuries under the PLRA, see *Aref v. Lynch*, 833 F.3d 242, 262–267 & n.15 (D.C. Cir. 2016) (describing the varying laws for recovering damages under the PLRA in more detail).

150. See *Hutchins v. McDaniels*, 512 F.3d 193, 196–198 (5th Cir. 2007) (noting that “the physical injury requirement does not bar declaratory or injunctive relief for violations of a prisoner’s Constitutional rights”); *Zehner v. Trigg*, 133 F.3d 459, 461–463 (7th Cir. 1997) (finding that in a suit for mental and emotional injuries because of exposure to asbestos, a incarcerated person cannot sue for monetary damages but can sue for other kinds of relief).

151. NPREC, Report and Standards, *available at* <https://www.bjs.gov/content/pub/pdf/svsfpri07.pdf> (last visited Oct. 21, 2019). Bureau of Justice Statistics, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12, *available at* <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (last visited Oct. 21, 2019).

152. See *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) (finding that, in principle, sexual abuse of a male incarcerated person by a female corrections officer could potentially violate the 8th Amendment); *Liner v. Goord*, 196 F.3d 132, 135–136 (2d Cir. 1999) (remanding case to consider whether a sexual assault claim violated the 8th Amendment).

conduct by threatening them with disciplinary action or some other punishment. This can be considered cruel and unusual punishment that violates the Eighth Amendment.

Courts look to see if an act of sexual harassment or assault is against “evolving standards of decency” to decide if the act violated an incarcerated person’s Eighth Amendment rights.¹⁵³ In other words, a court will look at what society believes is acceptable and good behavior to decide whether an attacker’s behavior went against that standard. Sexual assault is a clear violation. But, comments of a sexual nature by themselves are usually not enough to violate the Eighth Amendment.¹⁵⁴ When other forms of harassment are combined with comments of a sexual nature, they may constitute cruel and unusual punishment in violation of the Eighth Amendment.¹⁵⁵

If a prison official sexually harassed you, you can file a lawsuit both against that official and the prison. But, keep in mind that it is difficult to make an Eighth Amendment claim for sexual harassment against a correctional institution. It is difficult because you must prove that the administrators showed “deliberate indifference” toward the harassment.¹⁵⁶ In other words, you must show that the prison administrators knew or should have known of the risk of harassment, and ignored it. Showing this knowledge is difficult unless you have evidence that you told the administrators about the problem or asked them for help.

(d) Reporting Harassment in New York

New York law defines harassment as “employee misconduct meant to annoy, intimidate or harm an inmate.”¹⁵⁷ It creates a special procedure for reporting harassment.¹⁵⁸ The procedure says that if you think you are the victim of prison employee misconduct or harassment, you should tell the prison employee’s direct supervisor (but be aware that this is not a requirement for filing a formal grievance).¹⁵⁹ You should also file a formal grievance with the clerk of the Inmate Grievance Resolution Committee (“IGRC”).¹⁶⁰ The Committee will give this grievance to the prison superintendent for review.¹⁶¹ After receiving the grievance, the superintendent will decide within twenty-five (25) calendar days if the employee’s conduct was harassment.¹⁶² If you do not get an answer from the superintendent within this time, you can appeal the grievance to the Central Office Review Committee (“CORC”).¹⁶³

If you are a victim of sexual harassment, you should use the confidential procedure your prison has in place to bring a formal complaint. You should keep copies of these complaints so that you can later prove that administrators knew about the problem and were deliberately indifferent to your complaint.

153. *See, e.g.,* Wood v. Beauclair, 692 F.3d 1041, 1045 (9th Cir. 2012) (describing “evolving standards of decency”) (internal citations omitted).

154. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037–1038 (10th Cir. 1995) (finding that a prison official’s alleged verbal harassment of a incarcerated person did not violate the 8th Amendment because it was not objectively sufficiently serious and the prison official did not act with deliberate indifference to the incarcerated person’s health or safety).

155. *See, e.g.,* Berry v. Oswald, 143 F.3d 1127, 1133 (8th Cir. 1998) (holding that allegations of attempted non-routine pat-downs combined with sexual comments and propositions that caused fear and frustration violated the 8th Amendment).

156. *See* Daskalea v. District of Columbia, 227 F.3d 433, 441, 343 U.S. App. D.C. 261, 269 (D.C. Cir. 2000) (stating that a municipality can be found liable when its policy or custom inflicts the injury; finding that something constitutes a policy or custom when it arises out of deliberate indifference).

157. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(e) (2020).

158. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8 (2020).

159. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(a) (2020).

160. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a) (2020). Chapter 15 of the *JLM* includes information on how to file a grievance complaint.

161. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(b) (2020).

162. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(f) (2020).

163. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(g) (2020).

4. Force Used to Carry Out an Illegal Order

If you refuse to follow an order from a prison official, even if that order is illegal, prison officials can use force to make you obey. Courts have held that incarcerated people must follow orders so that prisons can be run in a safe and orderly way.¹⁶⁴ Even if you believe an order violates your constitutional rights, courts say you do not have the right to resist the order.¹⁶⁵

For example, in *Jackson v. Allen*, an incarcerated person resisted prison guards because he thought they were going to use cruel and unusual punishment against him in violation of the Eighth Amendment.¹⁶⁶ The guards used force on him to overcome his resistance. The incarcerated person won his case against the guards, but only because they used too much force. The district court said that the incarcerated person did not have a strong enough reason to resist the guards because guards have a legal right to make incarcerated people obey their orders and use force if necessary. The court stated that an incarcerated person in this situation can later try to get damages in court for the unconstitutional punishment, but should not resist the order itself. Again, this is only if the officials used a reasonable and necessary amount of force for that situation.¹⁶⁷ But, the court did say there was one exception to the general rule that incarcerated people may never resist orders. An incarcerated person may resist an illegal order to protect himself from “immediate, irreparable and permanent physical or mental damage or death.”¹⁶⁸ The court did not give specific examples of when an incarcerated person could legally refuse an order. The court just said that there would be exceptions only for extreme situations.

5. Protection Under State Constitutions and Statutes and Federal Statutes

You have already read how state tort law and federal constitutional law protect your rights against assault. State constitutions and statutes also protect your right to be free from assault. For example, the New York State Constitution, like the federal Eighth Amendment, prohibits cruel and unusual punishment.¹⁶⁹ Like the federal Fifth and Fourteenth Amendments, the New York Constitution does not allow you to lose your liberty without due process of law.¹⁷⁰

New York State laws give incarcerated people more protections. New York statutes say that prison officials cannot hit incarcerated people except under emergency circumstances: “[N]o officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self-defense, or to suppress a revolt or insurrection.”¹⁷¹ See Chapter 2 of the *JLM*, “Introduction to Legal Research,” for information on how to find similar laws in your state.

164. *Griffin v. Comm’r of Pa. Prisons*, No. 90-5284, 1991 U.S. Dist. LEXIS 17951, at *11 (E.D. Pa. Dec. 6, 1991) (*unpublished*) (“Even if plaintiff considered the order illegal, plaintiff should not have refused to follow it because it is critical to the orderly administration of a prison that prisoners follow orders.”), *aff’d*, 961 F.2d 208 (3d Cir. 1992).

165. *Pressly v. Gregory*, 831 F.2d 514, 518 n.3 (4th Cir. 1987) (holding the incarcerated person could not resist being taken into custody by claiming that it violated his civil rights when his habeas petition was still pending).

166. *Jackson v. Allen*, 376 F. Supp. 1393, 1394 (E.D. Ark. 1974); *see also* *Smith v. Sec’y, Fla. Dept. of Corrections*, 358 Fed.Appx. 60, 64 (11th Cir. 2009) (finding a rule that prisoners comply with all orders issued by guards is constitutional, even though the rule might mean prisoners will have to comply with illegal orders); *Gossett v. Stewart*, 2012 U.S. Dist. LEXIS 34374 (D. Ariz. Mar. 13, 2012).

167. *Jackson v. Allen*, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974).

168. *Jackson v. Allen*, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974).

169. N.Y. Const. art. I, § 5.

170. N.Y. Const. art. I, § 6. In general, you have two types of due process rights under the Constitution. Your right to procedural due process means government proceedings must treat you fairly. It limits the ways the government can take away your property, liberty, and life. Your right to substantive due process prevents government interference with other rights individuals have that the government cannot take away—rights such as privacy, speech, and religion. Many Chapters in the *JLM* deal with these two types of due process.

171. N.Y. CORRECT. LAW § 137(5) (McKinney 2014). See Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for information on how to bring tort actions against state employees.

In addition, federal statutes can also protect the rights of federal incarcerated people to be free from assault. The Federal Bureau of Prisons owes a duty of care to people in federal custody. This duty can be the basis for a suit against prison officials if you are attacked by other incarcerated people.¹⁷² But, a court will look at state tort law to decide if the officials have failed their duties. So, researching the laws of the state in which the prison sits is still necessary.¹⁷³

C. Sexual Assault and Rape

This Part of the Chapter explains the federal and state laws available if you have been sexually assaulted for both incarcerated men and women. Sexual assault and rape are both types of assaults. “Sexual assault” means any physical contact of a sexual nature, such as fondling your genitals (your private parts). If you have been sexually assaulted, you can make a claim using the laws described above, in Part B of this Chapter.

If you were attacked by a prison official, you can make an Eighth Amendment claim and a state tort law claim for assault and battery. Prison officials have the right to use lawful force to maintain order and security within the prison. They do not have the right to sexually abuse you.¹⁷⁴ Any bodily contact between you and a prison official must be (1) lawful force necessary to maintain security and (2) must connect to helping the official run the prison. A guard cannot claim that he is maintaining order or disciplining you for breaking a rule to force you to have sexual relations with him or to touch him in a sexual way.¹⁷⁵ If a prison official does this, you can seek the protection of the law.¹⁷⁶

Consensual sex (sex that both people agree to) between an incarcerated person and a prison official is not an Eighth Amendment violation. However, from a legal standpoint, consensual sex between an incarcerated person and prison official is “ unquestionably inappropriate.”¹⁷⁷ Federal law specifically criminalizes all sexual contact between corrections officers and incarcerated people in federal prisons, as Part C(2) explains below. Many states, including New York, have similar state laws,¹⁷⁸ as Part C(3) explains.

172. 18 U.S.C. § 4042(a)(2); *see* *United States v. Muniz*, 374 U.S. 150, 164–165, 83 S. Ct. 1850, 1859, 10 L. Ed. 2d 805, 816 (1963) (holding that the duty of care owed to federal prisoners is fixed by 18 U.S.C. § 4042, regardless of any conflicting state rules).

173. *Parrott v. United States*, 536 F.3d 629, 637 (7th Cir. 2008) (finding that Indiana tort law governs whether the duty of care is breached in a suit brought under the Federal Tort Claims Act). *See* footnote 3 of this Chapter for more information on the Federal Tort Claims Act under which such claims must be brought.

174. *See Women Prisoners v. District of Columbia*, 877 F. Supp. 634, 665 (D.C. Cir. 1994), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996) (“Rape, coerced sodomy, unsolicited touching of women prisoners’ vaginas, breasts and buttocks by prison employees are ‘simply not part of the penalty that criminal offenders pay for their offenses against society.’”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)).

175. *See Women Prisoners v. District of Columbia*, 877 F. Supp. 634, 665 (D.C. Cir. 1994), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996) (noting that although security concerns sometimes trump privacy interests, the evidence did not show any justification for the invasion of incarcerated people’s privacy or for vulgar sexual remarks).

176. *See Women Prisoners v. District of Columbia*, 877 F. Supp. 634, 665–666 (D.C. Cir. 1994), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996) (holding that the District of Columbia was liable under U.S.C. 42 § 1983 for 8th Amendment violations); *see also* *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (“[A]n inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards”) (citing *Alberti v. Klevenhagan*, 790 F.2d 1220, 1224 (5th Cir. 1986)).

177. *See, e.g.,* *Phillips v. Bird*, Civil Action No. 03-247-KAJ, 2003 U.S. Dist. LEXIS 22418, at *16 (D. Del. Dec. 1, 2003) (*unpublished*).

178. Just Detention International’s website has useful resources, including information on laws, organizations, and practitioners who can help you in each state. Visit <https://justdetention.org/service/> (last visited Oct. 21, 2019) to find local resources.

If another incarcerated person sexually assaulted you, you can claim that prison officials violated the Eighth Amendment if they knew that you were at risk of harm but did nothing about it.¹⁷⁹ You could also make a state law negligence claim against prison officials.

1. What to Do If You Are Sexually Assaulted

If you are raped or sexually assaulted, you should tell someone immediately and ask to go to the hospital. There, you should be tested for sexually transmitted infections, and women should also be tested

for pregnancy. The health professional should collect your clothing, fingernail scrapings, pubic hair samples, blood samples, hair strands, and swab samples from the back of your throat and your rectum and/or vagina.¹⁸⁰ If you would like to speak with someone after the sexual assault or rape, the prison may provide counseling.

You may also want to file a report about the sexual assault and press criminal charges. Many incarcerated people are afraid that prison officials will punish them if they file grievances, especially if they are complaining about staff. You may be afraid that your complaint will not be kept private or that you will be harassed or threatened. It can be difficult to report a sexual assault or rape. But, you should know that any sexual contact by a corrections officer is wrong. You have a right not to go through such abuse. It is also wrong for the prison guards to punish you or act against you for reporting the assault. Although, retaliation does happen.

If you bring a civil suit, it is important to know that the court allows claims based on physical abuse, but not claims based only on emotional damage.¹⁸¹ You could claim, however, that you experienced both physical and emotional damage. This makes the collection of physical evidence of sexual assault even more important. See Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” for more information on the PLRA.

(a) Eighth Amendment Claims for Sexual Assault

Courts use the Eighth Amendment deliberate indifference standard to determine if a prison official is liable for failing to prevent sexual assaults.¹⁸²

If you were assaulted by a prison official, you can claim that the assault was “cruel and unusual punishment” violating your Eighth Amendment rights. Conduct violates the Eighth Amendment if it is against the “evolving standards of decency that mark the progress of a maturing society.”¹⁸³ Courts have found that sexual assaults violate the Eighth Amendment because “rape, coerced sodomy,

179. *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 847 (1994) (“[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”).

180. See Linda M. Petter & David L. Whitehill, *Management of Female Sexual Assault*, 58 Am. Family Physician 920 (1998) (providing medical recommendations for rape and sexual assault victims), available at <http://www.aafp.org/afp/980915ap/petter.html> (last visited Oct. 21, 2019).

181. 42 U.S.C. §1997e(e) (“[N]o Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”).

182. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (holding that to violate the 8th Amendment, a prison official must have a “sufficiently culpable state of mind” which means one of “deliberate indifference” to incarcerated person’s health or safety) (citing *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)).

183. *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981)) (internal quotation marks omitted).

unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'"¹⁸⁴

In making your Eighth Amendment claim, you must show the same two parts as for any assault by a prison official: (1) the subjective part that the prison official has a state of mind that is guilty enough, and (2) the objective part that the harm is serious enough.¹⁸⁵ Showing these two parts is usually easier with sexual assault than with physical assault. Courts have said that sexual assaults are usually both malicious and harmful. As the Second Circuit has explained, a claim of sexual abuse may meet both the subjective and objective parts of the Eighth Amendment because sexual abuse can cause severe physical and mental harm.¹⁸⁶

(b) Sexual Abuse of Incarcerated Women

While both incarcerated men and women have been sexually assaulted and/or raped, incarcerated women are particularly vulnerable.¹⁸⁷ Although all incarcerated people's rights to privacy are very limited because of the nature of prison and incarceration,¹⁸⁸ courts are sometimes more sympathetic to female incarcerated people because of the greater chance of sexual abuses by prison guards. For example, some courts have found searches of incarcerated women by male guards to be unconstitutional, even if searches of male incarcerated people by female guards would be allowed under the same circumstances.¹⁸⁹ To help prevent sexual abuse of incarcerated women, some prisons have tried to hire only female corrections officers for women's prisons.¹⁹⁰

2. Federal Law

While a prison official is allowed to touch an incarcerated person for security reasons (for example, while performing a legal search), he is never allowed to have sexual contact with an incarcerated person. Federal law criminalizes sexual intercourse or any type of sexual contact between people with "custodial, supervisory or disciplinary" authority (like guards and wardens) and incarcerated people in federal correctional facilities.¹⁹¹ It is a *felony* to use or threaten force to engage in sexual intercourse

184. *Women Prisoners of D.C. Dept. of Corr. v. District of Columbia*, 877 F. Supp. 634, 665 (D.D.C. 1994) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)), *vacated in part on other grounds*, 9 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996).

185. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994). See Part B(2) of this Chapter for more information on the objective and subjective parts of 8th Amendment violations.

186. *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997); *see also* *Hammond v. Gordon County*, 316 F. Supp. 2d 1262, 1301 (N.D. Ga. 2002) (holding that an incarcerated person had satisfied both the objective and subjective components of her 8th Amendment claim by alleging she had sexual intercourse with a prison guard, even though the guard claimed it was consensual).

187. Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996) ("[The female prisoner population is] a population largely unaccustomed to having recourse against abuse; all the more necessary, then, for the state to present the available means of recourse clearly and in an accessible fashion."), *available at* <https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons> (last visited Oct. 21, 2019).

188. *See Hudson v. Palmer*, 468 U.S. 517, 527–528, 104 S. Ct. 3194, 3200–3201, 82 L. Ed. 2d 393, 403–404 (1983) (finding that the interest in ensuring institutional security necessitates a limited right of privacy for incarcerated people).

189. *See, e.g., Jordan v. Gardner*, 986 F.2d 1521, 1531 (9th Cir. 1993) (holding that prison policy requiring male guards to conduct non-emergency, suspicionless, clothed body searches on female incarcerated people was cruel and unusual punishment in violation of the 8th Amendment). *See* Part C(2)(e) of Chapter 25 of the *JLM*, "Your Right To Be Free From Illegal Body Searches," for more information about cross-gender body searches.

190. *See, e.g., Ind. Code Ann.* §§ 36-8-3-19, 36-8-10-5 (West 2016). California protects all incarcerated people from being searched by officers of the opposite sex. *Cal. Penal Code* § 4021(b) (West 2011). Michigan provides that if incarcerated people are subject to body cavity searches by officers of the opposite sex, an officer of the same sex must also be present. *MICH. COMP. LAWS ANN.* § 764.25b(5) (West 2000).

191. 18 U.S.C. § 2243. For an example of criminal prosecution of a federal prison guard for violating this statute, *see United States v. Vasquez*, 389 F.3d 65, 77 (2d Cir. 2004) (affirming the conviction of a defendant prison

(or sexual contact) in a federal prison.¹⁹² This means it is always illegal in a federal prison for prison officials to have sexual contact with incarcerated people. These laws only protect federal incarcerated people. Laws protecting state incarcerated people are discussed in the next Subsection.

In 2003, the federal government passed the Prison Rape Elimination Act, the first federal law about sexual assault in prisons. The Act calls for the collection of national statistics about sexual assault in federal, state, and local prisons. It also develops guidelines for states on addressing incarcerated people rape, creates a review panel to hold annual hearings, and provides grants to states to fight the problem.¹⁹³ With this Act, the federal government recognized that sexual assault in prisons is a major problem.¹⁹⁴

3. State Law

In many states, including New York and California, any sexual conduct between a prison employee and an incarcerated person—even with the incarcerated person’s consent—is a form of rape.¹⁹⁵ A New York State statute makes any sexual relations between incarcerated people and prison employees illegal. Specifically, the law says incarcerated people cannot legally “consent” to sexual relations with prison employees.¹⁹⁶ Thus, by state statute, New York State prison employees are criminally liable (responsible) for rape, sodomy, sexual misconduct, or sexual abuse if they have sexual contact with or commit a sexual act with incarcerated people. In other words, courts will consider any sexual contact between a prison employee and an incarcerated person a crime. Courts will consider this a crime even if the incarcerated person believed he or she agreed to such contact. Consent is not a valid defense for the prison official’s acts.

Other states that criminalize sexual contact between prison employees and incarcerated people include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin.¹⁹⁷ States that have laws that do

guard for five counts of sexual abuse of incarcerated people and one count of misdemeanor abusive sexual contact, and sentencing of defendant to 21 months imprisonment).

192. 18 U.S.C. § 2241.

193. Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301–30309 (2012). The National Prison Rape Elimination Commission (“NPREC”) released an official report and guidelines in mid-2009. NPREC, Report and Standards, *available at* <https://www.ncjrs.gov/pdffiles1/226680.pdf> (last visited Oct. 21, 2019).

194. The U.S. Department of Justice (“DOJ”) also released a report examining the DOJ’s efforts to deter sexual abuse of federally incarcerated people by federal corrections officers, and made recommendations to help the DOJ prevent this sexual abuse (including better staff training and increased medical and psychological help for victims of abuse). Dept. of Justice, Office of the Inspector General, The Department of Justice’s Efforts to Prevent Staff Sexual Abuse of Federal Inmates (2009), *available at* <http://www.justice.gov/oig/reports/plus/e0904.pdf> (last visited Oct. 21, 2019).

195. CAL. PENAL CODE § 289.6 (West 2014); N.Y. PENAL LAW § 130.05(3)(e)–(f) (McKinney 2014).

196. N.Y. PENAL LAW §§ 130.05(3) (e)–(f) (McKinney 2014).

197. ALASKA STAT. §§ 11.41.425(a)(2), 11.41.427(a)(1) (West 2007); ARIZ. REV. STAT. ANN. § 13-1419 (2010); ARK. CODE ANN. § 5-14-126(a)(1)(A) (2006 & Supp. 2009); Cal. Penal Code § 289.6 (West 2014); COLO. REV. STAT. § 18-3-404(f) (West 2013); Conn. Gen. Stat. Ann. §§ 53a-71(a)(5), 53a-73a(a)(1)(F) (West 2012); DEL. CODE ANN. tit. 11, § 1259 (2007); D.C. Code §§ 22-3013, 22-3014, and 22-3017 (West 2017); FLA. STAT. ANN. § 944.35(3) (West 2010); GA. CODE ANN. § 16-6-5.1 (West 2016); HAW. REV. STAT. ANN. §§ 707-731(1)(c), 707-732(1)(e) (West 2008); IDAHO CODE ANN. § 18-6110 (2004 & Supp. 2008); 720 ILL. COMP. STAT. ANN. 5/11-9.2 (West 2010); IOWA CODE ANN. § 709.16(1) (West 2016); KAN. STAT. ANN. § 21-5512 (2012); KY. REV. STAT. ANN. § 510.120 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:134.1 (2018); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(E) (2006); MD. CODE ANN., CRIM. LAW § 3-314 (West 2002); MICH. COMP. LAWS ANN. §§ 750.520c (1)(i–k) (West 2004); MINN. STAT. ANN. § 609.344(1)(m), 609.345(1)(m) (West 2009); MISS. CODE ANN. § 97-3-104 (West 2008); MO. ANN. STAT. § 566.145 (West 2012); MONT. CODE ANN. § 45-5-502(5)(a) (West 2009); NEV. REV. STAT. ANN. § 212.187 (West 2015); N.H. REV. STAT. ANN. § 632-A:4(III) (2016); N.J. STAT. ANN. § 2C:14-2(c)(2) (West 2015); N.M. STAT. ANN. § 30-9-11(E)(2) (West 2016); N.D. CENT. CODE ANN. § 12.1-

not refer specifically to prison employees but may also criminalize prison employees' sexual contact with incarcerated people include Nebraska, North Carolina, Oklahoma, Texas, and Wyoming.¹⁹⁸

Some states have also taken steps to protect incarcerated people from retaliation for reporting sexual misconduct by prison staff. For example, California has made it illegal for prison guards to retaliate against incarcerated people who report them for sexual assault.¹⁹⁹ Of course, even with such laws, retaliation still occurs and is a real concern. But, if your state law does not allow retaliation, the fact that the law forbids this behavior strengthens your legal claim.

D. Assault on LGBTQ Incarcerated People

This Part of the Chapter discusses special issues for lesbian, gay, bisexual, transgender, and/or queer people. Chapter 30 of the *JLM*, "Special Information for Lesbian, Gay, Bisexual, Transgender, and/or Queer Incarcerated People," explains these issues in more detail. You can sue before you are assaulted if you feel officials are ignoring a large risk that you will be seriously harmed.

Most LGBTQ incarcerated people who have been assaulted by other incarcerated people make Eighth Amendment deliberate indifference claims under *Farmer*.²⁰⁰ Although in one case, a court recognized a Fourteenth Amendment Equal Protection claim as well.²⁰¹ To make a claim that you are vulnerable to attack (in order to satisfy a deliberate indifference claim), you have to present evidence that you may be a target of assault.²⁰²

It is important to report any threats against you so that prison officials know about specific problems. For example, if you seem vulnerable because you are gay, transgender, and/or gender-nonconforming, then you should report to prison officials any harassment or threats of rape by other incarcerated people. When you report harassment or threats to prison officials, you need to have some specific evidence or examples (for example, that an incarcerated person who has raped other incarcerated people is threatening you) because suspicions alone are not enough.²⁰³ With such evidence, incarcerated people who are LGBTQ may be able to make a deliberate indifference Eighth Amendment claim that prison officials should have considered the previous threats and tried to prevent an attack. Of course, you will still have to prove that prison officials did not act reasonably to try to prevent the assault.

20-06 (West 2008); OHIO REV. CODE ANN. § 2907.03(A)(6,11) (West 2006); OR. REV. STAT. ANN. §§ 163.452, 454 (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 3124.2 (West 2015); R.I. GEN. LAWS § 11-25-24 (2002); S.C. CODE ANN. § 44-23-1150 (2017); S.D. CODIFIED LAWS § 24-1-26.1 (2013); UTAH CODE ANN. § 76-5-412 (West 2015); VA. CODE ANN. § 18.2-64.2 (West 2012); WASH. REV. CODE ANN. §§ 9A.44.160, 170, 180 (West 2015); W. VA. CODE ANN. § 61-8B-10 (LexisNexis 2005 & Supp. 2009); and WIS. STAT. ANN. § 940.225 (West 2005). These laws vary significantly in detail, and you should consult the law of the state in which you are imprisoned. See Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 39–40 (1996), available at <https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons> (last visited Oct. 21, 2019).

198. NEB. REV. STAT. ANN. § 28-322.03 (2009); N.C. GEN. STAT. ANN. § 14-27.31 (West 2014); OKLA. STAT. ANN. tit. 21 § 1114 (West 2015); TEX. PENAL CODE ANN. § 22.011 (West 2019); WYO. STAT. ANN. § 6-2-303 (West 2007 & Supp. 2018). See Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 40 (1996), available at <https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons> (last visited Oct. 21, 2019).

199. CAL. CODE REG. tit. 15, § 3401.5(f) (2003).

200. *Farmer v. Brennan*, 511 U.S. 825, 828–829, 114 S. Ct. 1970, 1974–1975, 128 L. Ed. 2d 811, 820 (1994) (recognizing as actionable an 8th Amendment claim for a prison's "deliberate indifference" to a prominent risk of assault).

201. *Johnson v. Johnson*, 385 F.3d 503, 532–533 (5th Cir. 2004) (holding that incarcerated person's sexual-orientation-based equal protection claims were properly pleaded and actionable).

202. See *Purvis v. Ponte*, 929 F.2d 822, 825–827 (1st Cir. 1991) (per curiam) (finding that the 8th Amendment is not violated when an incarcerated person alleged general fear of "gay bashing" and suspicions that homophobic cellmates threatened his safety, because the incarcerated person presented no evidence of the likelihood that violence would occur and officials had tried placing him with 6 different cellmates).

203. *Riccardo v. Rausch*, 375 F.3d 521, 527–528 (7th Cir. 2004) ("The Constitution does not oblige guards to believe whatever inmates say ... [A] prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion.").

You should also note that you may be able to get special protection even if you are not gay but are still more vulnerable to physical and sexual assaults by other incarcerated people because of how you look.²⁰⁴ If you fear you will be assaulted, you may request to be placed in special housing or protective custody. This request unfortunately usually also means you will lose certain privileges. Prison officials may also put you, without your consent, in protective custody or even solitary confinement because they believe that is the only way to protect you.²⁰⁵

1. Special Protections for LGBTQ People

In general, courts have recognized that gay or “effeminate” men are often assaulted in prison, especially when placed in the general population,²⁰⁶ and may need special consideration either at sentencing or after incarceration.²⁰⁷ Courts are still creating the law in this area. But, the Supreme Court has expressly said that a sentencing court may consider “susceptibility to abuse” in prison as a factor for a downward departure (a decrease from what the sentence would otherwise be) in extraordinary or unusual circumstances.²⁰⁸ Where the judge believes there is a serious risk you could be assaulted in prison or where prison officials say that they can protect you only by putting you in protective custody or solitary confinement, you can request better protective custody conditions or a shorter sentence. For example, several courts have ordered reduced sentences for incarcerated people at risk of assault because of their sexual orientation or appearance.²⁰⁹

Special treatment for LGBTQ incarcerated people was considered by the Second Circuit in *United States v. Lara*.²¹⁰ In this case, the incarcerated person had a youthful appearance and bisexual orientation that made him extremely vulnerable to physical attack. Prison officials were able to protect him only by putting him in solitary confinement, so the court reduced his sentence.²¹¹ A year after

204. See, e.g., *United States v. Gonzalez*, 945 F.2d 525, 526–527 (2d Cir. 1991) (ruling in favor of decreasing incarcerated person’s sentence because of his feminine appearance).

205. See, e.g., City of New York Department of Corrections, Directive 6007R-A: Protective Custody (May 24, 2010), available at <http://www.nyc.gov/html/doc/downloads/pdf/6007R-A.pdf> (last visited Oct. 21, 2019); New York Department of Corrections and Community Supervision, Directive 4948: Protective Custody Status (Mar. 13, 2015) available at <http://www.doccs.ny.gov/Directives/4948.pdf> (last visited Oct. 21, 2019).

206. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 848, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 832 (1994) (noting that placing a young, “effeminate” man into general population could threaten his safety); *Johnson v. Johnson*, 385 F.3d 503, 517–519 (5th Cir. 2004) (holding that officials must use all possible administrative means to protect incarcerated people from sexual abuse); *Taylor v. Mich. Dept. of Corr.*, 69 F.3d 76, 83–84 (6th Cir. 1995) (holding a warden liable for providing inadequate protection against physical and sexual abuse of a vulnerable incarcerated person).

207. *United States v. Gonzalez*, 945 F.2d 525, 526–527 (2d Cir. 1991) (holding that shortening the prison sentence for an incarcerated person was possible by balancing the government’s interest in incarcerating criminals with the goal of diminishing the likelihood that the incarcerated person would be assaulted).

208. *Koon v. United States*, 518 U.S. 81, 111, 116 S. Ct. 2035, 2053, 135 L. Ed. 2d 392, 421 (1996). Note that *Koon*, however, dealt with incarcerated people who were susceptible to abuse because they were ex-police officers, not because of their sexual orientation or appearance. See also *United States v. LaVallee* 439 F.3d 670, 708 (10th Cir. 2006) (allowing a reduced sentence for police officers because of their clearly demonstrated increased “susceptibility to abuse” in prison, but also noting that police officers will not get reduced sentences solely because of their increased “susceptibility”).

209. See, e.g., *United States v. Lara*, 905 F.2d 599, 601–602 (2d Cir. 1990) (reducing a sentence for a bisexual incarcerated person after prison officials put him in solitary confinement because solitary confinement was the only way the officials could protect him from assault); *United States v. Gonzalez*, 945 F.2d 525, 526–527 (2d Cir. 1991) (approving the trial court’s grant of a downward sentencing departure to a nineteen-year-old “effeminate-looking” heterosexual incarcerated person based on the likelihood of assault by other incarcerated people, even though no such attack had yet occurred); cf. *United States v. Parish*, 308 F.3d 1025, 1032–1033 (9th Cir. 2002) (upholding downward departure because incarcerated person was particularly susceptible to abuse). Note, however, that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance in determining an incarcerated person’s potential for victimization and thus reduction in sentence. See *Koon v. United States*, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050, 135 L. Ed. 2d 392, 418 (1996).

210. *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

211. *United States v. Lara*, 905 F.2d 599, 603 (2d Cir. 1990).

Lara, the Second Circuit also decided *United States v. Gonzalez*.²¹² In *Gonzalez*, the court similarly reduced the sentence of a nineteen-year-old incarcerated person who was young, “effeminate,” and likely to be victimized by his fellow incarcerated people.²¹³ Unlike in *Lara*, however, the incarcerated person in *Gonzalez* was not gay or bisexual but still vulnerable to homophobic attacks since the way he looked did not fit traditional views of masculinity.²¹⁴ In other words, as long as an incarcerated person looks like he might be gay, he is at a greater risk of attack, even if he is not actually gay. The *Gonzalez* court also found that the incarcerated person could get a shorter sentence even though he had not been attacked. Oppressive conditions without an actual attack may be enough to get a shorter sentence.²¹⁵

2. Examples of Legal Claims Brought by LGBT Incarcerated People.

In *Farmer v. Brennan*, a transgender incarcerated woman was placed in the general male prison population and was later beaten and raped by another incarcerated person.²¹⁶ The Supreme Court held that the incarcerated person may have had an Eighth Amendment claim. The Court sent the case back to the lower court to determine if prison officials acted with deliberate indifference by failing to protect him.²¹⁷

In *Young v. Quinlan*, other incarcerated people sexually assaulted an incarcerated person who looked small, young, and “effeminate.” Officials ignored his requests for protection.²¹⁸ The Third Circuit said that the officials had violated the Eighth Amendment.²¹⁹ Similarly, the Sixth Circuit in *Taylor v. Michigan Department of Corrections* held that an incarcerated person who was small and vulnerable looking with a youthful appearance, low IQ, and a seizure disorder had an Eighth Amendment claim for being placed in a sixty-person prison camp barracks where he was raped.²²⁰ The Seventh Circuit also recognized an Eighth Amendment claim in *Pope v. Shafer* when an incarcerated person was assaulted after officials ignored the incarcerated person’s and internal affairs officers’ specific reports of threats against him and refused transfer requests.²²¹

In *Greene v. Bowles*, a transsexual incarcerated person was placed in protective custody to prevent attacks from other incarcerated people, but was then severely beaten by another incarcerated person in the protective custody unit.²²² The Sixth Circuit recognized an Eighth Amendment deliberate indifference claim because the warden admitted that he knew that the attacker was a “predatory inmate,” that the plaintiff was in protective custody because of her status as a vulnerable incarcerated person, and that both attacker and plaintiff were being housed in the same unit.²²³ Importantly, the Sixth Circuit held that vulnerable incarcerated people (such as those who are, or are perceived as, gay, transgender, or “effeminate”) who have been attacked can prove prison officials knew of the substantial risk to their safety in two different ways:

212. *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991).

213. *United States v. Gonzalez*, 945 F.2d 525, 526 (2d Cir. 1991).

214. *United States v. Gonzalez*, 945 F.2d 525, 526–527 (2d Cir. 1991) (“[E]ven if Gonzalez is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him as susceptible to homophobic attacks as was the bisexual defendant before us in *Lara*.”).

215. *United States v. Gonzalez*, 945 F.2d 525, 527 (2d Cir. 1991); cf. *Koon v. United States*, 518 U.S. 81, 111, 116 S. Ct. 2035, 2053, 135 L. Ed. 2d 392, 421 (1996) (finding that the court did not abuse its discretion in granting a downward sentencing departure based on convicted police officers’ susceptibility to abuse in prison).

216. *Farmer v. Brennan*, 511 U.S. 825, 830, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994).

217. *Farmer v. Brennan*, 511 U.S. 825, 848–849, 114 S. Ct. 1970, 1985, 128 L. Ed. 2d 811, 833 (1994).

218. *Young v. Quinlan*, 960 F.2d 351, 362–363 (3d Cir. 1992).

219. *Young v. Quinlan*, 960 F.2d 351, 362–365 (3d Cir. 1992).

220. *Taylor v. Mich. Dept. of Corr.*, 69 F.3d 76, 77 (6th Cir. 1995).

221. *Pope v. Shafer*, 86 F.3d 90, 91–92 (7th Cir. 1996).

222. *Greene v. Bowles*, 361 F.3d 290, 292 (6th Cir. 2004).

223. *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004).

(1) by proving the officials knew of the plaintiff's vulnerable status and of the general risk to the plaintiff's safety from other incarcerated people, even if the officials did not know of any specific danger; or

(2) by proving that the officials knew that a predatory incarcerated person, without separation or other protective measures, could be dangerous to others, including the plaintiff.²²⁴

If you are a vulnerable incarcerated person attacked by a predatory incarcerated person, this makes it easier for you to prove that prison officials knew of the risk to your safety. But, you do not have to prove a particular incarcerated person presented a specific threat to your safety.²²⁵

In another important case, *Johnson v. Johnson*, an African-American homosexual incarcerated person sued prison officials after prison gangs sexually assaulted him and bought and sold him as a sexual slave for over eighteen months, even though the plaintiff had asked for protection.²²⁶ The Fifth Circuit said the plaintiff had a deliberate indifference claim because the officials continued to house him with the general population even though he repeatedly asked for protection. The prison officials' response—that Johnson must “learn to f*** or fight”—“was not a reasonable response and ... contraven[e]d clearly established law.”²²⁷ The Court further held that “[a]lthough it is not clear exactly what type of action an official is legally required to take under *Farmer* ... an official may not simply send the inmate into the general population to fight off attackers.”²²⁸

In his lawsuit, Johnson also claimed that the prison officials' actions violated his Equal Protection rights under the Fourteenth Amendment.²²⁹ Specifically, he claimed that, because of his sexual orientation, the officials failed to protect him like they protected other incarcerated people.²³⁰ The Fifth Circuit recognized this claim, noting that “if they actually did deny Johnson protection because of his homosexuality ... that decision would certainly not effectuate any legitimate [governmental] interest” and would be in violation of the Equal Protection Clause.²³¹ You should note that the *Johnson* court accepted the plaintiff's sexual-orientation-based equal protection claim without proof that other non-homosexual incarcerated people were treated differently. But, remember that the law is still developing.

224. *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (“[W]here a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability even where the particular prisoner at risk is not known in advance.”).

225. *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (“[A] prison official cannot ‘escape liability ... by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994)); *see also* *Curry v. Scott*, 249 F.3d 493, 507–508 (6th Cir. 2001) (finding that where a particular prison guard had a history of racially motivated harassment of African American incarcerated people, deliberate indifference could be demonstrated by a factual record, without threat to a particular incarcerated person), *overruled in part on other grounds by* *Jones v. Bock*, 549 U.S. 199, 216, 127 S. Ct. 910, 921, 166 L. Ed. 2d 798, 813 (2007).

226. *Johnson v. Johnson*, 385 F.3d 503, 512 (5th Cir. 2004).

227. *Johnson v. Johnson*, 385 F.3d 503, 527 (5th Cir. 2004).

228. *Johnson v. Johnson*, 385 F.3d 503, 527 (5th Cir. 2004); *see also* *Farmer v. Brennan*, 511 U.S. 825, 832–833, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (explaining that jailers must “take reasonable measures to guarantee the safety of the inmates” and “are not free to let the state of nature take its course” (internal quotation and citation omitted)); *James v. Hertzog*, 415 Fed. Appx. 530, 532 (5th Cir. 2011) (*unpublished*) (Noting that “The Supreme Court has not recognized sexual orientation as a suspect class; however, if the State violates the Equal Protection Clause by creating a disadvantage for homosexuals, the State's conduct must have ‘a rational relationship to legitimate governmental aims.’”) (internal quotation marks removed).

229. U.S. CONST. amend. XIV (“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”). *See* Chapter 30 of the *JLM*, “Special Information for Lesbian, Gay, Bisexual, and Transgender Incarcerated People” for more information on the Equal Protection Clause.

230. *Johnson v. Johnson*, 385 F.3d 503, 512 (5th Cir. 2004) (noting Johnson's claim that officials told him “[w]e don't protect punks on this farm”—‘punk’ being prison slang for a homosexual man”).

231. *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *see* *Farmer v. Brennan*, 511 U.S. 825, 833, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (“[G]ratuitously allowing the beating or rape of one prisoner by another serves ‘no legitimate penological objective.’”) (citation omitted).

E. Legal Remedies Available for Victims of Unlawful Assault

This Part explains what you can do, legally, if you have been the victim of an unlawful assault. Part E(1) explains how you should first complain using your prison's Inmate Grievance Program. Part E(2) describes how you can then file a Section 1983 suit if you believe prison officials or other government employees (including police officers) violated any of your constitutional rights. Part E(3) explains how you can also file a state tort claim. Finally, Part E(4) describes *class actions* (when groups of plaintiffs bring suit together).

Remembering that different laws apply in state and federal prisons is important. If you are in a federal prison, then it doesn't matter what state the prison is in because all federal prisons use federal law. If you are in state prison, you can use both state and federal laws. But remember each state creates its own laws. Research the laws of your state and how incarcerated people in your state file suits in that state's courts. Federal constitutional rights are protected regardless of whether you are in a state or a federal prison. But, the legal claims you make and how you make them will be different depending on whether you are in state or federal court.

1. Inmate Grievance Program

If you believe your rights have been violated, you should first file an administrative grievance. See Chapter 15 of the *JLM*, "Inmate Grievance Procedures," for further information. It is very important that you fully complete any administrative grievance processes before filing a lawsuit. If you do not, the court will probably reject your claim because you did not "exhaust" (complete) all administrative remedies first.²³²

2. 42 U.S.C. § 1983

If you think that prison officials have violated your Eighth Amendment rights, you may sue the officials or guards using Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983). Section 1983 is a federal law that allows you to sue state officials who have violated your constitutional rights while acting "under color of any statute, ordinance, regulation, custom or usage, of any state."²³³ You can sue federal officials in a similar suit, called a *Bivens* action.²³⁴

You can also use Section 1983 to sue local officials as long as you can show that they too acted under "color of state law." You may be able to sue local officials under state tort law as well. But note that you can only sue municipalities (towns, cities, or counties) under Section 1983 if your injury was the result of an official municipal policy or custom.²³⁵ This means that to sue a city or a county, you will have to show that the "execution of [the] government's policy or custom ... inflict[ed] the injury."²³⁶

232. See, e.g., *Johnson v. Johnson*, 385 F.3d 503, 515–523 (5th Cir. 2004) (dismissing an incarcerated person's claims that prison officials had failed to protect him from repeated sexual assaults due to his failure to exhaust administrative remedies).

233. 42 U.S.C. § 1983.

234. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (holding that the federal agent's warrantless entry of arrestee's apartment on narcotics charges without probable cause allowed arrestee to state a federal cause of action under the 14th Amendment). See Part E of Chapter 16 of the *JLM*, "Using 42 U.S.C. §1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for more information on *Bivens* actions.

235. See, e.g., *Williams v. Kaufman County*, 352 F.3d 994, 1013–1014 (5th Cir. 2003) (holding that a county could be held liable for unlawful searches of detainees when the relevant policymaker, in this case the sheriff, authorized the policy).

236. *Irwin v. City of Hemet*, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978)). In *Irwin*, a California court found that a complaint alleging that the City of Hemet's adoption of a policy or custom not to train its jailers in suicide screening and prevention was the proximate cause of an incarcerated person's suicide, may not be summarily dismissed without determination as to whether or not the city adopted a policy or custom to

In other words, a local government will be held liable only if an injury can be shown to be a direct result of the local government's official policy, either express or implied.²³⁷ Therefore, a local government is not liable under Section 1983 "for an injury inflicted solely by its employees or agents" who were not following official local policy or custom,²³⁸ even though the local officials may be individually liable under Section 1983.

You should read Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," to learn more about Section 1983 claims. Part E(1) of Chapter 16 explains *Bivens* actions and Part C(3)(c) gives more information on qualified immunity.

3. Tort Actions

Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," explains how to bring a tort action in New York's Court of Claims.²³⁹ If you were assaulted, you can bring a state law tort action against those who assaulted you, their supervisors, and maybe the state itself.

It is very important to read Chapter 17 because there is a time limit for filing a lawsuit in the Court of Claims. If you do not file before the deadline, then you cannot sue in the New York State court system. Both New York State incarcerated people and incarcerated people from outside New York should read Chapter 17 for more information on how to bring a tort claim in state court.

4. Class Action Suits

Class actions are a type of lawsuit in which many plaintiffs sue together for similar violations of their rights.²⁴⁰ Courts generally allow class actions where the following conditions are present:

- (1) there are too many plaintiffs for the court to try each case individually,
- (2) each plaintiff's case is similar in fact and law,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (group of plaintiffs suing),
- (4) the representative parties will fairly and adequately protect the interests of the class,²⁴¹

and

- (5) most of the claims would not be brought otherwise because each plaintiff's individual damages are too small.²⁴²

inadequately train jailers. For an example of such a municipal policy or custom, see *Blihovde v. St. Croix County*, 219 F.R.D. 607, 613 (W.D. Wis. 2003) (involving claims arising from a policy of strip searches for arrestees entering a jail).

237. *Blihovde v. St. Croix County*, 219 F.R.D. 607, 618 (W.D. Wis. 2003) ("Even when there is no express policy, a municipality may be liable when there is a 'custom' of unconstitutional conduct.") (citing *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978)); see also *Walker v. Sheahan*, 526 F.3d 973, 977 (7th Cir. 2008) (dismissing a § 1983 claim for lack of evidence of a practice of using excessive force and following a "code of silence"); *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 125–127 (2d Cir. 2004) (reviewing the law of municipal liability in a damage suit for excessive force).

238. *Irwin v. City of Hemet*, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978)).

239. Remember the New York Court of Claims is a specific state court in New York that only deals with claims against the State of New York. If the person who injured you was a state official or employee and you decide to file a tort action in state court in New York, you should file your claim in the New York Court of Claims. The New York Court of Claims can only award money damages; it cannot issue an injunction. See Part C(4) of Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit: An Overview of the Options," for more information on the Court of Claims and Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more detailed information on tort actions.

240. See Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit: An Overview of the Options" on class actions in general and Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for more detailed information on § 1983 class actions.

241. See FED. R. CIV. P. 23.

242. See, e.g., *Tardiff v. Knox County*, 365 F.3d 1, 7 (1st Cir. 2004) (holding that class action status probably

If a pattern of excessive force against incarcerated people exists within a prison, a class action suit may be brought on behalf of all the incarcerated people. This suit can be brought against the wardens or administrators in charge of the overall operations of the prison.²⁴³ Defendants in such an action are charged with “abdicating their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist.”²⁴⁴ In cases where injunctive relief is sought against prison officials for patterns of excessive force, “the subjective prong of the Eighth Amendment is satisfied by a showing of deliberate indifference” rather than by the *Hudson v. McMillian* standard of maliciousness.²⁴⁵

F. Conclusion

This Chapter described the legal meaning of “assault” and explained your right to be free from physical and sexual assault in prison. There are different sources of law offering you protection against guard and incarcerated person assault, and different ways to obtain relief for rights violations. Remember to complete administrative grievance processes before filing suit. Otherwise, courts might not allow you to continue.

is the only feasible means for arrestees to pursue strip search claims); *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689, 709 (1997) (noting that the policy underlying class actions is to make it possible for individuals with small claims to aggregate those claims in order to vindicate their rights).

243. See, e.g., *Ingles v. Toro*, 438 F. Supp. 2d 203, 208–209 (S.D.N.Y. 2006) (approving settlement of a class action over excessive use of force by New York City prison guards; the city agreed to pay injured incarcerated people \$2.2 million and revise its use-of-force directive and investigatory procedures, install new video cameras to watch guards and incarcerated people, and train guards in appropriate defensive techniques); *Madrid v. Gomez*, 889 F. Supp. 1146, 1254–1260 (N.D. Cal. 1995) (granting injunction in class action on behalf of all inmates at a facility where a pattern of unnecessary and wanton infliction of pain and constitutionally inadequate medical and mental health care was shown as cruel and unusual conditions of confinement for mentally ill incarcerated people in a security housing unit); see also Mark Mooney, *Inmates Win 1.5M in Rikers Abuse Settlement*, Daily News, Feb. 14, 1996, at 12, available at <https://www.nydailynews.com/archives/news/inmates-win-1-5m-rikers-abuse-settlement-article-1.750312> (last visited Oct. 20, 2019) (discussing a class action suit by 15 incarcerated people that involved allegations of abuse by corrections officers and that was settled by New York City for \$1.5 million).

244. *Madrid v. Gomez*, 889 F. Supp. 1146, 1249 (N.D. Cal. 1995).

245. *Madrid v. Gomez*, 889 F. Supp. 1146, 1250 (N.D. Cal. 1995).

CHAPTER 25

YOUR RIGHT TO BE FREE FROM ILLEGAL BODY SEARCHES*

A. Introduction

This Chapter explains your right to be free from the involuntary exposure of your body and illegal body searches. Part A is the Introduction. Part B explains your rights regarding involuntary cross-gender exposure (when people of the opposite sex see your body against your wishes) and your privacy rights regarding your body, focusing mainly on the rights of women who are incarcerated. Part C focuses on body searches for both men and women. Finally, Part D explains what you can do to protect your rights and what legal options you have to remedy violations of your rights.

This Chapter explains your rights using both federal constitutional law (from the U.S. Constitution) and New York State laws. When addressing problems related to searches, including body cavity searches, courts generally refer to the Fourth Amendment, which protects you against unreasonable searches.¹ Remember that rulings from the U.S. Supreme Court apply to the whole country. If you are in a prison outside of New York, you should research the laws and cases in your state. You should try to use the laws and court decisions of the federal circuit where you are located. Reading Chapter 2 of the *JLM* before you read this Chapter (or any other chapter of the *JLM*) will help you understand how to research the law and understand which laws apply to you and your legal problem.

If you think your rights are being violated, you should first try to protect your rights through your institution's administrative grievance procedures.² You *must* go through the prison grievance process to protect your right to sue in federal court under the Prison Litigation Reform Act ("PLRA"). Read Chapter 14 of the *JLM* on the PLRA. If you do not go through the prison grievance process, you might lose your right to sue (and possibly your good-time credit).

If the grievance system does not help you, or if it does not help you enough, you can then file a lawsuit. Incarcerated people who challenge illegal body searches and involuntary exposure usually file claims under 42 U.S.C. § 1983 ("Section 1983"),³ through a *Bivens* action in state or federal court,⁴ or through an Article 78 petition in state court (if you are in New York).⁵ Other chapters of the *JLM* have

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1. The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend. IV.

2. See Chapter 15 of the *JLM* for more information on grievance procedures for people who are incarcerated.

3. Remember that "§" is the symbol for "section." For example, § 1983 means "Section 1983." Therefore, "§ 1983" refers to a specific section—section 1983—of a law (here the United States Code).

4. For more information about *Bivens* actions, see Chapter 16 of the *JLM*.

5. See N.Y. C.P.L.R. § 7801–7806 (McKinney 2008). An Article 78 petition refers to a petition under Article 78 of the New York Civil Practice Law & Rules. You cannot use Article 78 to seek money damages. You can only use an Article 78 petition to go to court to challenge decisions made by New York State administrative bodies or officers, like the Department of Corrections and Community Supervision or prison employees, and only if you think the decision was illegal, arbitrary or grossly unfair. If a decision is arbitrary, it means that there was no good reason or policy to justify it. For example, an incarcerated person might file an Article 78 petition to request judicial review of a prison disciplinary determination resulting from what the incarcerated person believes to have been an illegal search. See, e.g., *Medina v. Portuondo*, 298 A.D.2d 733, 734, 749 N.Y.S.2d 291, 293 (3d Dept. 2002) (using Article 78 to challenge the determination that incarcerated person violated prison rules by possessing contraband and controlled substances); *Ocean v. Selsky*, 252 A.D.2d 984, 985, 676 N.Y.S.2d 380, 381 (4th Dept. 1998) (using Article 78 to challenge determination regarding the violation of the rules for a "pat frisk"); *Young v. Coombe*, 227 A.D.2d 799, 800, 642 N.Y.S.2d 443, 444 (3d Dept. 1996) (seeking judicial review of Commissioner's determination that incarcerated person was in violation of prison disciplinary rules by, among other things, not complying with a frisk under Article 78). For more information about Article 78 proceedings, see Part C(4) of

more information about these claims, including Chapter 5, Chapter 16, and Chapter 22. If you want to learn more about your rights against assaults in prison, see Chapter 24 of the *JLM*.

If you bring a civil suit, it is important to know that the court will not recognize emotional damage without physical abuse. According to Section 803(d) of the PLRA, “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act . . .”⁶ See Chapter 14 of the *JLM* for more information on the PLRA.

Also, because prison officers are government actors, they can use the defense of “qualified immunity”⁷ to counter a Section 1983 action. This means that even if you can prove you were illegally searched, the officials may not be liable (responsible) because of their qualified immunity defense.⁸ You should read Chapter 16 of the *JLM* carefully to learn more about the details of Section 1983, particularly Part C(3)(c) (Qualified Immunity) and Part B (Section 1983).

B. Involuntary Exposure

This Part discusses your privacy rights regarding your naked body.⁹ “Involuntary exposure” is when your naked or partly naked body is seen by guards of the opposite sex, such as when you are using showers or toilets. In *Turner v. Safley*, the Supreme Court stated that although incarcerated people do not have the same rights as people outside of prison, prison regulations that restrict the rights of incarcerated people must be reasonably related to legitimate penological (prison-related) interests.¹⁰ Thus, your privacy rights can be limited if the prison gives a reason that is reasonably related to a legitimate prison policy. For example, your state might allow prison guards of the opposite sex to see your naked body during emergencies.¹¹

But you can expect to have some privacy rights with respect to your naked body. Courts often disapprove of prison policies requiring incarcerated person to be routinely strip searched or seen naked by guards of the opposite sex.¹² Courts have held that prisons may accommodate the privacy interests

Chapter 5 of the *JLM* and Chapter 22 of the *JLM*.

6. Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(e).

7. “Qualified immunity” is defined as “[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights.” *Qualified Immunity*, BLACK’S LAW DICTIONARY (11th ed. 2019).

8. See, e.g., *Way v. County of Ventura*, 445 F.3d 1157, 1163 (9th Cir. 2006), *cert. denied*, 549 U.S. 1052, 127 S. Ct. 665, 166 L. Ed. 2d 513 (2006) (holding strip search of arrestee unconstitutional but finding in favor of the County because of the officers’ qualified immunity); *Lay v. Porker*, 371 F. Supp. 2d 1159, 1167 (C.D. Cal. 2004) (holding that a body cavity search of a naked incarcerated man in the presence of a female officer violated the person’s constitutional rights, but granting summary judgment to the prison because of the prison official’s qualified immunity). But see *Edgerly v. City & Cty. of S.F.*, 599 F.3d 946, 951, 958–959 (9th Cir. 2010) (finding that certain police officers were not entitled to qualified immunity because the law clearly established that the kind of search performed was unconstitutional).

9. For other privacy rights, see Chapter 19 of the *JLM* (monitoring of telephone calls, inspection of mail, etc.); Chapter 26 of the *JLM* (on the right to privacy regarding health status).

10. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987).

11. See, e.g., *Michenfelder v. Sumner*, 860 F.2d 328, 330–337 (9th Cir. 1988) (holding that strip searches conducted by prison guards of the opposite sex of the incarcerated person were reasonable, as they were related to the prison’s legitimate security concerns). For an example outside of the context of searches, see *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (upholding a regulation that allowed prison wardens to prevent incarcerated people from reading books and magazines which were “determined detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity.”).

12. See *Mills v. City of Barbourville*, 389 F.3d 568, 579 (6th Cir. 2004) (“As to jail employees of the opposite gender viewing prison inmates or detainees, we have recognized that a prison policy forcing incarcerated people to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked—for example while in the shower or using a toilet in a cell—would provide the basis of a claim on which relief could be granted.”) (citations omitted); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing incarcerated people’s right to bodily privacy “because most people have ‘a special sense of privacy in

of people who are incarcerated when such actions are reasonable and do not affect penological interests. But courts have not been clear about which specific prison actions violate your privacy rights.¹³ For example, the court in *Hudson v. Goodlander* held that assigning female guards to posts where they could see an incarcerated man while he was totally naked violated the man's privacy rights.¹⁴ However, the court stated that voluntary restrictions on the employment of female correction officers should adequately protect the privacy rights of incarcerated people and could be removed during times of emergency.¹⁵

One obstacle to challenging involuntary exposure situations is that prisons must obey federal employment discrimination laws that require male and female employees to be treated the same. Prohibiting guards of the opposite sex from viewing nude incarcerated people may violate laws requiring equal employment opportunities because whether the guard is a man or a woman would then become a factor in employment decisions.¹⁶ Most courts have held that prison policies which may allow for cross-sex viewing of nude incarcerated people do *not* violate incarcerated people's rights.¹⁷

their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating” (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415–1416 (9th Cir. 1992) (noting that, in the Ninth Circuit, the right to bodily privacy was extended to incarcerated people in 1985 and was “clearly established” for parolees by 1988); *Kent v. Johnson*, 821 F.2d 1220, 1226–1227 (6th Cir. 1987) (recognizing that an incarcerated person has a constitutional claim when the prison fails to reasonably accommodate the interests of incarcerated people against unnecessary bodily exposure to guards of the opposite sex).

13. *See Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559, 565 (W.D. Va. 2000) (recognizing that routinely or regularly exposing an unclothed incarcerated man to female guards may constitute a constitutional violation, but suggesting that an evidentiary hearing may be required to make that determination for particular encounters); *see also Oliver v. Scott*, 276 F.3d 736, 744–746 (5th Cir. 2002) (upholding under the *Turner* reasonable relationship standard a policy “permitting all guards to monitor all inmates at all times” because it “increases the overall level of surveillance” and noting that bathrooms and showers can be the site of violence, making it reasonable for prisons to monitor such areas); *Hill v. McKinley*, 311 F.3d 899, 903–905 (8th Cir. 2002) (holding both male and female staff could participate in transfer of a naked incarcerated woman who was allegedly disobedient, since not enough female guards were available, but the woman's Fourth Amendment rights were violated when the guards left her naked on a restraint board for a substantial period of time in the presence of male officers); *Somers v. Thurman*, 109 F.3d 614, 617–623 (9th Cir. 1997) (finding no clearly established Fourth Amendment protection against cross-gender strip searches and dismissing Eighth Amendment claim that female officers subjected male plaintiff to visual body cavity searches, watched him shower, pointed at him, and made jokes about him).

14. *Hudson v. Goodlander*, 494 F. Supp. 890, 893 (D. Md. 1980); *see also Fortner v. Thomas*, 983 F.2d 1024, 1029–1030 (11th Cir. 1993) (holding that incarcerated men suing to prevent female guards from coming into living quarters where they were exposed may be entitled to injunctive relief in light of court's recognition of limited constitutional right to bodily privacy); *Arey v. Robinson*, No. Y-90-3009, 1992 U.S. Dist. LEXIS 21810, at *32 (D. Md. Apr. 3, 1992) (*unpublished*) (finding the design and operation of bathroom facilities violated the incarcerated person's privacy rights), *adopted by Arey v. Robinson*, 819 F. Supp. 478, 479 (D. Md. 1992).

15. *Hudson v. Goodlander*, 494 F. Supp. 890, 894 (D. Md. 1980).

16. *See Csizmadia v. Fauver*, 746 F. Supp. 483, 491–492 (D.N.J. 1990) (discussing the tension between incarcerated people's constitutional privacy rights and guards' equal employment rights). *But see Tharp v. Iowa Dept. of Corr.*, 68 F.3d 223, 224–225 (8th Cir. 1995) (finding that assignment of female guards exclusively to female prison units did not violate equal employment rights and could be viewed as serving a positive interest for the prison as long as guards were not being denied opportunities for promotion or being discriminated against by these assignments).

17. *See, e.g., Mills v. City of Barbourville*, 389 F.3d 568, 579 (6th Cir. 2004) (finding no Fourth Amendment violation where male employee accidentally saw female plaintiff's bare chest while female jailers were searching her upon entry to prison); *Grummett v. Rushen*, 779 F.2d 491, 496 (9th Cir. 1985) (rejecting claims by incarcerated people challenging assignment of female officers to male housing units); *Smith v. Chrans*, 629 F. Supp. 606, 611 (C.D. Ill. 1986) (dismissing case when incarcerated person alleged nothing more than occasional and inadvertent sightings by female prison employees of incarcerated people in cells or open shower or toilet facilities engaged in basic bodily functions); *Cerniglia v. Cty. of Sacramento*, No. 2:99-cv-01938-JKS-DAD, 2008 U.S. Dist. LEXIS 32346, at *49–52 (E.D. Cal. Apr. 18, 2008) (*unpublished*) (finding no violation of an incarcerated person's right to privacy where incarcerated person was strip searched in a dayroom where anyone could have seen him, but there was no evidence that anyone actually did). *But see Morris v. Newland*, No. CIV S-00-2794 GEB GGH P, 2007 U.S.

For example, the Ninth Circuit in *Oliver v. Scott* held that an incarcerated man's Fourth and Fourteenth Amendment rights were not violated after female prison guards strip searched him and observed him showering and using the bathroom.¹⁸ Similarly, the Eighth Circuit in *Timm v. Gunter* held that allowing female guards, like male guards, to pat search incarcerated men was a reasonable regulation and did not violate any privacy interests of the incarcerated people.¹⁹

Courts have used several methods to balance incarcerated people's privacy rights and correction officers' right to be free from sex discrimination in employment. For example, the court in *Johnson v. Pennsylvania Bureau of Corrections* held that a prison's regulations were reasonable when it assigned female officers to patrol housing units since the officers were required to announce their presence when entering housing areas to avoid unnecessarily invading the privacy of incarcerated people of the opposite sex.²⁰ Other methods noted by courts or used by prisons include allowing incarcerated women to cover the windows of their cells for short periods of time,²¹ allowing incarcerated people to cover their genitals with a towel when guards are present in the restrooms,²² and providing pajamas for sleeping.²³ One court has even suggested that prisons should change the design of bathroom facilities to protect an incarcerated person's privacy rights.²⁴

C. Body Searches

This Part discusses when and how prison officials are allowed to search your body. Part C(1) introduces the names which courts use for different types of body searches. Part C(2) explains the Fourth Amendment protections against illegal searches for convicted incarcerated people. Part C(3) explains how the Eighth Amendment also limits certain body searches. Part C(4) discusses DNA testing. Part C(5) describes your privacy rights under state law. Part C(6) describes your right to be free from illegal searches under New York law and prison regulations. Part C(7) explains the consequences of resisting a body search you think is illegal.

Note that people in jail who were recently arrested (arrestees) or who are waiting for trial (pretrial detainees) have more constitutional protections against body searches than incarcerated people who have been convicted. When you research your case, *remember that the reasonableness standard for searches of arrestees/pretrial detainees differs from the reasonableness standard for convicted*

Dist. LEXIS 15725, at *17–22 (E.D. Cal. Mar. 6, 2007) (*unpublished*) (dismissing claim that incarcerated person's Fourth Amendment rights were violated by three prison guards watching him shower, but ruling he could continue to litigate his retaliation claim, which was that the guards had “repeatedly ogled him in retaliation for his having filed inmate grievances regarding female guards being allowed to watch him showering or otherwise undressed”).

18. *Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002); *see also* *Johnson v. Phelan*, 69 F.3d 144, 147 (7th Cir. 1995) (noting that limiting the prison guards that could monitor incarcerated people in the shower or toilets to a specific gender or sexual orientation would be inefficient staff deployment and therefore is not required under the Eighth Amendment).

19. *Timm v. Gunter*, 917 F.2d 1093, 1100 (8th Cir. 1990) (“We are persuaded that allowing such searches on the same basis as same-sex pat searches is a reasonable regulation as applied at [the prison], and thus is not a constitutional violation.”).

20. *Johnson v. Pa. Bureau of Corr.*, 661 F. Supp. 425, 432 (W.D. Pa. 1987).

21. *Torres v. Wis. Dept. of Health & Soc. Servs.*, 859 F.2d 1523, 1524 (7th Cir. 1988) (en banc) (noting that incarcerated women at women's maximum security prison were allowed to cover windows in the doors of their rooms with privacy cards for up to 10 minutes between the hours of 6 a.m. and 9 p.m. while they are dressing or using the toilet).

22. *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990) (noting that “[t]he use of a covering towel while using the toilet or while dressing and body positioning while showering or using a urinal allow the more modest inmates to minimize invasions of their privacy”).

23. *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980) (finding that a “suitable nighttime garment” can protect incarcerated people from inappropriate viewing of their private parts).

24. *Arey v. Robinson*, NO. Y-90-3009, 1992 U.S. Dist. LEXIS 21810 at *29-30 (D. Md. Apr. 6, 1992) (*unpublished*) ((stating that the “combined effect of [an] open dormitory and [an] open bathroom area” that puts incarcerated people “on display virtually 24 hours a day no matter how personal an activity” for guards of the opposite sex undermines “[b]asic human dignity”).

incarcerated people. For instance, strip/body cavity searches have been held to be unconstitutional where authorities had no reasonable suspicion that the arrestee was concealing contraband.²⁵ Also, law enforcement-related searches of pretrial detainees' cells are protected by the Fourth Amendment, but searches of the cells of people who have already been convicted are not.²⁶ Refer to Part C(2) of this section to learn about the reasonableness standard for searches of incarcerated people.

1. Types of Body Searches

It is important to remember that most searches of incarcerated people are legal. Prison officials may legally touch you for security reasons, such as when performing a valid search.²⁷ But courts have recognized that sometimes prison officials use searches, especially strip searches and body cavity searches, to harass or abuse incarcerated people. This type of search is not legal.²⁸ Courts, including the Supreme Court, have created some standards to balance the needs of prisons and incarcerated people.²⁹ This Section explains five types of searches:

- (1) pat frisk search—a search where a prison guard searches your body and clothes while you are still dressed (but you will usually have to remove your hat, shoes, and coat);
- (2) strip search—a search where you remove all of your clothing, and the prison official searches your clothes after you take them off (the prison guard does not touch you or search your body cavities);
- (3) strip frisk search—a search where the official searches your clothes after you have taken them off and also looks at (but does not touch) your body cavities (all incarcerated people must bend over to have their anal cavities searched; women must also squat so that the guards can look into their vaginal cavity);
- (4) body cavity search—a search that includes contact with any or all of your body cavities; these searches should be performed by trained medical personnel only; and
- (5) cross-gender body search—any search performed by someone of the opposite sex.

25. *See* Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986).

26. *Willis v. Artuz*, 301 F.3d 65, 69 (2d Cir. 2002) (justifying the differential treatment of convicted incarcerated person's room because "a convicted prisoner's loss of privacy rights can be justified on grounds other than institutional security," such as punishment).

27. Prison officials are allowed to use bodily force to maintain control and security within the prison as long as their actions relate to some penological need, meaning the action helps them manage and maintain control of the prison. *See* N.Y. CORRECT. LAW § 137(5) (McKinney 2014) ("When any inmate...shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape."). *But see* *Turner v. Huibregtse*, 421 F. Supp. 2d 1149, 1152 (W.D. Wis. 2006) (finding that inappropriate fondling of an incarcerated person in a harassing manner, unlike the touching requisite to a search, may violate the person's constitutional rights).

28. For more on harassment, see Part B(3) of Chapter 24 of the *JLM*.

29. *See generally* *Hudson v. Palmer*, 468 U.S. 517, 526–527, 104 S. Ct. 3194, 3200–3201, 82 L. Ed. 2d 393, 403–404 (1984) (utilizing a reasonableness standard to evaluate whether incarcerated people have an expectation of privacy); *Bell v. Wolfish*, 441 U.S. 520, 558–559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 480–481 (1979) (using a reasonableness standard); *see also* *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987) (establishing a four-part test to determine if a prison regulation's violation of a constitutional right was reasonable), *superseded in part by statute*, 42 U.S.C. § 2000cc-1 (introducing a standard for infringements on religious freedom).

2. Fourth Amendment Protections

Incarcerated people usually use the Fourth Amendment, which forbids “unreasonable searches and seizures,”³⁰ to challenge body searches. Incarcerated people have some, *but very limited*, privacy rights to their bodies under the Fourth Amendment.³¹

This Section first tells you when courts do allow body searches under the Fourth Amendment. Part C(2)(a) explains the Fourth Amendment’s “reasonableness standard,” which courts use to decide if a search was lawful. Part C(2)(b) discusses strip search cases, Part C(2)(c) discusses strip frisks, and Part C(2)(d) covers body cavity searches. Finally, Part C(2)(e) explains your limited right to not be searched by someone of the opposite sex (cross-gender body searches).

(a) Reasonableness Standard for Searches of Incarcerated People

The lawfulness of a body search depends on whether a prison guard performs the search reasonably. In *Bell v. Wolfish*, the Supreme Court said that body searches conducted by prison guards while in prison are constitutional, but only if performed in a “reasonable manner.”³² Guards must act reasonably when searching incarcerated people because searches invade incarcerated people’s privacy and can easily become abusive.³³ In other words, courts balance the state’s need for the search against how much the incarcerated person’s privacy is invaded.

The courts do not have one particular rule for what is reasonable in body searches. Instead, they have decided that some practices are unreasonable. To decide whether a search is unreasonable and unnecessarily invasive of incarcerated people’s privacy, courts must look at: (1) how the search is performed; (2) the scope of the search; (3) the reason for the search; and (4) the place of the search.³⁴

Different courts make different decisions using this test, depending on how reasonable a court finds the prison officials’ explanation for the search and the conduct during the search. Note that courts often believe prison officials when they claim that they needed to search an incarcerated person for security reasons. Courts usually “defer” to prison safety policies, meaning courts usually do not want to second-guess the policies.³⁵ While courts will not allow prison officials to do anything they wish

30. U.S. CONST. amend. IV. But remember that the Fourth Amendment does not protect you from searches and seizures of your prison cell because the Supreme Court has said that incarcerated people have no legitimate expectation of privacy in their prison cells. *See Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402–403 (1984) (holding that the Fourth Amendment prohibition against unreasonable searches does not apply to prison cells because “[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions”); *Block v. Rutherford*, 468 U.S. 576, 591, 104 S. Ct. 3227, 3235, 82 L. Ed. 2d 438, 450 (1984) (holding searches of pretrial detainees’ cells were not unconstitutional because they served the important government purpose of maintaining security in the jail); *Willis v. Artuz*, 301 F.3d 65, 68–69 (2d Cir. 2002) (holding that incarcerated people are not protected from cell searches prompted by prosecutors or police even though such searches are not related to prison security). *But see United States v. DeFonte*, 441 F.3d 92, 94 (2d Cir. 2006) (finding that even though is no reasonable expectation of privacy in prison cells for Fourth Amendment purposes, attorney-client privilege protects an incarcerated person’s journal kept in prison cell, since journal entries contained notes from conversations with the person’s attorney).

31. *See, e.g., Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005), *cert. denied*, 549 U.S. 953, 127 S. Ct. 384, 166 L. Ed. 2d 270 (2006) (“[P]risoners retain a right to bodily privacy, even if that right is limited by institutional and security concerns.”); *Peckham v. Wis. Dept. of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998) (noting that while incarcerated people have some limited protections under the Fourth Amendment, “it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment”); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (“We are persuaded to join other circuits in recognizing an incarcerated person’s constitutional right to bodily privacy because most people have ‘a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.’”).

32. *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979).

33. *Bell v. Wolfish*, 441 U.S. 520, 559–560, 99 S. Ct. 1861, 1884–1886, 60 L. Ed. 2d 447, 481–483 (1979).

34. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884–1885, 60 L. Ed. 2d 447, 481–482 (1979).

35. *See Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447, 474 (1979) (“Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and

(courts can and have struck down unreasonable policies), a prison official can typically easily prove the need for a search policy. Some examples of “reasonable” searches are:

- (1) a visual, public strip search and urine analysis drug test as part of a prison administration’s efforts to stop prison drug use;³⁶
- (2) drawing an incarcerated person’s blood or saliva to add DNA to a criminal profiling database;³⁷ and
- (3) a policy of visually strip searching all people recently-arrested before admitting them to the general population of a detention center, regardless of the reason for their arrest, in order to prevent dangerous or illegal materials from entering the prison.³⁸

In general, searches should not be performed abusively (in violation of the Eighth Amendment’s ban on cruel and unusual punishment)³⁹ or conducted in an unnecessarily public manner.⁴⁰ *Who* conducts the search can be important—for example, some states require body cavity searches to be performed by trained medical personnel, and some courts are less likely to find a violation when a body cavity search is conducted by medical personnel.⁴¹ *Where* the search is performed is also a factor—for example, prison officials should not perform strip searches in public without a good reason.⁴² *Which incarcerated people* are being searched is considered critical—courts allow more

practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”); *Bull v. City & Cty. of San Francisco*, 595 F.3d 964, 977 (9th Cir. 2010) (noting that courts owe great deference to prison officials’ professional judgment); *Whitman v. Nesic*, 368 F.3d 931, 934–935 (7th Cir. 2004) (deferring to prison’s claim of security justifications for requiring incarcerated people to be strip-searched before giving urine samples in a random drug testing program, because “[p]rison officials must be accorded wide-ranging deference in matters of internal order and security”) (quoting *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987)); *Elliott v. Lynn*, 38 F.3d 188, 191–192 (5th Cir. 1994) (agreeing with the prison’s claim that a state of emergency existed that justified the deprivation of privacy where prison officials conducted a massive prison shakedown after an increase in murders and violence and strip searches were conducted in front of other incarcerated people and several non-prison staff).

36. *See Thompson v. Souza*, 111 F.3d 694, 699–703 (9th Cir. 1997) (upholding a strip search conducted in front of other incarcerated people even though strip searches were not an official part of the prison’s policy, and holding that requiring incarcerate people to provide urine samples for the purposes of drug tests does not violate their constitutional rights).

37. *See Hamilton v. Brown*, 630 F.3d 889, 894–896 (9th Cir. 2011) (holding that prison officials can collect blood samples from incarcerated people for the purpose of DNA identification); *Padgett v. Donald*, 401 F.3d 1273, 1277–1280 (11th Cir. 2005) (holding that there is no constitutional violation in collecting saliva samples for the purpose of creating a DNA database of incarcerated people).

38. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 333–334, 132 S. Ct. 1510, 1520–1521, 182 L. Ed. 2d 566, 579 (2012) (concluding that a prison policy of strip searching every person admitted into a detention center, no matter the offense arrested for, was constitutional).

39. *See, e.g., Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (holding that conducting strip searches while opposite-sex staff were invited to watch, accompanied by sexual harassment and taunting, would be “designed to demean and humiliate” and would thus provide an Eighth Amendment claim). *But see Somers v. Thurman*, No. 96-55534, 1997 U.S. App. LEXIS 12272, at *31 (9th Cir. Mar. 25, 1997) (*unpublished*) (“To hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize the objective component of the Eighth Amendment test and render it absurd.”).

40. *See, e.g., Farmer v. Perrill*, 288 F.3d 1254, 1260 (10th Cir. 2002) (holding that the incarcerated person has “the right not to be subjected to a humiliating strip search in full view of several (or perhaps many) others unless the procedure is *reasonably related to a legitimate penological interest*”) (emphasis in original).

41. *See, e.g., CAL. PENAL CODE* § 4030(j) (Deering 2016) (requiring that a body cavity search be conducted only by “a physician, nurse practitioner, registered nurse, licensed vocational nurse, or emergency medical technician Level II licensed to practice in [California]”); *Turner v. Procopio*, No. 13-CV-693-FPG-MJR, 2020 U.S. Dist. LEXIS 55052 at *25 (W.D.N.Y. Mar. 27, 2020) (holding a physical body cavity search performed by a physician and licensed nurse was reasonable, even though the search warrant did not specify that the search had to be a physical cavity search); *see also Geder v. Lane*, 745 F. Supp. 538, 539 (C.D. Ill. 1990) (suggesting that medical personnel are authorized to perform a broader variety of searches than nonmedical personnel).

42. *See, e.g., Farmer v. Perrill*, 288 F.3d 1254, 1260–1261 (10th Cir. 2002) (permitting a challenge to visual strip searches en route to the recreation yard conducted in view of other incarcerated people and holding that the government must be justified when doing the visual strip searches in public); *Smith v. Taylor*, 149 F. App’x 12,

intrusive searches of maximum security incarcerated people,⁴³ though the Supreme Court has held that even people who are arrested for minor crimes can be visually strip searched when admitted into detention in the interest of prison security.⁴⁴

The New York State Department of Corrections and Community Supervision (“DOCCS”) relies on this standard (of what is or is not reasonable) when trying to figure out what kind of pat frisks are permitted. According to Directive 4910, a pat frisk is permitted if an official has “an articulable basis to suspect that an inmate may be in possession of contraband,” among other reasons.⁴⁵ The old reasonable suspicion standard required a “particularized and objective basis.”⁴⁶ This meant that from an objective point of view, the circumstances leading up to the search would have made a reasonable person believe that a suspect was in possession of contraband.⁴⁷ The wording in the new standard—“articulable basis”—gives prison officials even greater leeway when determining if a pat frisk is necessary. As long as a prison official can give a reason (and it may not be a good reason) to suspect that you may be carrying contraband, he can pat frisk you.⁴⁸ An official will also pat frisk you before you speak with Department officials or enter the visiting room.⁴⁹

(b) Strip Search

In a strip search, you take off your clothes and a prison official searches them and inspects your naked body. In a strip search, the official does not touch you or search your body cavities. At least one circuit court has held that a strip search does not have to be “deliberate,” meaning that an officer does not need to take specific actions, such as asking you to open your mouth or raise your armpits, for an

14 (2d Cir. 2005) (noting that the presence of more officers at a strip search than prison rules authorized may suggest a privacy violation not necessary to serve penological interests).

43. *See, e.g., Savard v. Rhode Island*, 338 F.3d 23, 30 (1st Cir. 2003) (en banc) (noting the different Fourth Amendment rights afforded to misdemeanor arrestees and convicted convicts); *Arruda v. Fair*, 710 F.2d 886, 886–888 (1st Cir. 1983) (upholding the practice of subjecting maximum-security incarcerated people to body cavity searches upon non-contact visitations, visits to the infirmary and library, and upon leaving cells, finding the practice reasonable given prison officials’ need to find smuggled contraband among segregated incarcerated people in maximum-security prison); *see also Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (“The fact that Unit 7 houses the state’s most difficult incarcerated people gives rise to a legitimate governmental security interest in procedures that might be unreasonable elsewhere.”); *Rickman v. Avanti*, 854 F.2d 327, 328 (9th Cir. 1988) (holding that policy of performing visual strip and body cavity searches on people held in administrative segregation unit whenever they left their cells was constitutional in light of security interests for most restrictive unit); *Lopez v. Youngblood*, 609 F. Supp. 2d 1125, 1136, 1139 (E.D. Cal. 2009) (distinguishing a county jail’s unreasonable blanket strip search policy from the reasonable searches at a maximum security facility such as the one in *Michenfelder*).

44. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012); *see also Brown v. Hilton*, 492 F. Supp. 771, 776–777 (D.N.J. 1980) (holding visual anal inspections of incarcerated people entering a segregated unit were proper for incarcerated person who was an accomplice of two other incarcerated people caught with contraband).

45. State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband 4 (2019), *available at* <http://www.doccs.ny.gov/Directives/4910.pdf>. (last visited Feb. 12, 2020).

46. *See Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661–62, 134 L. Ed. 2d 911, 918–19 (1996) (discussing “reasonable suspicion” in the context of a police officer’s decision to stop, question, and inspect a car on suspicion that drugs were stored in that car).

47. *See Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661–1662, 134 L. Ed. 2d 911, 918–919 (1996).

48. Though never explicitly discussed by the courts in the context of Directive No. 4910, in other contexts, an articulable basis standard is met when the person conducting the search “possesses a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’” that belief. *Mich. v. Long*, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 3481, 77 L. Ed. 2d 1201, 1220 (1983) (upholding a warrantless search of a car based on an officer’s suspicion that it contained weapons that could be used to harm the officers).

49. State of New York, Dept. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 4 (2019), *available at* <http://www.doccs.ny.gov/Directives/4910.pdf>. (last visited Feb. 12, 2020).

inspection of your naked body to count as a strip search.⁵⁰ All that matters is that “viewing of the naked body was an objective of the search, rather than an unavoidable and incidental by-product.”⁵¹ Courts generally allow strip searches if prison officials have a legitimate reason based on safety and security for conducting the search. For example, where there has been an increase in violence at the prison or where incarcerated people have had contact with visitors from outside of the prison.⁵² It is a violation of your Fourth or Eighth Amendment constitutional rights to be strip searched only because the prison wants to harass or punish you, and not because the prison has other legitimate security reasons.⁵³ However, courts will allow strip searches, even for people charged with minor offenses, without reasonable suspicion.⁵⁴

Courts often disagree about what the Fourth Amendment’s reasonableness standard for strip searches actually means. For example, in *Arruda v. Fair*, the First Circuit held that a policy requiring strip searches of maximum security incarcerated people when entering or leaving their units to go to the library or infirmary and after meeting visitors was reasonable.⁵⁵ Even though a guard accompanied incarcerated people to the infirmary and there was a wire screen in the visiting area, the court concluded this policy was reasonable because particularly dangerous people were involved.⁵⁶ However, in *Parkell v. Danberg*, decided by the Third Circuit, the court found that invasive strip searches three times a day of people held in a maximum security cell block was not reasonable, because it didn’t realistically serve the prison’s legitimate interest in preventing smuggling.⁵⁷

Courts also look at the place of the search and the conditions of the search to see if the incarcerated person’s privacy rights were violated.⁵⁸ For example, in *Hodges v. Stanley*, an incarcerated person

50. *Wood v. Hancock Cty. Sheriff’s Dept.*, 354 F.3d 57, 63–65 (1st Cir. 2003) (defining strip searches as “exposing one’s naked body to official scrutiny” and suggesting that the term may include a “clothing search” which requires the removal of all clothing in front of an officer). *But see Stanley v. Henson*, 337 F.3d 961, 963–964 (7th Cir. 2003) (concluding that observed clothing swap in which incarcerated person was never fully naked was not a “strip search” because it was an administrative procedure with the purpose of ensuring that contraband was not brought into the jail).

51. *Wood v. Hancock Cty. Sheriff’s Dept.*, 354 F.3d 57, 65 (1st Cir. 2003).

52. *See, e.g., Brown v. Blaine*, 185 F. App’x 166, 169 (3d Cir. 2006) (finding visual strip searches appropriate when conducted under institutional policy that mandated strip searches upon reentry to the restricted housing unit); *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001) (noting that prisons have discretion to base searches on the type of crime for which an incarcerated person is convicted, such as justifying a search on the fact that the incarcerated person was charged with a violent felony); *Peckham v. Wis. Dept. of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998) (finding strip searches that were for legitimate, identifiable purposes and not for punishment or harassment purposes did not violate incarcerated person’s rights); *Thompson v. Souza*, 111 F.3d 694, 700 (9th Cir. 1997) (upholding visual strip searches to search for drugs, even though the strip searches were not explicitly described in a drug search plan); *Goff v. Nix*, 803 F.2d 358, 366–371 (8th Cir. 1986) (upholding visual body cavity searches on incarcerated people before and after trips to hospital, visits to prison infirmary, other contacts with people outside the prison, and exercise period for incarcerated people in segregation).

53. *See Peckham v. Wis. Dept. of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998) (suggesting that the Eighth Amendment’s prohibition against cruel and unusual punishment protects incarcerated people from strip searches intended to punish and harass); *Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir. 1995) (stating that if strip searches “are devoid of penological merit and imposed simply to inflict pain, the federal courts should intervene,” and that strip searches may not be used to retaliate against First Amendment protected activity, such as the constitutional right of access to the courts); *see also Whitman v. Nescic*, 368 F.3d 931, 934 (7th Cir. 2004) (noting that a search must be “calculated harassment unrelated to prison needs” in order to be unconstitutional (quoting *Meriwether v. Faulkner*, 821 F.2d 408, 418 (7th Cir. 1987))).

54. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 322, 132 S. Ct. 1510, 1511, 182 L. Ed. 2d 566, 570 (2012) (finding that a prison policy of strip searching every person admitted into a detention center, no matter the offense arrested for, was constitutional).

55. *Arruda v. Fair*, 710 F.2d 886, 886–888 (1st Cir. 1983).

56. *Arruda v. Fair*, 710 F.2d 886, 886–888 (1st Cir. 1983).

57. *Parkell v. Danberg*, 833 F.3d 313, 327–328 (3d Cir. 2016).

58. *See, e.g., Evans v. Stephens*, 407 F.3d 1272, 1281 (11th Cir. 2005) (en banc) (holding that searches conducted with little respect for arrestees’ privacy, without sanitary precautions, and which included threatening and racist language were unreasonable), *Cornwell v. Dahlberg*, 963 F.2d 912, 916–917 (6th Cir. 1992) (holding

complained that a prison official had physically attacked him and then stripped searched him, which the incarcerated person claimed was unconstitutional.⁵⁹ The incarcerated person alleged (stated) that he had been searched twice in a row, and he questioned the need for a second search. The Second Circuit noted that the first search, a mandatory procedure when incarcerated people were put in administrative detention, was proper. However, the court found that Hodges stated a constitutional claim because the second search was unnecessary.⁶⁰

(c) Strip Frisk

“Strip frisk” means a visual search of an incarcerated person’s clothes and body, including body cavities.⁶¹ However, it’s important to note that courts will sometimes call it a “strip search” but are really referring to a visual search where prison officials also check your body cavities.⁶² For a male, this may involve one or more of the following procedures:

- (1) Opening his mouth and moving his tongue up and down and from side to side,
- (2) Removing any dentures,
- (3) Running his hands through his hair,
- (4) Allowing his ears to be visually examined,
- (5) Lifting his arms to expose his armpits,
- (6) Bending over and/or spreading his buttocks to expose his anus to the frisking officer, or
- (7) Spreading his testicles to expose the area behind his testicles.

For females the procedures are the same, except females may also be required to squat to show the vagina.⁶³ It is important to remember courts sometimes use the terms “strip frisk search” and “visual body cavity search” to mean the same thing.

Courts usually require that prison officials be suspicious of a particular incarcerated person before strip frisks or body cavity searches are justified.⁶⁴ However, some courts now allow random strip frisk searches. For example, the Second Circuit in *Covino v. Patrissi* suggested that routine strip frisk searches may be reasonable and do not need to be limited to searching incarcerated people after contact visits.⁶⁵ Using the reasonableness standard, the court in *Covino* found that a regulation allowing random visual body cavity searches (which required the incarcerated man to remove his clothing, lift his genitals, and spread his buttocks for a visual examination) was reasonable.⁶⁶ Because the

that an outdoor strip search of an incarcerated man in front of female prison officers was unreasonable).

59. Hodges v. Stanley, 712 F.2d 34, 35 (2d Cir. 1983).

60. Hodges v. Stanley, 712 F.2d 34, 35–36 (2d Cir. 1983); *see also* Iqbal v. Hasty, 490 F.3d 143, 172 (2d Cir. 2007) (finding that detainee stated a Fourth Amendment claim when he alleged that he was subjected to multiple consecutive strip searches and repeated strip and body cavity searches that might be understood to be punishment and not related to legitimate government purposes), *overruled on other grounds*, Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

61. *See* Florence v Bd. of Chosen Freeholders, 566 U.S. 318, 343, 132 S. Ct. 1510, 1525, 182 L. Ed. 2d 566, 585 (2012) (Breyer, J., dissenting). Prison officials only *look* at your body cavities in a strip frisk search. If officials *touch* any body cavity, they are conducting a physical body cavity search. *See, e.g.*, CAL. PENAL CODE § 4030(c)(2) (Deering 2016).

62. *See, e.g.*, Florence v Bd. of Chosen Freeholders, 566 U.S. 318, 343, 132 S. Ct. 1510, 1525, 182 L. Ed. 2d 566, 585 (2012) (Breyer, J., dissenting); *Abrams v. Erfe*, Civil Action No. 3: 17 - CV - 1570 (CSH), 2018 U.S. Dist. LEXIS 110816, at *23–26 (D. Conn. July 3, 2018) (*unpublished*). *But see* Harris v. Miller, 818 F.3d 49, 58 (2d Cir. 2016).

63. Florence v Bd. of Chosen Freeholders, 566 U.S. 318, 343, 132 S. Ct. 1510, 1525, 182 L. Ed. 2d 566, 585 (2012) (Breyer, J., dissenting).

64. *See, e.g.*, Vaughan v. Ricketts, 950 F.2d 1464, 1468–1469, 21 Fed. R. Serv. 3d (West) 959 (9th Cir. 1991) (requiring “reasonable cause” to justify manual rectal search), *overruled on other grounds by* Koch v. Ricketts, 68 F.3d 1191 (9th Cir. 1995); *see also* Hartline v. Gallo, 546 F.3d 95, 100 (2d Cir. 2008) (citation omitted) (“The Fourth Amendment requires an individualized ‘reasonable suspicion that [a misdemeanor] arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest’ before [he] may be lawfully subjected to a strip search”).

65. Covino v. Patrissi, 967 F.2d 73, 79 n.5 (2d Cir. 1992).

66. Covino v. Patrissi, 967 F.2d 73, 79–80 (2d Cir. 1992).

incarcerated people being searched were considered dangerous and the prison needed to prevent contraband, the court found that the prison officials' need to conduct these searches was more important than the incarcerated people's privacy.⁶⁷

When prison officials conduct strip frisk searches to control a dangerous situation, courts usually do not find any constitutional violation.⁶⁸ For example, the Eighth Circuit in *Franklin v. Lockhart* held that a policy requiring visual body cavity searches of incarcerated people on punitive status, in administrative segregation, or in need of protection, was justified by security concerns.⁶⁹ The Fifth Circuit in *Elliott v. Lynn* held that a visual body cavity search of an incarcerated person in front of other incarcerated people and non-searching officers was justified as part of a prison-wide shakedown following an increase in murders.⁷⁰ The Ninth Circuit in *Thompson v. Souza* held that a visual strip search of an incarcerated person's body cavities was reasonably related to the prison's legitimate need to keep drugs out of the prison and therefore did not violate the Fourth Amendment.⁷¹ The court reached this conclusion even though the search happened in front of other incarcerated people, the search went beyond prison guidelines and the officials' search plan, and the person being searched was told to run his fingers around his gums after touching his genitalia.⁷² Other courts have also held that a prison's safety concerns override incarcerated people's privacy rights in a strip frisk situation.⁷³

(d) Body Cavity Search

A "body cavity search" (or "digital search") is an actual physical examination of the incarcerated person's anal and/or genital cavities conducted by a professional member of the health services staff.⁷⁴ During a digital body cavity search, a guard or prison official places his or her fingers into an incarcerated person's nose, mouth, anus, and/or vagina. The test for deciding whether digital body cavity searches are reasonable is stricter than the test for any other type of search because body cavity searches are much more intrusive. The Ninth Circuit has established three requirements that must be satisfied in order for a digital body cavity search to be constitutional under the Fourth Amendment:⁷⁵

67. *Covino v. Patrissi*, 967 F.2d 73, 79–80 (2d Cir. 1992).

68. *See, e.g., Serna v. Goodno*, 567 F.3d 944, 953 (8th Cir. 2009) (holding that a body cavity search for a possible cellphone in a treatment facility for sex offenders did not violate the Fourth Amendment, because "[c]ell phones and their potential to grant access to past or future victims for illegal purposes or to procure sexually explicit material also have the potential to negatively interfere with the Program's treatment goals."); *Goff v. Nix*, 803 F.2d 358, 367–368 (8th Cir. 1986) (holding that visual body cavity searches by prison officials did not violate the Fourth Amendment, and prison administrators' decision to conduct such searches as a condition of any movement outside segregation unit or confines of prison was entitled to deference).

69. *Franklin v. Lockhart*, 883 F.2d 654, 656 (8th Cir. 1989).

70. *Elliott v. Lynn*, 38 F.3d 188, 191–192 (5th Cir. 1994); *cf. Moore v. Carwell*, 168 F.3d 234, 236–237 (5th Cir. 1999) (noting that in the absence of emergency or extraordinary circumstances, body cavity searches by an officer of the opposite sex in view of other officers of the same sex may be a violation of the incarcerated person's constitutional rights).

71. *Thompson v. Souza*, 111 F.3d 694, 700–701 (9th Cir. 1997).

72. *Thompson v. Souza*, 111 F.3d 694, 700–701 (9th Cir. 1997).

73. *See Thompson v. Souza*, 111 F.3d 694, 700–701 (9th Cir. 1997); *Givens v. Aaron*, No. 3:14-cv-378-FDW, 2016 U.S. Dist. LEXIS 117324, at *3–12 (W.D.N.C. Aug. 31, 2016) (*unpublished*) (holding that a strip frisk conducted by at least six prison officials and video recorded was reasonable because of the prison's safety concerns that the incarcerated person had an illegal cell phone on his person). *But see Malik v. Miller*, 679 F. Supp. 268, 269–270 (W.D.N.Y. 1988) (noting that if an incarcerated person could prove he endured a strip frisk in the middle of a hallway in front of 10 to 15 people who were not part of the search, his privacy interest could override the prison's claims of their security interest).

74. *See* 28 C.F.R. § 552.11(d) (defining "digital or simple instrument search" as an "inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps," but declaring that the search "may be conducted only by designated qualified health personnel").

75. *Wiley v. Serrano*, 37 F. App'x 252, 253 (9th Cir. 2002).

- (1) Prison officials must have reasonable cause to search the incarcerated person⁷⁶ (but this standard is less strict than probable cause);⁷⁷
- (2) The search must serve a valid penological (prison management) need;⁷⁸ and
- (3) The search must be “conducted in a reasonable manner,” which means the court will look at whether trained staff performed the search in private and under hygienic (clean) conditions.⁷⁹

The Seventh Circuit in *Bruscino v. Carlson* held that a policy requiring rectal searches of incarcerated people returning to cells was reasonable because guards found a lot of contraband, including knives and hacksaw blades, through those searches.⁸⁰ Furthermore, prison violence had decreased since the searches began.⁸¹ Please note, however, that *Bruscino* involved the U.S. Penitentiary in Marion, Illinois, a “prison designed to hold the most violent and dangerous prisoners in the federal system,” which may explain why the court allowed these invasive searches to occur frequently.⁸² As part of this search, incarcerated people returning to their cells were often subjected to a rectal search, where a paramedic inserted a gloved finger into the incarcerated person’s rectum and felt around for contraband.⁸³

Courts also often approve body cavity searches performed by X-ray.⁸⁴ For example, in *People v. Pifer* the court held an X-ray search, which discovered a hypodermic syringe in the incarcerated person’s rectal cavity, was reasonable.⁸⁵ The court found the prison had significant and legitimate security interests more important than the incarcerated person’s rights. The court also said “an X-ray is far less humiliating, degrading, invasive, annoying and physically uncomfortable than a physical viewing of the anal cavity or physical invasion of the rectal cavity.”⁸⁶

The New York State Department of Corrections and Community Supervision (DOCCS) rules say that body cavity searches may only be done when “there are compelling reasons to believe that the inmate or inmates to be searched have secreted contraband in an oral and/or genital cavity,” which

76. *Vaughan v. Ricketts*, 859 F.2d 736, 739–740 (9th Cir. 1988) (holding that reasonable cause is required but declining to rule on whether it existed in that case), *rev’d on other grounds sub nom.* *Koch v. Ricketts*, 68 F.3d 1191 (9th Cir. 1995).

77. *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447 (1979) (“Balancing the significant and legitimate security interests of [prisons] against the privacy interests of the inmates, we conclude that [digital cavity searches] can [be conducted on less than probable cause].”).

78. *Tribble v. Gardner*, 860 F.2d 321, 322–325 (9th Cir. 1988) (holding that if rectal searches were conducted every time an incarcerated person is moved into a secure housing unit within a maximum security prison and for purposes unrelated to security considerations, the searches would violate the Fourth Amendment); *see also* *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64 (1987) (holding that a prison regulation that impinges on incarcerated people’s constitutional rights must be reasonably related to a legitimate penological interest).

79. *See* *Vaughan v. Ricketts*, 859 F.2d 736, 739–741 (9th Cir. 1988) (holding that rectal searches conducted in an open hallway on an unsanitary table were unreasonable); *State v. Robinson*, 105 Conn. App. 179, 184, 937 A.2d 717, 720 n.9 (Conn. App. Ct. 2008) (noting that any warrant for a body cavity search must contain instruction that the search is to be conducted under sanitary conditions); *Nelson v. Dicke*, Civil No. 00-285 (JRT/FLN), 2002 U.S. Dist. LEXIS 5800, at *27 – 29 (D. Minn. Mar. 31, 2002) (*unpublished*) (finding that an incarcerated person likely had a Fourth Amendment claim for being subjected to a cavity search that was, among other things, not conducted in a sanitary environment).

80. *Bruscino v. Carlson*, 854 F.2d 162, 164–166 (7th Cir. 1988).

81. *Bruscino v. Carlson*, 854 F.2d 162, 164–165 (7th Cir. 1988).

82. *Bruscino v. Carlson*, 854 F.2d 162, 163 (7th Cir. 1988).

83. *Bruscino v. Carlson*, 854 F.2d 162, 164 (7th Cir. 1988).

84. *See, e.g.,* *People v. Collins*, 8 Cal. Rptr. 3d 731, 743–744, 115 Cal. App. 4th 137, 153–155 (Cal. Ct. App. 2004) (upholding an intended visual body cavity search of an incarcerated person; noting that X-ray searches are often reasonable and, when conducted by a specialized technician, are not harmful or uncomfortable).

85. *People v. Pifer*, 265 Cal. Rptr. 237, 238, 240–241, 216 Cal. App. 3d 956, 959, 962–963 (Cal. Ct. App. 1989) (finding that routine X-ray searches of all incarcerated people being transferred from one prison facility to another were reasonable).

86. *People v. Pifer*, 265 Cal. Rptr. 237, 240, 216 Cal. App. 3d 956, 961 (Cal. Ct. App. 1989).

creates “a clear threat to the safety ... of the facility and/or ... any person.”⁸⁷ A doctor must explain the process to the incarcerated person before performing a body cavity search.⁸⁸ The incarcerated person should have the opportunity to give up the contraband at this time.⁸⁹ A corrections officer of the same sex as the incarcerated person must be present during the search.⁹⁰

Note that in New York, an X-ray search using the Body Orifice Scanning System (“the BOSS” or “the BOSS chair”) is sometimes also called a metal detector search.⁹¹ Whenever you are searched with the BOSS chair, you are required to be fully clothed.⁹² Even if the X-ray search is being used after a strip search or a strip frisk, prison officials must let you put your undergarments, pants, and shirt back on first.⁹³ See Part C(6) of this Chapter for more information about these New York State specific prison rules.

(e) Cross-Gender Body Searches

This Subsection explains your right to not be searched by prison officials of the opposite sex. Part B of this Chapter, “Involuntary Exposure,” explained your right not to be seen by prison officials of the opposite sex. You should read both sections because the laws are very similar.

Courts have held that, in some situations, incarcerated people do have the right to not be searched by guards of the opposite sex.⁹⁴ However, courts have generally found that incarcerated people’s legitimate expectations of privacy from persons of the opposite sex are very limited.⁹⁵ In deciding whether a cross-gender search is a violation of an incarcerated person’s rights, courts must balance the incarcerated person’s limited right to be free from invasions of privacy by members of the opposite

87. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 11-12 (2019) (*as revised* June 28, 2019) (limiting compelling reasons to certain circumstances).

88. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 12 (2019) (*as revised* June 28, 2019) (noting that a primary care provider (PCP) must explain and conduct the body cavity search).

89. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 12 (2019) (*as revised* June 28, 2019) (noting that the incarcerated person must have the opportunity to voluntarily yield the contraband).

90. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 12 (2019) (*as revised* June 28, 2019).

91. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 2 (2019) (*as revised* June 28, 2019).

92. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 2–3 (2019) (*as revised* June 28, 2019).

93. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 2–3 (2019) (*as revised* June 28, 2019) (stating that underclothes means “undershorts for males, and bras and panties for females”).

94. *See, e.g.,* Mills v. City of Barbourville, 389 F.3d 568, 579 (6th Cir. 2004) (“[W]e have recognized that a prison policy forcing incarcerated people to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked...would provide the basis of a claim on which relief could be granted.”); Moore v. Carwell, 168 F.3d 234, 235–237 (5th Cir. 1999) (holding that an allegation of a strip and body cavity search performed by an officer of the opposite sex, absent an emergency or unavailability of a same sex officer, was not frivolous for purposes of the Fourth Amendment); Hayes v. Marriott, 70 F.3d 1144, 1147–1148 (10th Cir. 1995) (holding that summary judgment as to the Fourth Amendment claim was inappropriate for defendants because plaintiff was subjected to a body cavity search “in the presence of over 100 people, including female secretaries and case managers”); Byrd v. Maricopa Cty. Sheriff’s Dept., 629 F.3d 1135, 1136–1137, 1143, 1147 (9th Cir. 2011), *cert. denied*, 563 U.S. 1033, 131 S. Ct. 2964, 180 L. Ed. 2d 246 (2011) (holding that “the cross-gender strip search performed on [plaintiff] was unreasonable as a matter of law...and violated [plaintiff’s] rights under the Fourth Amendment to be free from unreasonable searches,” where a non-uniformed female guard conducted a strip search on an incarcerated man in front of 10 to 15 non-participating officers).

95. *See, e.g.,* Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988) (holding that strip searches of incarcerated men that occasionally occurred in view of female guards do not violate the Fourth Amendment); Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (finding that a pat-down search of an incarcerated man, including his groin area, by female guards does not violate the Fourth Amendment).

sex against the state's interests in maintaining the security of the prison⁹⁶ and in avoiding sex discrimination in prison employment.⁹⁷ Because a majority of incarcerated people are male, if the courts held that female guards could never search incarcerated men it might make it harder for women to be hired as security guards (since conducting searches is an important duty of security guards), resulting in possible employment discrimination. Therefore, the state has to balance this interest of not discriminating against female security guards with the particular rights of incarcerated people not to be searched by a guard of the opposite sex. In summary, most cases addressing cross-gender searches in prisons focus first on the incarcerated person's right to privacy and then try to balance this right against the government interests in maintaining security and in not discriminating against women. (Note also that even if a court finds that a search by a prison guard of the opposite sex was a violation of the incarcerated person's Fourth Amendment privacy rights, the guard may still be entitled to qualified immunity.)⁹⁸

This balancing test is difficult, so different cases and courts produce different outcomes. Usually, the focus is on the specific facts of each case. For example, even though the Ninth Circuit has said that "it is highly questionable. . . whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex,"⁹⁹ it declared a search "unreasonable as a matter of law" under the Fourth Amendment in another case.¹⁰⁰ Similarly, the Seventh Circuit has specifically said that not *all* cross-gender searches are permissible.¹⁰¹ It stated that prisons should respect an incarcerated person's constitutional privacy where it is reasonable, taking into account prison security and equal employment for female guards.¹⁰²

Your state may also have laws protecting incarcerated women or regulating searches by opposite-sex guards. For example, California law requires that all people incarcerated in California be searched "in a professional manner."¹⁰³ Routine clothed searches of incarcerated men may be performed by

96. *Hudson v. Palmer*, 468 U.S. 517, 527, 104 S. Ct. 3194, 3200–3201, 82 L. Ed. 2d 393, 403–404 (1984) ("Determining whether [an incarcerated person's] expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell.").

97. *See, e.g., Timm v. Gunter*, 917 F.2d 1093, 1096–1097, 1102 (8th Cir. 1990) (holding that it was not unreasonable for a prison to authorize female guards to conduct surveillance of all areas, including shower and toilet facilities, and to pat search incarcerated men on the same basis as male guards, given the prison's interest in protecting the equal employment rights of prison guards); *Berl v. Cty. of Westchester*, 849 F.2d 712, 716 (2d Cir. 1988) (finding the county liable for employment discrimination under Title VII for refusing to consider two male guards for promotion to female unit of prison); *Smith v. Fairman*, 678 F.2d 52, 53–55 (7th Cir. 1982) (*per curiam*) (considering the state's "strong interest in avoiding sex discrimination in its hiring practices at the prison" and holding that "requiring plaintiff to submit to a limited frisk-type search by a female guard infringes upon no right guaranteed by the Constitution" where the "limited frisk" did not include the genital area); *Bagley v. Watson*, 579 F. Supp. 1099, 1104–1105 (D. Or. 1983) (holding that female corrections officers cannot be excluded from positions that involve performing pat-down frisk searches of clothed incarcerated men and visual observations of incarcerated men in various states of undress); *Griffin v. Mich. Dept. of Corr.*, 654 F. Supp. 690, 702–703 (E.D. Mich. 1982) (finding gender an unacceptable occupational qualification for corrections officers). *See* Part B of this Chapter for a discussion of similar issues concerning involuntary exposure.

98. *See, e.g., Lay v. Forker*, 371 F. Supp. 2d 1159, 1166–1167 (C.D. Cal. 2004) (finding that a strip search of an incarcerated man in the presence of a female officer violated the Fourth Amendment but that the officer was entitled to qualified immunity).

99. *Somers v. Thurman*, 109 F.3d 614, 622, 1997 U.S. App. LEXIS 12272, 24 (9th Cir. 1997).

100. *Byrd v. Maricopa Cty. Sheriff's Dept.*, 629 F.3d 1135, 1136–1137, 1143, 1147 (9th Cir. 2011) (holding that "the cross-gender strip search performed on [plaintiff] was unreasonable as a matter of law...and violated [plaintiff's] rights under the Fourth Amendment to be free from unreasonable searches," where a non-uniformed female guard conducted a strip search on an incarcerated man in front of 10 to 15 non-participating officers).

101. *Canedy v. Boardman*, 16 F.3d 183, 188 (7th Cir. 1994).

102. *Canedy v. Boardman*, 16 F.3d 183, 188 (7th Cir. 1994) (finding that an incarcerated man *did* have a cause of action against strip searches by female guards, because "where it *is* reasonable—taking account of a state's interests in prison security and in providing equal employment opportunity for female guards—to respect an inmate's constitutional privacy interests, doing so...is a constitutional mandate").

103. CAL. CODE REGS. tit. 15, § 3287(b) (2019) (requiring that all searches of incarcerated people "be

prison officials of either sex, but searches of clothed incarcerated women should be performed only by female employees, except in emergency situations.¹⁰⁴ California prohibits opposite-sex guards (other than qualified medical staff) from performing unclothed body inspections “except under emergency conditions with life or death consequences.”¹⁰⁵

In New York, DOCCS allows female correction officers to routinely pat frisk most incarcerated men.¹⁰⁶ For women incarcerated in New York State, however, DOCCS notes that cross-gender pat frisks are not allowed, “absent exigent circumstances.”¹⁰⁷ For more information on New York DOCCS requirements, see Part C(6) of this Chapter.

(i) Searches of Incarcerated Women by Male Guards¹⁰⁸

While all incarcerated people’s rights to privacy are limited because of the nature of prison and incarceration,¹⁰⁹ courts are sometimes more sympathetic to women who are incarcerated. Some courts recognize that women have a greater privacy interest in certain situations because incarcerated women are particularly vulnerable to sexual abuse by correctional personnel. As a result, some courts have found searches of incarcerated women by male guards to be unconstitutional, even if the same searches of incarcerated men by female guards would be allowed under the same circumstances.

For example, in *Jordan v. Gardner*, the Ninth Circuit held that past sexual and physical abuse experienced by incarcerated women may affect the way they react to searches by male prison guards.¹¹⁰ Because of this, the court found that incarcerated women who have suffered past sexual and physical abuse had particular vulnerabilities that could cause the cross-gender body searches to be more traumatic and mentally painful for them than a similar cross-gender body search of incarcerated men who have not suffered past sexual and/or physical abuse.¹¹¹ The court held that random, non-emergency, clothed body searches conducted by male guards on incarcerated women were cruel and unusual punishment in violation of the Eighth Amendment.¹¹² During the searches, the guards

conducted in a professional manner which avoids embarrassment or indignity to the inmate. Whenever possible, unclothed body inspections of inmates shall be conducted outside the view of others”). Title 15 of the California Code of Regulations (Crime Prevention and Corrections) contains the provisions concerning body searches of people who are incarcerated.

104. CAL. CODE REGS. tit. 15, § 3287(b)(2)–(3) (2019).

105. CAL. CODE REGS. tit. 15, § 3287(b)(1) (2019). The California Department of Corrections and Rehabilitation’s Department Operations Manual (DOM) reflects the same policies. California Department of Corrections & Rehabilitation, Operations Manual, Chapter 5, § 52050.16.5 (updated through Jan. 1, 2019), available at <https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/> (last visited Sept. 16, 2019).

106. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 4 (2019) (*as revised* June 28, 2019) (“Pat frisks [of incarcerated men] will be performed by Officers regardless of gender,” but incarcerated men who are Muslim may request a male officer under some circumstances). In general, cross-gender pat-down searches of incarcerated men by female prison guards are constitutionally permissible. *See* Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985) (permitting routine cross-gender pat-downs because “[t]hese searches do not involve intimate contact with an inmate’s body”); *Smith v. Fairman*, 678 F.2d 52, 53–55 (7th Cir. 1982) (holding female guards may conduct pat-down searches without violating an incarcerated man’s constitutional right to privacy).

107. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 4 (2019) (*as revised* June 28, 2019).

108. It is very important that you read *all* of Part C of this Chapter, not just this Section. Courts will use the general rules explained in Part C to decide if a search was legal. This Section only explains some additional protections that incarcerated women may have against searches by male prison guards.

109. *See* *Hudson v. Palmer*, 468 U.S. 517, 527, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393, 404 (1984) (stating that the “right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells”).

110. *Jordan v. Gardner*, 986 F.2d 1521, 1539–1540 (9th Cir. 1993).

111. *Jordan v. Gardner*, 986 F.2d 1521, 1526 (9th Cir. 1993).

112. *Jordan v. Gardner*, 986 F.2d 1521, 1522–1523 1530–1531 (9th Cir. 1993). Whether the doctrine of this case will be adopted by other circuits or the Supreme Court is questionable. *See* *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (finding that the plaintiff could not prove that a prison policy allowing male guards to conduct searches of incarcerated women disregards a known or obvious risk that is very likely to result in the

rubbed, stroked, squeezed, and kneaded the women's bodies, including their covered breasts, buttocks, inner thighs, and crotches.¹¹³ The policy required guards to "[p]ush inward and upward when searching the crotch and upper thighs" of the women and to check the crease in their buttocks with a downward motion with the edge of the hand.¹¹⁴ Many of the women had been sexually or physically abused by men in the past, and one woman, after being searched, suffered severe distress.¹¹⁵ The court found that prison officials knew of the risks of mental trauma and acted with deliberate indifference to the harm that the cross-gender clothed body searches were likely to cause.¹¹⁶ The court additionally said the policy violated the Eighth Amendment because it was "unnecessary" for male guards to search the women since female guards could do the searches.¹¹⁷ Other courts have also recognized that incarcerated women are entitled to greater privacy protection, though with some limitations.¹¹⁸

In general, male prison officials are allowed to conduct clothed body frisks of incarcerated women (where the outer garments/clothing of the person is searched),¹¹⁹ cell searches,¹²⁰ and visual body cavity or strip searches (where incarcerated people must take off their clothes and be visually inspected by a guard).¹²¹ Some states require that only medical personnel, not correctional personnel, do body cavity searches that involve physical intrusion or extraction of a foreign object from a body cavity.¹²²

violation of an incarcerated person's constitutional rights). The *Jordan* court's decision was fact-specific to the particular prison in the case, and other courts have indicated that the case did not create a *per se* constitutional violation (meaning there may be cases in which cross-gender searches are constitutional). See *Carl v. Angelone*, 883 F. Supp. 1433, 1440 (D. Nev. 1995) (finding that although the prison director transferred male correction officers out of women's prisons based on *Jordan*, cross-gender searches were not always unconstitutional; thus, prisons could not be forced to transfer the men based on their sex).

113. *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993).

114. *Jordan v. Gardner*, 986 F.2d 1521, 1533 (9th Cir. 1993) (Reinhardt, J., concurring).

115. *Jordan v. Gardner*, 986 F.2d 1521, 1523, 1539 (9th Cir. 1993).

116. *Jordan v. Gardner*, 986 F.2d 1521, 1528–1529 (9th Cir. 1993).

117. *Jordan v. Gardner*, 986 F.2d 1521, 1526–1528 (9th Cir. 1993); see also *Berry v. City of Muskogee*, 900 F.2d 1489, 1498 (10th Cir. 1990) (stating knowledge of risk of harm and failure to act to prevent the harm constitute deliberate indifference to a known or obvious risk that is very likely to result in the violation of an incarcerated person's constitutional rights).

118. See, e.g., *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416–1417 (9th Cir. 1992) (denying qualified immunity to a male parole officer who walked in on a female parolee urinating as part of a required drug test); *Torres v. Wis. Dept. of Health & Soc. Servs.*, 838 F.2d 944, 953 (7th Cir.), *rev'd en banc*, 859 F.2d 1523, 1524–1525 (7th Cir. 1988) (noting approvingly that to protect incarcerated women's privacy, a state prison provided them with appropriate sleepwear and allowed them to cover their windows while dressing or using the toilet); *Forts v. Ward*, 621 F.2d 1210, 1213 (2d Cir. 1980) (allowing incarcerated women to cover the window of their cells for privacy for 15 minute intervals). But see *Carlin v. Manu*, 72 F. Supp. 2d 1177, 1184 (D. Or. 1999) (holding that male guards could be present as female guards strip searched incarcerated women during an emergency removal to a male prison since the male guards were not touching the women).

119. See *Colman v. Vasquez*, 142 F.Supp.2d 226, 231–234 (noting that cross-gender pat/frisk exams are not facially unconstitutional, but denying dismissal of an incarcerated person's 4th Amendment claim so the court could learn more facts to determine the balance of incarcerated people's 4th Amendment rights against valid penological interests); see also *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979) (upholding visual body cavity searches of incarcerated people against 4th Amendment challenge; the gender of the guards assigned to conduct the searches is not mentioned).

120. See *Hudson v. Palmer*, 468 U.S. 517, 525–526, 104 S. Ct. 3194, 3199–3200, 82 L. Ed. 2d 393, 402–403 (1984) (holding that incarcerated person has no reasonable expectation of privacy in his cell and that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell"); *Martin v. Lane*, 766 F. Supp. 641, 646 (N.D. Ill. 1991) (applying *Hudson* to deny relief under the 4th Amendment to an incarcerated person whose cell was searched during a lockdown).

121. See *Lee v. Downs*, 641 F.2d 1117, 1120–1121 (4th Cir. 1981) (finding that the presence of male guards during the body cavity search of an incarcerated woman by a female nurse was reasonably necessary to restrain the incarcerated person and therefore did not violate her 4th Amendment rights, but also suggesting that if female guards had been able to restrain the woman by themselves, the presence of male guards would have been unnecessary and potentially unreasonable).

122. See, e.g., *DaVee v. Mathis*, 812 S.W.2d 816, 824–826 (Mo. Ct. App. 1991) (concluding that while searches involving physical intrusion and removal of foreign objects must be conducted by medical personnel, the search in question did not involve physical contact and was thus reasonably conducted by non-medical personnel);

Similarly, body cavity searches requiring the use of one's fingers, called "digital body searches," are unreasonable unless medical personnel do these searches in a hygienic manner in a private area.¹²³ The presence of male officers is also a circumstance that might make a digital body search unreasonable.¹²⁴ A woman's pregnancy may justify even stricter standards for cavity searches.¹²⁵

Your state may have specific laws to protect you or to regulate searches by opposite-sex guards. California, for example, prohibits opposite-sex guards from performing unclothed body inspections in non-emergency situations.¹²⁶ In New York, DOCCS policy requires that, whenever possible, female guards—not male guards—should pat frisk incarcerated women.¹²⁷ If a male officer has to perform a pat frisk search of an incarcerated woman (because, for example, a female officer is not available), he must try to search the incarcerated person in a public location.¹²⁸ In New York, male guards cannot perform non-emergency pat frisks on incarcerated women; they can only perform a pat frisk on a woman in the case of "temporary and unforeseen circumstances that require immediate action" to combat any threats to the institution's security or order.¹²⁹ Even when a male officer performs a pat frisk on an incarcerated woman because of emergency circumstances, the officer must report the date,

U.S. *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 199 (E.D. Wis. 1974) ("The intrusion into or the examination of either the vaginal or anal cavities must be made by skilled medical technicians....").

123. See Bonitz v. Fair, 804 F.2d 164, 172–173 (1st Cir. 1986) (holding that digital body searches of incarcerated women were unreasonable and in violation of the 4th Amendment because non-medical personnel performed the searches in an unhygienic manner and in the presence of male personnel), *overruled on other grounds by* Unwin v. Campbell, 863 F.2d 124, 128 (1st Cir. 1988); U.S. *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (finding that a search "abused common conceptions of decency and civilized conduct" and violated the 5th Amendment even though it was done in a sanitary manner by female officers, because it involved forcing a pregnant woman to bend over painfully, the police officers conducting the search were not medically trained, and the search was not conducted in a medical environment); see also Rodriguez v. Furtado, 950 F.2d 805, 811 (1st Cir. 1991) (holding that a body cavity search of a female patient by a doctor in a hygienic and private setting pursuant to a search warrant was reasonable). Some states have statutes specifically requiring medical personnel perform body cavity searches of incarcerated people. See, e.g., MICH. COMP. LAWS ANN. § 764.25b(5) (West 2000).

124. See Bonitz v. Fair, 804 F.2d 164, 172–173 (1st Cir. 1986) (searching incarcerated women in the presence of male officers is one factor that the court considered in finding the search to be unreasonable), *overruled on other grounds by* Unwin v. Campbell, 863 F.2d 124, 128 (1st Cir. 1988).

125. See U.S. *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (holding that a visual vaginal search of woman who is seven-months pregnant "abuse[s] common conceptions of decency and civilized conduct" when the search is conducted in a non-medical environment by non-medical officers, and it was painful for the woman to bend over).

126. CAL. CODE REGS. tit. 15, § 3287(b)(1) (2018). The California Department of Corrections and Rehabilitation's Department Operations Manual (DOM) reflects the same policies. California Department of Corrections & Rehabilitation, Operations Manual § 52050.16.5 (as revised Jan. 1, 2019), available at https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2019/08/Ch_5_2019_DOM.pdf (last visited Feb. 10, 2020).

127. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 4 (2017) (as revised June 28, 2019), available at <https://doccs.ny.gov/system/files/documents/2019/08/4910%20Control%20of%20%26%20Search%20for%20Contraband.pdf> (last visited June 13, 2020). Pat frisks are required when incarcerated people are entering the visiting room, when an entire area of the institution is being searched, when an officer has an articulable basis to suspect an incarcerated person possesses contraband, or as directed by supervisory staff. Pat frisks are also allowed when an incarcerated person is going or returning to housing, program, and recreation areas and outside work details.

128. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 4–5 (2017) (as revised June 28, 2019), available at <https://doccs.ny.gov/system/files/documents/2019/08/4910%20Control%20of%20%26%20Search%20for%20Contraband.pdf> (last visited June 13, 2020).

129. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 4 (2017) (as revised June 28, 2019), available at <https://doccs.ny.gov/system/files/documents/2019/08/4910%20Control%20of%20%26%20Search%20for%20Contraband.pdf> (last visited June 13, 2020).

time, place, and reason for the pat frisk, and they cannot use the palms of their hands while frisking the woman's breast area.¹³⁰

Some prisons have tried to hire female prison officers for certain jobs in women's prisons.¹³¹ But the prisons can be sued for employment discrimination if they do this, since federal law prohibits employment discrimination based on sex,¹³² and courts have held that hiring officers of only one gender for a particular prison, block, or task violates this law.¹³³ Courts consider the state's interest in equal employment opportunities for correctional officers to be strong compared to an incarcerated person's privacy interest in her body, as long as the cross-gender interactions are not offensive, disrespectful, or unprofessional.¹³⁴ This is why male guards may be allowed to search women who are incarcerated.

In conclusion, courts will balance the invasive nature of the search against the prison's concerns of security and equal employment opportunities. But prison officials must still try to provide privacy to incarcerated people if reasonable, and they should also train prison employees to carry out searches professionally, without being unnecessarily intrusive.¹³⁵

3. Eighth Amendment Limitations

Chapter 24 of the *JLM* explains your rights under the Eighth Amendment, which prohibits cruel and unusual punishment. As this Chapter explains, courts usually view illegal search claims as possible violations of the Fourth Amendment. Sometimes, however, a court may believe a search was

130. State of New York, Department of Corrections & Community Supervision, Directive No. 4910, Control of & Search for Contraband 4 (2017) (*as revised* June 28, 2019), *available at* <https://doccs.ny.gov/system/files/documents/2019/08/4910%20Control%20of%20%26%20Search%20for%20Contraband.pdf> (last visited June 13, 2020).

131. Indiana requires a "prison matron" be appointed for female prisons. IND. CODE ANN. § 36-8-10-5 (LexisNexis 2016); California protects all incarcerated people from room searches performed solely by officers of the opposite sex and ensures that a trained female staff member is available and accessible to supervise incarcerated women. CAL. PENAL CODE § 4021 (West 2011). Michigan provides that if incarcerated people are subject to body cavity searches by a person of the opposite sex, another person of the same sex as the incarcerated person must also be present. MICH. COMP. LAWS ANN. § 764.25b(5) (West 2000).

132. 42 U.S.C. § 2000e-2(a)–(d) ("Title VII").

133. *See* Henry v. Milwaukee Cty., 539 F.3d 573, 581–586 (7th Cir. 2008) (finding that a prison policy which required staff overtime shifts to be staffed by same-sex guards and so reduced the number of shifts available to women was not reasonably necessary to achieve the goals of rehabilitation, security, and privacy); *see also* Forts v. Ward, 621 F.2d 1210, 1216–1217 (2d Cir. 1980) (holding that male prison guards could not be excluded from night shifts in a women's prison because other measures to ensure privacy of incarcerated person were available). *But see* Robino v. Iranon, 145 F.3d 1109, 1110–1111 (9th Cir. 1998) (upholding policy excluding male prison guards from certain posts in order to accommodate the privacy of incarcerated women and reduce the risk of sexual conduct between guards and incarcerated people when male prison guards still had many other employment opportunities in the system).

134. *See* Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (finding a prison policy which allowed female guards to conduct pat-down searches was not a violation of the incarcerated person's privacy when "the searches are performed by the female guards in a professional manner and with respect for the inmates"); *see also* Robins v. Centinela State Prison, 19 F. App'x. 549, 550–551 (9th Cir. 2001) (while generally the search of incarcerated men by female officers may not violate the 4th Amendment, a search that is "completely unprofessional and offensive" may be such a violation).

135. *See* Timm v. Gunter, 917 F.2d 1093, 1100 (8th Cir. 1990) (upholding cross-gender pat searches when female guards are trained to perform pat searches of incarcerated men in a professional manner); Torres v. Wisconsin Dept. of Health & Soc. Servs., 859 F.2d 1523, 1524–1525 (7th Cir. 1988) (noting procedures in place to minimize intrusions on the privacy of incarcerated people). *But see* Cameron v. Hendricks, 942 F. Supp. 499, 503 (D. Kan. 1996) (stating that the availability of less intrusive measures is only one factor in determining the reasonableness of a search and that officials are not required to perform the "least intrusive" search).

so unreasonable that it violates the Eighth Amendment's prohibition against cruel and unusual punishment.¹³⁶ Some illegal searches may also be considered assault and battery.¹³⁷

There is no clear standard about how much pain and suffering is unconstitutional. Courts usually say "the unnecessary and wanton infliction of pain" violates the Eighth Amendment.¹³⁸ Whether a search is considered an "unnecessary and wanton infliction of pain" depends on the circumstances, because it may be necessary for prison officials to use more force in certain situations. In general, however, infliction of pain is considered "unnecessary and wanton" when the prison official is acting in bad faith and for no other reason but to cause harm.¹³⁹ Prison officials' behavior must meet this standard before a court will find a constitutional violation. But if the official acts only to further some legitimate penological interest and if the pain suffered is not the main purpose of the search, then courts will probably say that your constitutional rights were not violated.¹⁴⁰ If you believe your Eighth Amendment rights were violated by an illegal search, you should read *JLM*, Chapter 16 as well as Chapter 24 for more information.

With regard to body searches, the Eighth Amendment is most often triggered by the manner in which the searches happen and, at times, because of the purpose of the searches. In *Meriwether v. Faulkner*, the plaintiff was a transgender woman who said that guards made her strip to harass her and to see her body parts after she had a gender-affirming surgery.¹⁴¹ She also said that there were no security reasons to search her.¹⁴² The court said that such searches might violate the Eighth Amendment. In addition, in *McRorie v. Shimoda*, the court sustained an Eighth Amendment claim against a prison guard who stuck his baton into the anus of an incarcerated person during a strip search.¹⁴³

The Seventh Circuit in *Isby v. Duckworth* held that a rectal cavity search conducted in a private room by a doctor, who put a gloved and lubricated finger into the incarcerated person's anus to check for a weapon, was not abusive because it was not an unreasonable precaution after hearing a gunshot.

136. See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1524–1531 (9th Cir. 1993) (en banc) (finding that a policy allowing male corrections officers to conduct random, non-emergency clothed body searches on incarcerated women without suspecting the women of any offense violated the 8th Amendment); *Tribble v. Gardner*, 860 F.2d 321, 325–326 (9th Cir. 1988) (finding that a rectal probe may have violated the 8th Amendment if it was conducted for purposes unrelated to security considerations, where an incarcerated person's clothing, hair, hands, and other body cavities were not searched and incarcerated person's recent X-ray revealed no contraband in his rectum).

137. See, e.g., *Hammond v. Gordon Cty.*, 316 F. Supp. 2d 1262, 1293–1294 (N.D. Ga. 2002) (holding that an incarcerated woman presented enough evidence to support a claim of assault and battery by alleging that a guard inserted his fingers into her vagina).

138. See *Hudson v. McMillian*, 503 U.S. 1, 5–10, 112 S. Ct. 995, 998–1000, 117 L. Ed. 2d 156, 165–168 (1992) (stating that although "the unnecessary and wanton infliction of pain" constitutes a violation of the Eighth Amendment, the Eighth Amendment also allows some use of force and allows force that is in proportion to the need to keep order); *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 874–875 (1976) (holding that a court must determine whether a punishment involves the unnecessary and wanton infliction of pain and whether the punishment is grossly out of proportion to the severity of the crime [meaning the punishment is much more severe than the crime]); see also *Baze v. Rees*, 553 U.S. 35, 54–57, 62, 128 S. Ct. 1520, 1531–1534, 1537, 170 L. Ed. 2d 420, 432–437, 440 (2008) (upholding the three-drug lethal injection protocol on the grounds that neither the risk of improper administration of the first drug nor the failure to adopt more humane alternatives constitute a "wanton infliction of pain under the Eighth Amendment").

139. See *Whitley v. Albers*, 475 U.S. 312, 321–322, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 262 (1986) (holding that an incarcerated person's 8th Amendment rights were not violated even after a prison officer shot the incarcerated person in the leg in the course of a prison riot).

140. See *Del Raine v. Williford*, 32 F.3d 1024, 1038–1042 (7th Cir. 1994) (finding that while rectal searches may inflict pain, if the official has a legitimate reason to conduct them, they do not violate the 8th Amendment); see also *Gillis v. Litscher*, 468 F.3d 488, 494 (7th Cir. 2006) (finding that a behavioral modification program imposed on an incarcerated person for breaking a rule may have violated his 8th Amendment rights if he could show that the prison officials disregarded a substantial risk of serious harm to him when they imposed it).

141. *Meriwether v. Faulkner*, 821 F.2d 408, 411, 417 (7th Cir. 1987).

142. *Meriwether v. Faulkner*, 821 F.2d 408, 417–418 (7th Cir. 1987).

143. *McRorie v. Shimoda*, 795 F.2d 780, 781–783 (9th Cir. 1986).

The Seventh Circuit held this even though the doctor laughed before doing the search and guards held the incarcerated person down.¹⁴⁴ Similarly, the Ninth Circuit in *Somers v. Thurman* held that an incarcerated man did not state an Eighth Amendment claim based on allegations (statements) that female guards pointed and joked among themselves while observing him showering and while conducting a body cavity search of him.¹⁴⁵ However, the Ninth Circuit in *Dockery v. Bass* held that an incarcerated person may have an Eighth Amendment claim when officials strip searched him twice, causing him pain from handcuff use and forcing a tube up his anus.¹⁴⁶

4. DNA Testing

Incarcerated people can be forced to give DNA samples by state or federal law.¹⁴⁷ Forced DNA testing of people who are incarcerated generally does not violate the Fourth Amendment.¹⁴⁸ It is unclear so far if all incarcerated people can be forced to give DNA samples, not just incarcerated people convicted of certain types of crimes,¹⁴⁹ like sex offenses.¹⁵⁰ Some courts have found that laws requiring DNA sampling of all people convicted of felonies do not violate the Fourth Amendment because the state's interest is more important than the bodily intrusion.¹⁵¹ See Chapter 11 of the *JLM* and Chapter 36 for more information.

144. *Isby v. Duckworth*, No. 97-3705, 1999 U.S. App. LEXIS 7823, at *2-7 (7th Cir. Apr. 21, 1999) (*unpublished*).

145. *Somers v. Thurman*, No. 96-55534, 1997 U.S. App. LEXIS 12272, at *25-26 (9th Cir. Mar. 25, 1997) (*unpublished*).

146. *Dockery v. Bass*, No. 95-17250, 1997 U.S. App. LEXIS 35693, at *2, *7-8 (9th Cir. Dec. 17, 1997) (*unpublished*).

147. *See, e.g., United States v. Weikert*, 504 F.3d 1, 2-3 (1st Cir. 2007) (holding that requiring an incarcerated person on supervised release to give a blood sample did not violate the 4th Amendment); *United States v. Kincade*, 379 F.3d 813, 832, 839 (9th Cir. 2004) (holding that compulsory DNA profiling of specified federal offenders was reasonable under the totality of the circumstances, which included the probationer's reduced expectations of privacy, the minimal intrusion that occurs from blood sampling, and the significant societal interests furthered by the collection of DNA information from convicted offenders); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (*per curiam*) (noting that every circuit court which has considered whether statutes requiring collection of DNA samples from people convicted of felonies violate the 4th Amendment has held that they do not); *State v. Martin*, 955 A.2d 1144, 1145-1146 (Vt. 2008) (upholding a state law requiring people convicted of nonviolent felonies to provide DNA samples).

148. *Groceman v. U.S. Dept. of Justice*, 354 F.3d 411, 413-414 (5th Cir. 2004) (*per curiam*) (“[A]lthough collection of DNA samples from incarcerated people implicates Fourth Amendment concerns, such collections are reasonable in light of an inmates diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime....[P]ersons incarcerated after conviction retain no constitutional privacy interest against their correct identification.”); *Padgett v. Donald*, 401 F.3d 1273, 1275 (11th Cir. 2005) (finding that forced DNA sampling does not violate the 4th Amendment because incarcerated people have more limited Fourth Amendment rights to privacy and the state has an interest in keeping track of people convicted of felonies).

149. *See Groceman v. U.S. Dept. of Justice*, 354 F.3d 411, 413 n.2 (*per curiam*) (5th Cir. 2004) (noting that in the Tenth and Second Circuits, DNA samples of incarcerated people must be taken in accordance with DNA collection statutes, which satisfies “the ‘special needs’ exception to the warrant requirement”; however, in the Fourth Circuit, incarcerated people have no 4th Amendment right to be free from DNA searches); *Roe v. Marcotte*, 193 F.3d 72, 81-82 (2d Cir. 1999) (upholding statute requiring people convicted of sex offenses to submit to collection of DNA samples, but disagreeing with argument that would have made the statute apply to people convicted of any offense). *But see United States v. Amerson*, 483 F.3d 73, 80-84, 89 (2d Cir. 2007) (holding DNA collection statute applied to non-violent probationers under the two-pronged special needs test used in the circuit when there was a strong governmental interest in rapidly and accurately solving crimes); *Nicholas v. Goord*, 430 F.3d 652, 655 n.2, 671 (2d Cir. 2005) (upholding statute requiring people found guilty of assault, homicide, rape, incest, escape, attempted murder, kidnapping, arson, and burglary have their DNA collected, and suggesting the statute may apply to all people convicted of felonies).

150. *See, e.g., Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996) (upholding a requirement that incarcerated people convicted of sexual assault provide DNA samples).

151. *United States v. Amerson*, 483 F.3d 73, 80-84, 89 (2d Cir. 2007) (holding that under the two-pronged special needs test used in the circuit, the DNA collection statute applied to people on probation who had been

5. Statutory Privacy Rights

You may also have privacy rights under state statutes and regulations, in addition to your federal constitutional rights.¹⁵² For example, New York State law requires prisons to give incarcerated people certain clothing, and to follow specific procedures when giving incarcerated people urine tests or searching incarcerated people's religious items.

(a) Clothing

New York State law gives all incarcerated people the right to the same amount of “facility-issued clothing.”¹⁵³ Look in your prison library for the New York DOCCS Directives (specific prison rules) for more specific information about clothing. Prison officials in New York *cannot* take clothing away as punishment.¹⁵⁴ But they can take clothing away if they think it is dangerous to the prison and/or yourself by being a threat “to the safety, security or good order” of the facility.¹⁵⁵ If officials want to take away some clothing from you because they think it is dangerous for you to have, they must follow specific procedures.¹⁵⁶ A deprivation order—an order that takes away a specific item, privilege or service—must be authorized by the chief administrative officer in writing.¹⁵⁷ The order must include the reasons for the order.¹⁵⁸ The deprivation order must be reviewed within seven days.¹⁵⁹ If this review could impact your health, then the chief administrative officer must consult with the jail doctor or other qualified health staff, who must record in writing whether continuing the deprivation would compromise your health.¹⁶⁰ After every review, the chief administrative officer must put in writing whether the order will stop or continue, and state the reasons for his decision.¹⁶¹

convicted of non-violent offenses because there was a strong governmental interest and minimal intrusion into and invasion of the privacy of the people on probation); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1342 (N.D. Ga. 2003) (finding that felony convictions justified searches, including DNA sampling, and so satisfied the 4th Amendment requirement that the search be reasonable); *United States v. Stegman*, 295 F. Supp. 2d 542, 548–550 (D. Md. 2003) (finding that compelling a person to provide a DNA sample while on supervised release was not an unreasonable search or seizure).

152. Incarcerated people should become familiar with the penal codes of their respective states, as well as the employee manual of their prisons, if possible. The employee manuals will tell you what procedures the guards must follow and may help you challenge the guards' behavior through internal prison grievance procedures.

153. N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.7 (2013). For men, this includes one shirt and one pair of pants. Women receive one shirt or blouse, and one skirt, smock, dress, or pair of pants. Both men and women should receive two pairs of socks, two sets of underwear, one pair of shoes, and one sweater, sweatshirt, or jacket during cold weather. Incarcerated women are allowed to wear bras. N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.7 (2013).

154. *See* N.Y. COMP. CODES R. & REGS. tit. 9, §§ 7075.5(a)–(b) (2019) (forbidding denial, restriction, or limited provision of an essential service to an incarcerated person as a means of punishment, and essential services will not be denied, restricted, or limited unless providing them would be a threat to the safety, security, or good order of the facility, incarcerated person, staff, or other people incarcerated at the facility); N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.12 (2013) (“Any decision to deny, restrict or limit an inmate of any right, service, item or article, guaranteed an inmate by the provisions of this Part, shall be done in accordance with [N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5]).

155. N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(b) (2019); N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.12 (2013).

156. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(b) (2019); N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.12 (2013).

157. N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(b) (2019).

158. N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(c) (2019).

159. N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(c) (2019).

160. N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(c) (2019).

161. N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(c) (2019).

(b) Urine Tests

Forcing people to take urine tests or give samples of other bodily fluids is considered a “search”¹⁶² under the Fourth Amendment, and the procedures for urine tests are held to the same rules and standards as other searches. Prison officials may make incarcerated people give urine samples for drug testing either with reasonable cause or under a program designed to prevent selective enforcement of prison rules or harassment of incarcerated people.¹⁶³ New York has state regulations about privacy when you take a urinalysis test.¹⁶⁴ The rules have a specific procedure for urine tests. You will be pat frisked before giving the sample, and someone will watch you give the sample. The person who watches you must be from the security or medical staff, and the person has to be the same sex as you. You should be in a private place where no other incarcerated people or staff can see you.¹⁶⁵

(c) Searches of Religious Items

In New York, religious items such as the medicine bag of an incarcerated person who is Native American can only be inspected in a way that respects its religious significance. However, a medicine bag may be scanned at any time with a metal or other electronic detector. An incarcerated person must also hold the medicine bag open for prison officials to look inside if the official has reason to believe that it may contain contraband.¹⁶⁶ See Chapter 27 of the *JLM* for more information on religious rights in prison.

6. Departmental Directives and Privacy Rights

The New York DOCCS Directives have specific rules for each state prison. Look in your prison library for a copy of these directives. These directives have additional rules for searches that may be stricter than the court rules. For example, the directives say that only a primary care provider (PCP), like a physician, can conduct body cavity searches.¹⁶⁷ The body cavity search must take place in an appropriate examining room. The official must use professional, hygienic techniques and explain the procedure to you. The physician must also give you a chance to give up contraband voluntarily. One corrections officer of your sex must be present to witness the examination.¹⁶⁸ These rules are intended

162. *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 639, 660 (1989) (holding that the Federal Railroad Administration’s policies of drug testing by collecting and testing urine samples and samples of other bodily fluids are “searches” under the 4th Amendment).

163. *See, e.g., Louis v. Dept. of Corr. Servs. of Neb.*, 437 F.3d 697, 700–701 (8th Cir. 2006) (holding in a 42 U.S.C. § 1983 action that prisons requiring urine tests do not need to allow incarcerated people to sign and seal their own urine specimens and do not have to conduct a confirmatory test where the test shows a positive result but incarcerated person denies using drugs); *Lucero v. Gunter*, 17 F.3d 1347, 1350 (10th Cir. 1994) (upholding the random urine collection and testing of incarcerated people as a reasonable means of preventing the unauthorized use of narcotics); *Forbes v. Trigg*, 976 F.2d 308, 310, 314–315 (7th Cir. 1992) (upholding urinalysis of all incarcerated people in jobs that allowed them potential access to contraband from outsiders); *Hurd v. Scribner*, No. 06CV0412, 2007 U.S. Dist. LEXIS 32651, at *9, *15 (S.D. Cal. May 02, 2007) (*unpublished*) (upholding, in response to a *habeas* petition, discipline taken against an incarcerated person who refused a drug test); *see also Thompson v. Souza*, 111 F.3d 694, 702 (9th Cir. 1997) (noting that other courts have held that truly random urine tests are reasonable because they prevent correctional officials from harassing particular incarcerated people by subjecting them to repeated drug tests); *Storms v. Coughlin*, 600 F. Supp. 1214, 1226 (S.D.N.Y. 1984) (holding that the incarcerated people must be chosen for urine tests through a system of selection in which the incarcerated people to be tested are chosen blindly). *But see Thompson v. Souza*, 111 F.3d 694, 702–703 (9th Cir. 1997) (upholding nonrandom urine testing of a group of 124 incarcerated people).

164. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 1020.4 (2012).

165. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 1020.4 (2012) (stating the rules and procedure for urinalysis); *see also* State of New York, Department of Corrections & Community Supervision, Directive No. 4937, Urinalysis Testing 1–4 (2017) (*as revised* Dec. 27, 2018).

166. State of New York, Department of Corrections & Community Supervision, Directive 4910, Control of & Search for Contraband 13 (2018) (*as revised* June 28, 2019).

167. State of New York, Department of Corrections & Community Supervision, Directive 4910, Control of & Search for Contraband 11–12 (2018) (*as revised* June 28, 2019).

168. State of New York, Department of Corrections & Community Supervision, Directive 4910, Control of

to make sure that no one, including health officials, humiliates or harasses you. If anyone does harass you, you may bring a complaint alleging violation of the professional standards set out in the directives.

The New York Directives also say that when you are transferred from one DOCCS facility to another, you will be strip frisked and subjected to a metal detector search at the facility from which you are being transferred, but you will not be strip searched or strip frisked at the receiving facility. You may have to go through a metal detector search at the receiving facility, though. The same policy applies when you are transferred from one Special Housing Unit to another Special Housing Unit. In both situations, however, an officer may strip search you at the receiving facility if an officer has “probable cause” to believe that you are carrying contraband.¹⁶⁹

When you are strip searched or strip frisked, prison officials must make sure you have some privacy. In general, only the prison official doing the search should be there, although a supervisor may watch.¹⁷⁰ Additional corrections officers should be present only if there are major disturbances or if it is likely that you will resist the search, and incarcerated people may be searched in groups if there is a major disturbance at the facility. The prison should limit traffic as much as possible where strip searches are conducted. Officers of the same sex as you must conduct your strip searches and strip frisks.¹⁷¹

A very important rule about strip searches in New York is that officers must always act professionally. They have to be aware of the sensitive nature of searches and must “conduct such searches in a manner least degrading to all involved.”¹⁷² Typically, if you cooperate in a non-body cavity search, the officer may not touch you, except to run fingers through your hair if necessary.¹⁷³ If you believe that a search is conducted improperly, you can use the New York Inmate Grievance Program or an Article 78 proceeding to seek a remedy.¹⁷⁴ If you believe the search also violated your constitutional rights, then you can use the legal remedies described in Part D of this Chapter. If you are incarcerated in another state, it is likely that there are similar regulations to protect your rights. See Chapter 2 of the *JLM* for more information on legal research so that you can find the laws and regulations of the state where you are incarcerated.

7. Why You Should Not Resist an Illegal Body Search

If you are searched in a way that you believe is illegal or against a prison regulation, it is best to allow the search to take place. (Prison officials can use force to make you obey orders, even if those orders may be illegal, so resisting is often not possible.) Courts have held that incarcerated people must follow orders so that prison rules can be administered safely and in an orderly way.¹⁷⁵ Even if you

& Search for Contraband 11–12 (2018) (*as revised* June 28, 2019).

169. State of New York, Department of Corrections & Community Supervision, Directive 4910, Control of & Search for Contraband 8–9 (2018) (*as revised* June 28, 2019).

170. State of New York, Department of Corrections & Community Supervision, Directive 4910, Control of & Search for Contraband 10 (2018) (*as revised* June 28, 2019).

171. State of New York, Department of Corrections & Community Supervision, Directive 4910, Control of & Search for Contraband 9 (2018) (*as revised* June 28, 2019).

172. State of New York, Department of Corrections & Community Supervision, Directive 4910, Control of & Search for Contraband 9 (2018) (*as revised* June 28, 2019).

173. State of New York, Department of Corrections & Community Supervision, Directive 4910, Control of & Search for Contraband 10 (2018) (*as revised* June 28, 2019).

174. See Chapter 15 of the *JLM* and Chapter 22 for more information on inmate grievance procedures and Article 78 proceedings.

175. *Griffin v. Comm’r of Pa. Prisons*, No. 90-5284, 1991 U.S. Dist. LEXIS 17951, at *11 (E.D. Pa. Dec. 10, 1991) (*unpublished*), *aff’d*, 961 F.2d 208 (3d Cir. 1992) (“Even if plaintiff considered the order illegal, plaintiff should not have refused to follow it because it is critical to the orderly administration of a prison that incarcerated people follow orders.”); *see also* *Eccleston v. Oregon ex rel. Or. Dept. of Corr.*, 168 F. App’x 760, 761 (9th Cir. 2006) (finding that a prison official’s use of a chemical agent on an incarcerated person who repeatedly refused to follow orders to leave his cell was not cruel and unusual punishment); *Williams v. Delo*, 49 F.3d 442, 446 (8th Cir. 1995) (finding that the incarcerated person’s refusal to follow the orders of corrections officials posed a threat to

believe that an order violates your constitutional rights, courts say that you do not have the right to resist the order.¹⁷⁶

It is safest for you *not* to resist the prison official, because if you resist you probably will be disciplined and you may be injured. You can later file a lawsuit to help prevent future violations of your rights and to punish the official. Any disciplinary action taken against you for resisting the search will be added to your record, affecting your good-time credit and your chances of parole. If you resist a search and then bring a lawsuit, winning the suit may mean the court will clear your disciplinary record after finding the search violated prison rules.¹⁷⁷ However, that is not always the case. Resisting a search—even if it is obviously illegal—is likely to lead to a permanent mark on your disciplinary record, because courts rarely order a disciplinary record to be changed. It is unlikely that a permanent mark due to your resisting an illegal search will ever be cleared from your record.¹⁷⁸ Courts want incarcerated people to challenge violations of their rights in courts, instead of refusing to obey orders from prison officials.¹⁷⁹ Do not count on the courts to clear your record, especially if the order you disobey is not clearly contrary to a prison's rules.

D. Legal Remedies

If you believe your rights have been violated, remember you *must* first file an administrative grievance at your institution. See Chapter 15 of the *JLM* for further information.¹⁸⁰ You can then file a Section 1983 lawsuit if you believe prison officials or other government employees (including police officers) have violated any of your constitutional rights. In addition, you can file a class action law suit, which involves a group of people, called plaintiffs, bringing a lawsuit together.

If you think that prison officials have violated your Eighth or Fourth Amendment rights, you may sue the officials or guards using 42 U.S.C. § 1983. Section 1983 is a federal law that allows you to sue state officials who have violated your constitutional rights while acting “under color of state law,”

institutional security).

176. *Pressly v. Gregory*, 831 F.2d 514, 518 n.3 (4th Cir. 1987) (citing *Wright v. Bailey*, 544 F.2d 737 (4th Cir. 1976), for the legal fact that you cannot resist arrest by stating that the arrest is illegal unless the illegality is clear at the time of the arrest); *Jackson v. Allen*, 376 F. Supp. 1393, 1394–1395 (E.D. Ark. 1974) (holding that, because of the discipline structure of prisons, incarcerated people do not have the right to resist an unconstitutional order or punishment unless resistance is necessary to prevent one's own permanent physical or mental damage or death). *But see Purcell v. Pa. Dept. of Corr.*, No. 95-6720, 1998 U.S. Dist. LEXIS 105, at *26–27 (E.D. Pa. Jan. 9, 1998) (*unpublished*) (finding the incarcerated plaintiff could proceed with his action against prison officials, where he may have been injured because he followed an order that medical professionals previously led him to believe he did not need to obey).

177. *See Dunne v. Reid*, 93 Misc. 2d 50, 51–52, 402 N.Y.S.2d 923, 924 (Sup. Ct. Dutchess County 1978) (ordering incarcerated person's disciplinary record from resisting search cleared after finding prison officials acted in violation of prison regulations when they tried to search the incarcerated person in front of other people, despite prison rules that said searches must respect incarcerated people's privacy).

178. *See, e.g., Mahogany v. Stalder*, 242 F. App'x 261, 263 (5th Cir. 2007) (*per curiam*) (dismissing incarcerated person's claim seeking restoration of good-time credits and removal of disciplinary proceedings from his record, despite allowing his § 1983 claim for “deprivation of civil rights” to proceed).

179. *See Rivera v. Smith*, 63 N.Y.2d 501, 515, 472 N.E.2d 1015, 1022, 483 N.Y.S.2d 187, 194 (1984) (“[T]he recognition and enforcement even of constitutional rights may have to await resolution in administrative or judicial proceedings; self-help by the inmate cannot be recognized as an acceptable remedy.”). *But see Sanchez v. Scully*, 143 Misc. 2d 889, 889–890, 542 N.Y.S.2d 920, 920 (Sup. Ct. Dutchess County 1989) (holding that, given the existence of unambiguous statutory language in support of incarcerated person's refusal to work in excess of eight hours per day, the record of the subsequent disciplinary proceeding should be expunged, or removed, from the person's record); *Dunne v. Reid*, 93 Misc. 2d 50, 51–52, 402 N.Y.S.2d 923, 924 (Sup. Ct. Dutchess County 1978) (finding a disciplinary action inappropriate where the incarcerated person resisted a search that violated the prison's own regulations).

180. *See, e.g., Johnson v. Johnson*, 385 F.3d 503, 515–523 (5th Cir. 2004) (describing in detail the requirement that an incarcerated person exhaust administrative remedies before filing a lawsuit).

which means while acting with authority from the state.¹⁸¹ You can sue federal officials in a similar suit, called a *Bivens* action.¹⁸²

You can also use Section 1983 to sue local officials as long as you can show that they too acted “under color of state law.” But note that you can only sue municipalities (towns, cities, or counties) under 42 U.S.C. § 1983 if your injury happened because of an official municipal policy or custom.¹⁸³ To sue a city or a county, then, you will have to show that the “execution of [the] government’s policy or custom . . . inflict[ed] the injury.”¹⁸⁴ In other words, a local government will be held liable only if an injury can be shown to be a direct result of the local government’s official policy, either express or implied.¹⁸⁵ Therefore, a local government is not at fault, or “liable,” under Section 1983, “for an injury inflicted solely by its employees or agents” who were not following official local policy,¹⁸⁶ even though the local officials may be individually liable under Section 1983. You should read Chapter 16 of the *JLM* to learn more about Section 1983 claims.

There have also been successful class actions challenging official municipal policies under 42 U.S.C. § 1983. Class actions are a type of lawsuit where many plaintiffs sue together for similar violations of their rights.¹⁸⁷ Most successful class action cases challenging prison search policies have been brought on behalf of non-violent, non-drug misdemeanor arrestees, not convicted incarcerated people.¹⁸⁸

181. 42 U.S.C. § 1983.

182. Incarcerated people can make constitutional claims against federal officials in federal court under 28 U.S.C. § 1331 by using *Bivens* actions. See Part E(1) of Chapter 16 of the *JLM* for more information on *Bivens* actions.

183. See, e.g., *Williams v. Kaufman County*, 352 F.3d 994, 1013–1014 (5th Cir. 2003) (holding that the municipality could be held liable for unlawful searches of detainees because the policy was authorized by the sheriff, the relevant policymaker).

184. *Irwin v. City of Hemet*, 22 Cal. App. 4th 507, 525–527, 27 Cal. Rptr.2d 433, 442–443 (Cal. Ct. App. 1994) (plaintiffs’ allegation that the City’s adoption of a policy or custom not to train its corrections officers in suicide screening and prevention caused their incarcerated family member to commit suicide was a factual issue the lower court should have allowed to proceed to trial) (quoting *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978))). For an example of such a municipal policy or custom, see *Blihovde v. St. Croix County*, 219 F.R.D. 607, 612–613 (W.D. Wis. 2003) (describing a county’s strip search policy, and concluding that the plaintiffs fairly alleged that the county-wide policy or custom of conducting strip searches could have been the cause of the plaintiff’s injury).

185. *Blihovde v. St. Croix County*, 219 F.R.D. 607, 618 (W.D. Wis. 2003) (“Even when there is no express policy, a municipality may be liable when there is a ‘custom’ of unconstitutional conduct.” (citing *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978))); see also *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 124–127 (2d Cir. 2004) (reviewing the law of municipal liability in a damages suit for excessive force).

186. *Irwin v. City of Hemet*, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr.2d 433, 442 (Cal. Ct. App. 1994) (internal quotation marks omitted) (quoting *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978)).

187. See Chapter 5 of the *JLM* for information on class actions in general and Part D(1) of Chapter 16 of the *JLM* for information on § 1983 class actions.

188. See, e.g., *Bynum v. District of Columbia*, 217 F.R.D. 43, 45–50 (D.D.C. 2003) (certifying a § 1983 class action claiming 4th and 5th Amendment violations, where plaintiffs challenged a prison policy of conducting strip searches of incarcerated people returning from court with orders for their release, without any suspicion). *Bynum* later settled for \$12 million and the District of Columbia agreed to “no longer strip search [detainees] who are entitled to release.” *Bynum v. Gov’t of the Dist. of Columbia*, 384 F. Supp. 2d 342, 358–359 (D.D.C. 2005); see also *Tardiff v. Knox County*, 365 F.3d 1, 5–7 (1st Cir. 2004) (affirming class certification of people arrested for non-violent, non-drug offenses who challenged policy of blanket, routine strip searches without reasonable suspicion); *Blihovde v. St. Croix County*, 219 F.R.D. 607, 612–621 (W.D. Wis. 2003) (affirming amended class definition in a § 1983 class action, alleging plaintiffs, all misdemeanor non-drug, non-violent arrestees, were subjected to strip searches without reasonable suspicion according to a county prison policy in violation of the Fourth and Fourteenth Amendments). *Nilsen v. York County*, 382 F. Supp. 2d 206, 209–213 (D. Me. 2005), approved a \$3.3 million settlement in a § 1983 class action over strip searches of non-drug, non-weapon, and non-violent arrestees at county jail; plaintiffs alleged the strip searches were conducted pursuant to county jail policy, without individualized reasonable suspicion in violation of the Fourth Amendment. The settlement also required the

It is important to remember that different laws apply in state and federal prisons. If you are in a federal prison, it does not matter what state the prison is in. Federal prisons only use federal law. If you are in a state prison, you can use both state and federal laws. But, remember that each state creates its own laws. You must research the laws of your particular state and how incarcerated people in your state file suits in that state's courts. Federal constitutional rights are protected regardless of whether you are in state or federal prison, but the way you present your case—what legal claims you make and how you make them—will differ.

E. Conclusion

In conclusion, although your rights against involuntary exposure and body searches are substantially limited in prison, you still have important protections under the Fourth Amendment, Eighth Amendment, and certain state statutes and regulations. Whether your rights have been violated will depend in large part on the reasonableness behind the search, or behind the policy leading to the involuntary exposure. It will also depend on what kind of search or exposure is at issue. The more cases you can find with facts similar to your own situation where the prison was found to have violated the law, the better your chances of showing that your rights were violated.

county to maintain a written policy prohibiting the challenged strip searches.

CHAPTER 26

INFECTIOUS DISEASES: AIDS, HEPATITIS, TUBERCULOSIS, AND MRSA IN PRISONS*

A. Introduction

This Chapter explains your legal rights with respect to infectious diseases in prison. This Chapter has information both for incarcerated people who already have an infectious disease (like HIV/AIDS, tuberculosis, hepatitis B, hepatitis C, or Methicillin-resistant *Staphylococcus aureus* (MRSA)), and for incarcerated people who want to avoid getting an infectious disease. Part B gives you some basic facts about infectious diseases. Section (1)(a) of Part B also describes how women may have different symptoms of HIV/AIDS than men. Part C explains the general standard used to determine whether a prison policy is constitutional. Part D is about medical testing for infectious diseases in prisons, including whether a prison can force you to get tested or have others tested. Part E discusses disease prevention and segregation issues. Part F discusses the role of confidentiality and what you can expect in terms of keeping your health status private in prison. Part G deals with treatment options and your legal rights to those options. Part H discusses issues relating to discrimination. Part I discusses sentencing issues. Part J discusses planning for your release if you have an infectious disease. Finally, Appendix A lists resources for further information, counseling, and support for you and your family.

You should also read other chapters of the *JLM* to understand your legal rights, especially Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law,” Chapter 36, “Special Considerations for Sex Offenders,” Chapter 28, “Rights of Prisoners with Disabilities,” Chapter 23, “Your Right to Adequate Medical Care,” and Chapter 35, “Getting Out Early: Conditional & Early Release.”

There are more court cases about HIV/AIDS than about the other diseases discussed in this Chapter. Because judges always look at the specific facts of each case, try to find cases about your disease. But, you also can try to make comparisons between different diseases and explain how the diseases are very similar, including how they are spread and their effects on incarcerated people. For example, if you want to use a case about AIDS and argue that the case should also apply to hepatitis C, you should try to explain your reasons as clearly as possible.

This Chapter is only a summary of the many issues about infectious diseases in the prison system. You probably will have to do more research elsewhere. For example, this Chapter only includes HIV/AIDS, tuberculosis, hepatitis (the most common infectious diseases in prison), and MRSA, but there are many other diseases. Scientists are always discovering new information about infectious diseases, so some of this information may not be correct in the future.

B. Background Information on Infectious Diseases

1. HIV and AIDS

HIV, the Human Immunodeficiency Virus, is the virus that causes AIDS.¹ AIDS stands for Acquired Immunodeficiency Syndrome. Over time, HIV weakens your immune system so your body

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1. *HIV/AIDS—About HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hiv/basics/whatishiv.html> (last visited Oct. 5, 2019). The *JLM* knows that many incarcerated people do not have access to the Internet, but because we want this information to be up to date, we cite frequently to different agencies’ and organizations’ websites.

cannot fight off infection properly. You may develop various infections—known as “opportunistic” infections—that take advantage of your body’s weakened condition.²

Most people with HIV develop AIDS within ten to fifteen years of getting HIV.³ The time it takes for HIV to develop into AIDS is different for each person. Medical treatments can slow down how fast HIV weakens your body.⁴ As HIV gets worse and becomes AIDS, people become sick with serious illnesses and infections.

Being HIV-positive *does not* mean that you have AIDS. It is very important that you consult a doctor to find out if you are infected with HIV or if you have developed AIDS so that you can receive proper medical treatment. The only way you can know for certain whether you are infected is to be tested.

An estimated 1.1 million people in the United States were living with HIV as of 2015, and, in 2017 alone, 38,739 people in the United States and U.S. territories were diagnosed with HIV.⁵ The estimated rate of confirmed AIDS cases in state and federal prisons between 1999 and 2008 was more than four times higher than in the general population.⁶ In 2014, approximately 1,994 incarcerated people in New York State prisons (but not counting prisons in New York City) were HIV positive, and of those, 1,284 incarcerated people had AIDS.⁷

HIV is most commonly spread by having unprotected anal, vaginal, or oral sex with a person who has HIV or by sharing needles or injection equipment with a drug user who has HIV.⁸ It can also be spread from an HIV-infected mother to her baby, before or during birth or through breast-feeding, and through unsanitary tattooing or body piercing procedures.⁹

You cannot get HIV by working with or being around someone who has HIV or by sharing a cell with another incarcerated person who has HIV. You also cannot get HIV from sweat, spit, tears, clothes, drinking fountains, telephones, toilet seats, or through everyday activities like sharing a meal. HIV is also not transmitted through insect bites or stings, donating blood, or through closed-mouth kissing (although there is a very small chance of getting it from open-mouthed or “French” kissing with someone who is HIV positive because of possible blood contact through open wounds, warts, etc.).¹⁰

If you are currently HIV negative, you can help avoid getting HIV by taking the following steps:

- (1) Never share needles or syringes if you inject drugs;

2. *HIV/AIDS—About HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/hiv/basics/whatishiv.html> (last visited Oct. 5, 2019).

3. *HIV/AIDS: Online Q&A*, WORLD HEALTH ORG. (Nov. 2017), available at <https://www.who.int/features/qa/71/en/> (last visited Oct. 5, 2019).

4. *HIV/AIDS—HIV Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hiv/basics/livingwithhiv/treatment.html> (last visited Oct. 5, 2019).

5. *HIV/AIDS—Basic Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/hiv/topics/surveillance/basic.htm#aidsdiagnoses> (last visited Oct. 5, 2019); see also *HIV in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hiv/statistics/overview/atalgance.html> (last visited Oct. 5, 2019).

6. Laura M. Maruschak & Randy Beavers, *Bulletin: HIV in Prisons, 2007–08*, BUREAU OF JUSTICE STATISTICS, at 3 (2010), available at <https://www.bjs.gov/content/pub/pdf/hivp08.pdf> (last visited Oct. 5, 2019); see also *Fenced In: HIV/AIDS in the US Criminal Justice System*, GAY MEN'S HEALTH CRISIS, available at <https://www.hivlawandpolicy.org/sites/default/files/Fenced%20In.pdf> (last visited Oct. 5, 2019) (explaining that, as of 2012, HIV was four times more prevalent in the prison population than in the general population).

7. BUREAU OF HIV/AIDS EPIDEMIOLOGY, N.Y. STATE DEPT. OF HEALTH, N.Y. STATE HIV/AIDS SURVEILLANCE ANNUAL REPORT: FOR CASES DIAGNOSED THROUGH DECEMBER 2014, at 59 (2016), available at https://www.health.ny.gov/diseases/aids/general/statistics/annual/2014/2014-12_annual_surveillance_report.pdf (last visited Oct. 5, 2019).

8. *HIV/AIDS—HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Oct. 5, 2019).

9. *HIV/AIDS—HIV Transmissions*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Oct. 5, 2019).

10. *HIV/AIDS—HIV Transmissions*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Oct. 5, 2019).

- (2) Never share needles or syringes if you get a tattoo or body piercing;
- (3) Do not share equipment used to prepare and inject drugs (“works”);
- (4) Use a latex condom—not a lambskin condom—every time you have sex, including anal and oral sex;
- (5) Never share razors or toothbrushes because of the risk of contact with someone else’s blood.

Taking these precautions can help protect you from contracting the HIV infection.¹¹

(a) Women and HIV/AIDS

Symptoms of HIV are often different for women than for men. Because these symptoms are typically not associated with HIV, many women go undiagnosed until the virus progresses to AIDS.¹² Early signs for a woman with HIV include gynecological disorders, especially pelvic inflammatory disease (“PID”)¹³; infections, such as human papillomavirus (“HPV”), that can cause cervical dysplasia¹⁴; and chronic yeast infections.¹⁵ HIV-positive women also have a higher risk of developing cervical cancer.¹⁶ If you are HIV-positive, getting a complete gynecological exam—including an inspection of the cervix (colposcopy) and a pap smear—every six months is important in order to detect any problems early. If you believe you may be infected with HIV or AIDS, try to get tested.

Appendix A includes several organizations and sources of information about HIV and AIDS. *If you are HIV-positive, it is important that you be tested for tuberculosis*, a very contagious and serious disease, because HIV-positive people have a much higher risk of getting tuberculosis.¹⁷

2. Tuberculosis

Tuberculosis (“TB”) is a disease caused by bacteria that are spread through the air. When you breathe in the bacteria, they usually settle in and attack your lungs, but the bacteria can also move to and attack other parts of your body.¹⁸ Outside of prison, TB does not spread that easily. In prison, however, TB spreads much more easily because of overcrowding and poor ventilation.¹⁹ People born outside the United States (especially in Latin America, the Caribbean, Africa, Asia, Eastern Europe, or Russia) are more likely to have been infected with the bacteria.²⁰ Additionally, people who have

11. See *HIV/AIDS—Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hiv/basics/prevention.html> (last visited Oct. 5, 2019).

12. See Louise G. Trubek & Elizabeth A. Hoffman, *Searching for a Balance in Universal Health Care Reform: Protection for the Disenfranchised Consumer*, 43 DEPAUL L. REV. 1081, 1087 (1994).

13. See *Pelvic Inflammatory Disease (PID)—CDC Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/std/pid/stdfact-pid-detailed.htm> (last visited Oct. 15, 2019) (warning that PID is a serious complication of sexually transmitted diseases).

14. See U.S. DEPT. OF HEALTH & HUMAN SERVS., GUIDE FOR HIV/AIDS CLINICAL CARE, at 378 (2011), available at [https://aidsetc.org/sites/default/files/resources_files/CM_Jan2011%20\(1\).pdf](https://aidsetc.org/sites/default/files/resources_files/CM_Jan2011%20(1).pdf) (last visited Oct. 5, 2019) (explaining that HIV-infected women are at a higher risk of HPV infection).

15. See *Fungal Diseases—Vaginal Candidiasis*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/fungal/diseases/candidiasis/genital/index.html> (last visited Oct. 5, 2019) (explaining that women with HIV are at a higher risk of developing yeast infections); see also *Women and HIV*, OFFICE ON WOMEN’S HEALTH, U.S. DEPT. OF HEALTH & HUMAN SERVS., available at <https://www.womenshealth.gov/hiv-and-aids/women-and-hiv> (last visited Oct. 5, 2019).

16. *HIV Infection and Cancer Risk*, NAT’L CANCER INST., available at <http://www.cancer.gov/cancertopics/factsheet/Risk/hiv-infection> (last visited Oct. 5, 2019).

17. *Tuberculosis (TB)—TB and HIV Coinfection*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm> (last visited Oct. 5, 2019).

18. *Tuberculosis (TB)—How TB Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/tb/topic/basics/howtbspreads.htm> (last visited Oct. 5, 2019).

19. See *Prevention and Control of Tuberculosis in Correctional and Detention Facilities: Recommendations from CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5509a1.htm> (last visited Oct. 5, 2019).

20. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEPT. OF HEALTH & HUMAN SERVS., *Epidemiology of Tuberculosis, in SELF-STUDY MODULES ON TUBERCULOSIS* at 13 (2019), available at <https://www.cdc.gov/tb/education/ssmodules/pdfs/Module2.pdf> (last visited Oct. 5, 2019).

spent time in places where TB is common, like homeless shelters, hospitals, and prisons, are also more likely to have a TB infection.²¹

It is important to know that being infected with the TB bacteria is *not* the same as having TB disease. If you have a “TB infection” (also referred to as “latent TB”), you will have no symptoms and you cannot spread TB to others. But if you do not get medical treatment, your TB infection can develop into “TB disease” (or “active TB”).²² If you have active TB, you can have symptoms like a bad cough lasting more than three weeks, pain in your chest, coughing up blood or phlegm, weakness or fatigue, weight loss, no appetite, chills, a fever, or night sweating.²³

TB is particularly dangerous for HIV-positive people because of their weakened immune systems. In fact, TB is one of the leading causes of death for HIV-positive people.²⁴ Although as many as 13 million people in the United States have latent TB, only about five to ten percent will develop active TB disease if left untreated.²⁵ If you have HIV, however, you should be aware that people with both HIV and TB infections are much more likely to develop active TB than HIV-negative people.²⁶

Be sure to consult other sources and prison medical professionals if you think you have TB. Active TB disease can be treated and cured if you get medical care, take prescription medication, and follow your doctor's orders.²⁷

3. Hepatitis B and Hepatitis C

Hepatitis is a disease that attacks the liver. There are different types of hepatitis, but the most common types among incarcerated people are hepatitis B and hepatitis C.

(a) Hepatitis B

In 2017, there were about 22,100 new hepatitis B infections in the United States.²⁸ More than 1,700 people died in 2016 from liver disease related to hepatitis B.²⁹ The hepatitis B virus, like HIV, is spread by having sex with infected persons, through sharing needles (“works”) when shooting drugs, through workplace exposure to infected needles or other sharp objects, or from an infected mother to her baby during birth.³⁰ You can avoid getting hepatitis B by taking the same precautions as you would take to avoid getting HIV. For more information on HIV prevention, see Part B(1) of this Chapter.

People who have hepatitis B often do not have any symptoms but can still spread the virus to other people.³¹ If you do have symptoms, you may develop yellow eyes and skin, tiredness, loss of appetite,

21. Neela D. Goswami & Philip LoBue, *Travel-Related Infectious Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://wwwnc.cdc.gov/travel/yellowbook/2014/chapter-3-infectious-diseases-related-to-travel/tuberculosis> (last visited Oct. 5, 2019).

22. *Tuberculosis (TB)—Latent TB Infection and TB Disease*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/tb/topic/basics/tbinfectiondisease.htm> (last visited Oct. 5, 2019).

23. *Tuberculosis (TB)—Signs and Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/tb/topic/basics/signsandSYMPTOMS.htm> (last visited Oct. 5, 2019).

24. *Tuberculosis (TB)—TB and HIV Coinfection*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm> (last visited Sep. 15, 2019).

25. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEPT. OF HEALTH & HUMAN SERVS., *TB IN THE UNITED STATES: A SNAPSHOT*, at 2 (2018), available at <https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/tb-in-the-us-a-snapshot.pdf> (last visited Oct. 5, 2019).

26. *Tuberculosis (TB)—TB and HIV Coinfection*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm> (last visited Oct. 5, 2019).

27. *Tuberculosis Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at https://www.cdc.gov/tb/publications/factseries/cure_eng.htm (last visited Oct. 5, 2019).

28. *Viral Hepatitis—Hepatitis B Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 5, 2019).

29. *Viral Hepatitis—Hepatitis B Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 5, 2019).

30. *Viral Hepatitis—Hepatitis B Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 5, 2019).

31. *Viral Hepatitis—Hepatitis B Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL &

dark urine, abdominal pains, and nausea.³² There are vaccines to protect you from hepatitis B, but once you get hepatitis B, there is no cure.³³ You should still get medical attention, however, because there are medical treatments to help your symptoms.³⁴ If you have hepatitis B, you should get tested for HIV and hepatitis C.

(b) Hepatitis C

Hepatitis C virus (“HCV”) causes hepatitis C. In 2016, there were an estimated 41,200 new hepatitis C virus infections in the United States, and there were about 2.4 million people living with the disease in this country.³⁵ Almost 80% of infected persons do not show any signs or symptoms of hepatitis C.³⁶ Some people infected with hepatitis C may not show any symptoms for twenty or thirty years.³⁷ Hepatitis C symptoms include yellow skin, dark urine, fatigue, abdominal pain, and loss of appetite.³⁸ People with chronic HCV infection have a serious risk of developing liver damage.³⁹ If you have hepatitis C, you should not drink alcohol because alcohol can make your liver damage worse.⁴⁰

While few people outside of prison have HCV, a high percentage of incarcerated people are infected with HCV.⁴¹ To avoid getting hepatitis C, you should:

- (1) Never shoot drugs (if you cannot stop, never reuse or share syringes, water, or “works”);
- (2) Never share toothbrushes, razors, or other personal care items;
- (3) Avoid getting a tattoo or body piercing if there is a chance that someone else’s blood is on the tools or that the artist or piercer does not follow good health practices;⁴²
- (4) Avoid having unprotected sex.

Though the chances of spreading hepatitis C through sexual intercourse is not known, the risk of spreading hepatitis C through direct contact with infected blood is high.⁴³ If you have hepatitis C, you should be tested for HIV and hepatitis B.

PREVENTION, available at <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 5, 2019).

32. *Viral Hepatitis—Hepatitis B Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 5, 2019).

33. *See Finding a Cure for Hepatitis B: Are We Close?*, WORLD HEALTH ORG. (June 2018), available at <https://www.who.int/hepatitis/news-events/hbv-cure-overview/en/> (last visited Oct. 5, 2019).

34. *Viral Hepatitis—Hepatitis B Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 5, 2019).

35. *Viral Hepatitis—Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 6, 2019).

36. Nat’l Prevention Info. Network, U.S. Dept. of Health & Human Servs., *Viral Hepatitis—Hepatitis C Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://npin.cdc.gov/pages/hepatitis-c-basics> (last visited Oct. 6, 2019).

37. *See Viral Hepatitis—Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 6, 2019).

38. *Viral Hepatitis—Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 6, 2019).

39. *See Viral Hepatitis—Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 6, 2019).

40. *Viral Hepatitis—Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 6, 2019).

41. *See An Overview of Hepatitis C in Prisons and Jails*, NAT’L HEPATITIS CORRECTIONS NETWORK (Feb. 22, 2016), available at http://www.hcvinprison.org/resources/articles-documents/71-main-content/content/191-hepcprison#_edn2 (last visited Oct. 6, 2019) (citing a study that estimated that incarcerated people account for one-third of hepatitis C infections in the United States).

42. *See Hepatitis C: General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (2015), available at <http://www.cdc.gov/hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf> (last visited Oct. 6, 2019).

43. *See Hepatitis C: General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (2015), available at <http://www.cdc.gov/hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf> (last visited Oct. 6, 2019).

4. Methicillin-resistant Staphylococcus Aureus (“MRSA”)

Staphylococcus (staph) is a kind of bacteria that can cause a variety of health problems, ranging from minor skin irritation to, more rarely, deadly infections.⁴⁴ Methicillin-resistant Staphylococcus aureus, or MRSA, is a kind of staph not easily treatable with the antibiotics that normally cure a staph infection.⁴⁵ Many people carry staph bacteria in their nose without getting sick.⁴⁶ The illness can develop if the bacteria enter the skin, often through a scratch, scrape, or other minor wound.⁴⁷ Most cases of MRSA happen in healthcare settings like hospitals, but MRSA is also likely to spread in crowded living conditions, including in dormitories, athletic facilities, and correctional facilities.⁴⁸

The first symptom of MRSA is usually a skin infection easily mistaken for a pimple, boil, or insect bite.⁴⁹ The infection may be painful, swollen, red, or produce pus.⁵⁰ It can develop into a large abscess or blister.⁵¹ MRSA can usually be treated by either draining the wound or taking antibiotics.⁵² Do not drain the wound yourself because that can cause the infection to spread.⁵³ The infection may return even after treatment.⁵⁴

MRSA and other staph infections can be spread to other people through direct physical contact or, less commonly, through contact with an infected surface or object.⁵⁵ You can reduce the risk of infection by keeping wounds clean, dry, and covered.⁵⁶ It is also important to keep shared surfaces clean, to wash your hands often (especially after touching a wound), and to avoid sharing personal items like razors and clothing.⁵⁷ If you suspect you have MRSA, it is especially important to seek treatment if

44. See *Staph Infections—Overview*, MAYO CLINIC, available at <https://www.mayoclinic.org/diseases-conditions/staph-infections/symptoms-causes/syc-20356221> (last visited Oct. 6, 2019).

45. See *Methicillin-Resistant Staphylococcus Aureus (MRSA) Infections—General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/mrsa/community/index.html> (last visited Oct. 6, 2019).

46. See *Staph Infections—Overview*, MAYO CLINIC, available at <https://www.mayoclinic.org/diseases-conditions/staph-infections/symptoms-causes/syc-20356221> (last visited Oct. 6, 2019).

47. See *Methicillin-Resistant Staphylococcus Aureus (MRSA) Infections—General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/mrsa/community/index.html> (last visited Oct. 6, 2019).

48. See Peter Eisler, *Dangerous MRSA Bacteria Expand into Communities*, USA TODAY (Dec. 16, 2013, 6:16 PM), available at <https://www.usatoday.com/story/news/nation/2013/12/16/mrsa-infection-community-schools-victims-doctors/3991833/> (last visited Oct. 6, 2019).

49. Tara Parker-Pope, *MRSA Warning Signs and Preventive Measures*, N.Y. TIMES, Oct. 27, 2007, at B4, available at <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html> (last visited Oct. 6, 2019).

50. *Methicillin-Resistant Staphylococcus Aureus (MRSA) Infections—General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/mrsa/community/index.html> (last visited Oct. 6, 2019).

51. Tara Parker-Pope, *MRSA Warning Signs and Preventive Measures*, N.Y. TIMES, Oct. 27, 2007, at B4, available at <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html> (last visited Oct. 6, 2019).

52. See *Staph Infections—Overview*, MAYO CLINIC, available at <https://www.mayoclinic.org/diseases-conditions/staph-infections/symptoms-causes/syc-20356221> (last visited Oct. 6, 2019) (noting that strains of MRSA still respond to certain antibiotics).

53. Tara Parker-Pope, *MRSA Warning Signs and Preventive Measures*, N.Y. TIMES, Oct. 27, 2007, at B4, available at <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html> (last visited Oct. 6, 2019).

54. *Learning About MRSA: A Guide for Patients*, MINN. DEPT. OF HEALTH, available at <https://www.health.state.mn.us/diseases/staph/mrsa/book.html> (last visited Oct. 6, 2019).

55. FED. BUREAU OF PRISONS, MANAGEMENT OF METHICILLIN-RESISTANT STAPHYLOCOCCUS AUREUS (MRSA) INFECTIONS, FEDERAL BUREAU OF PRISONS CLINICAL PRACTICE GUIDELINES, at 28 (2012), available at <https://www.bop.gov/resources/pdfs/mrsa.pdf> (last visited Oct. 6, 2019).

56. See *Methicillin-Resistant Staphylococcus Aureus (MRSA) Infections—General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/mrsa/community/index.html> (last visited Oct. 6, 2019).

57. See *Methicillin-Resistant Staphylococcus Aureus (MRSA) Infections—General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/mrsa/community/index.html> (last visited Oct. 6, 2019).

you have HIV or another immune-system disorder, because a MRSA infection may lead to more serious problems.⁵⁸

C. Constitutional Rights in a Prison Setting

The rest of this Chapter discusses your rights to treatment for and protection from infectious diseases in prison. It also explains when and how a correctional facility can limit your rights to treatment and protection. This Part explains the general legal standard that courts use to determine if a prison policy is constitutionally valid. Knowing the rule will help you better understand the court decisions in this Chapter.

In general, correctional facilities can limit your constitutional rights if their actions are “reasonably related to a legitimate penological (meaning, prison-related) interest.”⁵⁹ To decide if a prison policy has a legitimate penological interest, courts look at four factors:⁶⁰

- (1) The existence of a valid, rational connection between the prison policy and a legitimate state interest (which means that the state has a real or good reason for the policy);⁶¹
- (2) Whether alternative means of exercising the right are limited (which means that there is another way you can exercise your constitutional right);⁶²
- (3) The impact that allowing exercise of the right will have on guards, other incarcerated people, or the allocation of prison resources (which means that a court will look at how your constitutional right affects guards, other incarcerated people and the prison’s resources, like the prison’s money or visitor safety);⁶³ and
- (4) Whether the prison policy or regulation is an exaggerated response to prison concerns, as shown by the ready availability of alternative means of exercising the right (which means that a court will consider if the policy is an extreme reaction to the prison’s concern).⁶⁴

These four factors are often referred to as the *Turner* standard, because the Supreme Court first used them in the case *Turner v. Safley*.⁶⁵

If you think a prison policy illegally violates your constitutional rights, you may want to argue that “there is no legitimate penological interest which justifies the violation” which means that there is no real reason for the prison to limit your constitutional right so their policy is illegal. At the least, you can argue that the interest is not “reasonably related” to the actions or policy of the prison officials.

58. See Divya Ahuja & Helmut Albrecht, *HIV and Community-Acquired MRSA*, J. WATCH (Feb. 9, 2009), available at <https://www.jwatch.org/ac200902090000001/2009/02/09/hiv-and-community-acquired-mrsa> (last visited Oct. 6, 2019).

59. *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (superseded by statute) (holding that prison systems’ regulations of marriages between incarcerated people and incarcerated person-to-incarcerated person correspondence must meet a “reasonable relationship” standard).

60. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987) (superseded by statute).

61. See, e.g., *Beard v. Banks*, 548 U.S. 521, 530, 126 S. Ct. 2572, 2578, 165 L. Ed. 2d 697, 706 (2006) (finding that the prohibition on access to newspapers, magazines, and personal photographs was necessary in order to motivate better behavior on the part of incarcerated people who had already been deprived of almost all privileges).

62. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (holding restrictions on incarcerated people’s visitation rights to be legitimate when restricted incarcerated people have available alternative means of exercising the right of association, even if those alternative means (letters, telephone calls, and messages sent through those permitted to visit) are not ideal).

63. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (stating that courts will be “particularly deferential” to prison administrators’ regulatory judgments” where the allocation of prison resources and the safety of visitors, guards, and other incarcerated people are implicated).

64. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 136, 123 S. Ct. 2162, 2169–2170, 156 L. Ed. 2d 162, 172–173 (2003) (finding that, although *Turner* requires looking to whether the prison policy is an exaggerated response, *Turner* does not impose a least restrictive alternative test).

65. *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (superseded by statute).

This is different from saying there is no legitimate interest because you're saying that the prison has a real interest, but limiting your rights has nothing to do with it. You can also try to argue that there are other ways for the prison to achieve their goal without limiting your constitutional rights.

D. Legal Rights Concerning Testing for Infectious Diseases

1. Involuntary Testing

Mandatory testing policies, or testing that you are required to do, are different depending on which state you are in. States may also have different policies for different diseases. For example, a state may require incarcerated people to take a TB test but not an HIV test. If you are outside New York State, you should check your state's laws to find out what its testing policies are. Because courts find that the prevention of disease is a legitimate state interest under the *Turner* standard discussed above, courts will generally allow prisons to test you for infectious diseases, even without your consent (which means that you can be tested even if you do not voluntarily agree to testing).⁶⁶

(a) HIV Testing

In New York State prisons, you normally cannot be tested for HIV without your consent (which means that you will not be tested unless you voluntarily agree).⁶⁷ But, if you are convicted of certain sex offenses, you can be tested for HIV against your will if the victim requests that you be tested.⁶⁸ You will be given your test results, and the results will also be sent to the victim, and possibly to the victim's immediate family, guardian, physicians, attorneys, and medical or mental health providers. Past and future contacts of the victim may also be notified if there has been a risk of HIV transmission to that contact.⁶⁹ Your test results cannot be used against you in a civil or criminal proceeding if they are related to the events that caused you to be convicted.⁷⁰

Federal prisons, unlike New York State prisons, can require you to undergo HIV testing, although federal prisons do not test all incarcerated people. If you have a sentence of six months or longer, and if medical personnel think you might have HIV, they may require you to take an HIV test.⁷¹ If you refuse the test, you might receive an incident report for failing to follow an order.⁷² Also, if you refuse HIV testing, you may not be able to file a claim for failure to receive adequate medical care for HIV.⁷³ Additionally, federal prisons conduct mandatory random testing once a year. If you test positive, the prison cannot subject you to disciplinary action based solely on your results, though you may be punished if you are caught performing an act that could transmit the disease.⁷⁴ Also, federal prisons

66. See, e.g., *Rossi v. Portuondo*, 277 A.D.2d 526, 527, 714 N.Y.S.2d 816, 817 (3d Dept. 2000).

67. N.Y. PUB. HEALTH LAW § 2781(1) (McKinney 2012) (stating that consent must be “written” and “informed” from a person who is capable of consenting; if the person is incapable, someone authorized by law may consent for the person). See *McLain v. Grosso*, 31 A.D.3d 765, 766, 820 N.Y.S.2d 93, 94 (2d Dept. 2006) (holding that a prison could not administer an HIV test on an incarcerated person because according to § 2781(1), “HIV-related testing is prohibited without the written informed consent of the person to be tested, except as authorized by CPLR 3121 or otherwise specifically permitted by statute”). See also *Siegrist v. State*, 55 A.D.3d 717, 718, 868 N.Y.S.2d 670, 671 (2d Dept. 2008) (explaining that a nurse could not administer an HIV test to an incarcerated person in a coma because the incarcerated person could not consent to the test).

68. N.Y. CRIM. PROC. LAW § 390.15(1)(a) (McKinney 2018) (stating that the sex offense must be an act of “sexual intercourse,” “oral sexual conduct,” or “anal sexual conduct” as defined by N.Y. Penal Law § 130.00).

69. N.Y. CRIM. PROC. LAW § 390.15(6)(a)(ii) (McKinney 2018).

70. N.Y. CRIM. PROC. LAW § 390.15(8) (McKinney 2018).

71. 28 C.F.R. § 549.12(a)(1) (2020).

72. 28 C.F.R. § 549.12(a)(1) (2020). See Chapter 18 of the *JLM*, “Your Rights at Prison Disciplinary Hearings,” for more information about the consequences of prison incident reports.

73. *Walker v. Peters*, 989 F. Supp. 971, 975 (N.D. Ill. 1997) (finding that deprivation of HIV medication cannot be considered deliberate indifference unless incarcerated person has received a positive HIV test first). See Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care,” for more information on the deliberate indifference standard.

74. 28 C.F.R. § 549.13(c) (2020).

can test you if you are being considered for release, parole, good conduct time release, furlough, or placement in a community-based program. If you test positive, the prison cannot deny you participation in activities and programs just because of the result.⁷⁵

Outside of New York State, many states conduct involuntary HIV tests when you enter prison,⁷⁶ during custody, and/or upon your impending release.⁷⁷ Involuntary HIV testing has been challenged in court on the basis of the Eighth Amendment, which prohibits cruel and unusual punishment, the Fourth Amendment, which prohibits unreasonable searches and seizures, the right to privacy, and the Equal Protection Clause of the Fourteenth Amendment. However, courts tend to uphold involuntary testing because it is reasonably related to a “legitimate penological interest,” which means that it is a valid interest for the prison to have.⁷⁸

(b) TB Testing

While HIV cannot be passed from person to person by casual contact, TB is spread through the air. So, prison TB testing policies are usually different from prison HIV testing policies. In New York State, Department of Corrections and Community Supervision (“DOCCS”) policy requires all incarcerated people entering prison to be tested for TB. The TB screening includes a chest x-ray and a skin test, where a small amount of purified protein derivative (“PPD”) is injected beneath your skin and observed for a reaction. After the initial test, you will be re-tested yearly. If you refuse testing, medical personnel will tell you about the benefits of the test. If you still refuse, then you will be placed in medical keeplock (also known as “tuberculin (TB) hold”) for up to a year until you have received three negative chest x-rays or you agree to be tested. While in TB hold, you are only allowed one hour of solitary exercise per day and three showers a week. You will lose your telephone privileges but you can receive visits from lawyers.⁷⁹

Courts have generally upheld the New York State DOCCS TB testing policy against challenges claiming that the policy violates the Fourth Amendment protection against unreasonable searches and challenges claiming the policy violates the Eighth Amendment prohibition against cruel and unusual punishment. This is because courts think the policy is reasonably related to preventing the spread of TB in prisons.⁸⁰ Additionally, some courts have said mandatory TB testing or confinement in TB hold

75. See 28 C.F.R. § 549.13(b) (2020) (stating that incarcerated people may be limited in programming if they have an infectious disease that can be transferred through casual conduct. HIV cannot be transmitted through casual conduct). See also 42 U.S.C. § 2000cc-1 (stating generally that the government shall not impose “substantial burdens” on the religious activity of incarcerated people unless the government can show that such burdens further a compelling governmental interest using the least restrictive means possible). Various circuits have their own tests for “substantial burden.” This is limited to federally funded programs available to institutionalized persons. See also 42 U.S.C. § 2000d-4a(1)(A) (defining “program or activity” as “all of the operations of a department, agency, special purpose district, or other instrumentality of a state or local government”). Note that this only applies to religious activity, which means that this law does not prevent you from being excluded from a nonreligious activity if you test positive for HIV. But, you may still be excluded from religious activities if the government can show a compelling interest in doing so.

76. Alabama, Georgia, Idaho, and Missouri are among the states that mandate testing of incarcerated people entering the prison system. See ALA. CODE § 22-11A-17(a) (LexisNexis 2019) (subjecting all persons sentenced to confinement or imprisonment for more than 30 consecutive days to mandatory testing); GA. CODE ANN. § 42-5-52.1(b) (2009); IDAHO CODE § 39-604(1) (2013); MO. ANN. STAT. § 191.659(1) (2003).

77. Alabama, Idaho, and Missouri are among the states that test upon release. See ALA. CODE § 22-11A-17(a) (LexisNexis 2019); IDAHO CODE ANN. § 39-604(1) (2013); MO. ANN. STAT. § 191.659(1) (2003).

78. See, e.g., *Dunn v. White*, 880 F.2d 1188, 1196–1198 (10th Cir. 1989) (finding no 1st, 4th, or 14th Amendment constitutional violations when incarcerated person claimed he was threatened with disciplinary segregation if he failed to submit to the HIV blood test even though he claimed his religious beliefs did not allow the test).

79. See N.Y. Dept. of Corr. Servs., Request for Proposals #2016-11, at 133 (2016), available at http://www.doccs.ny.gov/pdf/RFP_2016-11_Operation_of_a_Skilled_Nursing_Services_Program.pdf (Last visited Oct. 13, 2019); *Smith v. Wright*, No. 9:06-CV-00401 (FJS/DEP), 2011 U.S. Dist. LEXIS 109058, at *5–6 (N.D.N.Y. Aug. 31, 2011) (describing the conditions and rules for TB hold).

80. See *Smith v. Wright*, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *60–62 (N.D.N.Y. Aug. 31,

is legal even if the test is against the incarcerated person's religious beliefs.⁸¹ However, DOCCS TB policy states that the prison may, though is not required to, make changes to the TB test if the prison can do this without putting other incarcerated people's and staff's health in significant danger.⁸² According to the policy, if you refuse the PPD test because of your religion, you will be placed in TB hold while the Chief Medical Officer decides if you are telling the truth. If the Chief Medical Officer thinks that you actually hold a religious belief that prohibits PPD testing, he may ask you to take a blood test and chest x-ray instead of the skin test. You will remain in TB hold until the results of the blood test, chest x-ray, and physical examination show that you do not have latent TB (TB that is hidden because you do not have any symptoms).⁸³

If the TB test is against your religion and you want to challenge the policy as a violation of your First Amendment right to free exercise of religion, you should try to show how the policy, as applied to you, does not make sense.⁸⁴ If you have submitted to the test in the past or are willing to undergo a

2011) (*unpublished*) (stating that DOCS has a strong, legitimate interest in containing contagious diseases, including TB, within its facilities and that confinement in keeplock under normal conditions does not constitute a violation of an incarcerated person's 8th Amendment rights); *Lee v. Frederick* 519 F. Supp. 2d 320, 327 (W.D.N.Y. 2007) (finding that incarcerated person's 8th Amendment rights were not violated when he was placed on TB hold because, while plaintiff did suffer some loss of his freedom of movement, he did not present evidence that he suffered a serious deprivation of his rights or that defendants acted with the required state of mind associated with the "unnecessary and wanton infliction of pain"); *Delisser v. Goord*, No. 9:02-CV-00073 (FJS/GLS), 2003 U.S. Dist. LEXIS 488, at *4, *16, *18–19, *22–23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (holding that an incarcerated person, who was placed in TB hold for a total of 52 days for refusing to submit to PPD test and then for refusing to take TB medication, did not suffer a violation of his 8th or 14th Amendment rights); *Word v. Croce*, 169 F. Supp. 2d 219, 222, 222 n.1, 225, 230 (S.D.N.Y. 2001) (finding that where plaintiff alleged violations of the 4th Amendment because she was put on TB hold, her claims were more appropriately brought under the 8th Amendment, but also finding that the TB hold was not a violation of her constitutional rights); *Davidson v. Kelly*, No. 96-2066, 1997 U.S. App. LEXIS 33796, at *4–5, *8 (2d Cir. Nov. 24, 1997) (*unpublished*) (holding that placing an incarcerated person in TB hold for three days until he agreed to be tested for TB did not violate the incarcerated person's 8th Amendment rights because it furthered a legitimate penological (prison-related) interest).

81. *See Smith v. Wright*, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *49–53 (N.D.N.Y. Aug. 31, 2011) (*unpublished*) (stating that DOCS amended its testing policy in 2004 to accommodate those with religious objections to the PPD test and there is no case law for concluding it to violate the 1st Amendment); *Redd v. Wright*, 597 F.3d 532, 537 (2d Cir. 2010) (finding that the TB policy was motivated by a legitimate public health concern, not animus, and so did not target incarcerated people for engaging in a religious practice); *Rossi v. Portuondo*, 277 A.D.2d 526, 527, 714 N.Y.S.2d 816, 817 (3d Dept. 2000) (holding that giving incarcerated people the option of testing or being placed in medical confinement is "reasonably related" to the "legitimate penological interest" of preventing the spread of the disease; therefore, the testing policy did not violate incarcerated person's 1st Amendment right to free exercise of religion).

82. *See Smith v. Wright*, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *53–54 n.26 (N.D.N.Y. Aug. 31, 2011) (*unpublished*).

83. *See Smith v. Wright*, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *6–8 (N.D.N.Y. Aug. 31, 2011) (*unpublished*).

84. *Reynolds v. Goord*, 103 F. Supp. 2d 316, 337 (S.D.N.Y. 2000) (holding that Rastafarian incarcerated person who expected to be in tuberculin hold for a year after refusing a TB test showed a clear likelihood of proving at trial that the prison policy as applied to him violated his 1st Amendment rights because it was a substantial burden on his constitutional rights). Note that an incarcerated person making a 1st Amendment claim in this context must frame the 1st Amendment right as one that is clearly established and not too generalized. *See, e.g., Redd v. Wright*, 597 F.3d 532, 536 (2d Cir. 2010) (holding that, if the court can determine that the rights were not clearly established at the time of the alleged violation, the court is not required to determine if the incarcerated person's rights are violated under the 1st Amendment). If you are incarcerated in federal prison, also see *Jolly v. Coughlin*, 76 F.3d 468, 478–480 (2d Cir. 1996) (stating that prison officials likely violated the incarcerated person's religious freedom under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–bb-4). If you are incarcerated in state prison, however, RFRA is no longer good law and *Jolly* will not apply to your case. *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). After RFRA was declared unconstitutional as applied to states, some states enacted state laws modeled on RFRA to fill the gap. If you are incarcerated in state prison, you should check to see if your state has enacted a "mini-RFRA" state law. If you are a state or federal incarcerated person, you may also be able to make an argument under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which states that "[n]o government shall impose a substantial

chest x-ray, you might increase your chances of winning.⁸⁵ Although courts do not always agree with incarcerated people's Eighth Amendment claims, you may also be able to argue that being placed on TB hold is a violation of your Eighth Amendment right to be free from cruel and unusual punishment. This is especially true if your prison's ventilation system does not prevent the air in your cell from getting to other incarcerated people or staff. You might be able to argue that the keeplock policy should not be applied to you because the air from your cell can still reach others through the vents, which means that your confinement does not help protect others' safety.⁸⁶

If you are in a federal prison, you must undergo a PPD test and possibly a chest x-ray when you enter the facility.⁸⁷ If you refuse both tests, the prison will test you without your consent, meaning that the prison can test you even if you do not agree to take the test.⁸⁸ Refusing to be tested may result in an incident report, although you will not be placed in medical isolation unless the prison has a reason to think you have TB.⁸⁹

(c) Hepatitis B and Hepatitis C

New York State requires prisons to offer HCV (which means Hepatitis C virus) testing for all incarcerated persons born between 1945 and 1965. It also suggests prisons offer such testing to all

burden on the religious exercise of a person residing in or confined to an institution" unless the government establishes that the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2). For a discussion of a possible RLUIPA argument, see *Johnson v. Sherman*, 2007 U.S. Dist. LEXIS 24098, at *6-7, *14 (E.D. Cal. Apr. 2, 2007) (*unpublished*) ("Preventing the spread of tuberculosis among the closely confined population within the prison by use of the least restrictive means possible greatly outweighs the harm posed to the plaintiff by submitting to the skin test. While the harm to plaintiff's ability to practice his belief is no doubt burdened, the CDCR has a grave responsibility to protect the inmate populations confined within its prisons from the spread of a highly contagious and debilitating disease.").

85. See *Selah v. Goord*, 255 F. Supp. 2d 42, 54-55 (N.D.N.Y. 2003) (holding DOCS TB policy as applied to petitioner was irrational since he had been tested while incarcerated); *Word v. Croce*, No. 00 CIV. 6496 (SAS), 2001 U.S. Dist. LEXIS 9071, at *10-13 (S.D.N.Y. July 5, 2001) (*unpublished*) (describing that it is DOCS practice to exempt an incarcerated person from TB hold if he who refuses the PPD test on religious grounds undergoes a chest x-ray instead); *Reynolds v. Goord*, 103 F. Supp. 2d 316, 337 (S.D.N.Y. 2000) (holding that Rastafarian incarcerated person who expected to be in TB hold for a year after refusing a PPD test showed a clear likelihood of proving at trial that the prison policy as applied violated his 1st Amendment rights).

86. *Smith v. Wright*, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *23-24 (N.D.N.Y. Aug. 31, 2011) (*unpublished*) (indicating that the 8th Amendment could be violated by keeplock confinement if it deprived an incarcerated person of a basic human need); *Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir. 1996) (finding a substantial likelihood of an 8th Amendment violation when New York State prison officials placed an incarcerated person in "medical keeplock" for three-and-a-half years, after the incarcerated person refused to undergo a TB test for religious reasons). In *Jolly*, the court considered these facts: (1) incarcerated people who refused to be tested were placed in medical keeplock; (2) medical keeplock did not involve "respiratory isolation" and thus did not reduce the risks of infection; (3) incarcerated people were allowed to leave their cells only once each week for a 10-minute shower and could leave for meetings with counsel; and (4) plaintiff suffered headaches, hair loss, rashes, and difficulty standing or walking due to his confinement. *Jolly v. Coughlin*, 76 F.3d 468, 472 (2d Cir. 1996). Although the portion of *Jolly* addressing RFRA violations is no longer good law for people incarcerated in state prison (see footnote 72), it is still good law for both state and federal incarcerated people for arguments based on Eight Amendment violations.

87. FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT P6190.04, INFECTIOUS DISEASE MANAGEMENT 7 (2014), available at http://www.bop.gov/policy/progstat/6190_004.pdf (last visited Oct. 5, 2019); see also *Washington v. Cambra*, No. 96-16925, 1998 U.S. App. LEXIS 30072, at *2-3 (9th Cir. 1998) (*unpublished table decision*) (holding that the policy of conducting TB tests was reasonably related to the legitimate penological goal of detecting and containing TB).

88. See, e.g., *Ballard v. Woodard*, 641 F. Supp. 432, 437 (W.D.N.C. 1986) (performing a PPD test without an incarcerated person's consent does not constitute the denial of any federal constitutional rights where the prison had a legitimate interest in "orderly and uniform implementation" of the test); *Dunn v. Zenk*, No. 1:07-CV-2007-RLV, 2007 U.S. Dist. LEXIS 73891, at *9 (N.D. Ga. Oct. 1, 2007) (*unpublished*) (holding that involuntary testing for TB does not violate incarcerated person's constitutional rights).

89. FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT P6190.04, INFECTIOUS DISEASE MANAGEMENT 9 (2014), available at http://www.bop.gov/policy/progstat/6190_004.pdf (last visited Oct. 5, 2019).

incarcerated persons who are determined to be at high risk.⁹⁰ You may be considered to be at high risk of Hepatitis B or Hepatitis C if you have a history of any of the following: HIV, intravenous drug use (which means drugs that are injected), intranasal cocaine use (inhaling cocaine through your nose), sexually-transmitted diseases, blood transfusions before July 1992, hemodialysis, infusion of clotting factor before 1987, tattoos or body piercing with non-sterile equipment, solid organ transplants, or symptoms of hepatitis.

In New York State, during your initial health screening, you may be offered a hepatitis A or hepatitis B vaccine, and the New York State Department of Health recommends vaccination for hepatitis A and B if you have already been diagnosed with hepatitis C. The policies surrounding access and qualifications for these vaccines vary from facility to facility so check with your doctors and nurses about what is available.⁹¹

If you are in a federal prison, you will be screened to determine if you have HBV or HCV. Like the TB policy in the federal prison system discussed in Part (D)(1)(b), refusal to take the test will result in an incident report.

(d) MRSA

The Federal Bureau of Prisons recommends that all incarcerated people should be checked for skin infections at their initial intake screening and also after returning from the hospital.⁹² Incarcerated people at high risk for MRSA infections are supposed to be screened at all routine medical examinations.⁹³ Incarcerated people with HIV, diabetes, or open wounds are considered high risk for MRSA.

2. Right to Testing upon Request

(a) HIV Testing

Many states provide HIV tests for incarcerated people upon request. If you are denied a test, you might want to challenge the denial as a violation of the correctional facility's own policy. In New York State prisons, you will be offered a test when you first enter the facility. Also, anonymous testing (which means a test where you do not include your identity) is available through the Criminal Justice Initiative ("CJI").⁹⁴

If you are incarcerated in federal prison, you can request HIV testing, but only once per year.⁹⁵ Some federal courts do not recognize the constitutional right to HIV testing, especially if you cannot give a reason for why you think you might have HIV.⁹⁶ But, even in those courts, you may have an

90. See N.Y. Dept. of Health, DOH Review of Corrections HIV and HCV Policy and Procedures 14, 18 (2015).

91. See N.Y. Dept. of Health, "Hepatitis C in Prison and Jail", available at https://www.health.ny.gov/diseases/aids/providers/corrections/docs/hcv_inmate_brochure.pdf.

92. FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, MANAGEMENT OF METHICILLIN-RESISTANT STAPHYLOCOCCUS AUREUS (MRSA) INFECTIONS—CLINICAL PRACTICE GUIDELINES 2 (2012), available at <https://www.bop.gov/resources/pdfs/mrsa.pdf> (last visited Oct. 5, 2019).

93. FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, MANAGEMENT OF METHICILLIN-RESISTANT STAPHYLOCOCCUS AUREUS (MRSA) INFECTIONS—CLINICAL PRACTICE GUIDELINES 2 (2012), available at <https://www.bop.gov/resources/pdfs/mrsa.pdf> (last visited Oct. 5, 2019).

94. The Criminal Justice Initiative is a project funded by the New York Department of Health's AIDS Institute. Community-based organizations go into prisons and provide tests, counseling, peer education, and discharge planning through the initiative. *Criminal Justice Initiative, HIV/STD/HCV Prevention and Related Services*, N.Y. DEPT. OF HEALTH, <https://www.health.ny.gov/diseases/aids/general/about/prevsup.htm#cji> (last visited Oct. 5, 2019).

95. 28 C.F.R. § 549.12(a)(4) (2020).

96. See *St. Hilaire v. Lewis*, No. 93-15129, 1994 U.S. App. LEXIS 14867, at *9–10 (9th Cir. June 7, 1994) (*unpublished*) (finding no constitutional violation for failure to provide an HIV test because incarcerated person was not a member of a high-risk group and had no alleged exposure to HIV); *Doe v. Wigginton*, 21 F.3d 733, 738–739 (6th Cir. 1994) (finding no 8th Amendment violation where an incarcerated person was refused an HIV test).

Eighth Amendment claim if you are high-risk and are denied an HIV test, because this will prevent you from getting proper medical care. Additionally, if your prison has listed standards for who should get an HIV test and you meet them but are refused a test, you may have a claim.⁹⁷ You should check to see how the courts in your state have decided this issue.

(b) Hepatitis

While there is no right to be tested for Hepatitis B specifically, if you are a federal incarcerated person given a work assignment which staff think might expose you to blood or bodily fluids, you should be offered the Hepatitis B vaccine.⁹⁸

(c) MRSA

If you have a skin infection that you think may be caused by MRSA, you can ask to be tested. If you were recently hospitalized, you may be specifically instructed to self-report any skin infections or fevers for a few weeks after.⁹⁹

3. Consequences of Testing Positive for HIV in New York

States have different rules about what happens after an incarcerated person tests positive for HIV. New York State has had the HIV Reporting and Partner Notification (HIVRPN) law since 2000.¹⁰⁰ This law requires doctors and other medical providers (including the laboratories doing the tests) to report to the Department of Health the names of people infected with HIV, HIV-related illness, or AIDS.¹⁰¹ The information is supposed to remain confidential.¹⁰² However, New York regulations allow for HIV status to be given to employees or agents of the Division of Probation and Correctional Alternatives, Division of Parole, Commission of Correction, or any local probation department. An incarcerated person's HIV status can only be given to people who need the information in order to

because the state policy required an HIV test only if an incarcerated person “provides a presumptive history of exposure” and the incarcerated person did not provide such information).

97. *See Doe v. Wigginton*, 21 F.3d 733, 739–740 (6th Cir. 1994) (holding the prison did not violate the 8th or 14th Amendments for refusing to test for HIV on request because the prison could reasonably limit the testing based on an incarcerated person's history, medical symptoms, prior drug use, or sexual activity). It is possible the court would have allowed Doe's claim if he had given officials information indicating that he met the criteria for testing and was still refused a test.

98. 28 C.F.R. § 549.15(b) (2020) (providing that an incarcerated person given a work assignment with risk of exposure to blood or bodily fluids will receive annual training to reduce exposures and be offered vaccination for Hepatitis B).

99. *See* Fed. Bureau of Prisons, U.S. Dept. of Justice, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections (2012), available at <https://www.bop.gov/resources/pdfs/mrsa.pdf> (last visited Oct. 14, 2019).

100. N.Y. COMP. CODES R. & REGS. tit. 10, §§ 63.1–63.11 (2020). *See also What You Need to Know about the Law*, N.Y. Dept. of Health, http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Oct. 5, 2019).

101. N.Y. COMP. CODES R. & REGS. tit. 10, § 63.4(a)(1) (2020). *See also What You Need to Know about the Law*, N.Y. Dept. of Health, http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Oct. 5, 2019).

102. N.Y. COMP. CODES R. & REGS. tit. 10, § 63.6 (2020). *See also What You Need to Know about the Law*, N.Y. Dept. of Health, http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Oct. 5, 2019) (“Under the law, identifying information about people with HIV infection is ONLY to be used to help the Health Department track the epidemic and for partner notification. The Health Department will NOT disclose this information to other government or private agencies like...police, welfare, insurance companies or landlords.”). The Health Department will also not disclose this information to Immigration and Customs Enforcement (ICE).

carry out their jobs.¹⁰³ If you are diagnosed with an HIV-related illness, your medical care provider will ask for the names of your spouse, sexual partners, and/or needle-sharing partners.¹⁰⁴ If you provide those names, those individuals will receive notice they are at risk of being infected with HIV,¹⁰⁵ and they will be offered counseling and HIV testing.¹⁰⁶ Your name will not be given to them.¹⁰⁷ You have the right to refuse to tell your doctor the names of your partners, and will not face any legal penalty (civil or criminal) if you choose not to share this information.¹⁰⁸

E. Legal Rights and Prevention of Infectious Diseases

1. Prevention and Prison Policy

The government has a responsibility to give medical care to incarcerated people.¹⁰⁹ This duty may also include protecting incarcerated people from infectious diseases, such as TB.¹¹⁰ But, it is also very important to take the necessary precautions to protect yourself and others from disease. If you have anal, vaginal, or oral sex, it is extremely important to use latex condoms in order to protect yourself against HIV infection and other sexually-transmitted diseases. This is particularly important in the prison system, where more people are HIV-positive. Very few jails or prisons provide condoms for incarcerated people. A few jails in Los Angeles, New York City, Philadelphia, San Francisco, Washington, D.C., Mississippi, and Vermont supply condoms on a limited basis.¹¹¹

Prisons have some duty to prevent MRSA's spread once they know the infection is present within the prison. As an incarcerated person, you have limited options to make the prison protect you. If you show that the prison is "deliberately indifferent" to your serious medical needs, you can bring an Eighth Amendment claim against the jail or prison for failing to protect you from MRSA.¹¹² Courts generally say that prisons do not have to take every possible measure to prevent MRSA's spread. As long as a prison takes reasonable steps, you will not be able to make a constitutional claim by showing that the prison could have done more to protect you.¹¹³

103. N.Y. COMP. CODES R. & REGS. tit. 10, § 63.6(a)(13) (2020).

104. N.Y. COMP. CODES R. & REGS. tit. 10, § 63.8(a)(3) (2020).

105. N.Y. COMP. CODES R. & REGS. tit. 10, § 63.8(a)(3) (2020).

106. N.Y. COMP. CODES R. & REGS. tit. 10, § 63.8(g) (2020).

107. N.Y. COMP. CODES R. & REGS. tit. 10, §§ 63.6(b)(3), 63.8(a)(3) (2020).

108. *What You Need to Know about the Law*, N.Y. Dept. of Health, http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Oct. 5, 2019).

109. *See* Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (confirming "the government's obligation to provide medical care for those whom it is punishing by incarceration"). *See JLM* Chapter 23 for more information on a prison's duty to provide medical care and what you can do if you are not receiving proper care.

110. *See* Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (finding that a prison's failure to adequately screen incoming incarcerated people constituted a serious "threat to the well-being of the inmates," and because defendants lacked justification for the policy the practice was considered punishment under the Due Process clause); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (holding that though a prison is not required to conduct medical exams on incarcerated people within 36 hours of entering the facility, leaving persons with communicable or contagious diseases, like scabies or gonorrhea, among other incarcerated people for a month or more without medical care, violated the standard of adequate medical services).

111. Beth Shuster, *Sheriff Approves Handout of Condoms to Gay Inmates*, L.A. Times, Nov. 30, 2001, at A38, available at <http://articles.latimes.com/2001/nov/30/news/mn-10008>. George Lavender, *California Prisons Aim to Keep Sex Between Inmates Safe, If Illegal*, Npr, Jan. 21, 2015, available at <https://www.npr.org/2015/01/21/378678167/california-prisons-aim-to-keep-sex-between-inmates-safe-if-illegal>.

112. *See* Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d. 251, 260 (1976).

113. *See* Lopez v. McGrath, No. C 04-4782 MHP, 2007 U.S. Dist. LEXIS 39409 at *24–25 (N.D. Cal. May 31, 2007) (*unpublished*) (stating that while taking more hygienic measures would have reduced the risk of infection, there is no evidence they were necessary to reduce risk to the plaintiff to acceptable levels); Walker v. Floyd County, No. 4:07-CV-0014-SEB-WGH, 2007 U.S. Dist. LEXIS 56134 at *25–27 (S.D. Ind. July 31, 2007) (*unpublished*) (holding that a showing that there were additional measures a prison could have taken to stop MRSA's spread is not enough to demonstrate a constitutional violation).

2. Segregation of Incarcerated People with Infectious Diseases

(a) Mandatory Segregation

(i) Mandatory Segregation of Incarcerated People with TB

Prisons may want to segregate (separate) incarcerated people with infectious diseases from other incarcerated people to prevent the disease's spread. This type of segregation is often mandatory and involves separate housing. New York State law allows prison officials to separate incarcerated people if a "contagious disease" (which means a disease that spreads easily) becomes widespread.¹¹⁴ But, New York law also says that all incarcerated people who are "sick shall receive all necessary care and medical assistance," and that all such incarcerated people should be transferred back to the general population as soon as possible.¹¹⁵

Because TB can be spread through the air, the law often treats incarcerated people with TB differently from incarcerated people who have other diseases. Normally, prisons *can* separate incarcerated people who are suffering from TB to prevent the spread.¹¹⁶ New York City law even allows non-incarcerated persons infected with TB to be detained in a hospital in certain circumstances.¹¹⁷ DOCCS TB policy requires incarcerated people with contagious TB to be placed in respiratory isolation. If you are in respiratory isolation, you are only allowed to leave the area for certain medical treatment and you will have to wear a surgical mask.¹¹⁸

(ii) Mandatory Segregation of Incarcerated People with HIV

Because HIV does not spread as easily as TB, New York state prisons¹¹⁹ and federal prisons¹²⁰ do not decide housing or program assignments based only on HIV status. New York prisons are not allowed to automatically separate HIV-positive incarcerated people. New York state courts have found

114. N.Y. CORRECT. LAW § 141 (McKinney 2014).

115. N.Y. CORRECT. LAW § 141 (McKinney 2014).

116. *See* Washington v. Cambra, No. 96–16925, 1998 U.S. App. LEXIS 30072, at *3 (9th Cir 1998) (*unpublished*) (holding that a policy of testing incarcerated people twice for TB is reasonably related to the legitimate penological goal of detecting and containing TB and that the second test did not violate the incarcerated person's rights under the 8th or 14th Amendments); Davidson v. Kelly, No. 96–2066, 1997 U.S. App. LEXIS 33796, at *4 (2d Cir. Nov. 24, 1997) (*unpublished*) (holding that placing an incarcerated person in TB hold for three days until he agreed to be tested for TB did not violate the incarcerated person's 8th Amendment rights because it furthered a legitimate penological interest); McCormick v. Stalder, 105 F.3d 1059, 1061–1062 (5th Cir. 1997) (holding that prison policy requiring TB patients to be medicated or isolated was reasonably related to legitimate penological interests); Dunn v. Zenk, No. 1:07-CV-2007-RLV, 2007 U.S. Dist. LEXIS 73891, at *9 (N.D. Ga. 2007) (*unpublished*) (holding that states have a legitimate penological interest in controlling the spread of tuberculosis so that the involuntary administration of a TB test does not offend the Constitution); Delisser v. Goord, No. 9:02-CV-00073 (FJS/GLS), 2003 U.S. Dist. LEXIS 488, at *16, *18–19, *23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (holding that incarcerated person, who was placed in TB hold for a total of ninety-three days for refusing to submit to PPD test and then for refusing to take TB medication, did not suffer a violation of his 8th or 14th Amendment rights).

117. *See* 24 RCNY Health Code § 11.21(d)(1) (2018) (authorizing "the removal to and/or detention in a hospital or other treatment facility for appropriate examination for tuberculosis of a person who has active tuberculosis or who is suspected of having active tuberculosis and who is unable or unwilling voluntarily to submit to such examination by a physician or by the Department"); City of New York v. Doe, 205 A.D.2d 469, 470, 614 N.Y.S.2d 8, 9 (1st Dept. 1994) (holding that a patient could be detained pursuant to then-New York City Health Code § 11.47 where there was no less restrictive way to treat patient's TB infection).

118. DIV. OF HEALTH SERVS., NEW YORK DEPT. OF CORR. SERVICES, HEALTH SERVICES POLICY MANUAL: TUBERCULOSIS, § 1.18 at 10–11 (June 21, 2004).

119. *See, e.g.,* Nolley v. Erie, 776 F. Supp. 715, 719 (W.D.N.Y. 1991) (noting that "DOCS stopped isolating HIV+ inmates from the general population in 1987").

120. 28 C.F.R. § 549.13(c) (2020) ("Except as provided for in disciplinary policy, no special or separate housing units may be established for HIV-positive inmates."). However, as a person incarcerated in federal prison, you can be placed in controlled housing if there is reasonable evidence that you will pose a health risk to others. 28 C.F.R. § 541.61 (2020).

that mandatory segregation because of your HIV status violates your right to privacy—specifically, your right to medical confidentiality. This is because housing in an AIDS unit tells other incarcerated people and staff that you are HIV-positive.¹²¹ If you are incarcerated in federal prison and have HIV or AIDS, the prison can only separate you if prison officials have reasonable evidence to think that you pose a health risk.¹²² For more information on confidentiality issues, see Part F of this Chapter, and for information regarding discriminatory treatment based on your health status, see Part H of this Chapter.

Although New York prisons cannot separate HIV-positive incarcerated people, some states say that all HIV-infected incarcerated people must live separately from other incarcerated people. Many courts outside of New York have upheld prisons' decisions to separate HIV-positive incarcerated people. Courts generally think that segregation is a reasonable way to prevent other incarcerated people from getting HIV, and courts consider preventing the spread of HIV to be a legitimate interest of prisons.¹²³ Additionally, at least one federal court of appeals found that there is a high risk of HIV spreading in prison. In that case, the prison did not present evidence that HIV spread between incarcerated people, but the court thought that because there was high-risk behavior in the prison—like intravenous drug use, sex, and violence—this was enough to prove that there was a significant risk of HIV spreading.¹²⁴ The court also rejected the incarcerated people's argument that the prison should either hire more corrections officers or identify incarcerated people who were both HIV-positive and also likely to engage in high-risk conduct. The court found that these two suggestions were unreasonable and created an "undue hardship" on the prison facility.¹²⁵ The court's ruling might make it more difficult to argue that your segregation because of your HIV-positive status is unconstitutional.

(iii) Mandatory Segregation of Incarcerated People with MRSA

Prisons may segregate incarcerated people who have active MRSA infections to prevent the spread of the infection to others through contact. But the Federal Bureau of Prisons generally says that incarcerated people do not need to be housed separately if they have MRSA wounds that are not draining or that can be easily covered with bandages.¹²⁶ As the infection becomes more serious or develops into MRSA pneumonia, separate housing may be recommended or required.¹²⁷ A prison may have the right to threaten you with solitary confinement if you refuse to accept the prison's prescribed treatment for your MRSA infection.¹²⁸

121. See *Nolley v. Erie*, 776 F. Supp. 715, 733–736 (W.D.N.Y. 1991) (holding that segregating HIV-positive incarcerated people violated constitutional and statutory rights to privacy because HIV status was improperly disclosed to non-medical personnel); *Doe v. Coughlin*, 697 F. Supp. 1234, 1240–1241 (N.D.N.Y. 1988) (holding that involuntary segregation of incarcerated people with HIV or AIDS violates incarcerated people's right to privacy).

122. 28 C.F.R. § 541.61 (2020).

123. See, e.g., *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992) (holding that Mississippi prisons had reasonable interests in segregating HIV-positive incarcerated people, and that segregation did not violate rights to privacy, equal protection, or due process).

124. *Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that risk of HIV transmission justified segregation of HIV-positive incarcerated people, including exclusion from programs and activities offered to other incarcerated people).

125. *Onishea v. Hopper*, 171 F.3d 1289, 1302–1304 (11th Cir. 1999) (finding that the cost of special programs to reduce the risk of HIV transmission would be too high).

126. See Fed. Bureau of Prisons, Management of Methicillin-Resistant *Staphylococcus Aureus* (MRSA) Infections—Clinical Practice Guidelines 33 (2012), available at <http://www.bop.gov/resources/pdfs/mrsa.pdf> (last visited Oct. 5, 2019).

127. See Fed. Bureau of Prisons, Management of Methicillin-Resistant *Staphylococcus Aureus* (MRSA) Infections—Clinical Practice Guidelines 33 (2012), available at <http://www.bop.gov/resources/pdfs/mrsa.pdf> (last visited Oct. 5, 2019).

128. See *Keller v. County of Bucks*, No. 05-2146, 209 F. App'x 201, 205–206 (3d Cir. 2006) (*unpublished*) (holding that it was not a constitutional violation to isolate a pre-trial detainee who refused treatment for a MRSA infection when the isolation was medically determined); *Munoz v. Fortner*, No. 6:07cv170, 2007 U.S. Dist. LEXIS

(iv) Segregation Requested by Incarcerated People

If you are afraid of contracting an infectious disease, read Part B of this Chapter to get a sense of the steps that you can take to protect yourself. In general, incarcerated people who are afraid of getting infectious diseases from other incarcerated people have not been able to successfully sue prison officials. Some incarcerated people have tried to get prisons to separate other incarcerated people who are infected with a communicable disease, but these incarcerated people have been generally unsuccessful. Incarcerated people who already are infected have also been unsuccessful when they request that the prison give them a single cell or vaccinate other incarcerated people so that they do not spread their diseases.¹²⁹ Courts will generally support a prison's decision not to separate incarcerated people with HIV-related illnesses.¹³⁰

Although prisons may have a legal responsibility to protect incarcerated people from exposure to communicable diseases,¹³¹ to win a lawsuit against prison officials for exposing you to infectious diseases, you must prove that: (1) there was a specific and significant risk of infection, and (2) prison officials were aware of that risk, but disregarded it.¹³² In order to win this kind of a lawsuit, you must show that there is a significant possibility that you will contract the virus or disease. For example, some courts have decided against a prison when incarcerated people are housed with people who have known MRSA infections. In order to meet the standard, however, the infected incarcerated person must have open wounds that are not being adequately covered or cleaned and that are likely to infect other incarcerated people.¹³³ You will not win if you only have a general fear of getting the virus.

91543, at *20–21 (E.D. Tex. Dec. 13, 2007) (*unpublished*) (holding that it does not violate the Constitution to threaten to put incarcerated people in isolation who have MRSA and do not comply with recommended treatment).

129. *Johnson v. Horn*, 782 A.2d 1073, 1076–1077 (Pa. Commw. Ct. 2001) (refusing to give court order forcing prison officials to assign incarcerated person to a single cell so he would not spread hepatitis C to other incarcerated people).

130. *See Glick v. Henderson*, 855 F.2d 536, 539–540 (8th Cir. 1988) (holding that incarcerated person's fear of contracting HIV either through sharing work assignments with an HIV-infected incarcerated person or through eating food that might have been prepared by an HIV-infected incarcerated person was not sufficient to justify an order to segregate HIV-infected incarcerated people); *Deutsch v. Fed. Bureau of Prisons*, 737 F. Supp. 261, 267–268 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991) (holding that incarcerated person did not have the right to have another HIV-positive incarcerated person segregated unless the incarcerated person poses a known health risk).

131. *See Hutto v. Finney*, 437 U.S. 678, 682–688, 98 S. Ct 2565, 2569–2572, 57 L. Ed. 2d 522, 529–533 (1978) (finding prison conditions unconstitutional under the Eight Amendment where, among other concerns, incarcerated people in “punitive isolation” were crowded into cells and some had infectious conditions such as hepatitis and venereal diseases); *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (finding that prison's failure to adequately screen incoming incarcerated people violated the due process and Eight Amendment rights of other incarcerated people) [overruled in part]; *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977) (stating that leaving persons with communicable or contagious diseases, such as scabies or gonorrhea, without medical attention for over a month and in the midst of other incarcerated people violated the required standard of adequate medical services).

132. *See Massick v. N. Cent. Corr. Facility*, 136 F.3d 580, 581 (8th Cir. 1998) (holding that there was no Eight Amendment violation when prison officials placed the plaintiff in a cell with an HIV-positive incarcerated person, who had open bleeding wounds, without warning the plaintiff of his cellmate's HIV status; the court found no constitutional violation, because the risk of plaintiff contracting HIV was small and because prison officials acted reasonably by granting plaintiff's request to change cellmates); *Billman v. Ind. Dept. of Corr.*, 56 F.3d 785, 788–789 (7th Cir. 1995) (holding that prison officials who knowingly and without warning assigned an incarcerated person to share a cell with an HIV-positive incarcerated person with a known propensity to rape, constitutes an Eight Amendment violation due to the official's “deliberate indifference” to the “fear and humiliation inflicted by the rape and the fear of contracting the AIDS virus”); *DeGidio v. Pung*, 920 F.2d 525, 532–533 (8th Cir. 1990) (holding that prison officials' pattern of reckless or negligent responses to tuberculosis outbreaks was sufficient to constitute deliberate indifference, violating the Eight Amendment).

133. *See Lopez v. McGrath*, No. C 04-4782 MHP, 2007 U.S. Dist. LEXIS 30409 (N.D. Cal. May 31, 2007) (*unpublished*) (finding an issue of fact where plaintiff claimed that administrators knew medical staff were putting incarcerated people with MRSA infections back into the general population, possibly creating “substantial risk” to other incarcerated people); *Kimble v. Tennis*, No. 4:CV-05-1871, 2006 U.S. Dist. LEXIS 36285 (M.D. Pa.

Additionally, the Prison Litigation Reform Act (“PLRA”) makes winning money damages even more difficult. Under the PLRA, if you seek money damages, you will have to show you were physically injured, not just mentally or emotionally injured, or placed at an increased risk of being infected. For more information on the PLRA, see *JLM* Chapter 14, “The Prison Litigation Reform Act.”

F. Legal Rights and Confidentiality

Under the U.S. Constitution, you have a right to privacy (a “privacy interest”) regarding the disclosure of personal matters.¹³⁴ For information about your medical privacy, please see Part E(3) of *JLM* Chapter 23, “Your Right to Adequate Medical Care.”

Incarcerated people with infectious diseases generally have a limited right to have information about their medical condition kept confidential. Some courts have held that the right to medical confidentiality also applies to an individual’s HIV status.¹³⁵ But, other courts have held that there is no constitutional right to privacy regarding HIV status.¹³⁶ If you are in federal prison, your HIV test results, if positive, must be disclosed to the prison’s employees.¹³⁷

In New York state, your HIV-related information cannot be disclosed to anyone other than you and certain individuals or institutions who are authorized to know by law.¹³⁸ Individuals who are authorized to receive your HIV information include health care providers (when knowledge is necessary to provide you with adequate care),¹³⁹ employees of the Division of Parole,¹⁴⁰ employees of the Division of Probation and Correctional Alternatives or local probation department,¹⁴¹ the medical director of the local correctional facility,¹⁴² or an employee or agent of the Commission of Correction.¹⁴³ These authorized individuals are allowed to access your HIV information only if they need the information to carry out their duties and functions.¹⁴⁴

In New York, incarcerated people have won lawsuits that found statutory and constitutional rights violations when their HIV status was improperly disclosed. In particular, it is not allowed for a prison official to disclose your HIV status to other incarcerated people or non-medical personnel.¹⁴⁵ The courts

June 5, 2006) (*unpublished*) (holding that evidence that prison doctor authorized release of a MRSA-infected incarcerated person with open sores to the general population may be sufficient to support a claim of deliberate indifference).

134. See *Whalen v. Roe*, 429 U.S. 589, 599–600, 97 S. Ct. 869, 876, 51 L. Ed. 2d 64, 73 (1977) (finding that the U.S. Constitution protects your right to make personal decisions about the disclosure of your personal information) (non-prison case); *O’Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (“Medical information in general, and information about a person’s psychiatric health and substance-abuse history in particular, is information of the most intimate kind.”) (non-prison case).

135. See *Doe v. Delie*, 257 F.3d 309, 315–317 (3d Cir. 2001) (finding incarcerated people have a right to medical privacy and that the right is “particularly strong” regarding one’s HIV status); *Doe v. New York*, 15 F.3d 264, 267 (2d Cir. 1994) (“Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.”).

136. See, e.g., *Sherman v. Jones*, 258 F. Supp. 2d 440, 444 (E.D. Va. 2003) (holding that there is no constitutional right to privacy of HIV status and noting that different circuit courts have reached different conclusions on this issue).

137. 28 C.F.R. § 549.14 (2020).

138. N.Y. PUB. HEALTH LAW § 2782 (McKinney 2012). State agencies authorized to obtain confidential HIV-related information should have regulations to prevent discrimination, prohibit unauthorized disclosure, and establish rules for determining who should receive the information and when. N.Y. PUB. HEALTH LAW § 2786(2)(a) (McKinney 2012).

139. N.Y. PUB. HEALTH LAW § 2782(1)(d) (McKinney 2012).

140. N.Y. PUB. HEALTH LAW § 2782(1)(l) (McKinney 2012).

141. N.Y. PUB. HEALTH LAW § 2782(1)(m) (McKinney 2012).

142. N.Y. PUB. HEALTH LAW § 2782(1)(n) (McKinney 2012).

143. N.Y. PUB. HEALTH LAW § 2782(1)(o) (McKinney 2012).

144. N.Y. PUB. HEALTH LAW §§ 2782(1)(l)–(o) (McKinney 2012).

145. See *Lipinski v. Skinner*, 781 F. Supp. 131, 140 (N.D.N.Y. 1991) (allowing incarcerated person to force protected media sources to give deposition testimony in connection with lawsuit against law enforcement officials and prison officials when they disclosed incarcerated person’s HIV status to a newspaper); *Matter of V. v. New*

seem to permit disclosure of your HIV status only if such disclosure is reasonably related to legitimate prison interests, like protecting incarcerated people or corrections officers from infection. But unnecessary disclosure of such information for humor or gossip violates your constitutional rights.¹⁴⁶

In other jurisdictions, courts are divided about medical privacy. Some courts find that an incarcerated person's right to medical privacy is not that strong.¹⁴⁷ Other courts protect medical privacy rights for incarcerated people and people who are arrested.¹⁴⁸ But now that the Prison Litigation Reform Act (PLRA) has been passed, similar cases brought today might turn out differently. For more information on the PLRA, see Chapter 14 of the *JLM*. It is important to remember that the PLRA requires a showing of *physical injury*, not just mental or emotional injury, to recover monetary damages. Thus, to be successful in a lawsuit, you would probably have to prove that the prison official's actions physically injured you. Some courts may require you to show the harm is likely to occur again in order to get injunctions (orders requiring officials to stop or change a policy).¹⁴⁹

G. Legal Rights and Medical Treatment

1. Right to Medical Treatment

If you are denied medical treatment for an infectious disease, you may have a claim that the prison violated your rights under the Eighth Amendment. The Eighth Amendment protects you from cruel and unusual punishment. To win an Eighth Amendment claim, you must prove that prison officials showed "deliberate indifference" to your "serious medical needs."¹⁵⁰ It is important to remember that

York, 150 Misc. 2d 156, 157–158, 566 N.Y.S.2d 987, 988–989 (N.Y. Ct. Cl. 1991) (holding that an incarcerated person stated a proper claim for relief when he accused his prison of improperly revealing his HIV information); Doe v. Coughlin, 697 F. Supp. 1234, 1240–1241 (N.D.N.Y. 1988) (temporarily forbidding a plan to segregate AIDS-infected incarcerated people, because it would disclose their AIDS status and therefore violate their right to privacy). But see Cordero v. Coughlin, 607 F. Supp. 9, 11 (S.D.N.Y. 1984) (holding that a plan which segregated incarcerated people with AIDS did not violate the incarcerated people's 1st Amendment right to privacy, because the right to privacy is limited by the prison's needs and by the incarcerated people's confinement).

146. See Powell v. Schriver, 175 F.3d 107, 112–113 (2d Cir. 1999) (holding that a prison official does not violate an incarcerated person's right to medical privacy, if the official's actions are reasonably related to legitimate prison interests. A prison official does violate an incarcerated person's medical privacy if he discloses an incarcerated person's medical information as gossip or a joke); see also Baez v. Rapping, 680 F. Supp. 112, 115 (S.D.N.Y. 1988) (holding that prison officials did not violate an incarcerated person's right to confidentiality when they warned other officials to avoid contact with incarcerated person's body fluids). But see Nolley v. Erie, 776 F. Supp. 715, 725–728 (W.D.N.Y. 1991) (holding that a policy of putting red stickers on HIV-positive incarcerated people's possessions, and therefore revealing incarcerated people's HIV status, violated privacy rights under New York law).

147. See Anderson v. Romero, 72 F.3d 518, 523–524 (7th Cir. 1995) (holding that incarcerated people do not have a constitutional right to the confidentiality of their HIV status, especially in light of the fact that HIV-positive incarcerated people could be identified when segregated from the rest of the prison population); Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994) (holding that the incarcerated person's right to privacy was not violated when a corrections officer opened his file in the presence of other witnesses after the incarcerated person refused to answer questions about his medical condition); Adams v. Drew, 906 F. Supp. 1050, 1055–1058 (E.D. Va. 1995) (stating that prison officials' unintentional disclosure of incarcerated person's HIV status to another incarcerated person did not violate right to privacy).

148. See A.L.A. v. W. Valley City, 26 F.3d 989, 990–991 (10th Cir. 1994) (stating that an arrestee brought a valid claim against the police for disclosing that he was HIV-positive to his family and strangers, even though it was later found that the arrestee was not HIV-positive).

149. See Davis v. District of Columbia, 158 F.3d 1342, 1346–1347 (D.C. Cir. 1998) (holding that an HIV-positive incarcerated person could not obtain an injunction against prison officials for the unauthorized disclosure of his medical files because he could not show a threat that it might happen again).

150. See Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (describing the standard for bringing an 8th Amendment claim for failure to receive proper medical care) (citing Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)). HIV and hepatitis are generally considered "serious medical needs." Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004) (finding that the PLRA did not deprive the incarcerated person of his right to amend his complaint that defendants had withdrawn his prescribed medications and were deliberately indifferent to his serious medical needs).

courts do not think that every claim of inadequate medical care is bad enough to be a constitutional violation.¹⁵¹ But a few courts have held that a denial of prescribed AIDS or hepatitis C medical treatment does violate an incarcerated person's constitutional rights.¹⁵² See Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," for more information on how to bring an Eighth Amendment claim for failure to provide adequate medical treatment.

Courts generally do *not* believe incarcerated people have a constitutional right to a private doctor or experimental medication.¹⁵³ You may still be able to get experimental drugs, but you will probably not have an Eighth Amendment claim against your facility if it does not prescribe them for you. But some prisons have participated in clinical trials for anti-retroviral therapy for AIDS. To take part in such trials, you must first get approval from the Institutional Review Board of the testing site and your prison's medical department.¹⁵⁴

If you believe that your health is suffering because you are being wrongfully denied medication, you will probably have to show that the medical community agrees that this medication will help your condition. Otherwise, the court may see your claim as a simple disagreement between you and the prison doctor.¹⁵⁵ If you want to bring a claim about medical treatment or medication that was denied to you sometime in the past, a court may look back to see what the accepted medical practices were at that time.¹⁵⁶

If you got medical treatment, but you think that a prison doctor incorrectly diagnosed your condition, it will be hard to bring a successful case against the prison officials. In the past, courts have

151. See *Smith v. Carpenter*, 316 F.3d 178, 184, 186–87 (2d Cir. 2003) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)) (holding that brief interruptions of HIV medications, with no noticeable bad effects, was not a denial of serious medical needs. However, the court also noted that a showing of increased risk, even without noticeable symptoms, might be serious enough to be denial of medical care).

152. See *Montgomery v. Pinchak*, 294 F.3d 492, 500 (3d Cir. 2002) (finding HIV-positive incarcerated person's claim regarding violation of his right to adequate medical treatment had merit and holding that, because HIV is a life-threatening disease if left untreated, the incarcerated person had met the serious medical need prong of *Estelle v. Gamble*). But see *Johnson v. Wright*, 412 F.3d 398 (2d Cir. 2005) (finding that although a facility's refusal to give an incarcerated person the medication most incarcerated people received for hepatitis C because he had used illegal drugs constituted deliberate indifference, there was medical reason for denying the prison therapy); *Niemiec v. Maloney*, 448 F. Supp. 2d 270 (9th Cir. 2006) (finding that the denial of a medicine subsequent to a failed drug test does not violate Due Process under the 14th Amendment, especially given that a decision to deny the medicine to active drug users is in accord with medical custom).

153. See *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) ("[M]ere disagreement over the proper treatment does not create a constitutional claim."); *McKenna v. Wright*, No. 01 Civ. 6571 (WK), 2002 U.S. Dist. LEXIS 3489 (S.D.N.Y. Mar. 4, 2002) (*unpublished*) (dismissing plaintiff's claim on the basis that the doctor's treatment decision was his medical judgment and consistent with current medical literature); *Carter v. Cash*, No. 92-CV-5526 (JG), 1995 U.S. Dist. LEXIS 22209 (E.D.N.Y. May 31, 1995) (*unpublished*) (finding that incarcerated person was not entitled to medication of his choice if doctor decided, based on his professional judgment, that it would not be in the incarcerated person's best interest).

154. You can find information about clinical trials from publications such as the American Foundation for AIDS Research ("AMFAR") AIDS/HIV Treatment Direction. AMFAR's contact information is included in Appendix A at the end of this chapter.

155. See *Perkins v. Kan. Dept. of Corrs.*, 165 F.3d 803, 811 (10th Cir. 1999) (upholding the denial of protease inhibitor to incarcerated person with HIV because other treatment was provided); *Loch v. County of Bucks*, 2006 U.S. Dist. LEXIS 62620, at *10–11 (E.D. Pa. Sept. 1, 2006), No. 03-cv-4833, 2006 WL 2559296, at *3, available at <http://www.paed.uscourts.gov/documents/opinions/06D1114P.pdf> at 5 (last visited Oct. 6, 2019) (holding that an incarcerated person who had been treated for conditions including MRSA did not assert a constitutional violation simply because they claim the treatment they received was inadequate); *Matthews v. Crosby*, No. 3-06-CV-38, 2006 U.S. Dist. LEXIS 35049, at *7 (N.D. Fla. May 31, 2006) (holding that a complete denial of available treatment, but not a dispute over the care received, could be a constitutional violation).

156. See *Parker v. Proffit*, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at *19 (W.D. Va. Oct. 27, 1995) (*unpublished*) (evaluating denial of medication by standards of medical treatment at time of denial); *Adams v. Poag*, 61 F.3d 1537, 1543 (11th Cir. 1995) (holding that to show a prison official's actions were deliberately indifferent, a plaintiff could produce opinions of medical experts stating that the official's actions were contrary to medical practices accepted at the time).

dismissed cases for different reasons. One reason could be because the incarcerated person could not prove that the prison officials had personal involvement.¹⁵⁷ In other cases, the incarcerated person could not show any physical harm or the incarcerated person could not show that his needs were ignored.¹⁵⁸

If you have hepatitis C and prison officials determine that you should receive a certain treatment for a certain length of time, and you are then denied that treatment, you may have a claim under the Eighth Amendment. The first requirements to bring a claim will be met if you can say that being denied the prescribed treatment is risking your life by not treating your disease.¹⁵⁹ You do *not* have to also claim that you have suffered a separate harm in addition to your disease in order to bring your claim.¹⁶⁰ Meeting these requirements allows you to begin your case, but does *not* mean that you will win. You will still need to show that there was “deliberate indifference” to your medical needs.¹⁶¹

This does not change the rule that courts do not like to question doctors’ medical decisions. If you have received treatment for hepatitis C but think you should have been given different treatment,¹⁶² or if your doctors said you do not have a condition requiring any treatment, this rule will *not* allow you to bring suit.¹⁶³

2. Right to Refuse Medical Treatment

Some people, for a variety of reasons, choose to refuse medical treatment. Competent people—people who can think and understand well enough to make medical decisions for themselves—have the right to refuse treatment, even if it means they will die as a result.¹⁶⁴ However, your right to refuse treatment is limited as an incarcerated person.¹⁶⁵ Most courts have held that prisons can treat TB-

157. See *Timmons v. N.Y. State Dept. of Corr. Servs.*, 887 F. Supp. 576, 580 (S.D.N.Y. 1995) (holding an incarcerated person’s bringing a claim against prison officials for misdiagnosing him with HIV in 1986 had not shown the officials had any personal involvement in the alleged violations and was thus not entitled to relief under 42 U.S.C. § 1983). Section 1983 governs suits against prison officials for federal statutory and constitutional violations and is described in detail in *JLM* Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

158. See *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir. 2003) (dismissing 8th Amendment claim because incarcerated person failed to show that he suffered any adverse medical effects from the sporadic lack of treatment).

159. See *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1085 (2007) (holding that the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) were met by statements that an incarcerated person with hepatitis C had been removed from his prescribed course of treatment and denied all treatment for his disease due to suspicion of drug use).

160. See *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1085 (2007) (stating that allegations (that is, the incarcerated person’s claims of harm) in complaint were sufficient to bring an initial claim and that no claim of “cognizable independent harm” (that is, separate harm) apart from removal from treatment is required).

161. See *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976).

162. See *Loukas v. Mich. Dept. of Corr.*, No. 2-07-CV-142, 2008 U.S. Dist. LEXIS 14724, at *2 (W.D. Mich. Feb. 27, 2008) (holding that an incarcerated person who has received medical care, but just questions whether the treatment he has been receiving is adequate, does not have an 8th Amendment claim).

163. See *Hix v. Tenn. Dept. of Corr.*, 196 Fed.App’x. 350, 357 n.1 (6th Cir. 2006) (stating that hepatitis C does not require treatment in all cases, and a difference of opinion over medical treatment does not violate the 8th Amendment).

164. For New York law, see N.Y. Pub. Health Law §§ 2960–2979 (McKinney 2007) (“Orders Not to Resuscitate”) (regulating right of “adult with capacity” to direct issuance of orders not to resuscitate); N.Y. Pub. Health Law §§ 2980–2994 (McKinney 2007) (“Health Care Agents and Proxies”) (allowing appointment of agents to make important health care decisions including the refusal of life-saving treatment for the appointer); *Quill v. Koppell*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994) (“It is established under New York law that a competent person may refuse medical treatment, even if the withdrawal of such treatment will result in death.”). See also *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (holding that physicians can prescribe death-inducing drugs for mentally competent patients who wish to end their lives during the end stages of terminal illness. This case could help the argument that a competent person may refuse medical treatment, even if such refusal will result in death).

165. See *Washington v. Harper*, 494 U.S. 210, 223–227, 110 S. Ct. 1028, 1037–1040, 108 L. Ed. 2d 178

infected incarcerated people without their consent.¹⁶⁶ Courts balance your interest in refusing treatment with the prison's "legitimate penological interest" in preventing the spread of disease. Courts will also consider whether the prison's actions are reasonably related to the prison's interests. If you do not have a disease that is transmitted through air, the prison will have a weaker argument for forcing you to take medication than if you have a disease such as TB that is easily spread. See Part C of Chapter 29, "Special Issues for Prisoners with Mental Illness," for more information about your right to refuse medical treatment.

H. Discriminatory Treatment and Infectious Diseases

1. Constitutional Rights

The Fourteenth Amendment may protect you from being discriminated against for having an infectious disease. For example, your rights under the Equal Protection Clause of the Fourteenth Amendment prohibit discrimination by the state that is not rationally related to a legitimate purpose.¹⁶⁷ The Due Process Clause of the Fourteenth Amendment forbids the prison facility from taking away your life, liberty, or property without due process of law.¹⁶⁸ The Eighth Amendment protects you from "cruel and unusual punishment."¹⁶⁹ Keep in mind, however, that the courts balance these constitutional rights against legitimate penological interests,¹⁷⁰ which may allow prison officials to lawfully infringe upon or violate your rights. Prison policies are valid if they are reasonably related to a legitimate penological (prison-related) interest; however, the prison is required to use the least restrictive means of achieving the goals of the policy.¹⁷¹

(1990) (recognizing 14th Amendment right to refuse medical treatment, using *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64 (1987) (superseded by statute), balancing incarcerated person's rights against the state's duty to treat mentally ill incarcerated people and protect the safety of incarcerated people and correction officers, and finding the state did not deprive right to refuse treatment without due process).

166. See *McCormick v. Stalder*, 105 F.3d 1059, 1062 (5th Cir. 1997) (holding that prison officials did not violate the 8th Amendment when they required an incarcerated person with TB to undergo drug therapy without his consent).

167. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

168. U.S. CONST. amend. XIV, § 1. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

169. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

170. See *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64 (1987) (superseded by statute) (analyzing whether prison regulations that burden fundamental rights are "reasonably related" to legitimate penological objectives).

171. See *Turner v. Safley*, 482 U.S. 78, 91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987) (superseded by statute) ("But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." This means if an incarcerated person can point to a different procedure not requiring more money or time, the alternative can be used as evidence that the challenged policy is not reasonable); *Perkins v. Kan. Dept. of Corr.*, 165 F.3d 803, 810–11 (10th Cir. 1999) (holding HIV-positive incarcerated person could claim a constitutional violation for being forced to wear a face mask whenever he left his cell and noting that wearing such a mask could become a humiliating form of branding that violated the 8th Amendment's prohibition of punishing individuals for a physical condition). But see *Parker v. Proffit*, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at *19–21 (W.D. Va. Oct. 27, 1995) (*unpublished*) (stating that making an HIV-positive incarcerated person wear a mask and protective clothing may have caused some embarrassment, but the practice did not rise to a constitutional violation of the 8th Amendment prohibition on cruel and unusual punishment).

If you bring a suit challenging a prison practice under the Fourteenth Amendment's Due Process Clause, you must prove you were entitled to something the prison took away.¹⁷² Any entitlement must be created by *state law*. If you think you are entitled to something, you should first determine whether or not a state statute or regulation gives you a right to that entitlement. Also know that prison officials *can* treat incarcerated people with infectious diseases differently from other incarcerated people if they have legitimate penological interests in doing so;¹⁷³ however, the reasons must be rational and not purely discriminatory.

The Fourteenth Amendment only applies to the *states*, but the Fifth Amendment's Due Process Clause protects your rights against the *federal* government. If you are in a federal prison, you might also consider bringing your lawsuit under federal statutes, instead of under the Fifth Amendment.

2. Statutory Rights

Certain laws protect you from forms of discrimination based on disabilities, including HIV status. The Federal Rehabilitation Act of 1973 ("FRA") prohibits discrimination, or denial of programs or benefits based on disability, by a federal, state, or local government agency, or any recipient of federal funding.¹⁷⁴ Similarly, the Americans with Disabilities Act ("ADA") prohibits public and private entities from discriminating, excluding, or denying services, programs, or activities to a person with a disability.¹⁷⁵ These laws recognize TB and HIV infection as a form of disability because they are physical impairments limiting major life activities.¹⁷⁶ Also, in *Bragdon v. Abbott*, the Supreme Court clearly stated that under the ADA, "HIV infection satisfies the . . . definition of a physical impairment during every stage of the disease."¹⁷⁷

Although HIV is viewed as a disability according to the FRA and the ADA, your rights are limited to some extent if: (1) your HIV infection poses a significant risk to the health or safety of others; or (2)

172. See *Anderson v. Romero*, 72 F.3d 518, 527 (7th Cir. 1995). (ruling that a state statute making prisons provide "barber facilities" gave the plaintiff an entitlement to a haircut, and keeping plaintiff from this entitlement because of his HIV status deprived him of his property and liberty rights under the 14th Amendment's Due Process Clause).

173. See *Laureano v. Vega*, No. 92 Civ. 6056 (LMM), 1994 U.S. Dist. LEXIS 2107, at *23–24 (S.D.N.Y. Feb. 23, 1994) (*unpublished*), *aff'd*, 40 F.3d 1237 (2d Cir. 1994) (rejecting incarcerated person's claim that he had received difficult work assignments because of his HIV status; holding that he had failed to establish any retaliatory motive by prison officials and that there is no right to a particular prison job); *Farmer v. Moritsugu*, 742 F. Supp. 525, 528 (W.D. Wis. 1990) (finding that prison had legitimate interest in maintaining security and order and therefore refusal of HIV-infected incarcerated person's request for food service job was not denial of equal protection); *Doe v. Coughlin*, 71 N.Y.2d 48, 54, 56, 60, 518 N.E.2d 536, 540, 541, 544, 523 N.Y.S.2d 782, 786, 787, 790 (1987) (upholding prison officials' refusal to allow an incarcerated person with AIDS to participate in a Family Reunion Program and holding that incarcerated person's privacy rights and his rights under the Due Process Clause and the Equal Protection Clause had not been violated, reasoning that there is no right to marital relations and that the prison officials had a rational basis to believe that such visits would help the spread of a disease). Note, however, the New York State Department of Corrections and Community Supervision's official policy does not currently deny participation in the Family Reunion Program based solely on the HIV status of the incarcerated person. Instead, there is a special review of each incarcerated person's application because of potential health risks to the visitor. N.Y. Comp. Codes R. & Regs. tit. 7 §§ 220.2–220.9.

174. 29 U.S.C. §§ 701(a)–(c).

175. 42 U.S.C. § 12132.

176. 28 C.F.R. §§ 35.108(a)(1)(i), (b)(2) (2018) ("Physical or mental impairment includes, but is not limited to, contagious and non-contagious diseases and conditions such as . . . [HIV disease] (whether symptomatic or asymptomatic), tuberculosis . . ."); 42 U.S.C. § 12102(1)(A)–(C) ("The term 'disability' means . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment.").

177. See *Bragdon v. Abbott*, 524 U.S. 624, 637, 118 S. Ct. 2196, 2204, 141 L. Ed. 2d 540, 556–57 (1998). This case was about a dentist's refusal to examine an HIV-infected patient in his office. Though the facts did not involve incarcerated people, the legal principle is the same regarding HIV infection as a disability. For a lower court decision finding an HIV-positive incarcerated person disabled under the FRA and ADA, see, e.g., *Dean v. Knowles*, 912 F. Supp. 519, 521 (S.D. Fla. 1996).

it would be an undue hardship on the prison facility to accommodate your needs.¹⁷⁸ Also, the U.S. Supreme Court has decided that individuals cannot recover monetary damages from the state for its failure to comply with the ADA.¹⁷⁹ However, you can still seek injunctive relief, which means that you can file a claim in which you ask the court to require the state to end practices that violate the ADA.¹⁸⁰

If you are suing for violation of your statutory rights, you should cite both the FRA and the ADA, since the remedies, procedures, and rights are the same under both laws.¹⁸¹ The only difference is the FRA only applies to public (government) entities while the ADA can support a claim against both private and public entities. You should also check the law of your state and city since sometimes states and localities enact additional laws to protect people with communicable diseases, like HIV or hepatitis, from discrimination. In New York State, the Executive Law prohibits discrimination in several settings against people who carry diseases like HIV or hepatitis.¹⁸² If you are suing in New York, you should review New York law to see if it applies to your circumstances.

Most prison facilities are controlled and financed by federal, state, or local governments, so the ADA and FRA usually apply to prison facilities. Furthermore, the U.S. Supreme Court has stated the ADA and FRA prohibit discrimination in the prison system.¹⁸³ This means prison facilities cannot exclude or deny incarcerated people “benefits of the services, programs, or activities of a public entity” or subject them to discrimination.¹⁸⁴ Benefits include recreational activities, medical services, and educational and vocational programs.¹⁸⁵

However, when a court evaluates a prison policy, it will consider whether the restriction is reasonably related to a legitimate penological interest.¹⁸⁶ When a prison is defending a policy, it only has to show that the possibility of a risk exists; it does not have to demonstrate that the risk has actually occurred. Examples of interests cited by prison authorities include prison safety and undue financial or administrative burden.¹⁸⁷

178. *See Onishea v. Hopper*, 171 F.3d 1289, 1297–1299, 1305 (11th Cir. 1999) (holding any amount of risk through a “specific and theoretically sound means of possible transmission” is a significant risk, and allowing segregation of HIV-positive incarcerated people).

179. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374, 121 S. Ct. 955, 968, 148 L. Ed. 2d 866, 884 (2001) (holding Alabama State employees could not recover damages because of state’s failure to comply with the ADA).

180. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9, 121 S. Ct. 955, 968 n.9, 148 L. Ed. 2d 866, 884 n.9 (2001) (“[ADA] standards can be enforced by . . . private individuals in actions for injunctive relief.”).

181. 42 U.S.C. § 12133 (“The remedies, procedures, and rights set forth in [29 U.S.C. § 794(a)] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [42 U.S.C. § 12132].”).

182. *See* N.Y. EXEC. LAW § 296 (McKinney 2018).

183. *See* Pa. Dept. of Corr. v. *Yeskey*, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, 221 (1998) (“[T]he plain text of Title II of the ADA unambiguously extends to state prison inmates.”).

184. 42 U.S.C. § 12132.

185. *See* Pa. Dept. of Corr. v. *Yeskey*, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (stating that “[m]odern prisons provide inmates with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the prisoners.”).

186. *See* *Gates v. Rowland*, 39 F.3d 1439, 1448 (9th Cir. 1994) (finding that a legitimate penological interest allowed prison to discriminate against HIV-positive incarcerated people by denying them food service jobs). In *Gates* the prison claimed that although the medical risk of infecting other incarcerated people through food service is admittedly small, the perception of a risk by other incarcerated people could be threatening and could lead to violence. Thus, the prison interest was not in preventing the spread of HIV so much as promoting prison safety, a typical prison interest. *See also* *Onishea v. Hopper*, 171 F.3d 1289, 1300–1301 (11th Cir. 1999) (finding that the prison’s interest in avoiding violence based on incarcerated people’s HIV status was a valid penal interest).

187. *See* *Bullock v. Gomez*, 929 F. Supp. 1299, 1305–1308 (C.D. Cal. 1996) (finding the California Men’s Colony possibly violated the ADA and the FRA when it prohibited HIV-infected incarcerated people from visiting their spouses in a family visiting program permitting incarcerated people to visit immediate family members in private conditions for relatively extended periods of time, including overnight stays; stating that the discrimination may be justified under the standard in *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79 (1987) (superseded by statute), as a legitimate penological interest if accommodating

I. Sentencing Persons with Infectious Diseases

If you have an infectious disease and you have been indicted for a crime but not yet sentenced, you may be able to ask the judge to dismiss the indictment or decrease your sentence because of your health condition. Different states have different rules, so be sure to look at your state's statutes and cases.

If your case is in New York State and you have a terminal illness, you may: (1) ask for lower bail, (2) ask to be released on your own recognizance, or (3) make a *Clayton* motion to have your case dismissed "in the interest of justice" (under New York Criminal Procedure Law § 210.40 and § 210.45).¹⁸⁸ The court will look at the evidence of guilt, the seriousness of the offense, your character, and your criminal record.¹⁸⁹ To support a request for dismissal, try to provide medical documentation that imprisonment would worsen your health.

If you have a terminal disease and are in prison because you violated your parole, you can request to: (1) be returned to parole status, (2) be released to time served or granted conditional release to probation, or (3) have your case adjourned in contemplation of dismissal. The adjournment may be extended indefinitely, which may allow you to live your last days out of prison.

If you are facing sentencing in federal court, judges consider the sentencing guidelines on an advisory basis.¹⁹⁰ This means the court can give you a lesser sentence ("downward departure") if mitigating circumstances exist.¹⁹¹ The U.S. Sentencing Commission Guidelines Manual states, "an extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment."¹⁹² Courts usually do not reduce sentences for diseases like AIDS unless the defendant's AIDS is serious enough to be an "extraordinary physical impairment."¹⁹³ Some courts only consider the defendant's health at the time of sentencing, even if the disease will likely worsen in prison.¹⁹⁴

HIV-positive incarcerated people proved to be an undue financial or administrative burden, or if the concerns of other incarcerated people could lead to prison violence; and noting that proof of previous prison violence is not required to prove a legitimate penological interest).

188. See *People v. Clayton*, 41 A.D.2d 204, 208, 342 N.Y.S.2d 106, 110 (2d Dept. 1973) (listing factors a court should consider where defendant seeks to dismiss case "in the furtherance of justice," including the (1) nature of the crime; (2) available evidence of guilt; (3) defendant's prior record; (4) punishment already suffered by defendant; (5) purpose and effect of further punishment; (6) any prejudice to defendant by the passage of time; and (7) the impact of the indictment's dismissal on the public interest); see also *People v. Lawson*, 198 A.D.2d 71, 73, 74, 603 N.Y.S.2d 311, 313 (1st Dept. 1993) (dismissing indictment of defendant, described as "thin as a rail" and unable to stand properly, who had not been involved in any other criminal activity, was honorably discharged from the Air Force, and was in final stages of AIDS), *aff'd*, *People v. Herman L.*, 83 N.Y.2d 958, 960, 639 N.E.2d 404, 405, 615 N.Y.S.2d 865, 866 (1994) (dismissing indictment pursuant to N.Y. Crim. Proc. Law § 210.40 (McKinney 1993), which allows dismissals "in furtherance of justice" and in judge's discretion).

189. See, e.g., *People v. Sierra*, 149 Misc. 2d 588, 590–591, 566 N.Y.S.2d 818, 819 (Sup. Ct. Kings County 1990) (refusing to dismiss conviction because defendant suffered from AIDS Related Complex ("ARC") and would eventually develop AIDS, since he was a repeat felon with a long criminal history; the court also considered the evidence of the defendant's guilt, the offense's seriousness, his character, and criminal history to find he was not entitled to dismissal).

190. See *United States v. Booker*, 543 U.S. 220, 245, 125 S. Ct. 738, 756–757, 160 L. Ed. 2d 621, 651 (2005) (holding that the use of facts under the sentencing guidelines are not binding on federal judges).

191. U.S. SENTENCING GUIDELINES MANUAL, § 5H1.4 (U.S. Sentencing Comm'n 2015); § 5C1.1 app. n.7 (U.S. Sentencing Comm'n 2015).

192. U.S. SENTENCING GUIDELINES MANUAL, § 5H1.4 (U.S. Sentencing Comm'n 2015).

193. See *Downward Departure Under § 5H1.4 of United States Sentencing Guidelines Permitting Downward Departure for Extraordinary Physical Impairment*, 16 A.L.R. Fed. 2d 113 (2007).

194. See *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995) (denying downward departure because defendant's HIV infection had not progressed into advanced AIDS and was not an "extraordinary physical impairment"); *United States v. Woody*, 55 F.3d 1257, 1275–1276 (7th Cir. 1995) (refusing downward departure because HIV-positive defendant did not have "full-blown AIDS"); *United States v. Rabins*, 63 F.3d 721, 729 (8th Cir. 1995) (denying downward departure because defendant's AIDS had not become life-threatening; also holding that the defendant's condition should be assessed at the time of sentencing, regardless of the serious physical

Most courts require you to be very sick before dismissing an indictment or reducing your sentence. But one federal district court did grant a downward departure to an HIV-positive defendant in stable condition. The court thought that the defendant believed his good health was a result of his special regimen of strict diet, regular exercise, acupuncture, and a combination of vitamins and natural supplements under the close supervision of a medical professional.¹⁹⁵ In this case the judge was not worried about whether the treatment actually contributed to the defendant's good health. The judge thought that since the defendant believed his regimen was effective, he would suffer emotional harm if he had to change treatments in prison.¹⁹⁶

If you are trying to get your sentence dismissed or reduced because of your health, you have a greater chance of success if you suffer from a very serious illness, like advanced-stage AIDS. You should try to present medical documentation that being in prison will harm your health. Also, keep in mind that courts might not be sympathetic to you if you have a long criminal history. Remember, courts have discretion to grant downward departures. The law does not say exactly what an "extraordinary physical impairment" is, so you may be able to get a reduced sentence or dismissal even if you do not have AIDS but have TB or hepatitis instead.

J. Life After Imprisonment: Planning for Your Release

Chapter 35 of the *JLM*, "Getting Out Early: Conditional & Early Release," contains information about compassionate release and medical parole. If you have been diagnosed with an infectious disease, you should read that Chapter carefully to see whether you might be eligible for either of these options.

If you are about to be paroled or released, you should get a confidential HIV test before leaving prison. Getting a test can be more difficult or expensive outside of prison. If you do have HIV/AIDS or hepatitis, you should continue to take preventative measures to protect others. Before release, you should also try to contact local agencies and organizations for help transitioning from prison to community life. You can contact the public health department in your area for free brochures. Appendix A lists other helpful agencies.

K. Conclusion

If you have AIDS, TB, hepatitis B or C, MRSA or another infectious disease, people may treat you differently due to ignorance and fear. Protect yourself by becoming aware of the facts of the disease and your legal rights. As an incarcerated person, you may find that information and support is not always readily available. But many of the organizations in Appendix A of this Chapter work with incarcerated people and may be able help you.

difficulties that may develop over the years).

195. See *United States v. Blarek*, 7 F. Supp. 2d 192, 212 (E.D.N.Y. 1998).

196. See *United States v. Blarek*, 7 F. Supp. 2d 192, 212 (E.D.N.Y. 1998).

APPENDIX A

RESOURCES FOR INFORMATION, COUNSELING, AND SUPPORT

National AIDS Organizations

Center for Disease Control National AIDS Hotline (CDC-INFO)

Centers for Disease Control and Prevention, 1600 Clifton Rd., Atlanta, GA 30333

Phone: (800) CDC-INFO (232-4636) (Monday through Friday, 8:00 am to 8:00 pm, in English, en Español)

TTY (for callers with hearing impairments): (888) 232-6348 (Monday through Friday, 8:00 am to 8:00 pm)

Center for Disease Control HIVInfo

Phone: (800) 448-0440

TTY (for callers with hearing impairments): (888) 480-3739 (M–F 9:00 am to 6:00 pm ET)

HIV/AIDS Treatment Information Service (AIDSinfo)

P.O. Box 4780

Rockville, MD 20849

Toll-free: (800) 448-0440 (M–F 1:00 pm to 4:00 pm ET)

<http://www.aidsinfo.nih.gov/>

Free literature, including U.S. guidelines on HIV treatment from the Department of Health and Human Services (DHHS).

HIV/AIDS/HCV Education Project

ACLU NATIONAL PRISON PROJECT

915 15th St. NW, 7th Floor

Washington D.C. 20005

<https://www.aclu.org/issues/hiv>

Referrals to city and state programs nationwide. Resource center, including free copies of PLAY IT SAFER, a booklet on STIs (sexually transmitted infections), and HIV/AIDS magazines.

National Hepatitis Corrections Network

1621 South Jackson Street, Suite 201

Seattle, WA 98144

Phone: (206) 732-0311 or (800) 218-6932

E-mail: mandy@hepeducation.org

<http://www.hevinprison.org/>

Education, advocacy and support for incarcerated people with hepatitis C and HIV co-infection.

National Minority AIDS Council

Prison Initiative

1000 Vermont Ave. NW, Ste. 200

Washington, DC 20005-4903

Phone: (202) 870-0918

<http://www.nmac.org/>

E-mail: info@nmac.org

The Prison Initiative is a project of NMAC, which helps community and faith-based organizations, correctional facilities and health departments evaluate, improve, and implement effective discharge planning for HIV positive incarcerated people and formerly incarcerated people.

National Native American AIDS Prevention Center

1031 33rd St #270

Denver, CO 80205

Phone: (720) 382-2244

Fax: (720) 382-2248

Automated fax info: (800) 283-6880

Hours: Monday–Friday 9:00 am to 5:00 pm

<http://www.nnaapc.net/>

E-mail: information@nnaapc.org

The National Native American AIDS Prevention Center (NNAAPC) offers a variety of programs to help promote education about HIV/AIDS, support prevention efforts, and help foster healthy attitudes about sexuality and sexual health in the Native community.

AIDS Organizations in New York

Hudson Valley Community Services

HVCS Headquarters

40 Saw Mill River Road Suite UL-5

Hawthorne, NY 10532

Tel: (914) 345-8888

Fax: (914) 785-8299

Orange County

280 Broadway 4th Floor

Newburgh, NY 12550

Phone: (845) 562-5005

Fax: (845) 562-5212

<http://www.hudsonvalleycs.org/>

Counseling, education, food, and pantry.

American Foundation for AIDS Research

120 Wall Street, 13th Floor

New York, NY 10005-3902

Phone: (212) 806-1600

Toll-free: (800) 392-6327

Fax: (212) 806-1601

This group is a non-profit organization that supports AIDS research, HIV prevention, treatment education, and the advocacy of AIDS-related public policy.

Asian Pacific Islander Coalition on HIV/AIDS

400 Broadway

New York, NY 10013

Phone: (212) 334-7940

(866) 274-2429 (Infoline)

Fax: (212) 334-7956

This group is a non-profit organization providing HIV/AIDS-related services, education, and research to Asian and Pacific Islander Communities in New York City. Services include HIV testing, STI screening and treatment, acupuncture, and more.

Correctional Association of New York

PO Box 793

Brooklyn, NY 11207

Phone: (212) 254-5700

Fax: (212) 473-2807

*This organization provides advocacy, research, information, and referral to incarcerated people and parolees living with HIV.*Gay Men's Health Crisis

307 W 38th St.

New York, NY 10018

Phone: (212) 367-1000

Toll-free: (800) 243-7692 (Hotline) (in English, en Español) (Mon-Fri. 9:00 am to 6:00 pm)

*Assists incarcerated people with obtaining public benefits when on parole, and publishes a variety of informational brochures. It provides legal services to anyone who is HIV-positive. It also provides referrals and serves women and children.*HIV Law Project

81 Willoughby St.

Brooklyn, NY 11201

Phone: (212) 577-3001 (in English, en Español)

Fax: (212) 577-3192

*This organization provides legal advocacy. However, it only deals with civil law, not criminal law, cases. It provides free civil legal services primarily related to entitlements, housing, immigration (including permanency planning), and family law. It serves residents of Manhattan and the Bronx, and homeless people in all five boroughs. Collect calls are accepted.*Hispanic AIDS Forum, Inc.

Manhattan Office:

1767 Park Avenue, 4th Floor

New York, NY 10035

Phone: (212) 563-4500 (in English, en Español)

Fax: (212) 868-6237

Bronx Office:

975 Kelly Street, Suite 402

Bronx, NY 10459

Phone: (718) 328-4188 (in English, en Español)

Fax: (718) 328-2888

Queens Office:

76-11 37th Avenue, Suite 206

Jackson Heights, New York 10372

Phone: (718) 409-5309

The Hispanic AIDS Forum is New York's largest Latino-run AIDS outreach organization. It has a bilingual staff and provides seminars, outreach programs, case management services, counseling and other support, and referrals to other organizations.

Latino Commission on AIDS

24 West 25th Street, 9th Floor

New York, NY 10010

Phone: (212) 675-3288

Fax: (212) 675-3466

A grass-roots organization working in collaboration with the AIDS in Prison Project.

Legal Action Center (LAC)

225 Varick Street #401

New York, NY 10014

Phone: (212) 243-1313

Toll-free: (800) 223-4044

Fax: (212) 675-0286

This organization provides legal services for ex-offenders with HIV, such as help with housing and employment discrimination.

New York AIDS Coalition (NYAC)

400 Broadway

New York, NY 10013

Phone: 646-744-1597

Fax: 212-334-7956

Brings together community-based HIV/AIDS organizations and their supporters to work for increased funding and fair policies for people living with HIV/AIDS in New York State.

The Osborne Association AIDS in Prison Project

809 Westchester Avenue

Bronx, NY 10455

Phone: (718) 707-2600

Fax: (718) 707-3102

E-mail: info@osborneny.org

AIDS in Prison Project Hotline (718) 378-7022 (T,W,R, 3:00 to 8:00 pm; collect calls accepted)

<http://www.osborneny.org>

<https://healthyoxfordhills.org/resources/aids-prison-projects-hotline/>

Provides information, counseling, education, placement in service organizations, and medical advocacy for incarcerated people in New York.

Prisoners' Rights Project of the Legal Aid Society

199 Water Street

New York, NY 10038

Phone: (212) 577-3300

Fax: (212) 509 8433

Provides services to incarcerated people only. It also helps incarcerated people in New York City and New York State with medical concerns and brutality cases.

Prisoners Legal Services of New York (PLSNY)

Albany Location:

41 State Street, Suite M112

Albany, NY 12207

Prisons served: Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Marcy, Midstate, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

Buffalo Location:

14 Lafayette Sq., Suite 510

Buffalo, NY 14203

Prisons served: Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Orleans, Rochester, Wende, Wyoming.

Ithaca Location:

114 Prospect St.

Ithaca, NY 14850

Prisons served: Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

Plattsburgh Location:

24 Margaret St., Suite 9

Plattsburgh, NY 12901

Prisons served: Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.

(Due to the large number of inquiries, PLSNY does not accept telephone calls from incarcerated people and their family members). PLSNY is a non-profit legal services organization providing civil legal services to indigent incarcerated people in New York State correctional facilities in cases where no other counsel is available.

Women's Prison Association

Reentry Unit

110 2nd Avenue

New York, NY 10003

Phone: General Info: (646) 292-7740

Reentry Services: (718) 637-6877

Fax: (646) 292-7763

*WPA **Reentry Services** include a full array of prison, jail, and community-based assistance aimed at helping women become full participants in community life following incarceration or other criminal justice involvement.*

AIDS Organizations in CaliforniaSan Francisco AIDS Foundation

1035 Market St, Ste. 400

San Francisco, CA 94103

Phone: (415) 487-8000

Fax: (415) 487-8079

<http://www.sfaf.org>

Provides vital services and programs designed to improve the quality of life for people living with HIV/AIDS and to reduce the number of new infections that occur each year.

Center for Health Justice

900 Avila Street, Stes. 102 & 301

Los Angeles, CA 90012

Phone: (213) 229-0985

Fax: (213) 229-0986

E-mail: info@healthjustice.net

<http://www.healthjustice.net>

Provides HIV legal and education information inside and outside correctional facilities.

Project Inform's National HIV/AIDS Treatment Hotline

273 Ninth Street

San Francisco, CA 94103

Toll-free: (800) 822-7422

Hours: Monday-Friday, 10:00 am to 4:00 pm Pacific Time (PT).

Nightline: (800) 628-9240

Hours: 5:00 pm to 5:00 am every day.

Provides legal and educational information for those with HIV/AIDS. Will mail out materials to incarcerated people and accepts collect calls from correctional institutions.

AIDS Project Los Angeles

611 South Kingsley Drive

Los Angeles, CA 90005

Phone: (213) 201-1600

<http://www.aplahealth.org/>

AIDS Organizations in IllinoisIllinois AIDS Hotline

Toll-free: (800) 243-2437 (in English, en Español)

Hours: daily 8:00 am to 10:00 pm Central Time (CT).

Up-to-date information on HIV transmission, HIV counseling and testing sites. Offers information and support resources, risk reduction. Bilingual.

AIDS Organizations in PennsylvaniaLewisburg Prison Project

115 Farley Circle, Suite 110

Spring Run Professional Park

Lewisburg, PA 17837

Phone: (570) 523-1104

Fax: (570) 523-3944

E-mail: info@lewisburgprisonproject.org

Non-profit organization that provides legal and other assistance to incarcerated people in Central Pennsylvania for non-criminal issues. Counsels and assists incarcerated people who encounter treatment they perceive as illegal or unfair, including medical treatment.

Pennsylvania AIDS Hotline

Toll-free: (800) 662-6080

Up-to-date information on HIV transmission, HIV counseling and testing sites. Offers information and support resources, risk reduction.

AIDS Organizations in Texas

Prism Health North Texas
351 West Jefferson Blvd. #300
Dallas, Texas 75208
Phone: (214) 521-5191
Fax: (214) 528-5879
TDD: (214) 231-0151
<http://www.phntx.org>

Assists individuals in accessing the healthcare, resources, and support necessary to successfully manage the challenges of living with HIV/AIDS. Assists incarcerated people in obtaining information regarding HIV/AIDS and other STIs.

AIDS Foundation Houston

6260 Westpark Dr. #100
Houston, TX 77057
Phone: (713) 623-6796
Fax: (713) 623-4029
E-mail: info@AFHouston.org
<http://www.aidshelp.org>

Special Prison Initiative Program. Prevention counseling, health education/risk reduction, HIV prevention education, STI prevention education, street outreach, peer education, case management for HIV/AIDS, hepatitis education/counseling, hotline/telephone counseling, peer counseling, food pantry, nutrition services, volunteer services, HOPWA, emergency financial assistance, clothing assistance, housing programs.

National Hepatitis B Organization

Hepatitis B Foundation
3805 Old Easton Rd.
Doylestown, PA 18902
Phone: (215) 489-4900
Fax: (215) 489-4920
E-mail: info@hepb.org

Hepatitis B Foundation provides information and support for people with Hepatitis B and supports research for a cure. It also offers an online support group.

CHAPTER 27

RELIGIOUS FREEDOM IN PRISON*

A. Introduction

While you are in prison, you have the right to observe and practice the religion of your choice.² The Constitution, as well as federal and state laws, protect this right. This Chapter describes these protections and explains how courts determine whether an incarcerated person's right to religious freedom has been violated. Part B of this Chapter discusses the First Amendment Establishment Clause. Part C discusses the First Amendment Free Exercise Clause and RLUIPA or RFRA protections. Part D discusses your rights under selected state statutes, and Part E considers recent developments in faith-based rehabilitation programs. The Appendix lists some religious organizations that may provide you with additional support.

1. Constitutional Protections

The First Amendment to the Constitution provides the most basic protection to your right to religious freedom. This Amendment says that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”³

The first part of the Amendment—“Congress shall make no law respecting an establishment of religion”—is known as the Establishment Clause. It prohibits government officials from establishing a national religion. Generally, this means that the government is not allowed to set up a religion, to aid one religion, to aid all religions, or to favor one religion over another.⁴

The second part of the First Amendment—“or prohibiting the free exercise thereof”—is known as the Free Exercise Clause. It means that government officials cannot prevent you from practicing your religion. However, under the Free Exercise Clause, prison officials can impose restrictions on your exercise of religion that are “reasonably related” to legitimate prison goals.⁵ In other words, you might be barred from performing a religious practice if the justification reasonably relates to the prison's legitimate aims. These justifications may include preventing crime, rehabilitating incarcerated people, and ensuring the internal security of the correctional facility.⁶

* See Chapter 2 of the *JLM*, “Introduction to Legal Research,” for information on how to conduct legal research in prison.

2. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688, 134 S. Ct. 2751, 2759, 189 L.Ed.2d 675, 689 (2014) (holding that the exercise of religion for the purposes of the Free Exercise Clause involves not only belief and profession, but the performance of, or abstention from, physical acts for religious reasons). See also *Cruz v. Beto*, 405 U.S. 319, 321–322, 92 S. Ct. 1079, 1081–1082, 31 L. Ed. 2d 263, 268 (1972) (finding that incarcerated people retain First Amendment protections, including its requirement that no law shall prohibit the free exercise of religion).

3. U.S. CONST. amend. I.

4. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S. Ct. 504, 511, 91 L. Ed. 711, 723 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

5. *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

6. See *Pell v. Procunier*, 417 U.S. 817, 822–823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501–502 (1974) (finding that deterrence of crime, rehabilitation of incarcerated people, and security within a correctional facility are legitimate prison goals); see also *McKune v. Lile*, 536 U.S. 24, 47–48, 122 S. Ct. 2017, 2032, 153 L.Ed.2d 47 (2002) (stating that sexual abuse treatment programs serve legitimate prison goals); *Procunier v. Martinez*, 416 U.S. 396, 412–413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 239 (1974) (finding preservation of internal order and discipline, maintenance of institutional security against escape or unauthorized entry, and rehabilitation of

Even though the Establishment Clause and the Free Exercise Clause are both part of the First Amendment, courts address these clauses separately. This Chapter will also address them separately.

2. Statutory Protections

The U.S. Congress and state legislatures pass laws that provide additional protections to your religious freedom. Depending on whether you are in a state or federal prison, different laws apply. If you are in a state prison, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) protects your religious freedom.⁷ If you are in a federal prison, the Religious Freedom Restoration Act of 1993 (RFRA) protects your religious freedom.⁸

Although RLUIPA and RFRA are two different laws, both use the same language to describe the religious free exercise protections given to incarcerated people.⁹ Therefore, if you are a federal incarcerated person protected by RFRA, this Chapter's discussion of RLUIPA can still help you figure out how strong your RFRA claims are. You can also cite cases decided under either RLUIPA or RFRA to support your claim, regardless of whether you are in federal or state prison.¹⁰

Some states have also enacted additional laws that further protect the religious freedom of incarcerated people in their correctional facilities. These laws are discussed in more detail in Part D of this Chapter.

3. Bringing a Religious Freedom Lawsuit

If you believe prison officials have violated your constitutional or statutory rights to religious freedom and you want to sue them, you will first need to follow your institution's administrative grievance procedure.¹¹ See Chapter 15 of the *JLM*, "Inmate Grievance Procedures," for further information on inmate grievance procedures.

If you do not receive a favorable result through the grievance procedure, you can file suit in federal court. Depending on which type of prison you are in, you will need to bring different types of claims. If you are incarcerated in a state facility, you should bring a RLUIPA claim under 42 U.S.C. § 2000cc and a First Amendment claim under 42 U.S.C. § 1983. If you are incarcerated in a federal facility, you should bring a RFRA claim under 42 U.S.C. § 2000bb and a First Amendment claim in a *Bivens* action.¹²

incarcerated people are justifiable interests of the government), *overruled on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401, 413–414, 109 S. Ct. 1874, 1881–1882, 104 L. Ed. 2d 459, 473 (1989).

7. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. §§ 2000cc-cc-5 (codifying that no government shall impose a substantial burden on the religious exercise of a person in jail unless the government demonstrates that the burden serves a compelling governmental interest and does so by the least restrictive means).

8. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb-bb-4.

9. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc-1(a); Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-(1)(a)–(b). *See* *Lovelace v. Lee*, 472 F.3d 174, 182 (4th Cir. 2006) (finding that Congress enacted RLUIPA in response to restrictions on religious liberties in prisons that were "egregious and unnecessary," and applying the statute such that, when a prison substantially burdens an inmate's exercise of religion, the prison must demonstrate that imposing the burden serves a compelling government interest and does so by the least restrictive means).

10. *See, e.g.,* *Fowler v. Crawford*, 534 F.3d 931, 938 (8th Cir. 2008) (holding that a RFRA case "dictate[d] the outcome" in the RLUIPA case before the court).

11. *See* Prison Litigation Reform Act (PLRA) of 1995, 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); *Cutter v. Wilkinson*, 544 U.S. 709, 723 n.12, 125 S. Ct. 2113, 2123 n.12, 161 L. Ed. 2d 1020, 1035 n.12 (2005) ("[A] prisoner may not sue under RLUIPA without first exhausting all available administrative remedies."); *Jackson v. District of Columbia*, 254 F.3d 262, 266–67 (D.C. Cir. 2001) (holding that PLRA's requirement that incarcerated people exhaust all available administrative remedies applies in actions brought under RFRA).

12. A *Bivens* action allows incarcerated people to sue federal officials for constitutional violations. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal

Regardless of which types of claims you bring, when you draft your complaint, you should be sure to begin by asserting a RLUIPA claim (if you are incarcerated by the state government) or a RFRA claim (if you are incarcerated by the federal government), followed by a First Amendment claim. This is because it is easier to meet the RLUIPA or RFRA standards than the First Amendment standards. You are therefore more likely to receive relief under RLUIPA or RFRA than under the First Amendment.¹³

If you are incarcerated in a state facility, you can also file an action in a state court. If you are in a New York state prison, you can either file an action in the Court of Claims, or you can file an Article 78 petition, depending on what kind of relief you want. More information on all of these types of cases can be found in Chapter 5 of the *JLM*, “Choosing a Court and a Lawsuit,” Chapter 14 of the *JLM*, “Prison Litigation Reform Act,” Chapter 16 of the *JLM*, “42 U.S.C. § 1983 and *Bivens* actions,” Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” and Chapter 22 of the *JLM*, “How To Challenge Decisions Using Article 78 of the New York Civil Practice Law and Rules.”

If you end up pursuing any claim in federal court, you should make sure to read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” on the Prison Litigation Reform Act (PLRA) before you file your claim. If you do not follow PLRA requirements, you can, among other things, lose your good time credit and your right to bring future claims in federal court without paying the full filing fee.

B. The First Amendment Establishment Clause

The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion.”¹⁴ This means that neither the federal government nor the states may set up a religion, aid all religions, aid one religion, or favor one religion over another.¹⁵ Thus, prison officials violate the Establishment Clause if they give special treatment to certain religious groups. For example, if prison officials were to set up a church within the prison and force incarcerated people to attend religious services, their actions would violate the Establishment Clause.¹⁶

Law,” for a detailed discussion. *See also* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72, 122 S. Ct. 515, 522, 151 L. Ed. 2d 456, 467 (2001) (finding that a federal incarcerated person alleging a constitutional violation can bring a *Bivens* claim against the offending federal officer).

13. *See* *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) (“RLUIPA...mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment].”); *see also* *Smith v. Allen*, 502 F.3d 1255, 1265–1266 (11th Cir. 2007) (noting that RLUIPA affords more “protection from government-imposed burdens” than the First Amendment does), *abrogated on other grounds by* *Sossamon v. Texas*, 563 U.S. 277, 293, 131 S. Ct. 1651, 1663, 179 L. Ed. 2d 700, 714 (2011); *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *11 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (noting that RLUIPA provides more expansive protections than the First Amendment does for those in the custody of the state, as it prohibits “institutions that receive federal funding from substantially burdening an inmate’s exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.”).

14. U.S. CONST. amend. I.

15. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216, 8 S. Ct. 1560, 1568, 10 L. Ed. 2d 844, 855 (1963) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S. Ct. 504, 511, 91 L. Ed. 711, 723 (1947)) (“[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another”); *Wallace v. Jaffree*, 472 U.S. 38, 60–61, 105 S. Ct. 2479, 2492, 86 L. Ed. 2d 29 (1985) (finding state laws violated the Establishment Clause because they “conveyed a message of endorsement” of a particular religion); *Buckley v. Valeo*, 424 U.S. 1, 92, 96 S. Ct. 612, 669, 46 L. Ed. 2d 659, 729 (1976) (stating the government may not aid one religion at the harm of another religion; the government may not place a burden on one religion that is not placed on others; and the government may not even help all religions), *overruled on other grounds by* *Citizens United v. Fed. Election Com’n*, 558 U.S. 301, 130 S. Ct. 876 (2010); *Cantwell v. Conn.*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218 (1940) (applying the Establishment Clause to the states).

16. *See* *Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980) (holding that allowing religious volunteers into a cell block did not violate the Establishment Clause, but that prison officials were required to make sure

In order for your Establishment Clause claim to succeed, you will first need to prove that there was “government action.” This is often referred to as “state action.” The Supreme Court has held that “state action may be found. . . only if. . . there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”¹⁷ In other words, the connection between the State and the behavior of the private individual or organization must be so close that it seems as though the State caused the individual or organization to perform the action.

Generally, courts will consider actions by prison officials and private groups acting under the authority of prison officials to be state action.¹⁸ For example, in 2007, the Court of Appeals for the Seventh Circuit held that when a department of corrections gave private religious organizations the power to incarcerate, treat, and discipline incarcerated people, as well as access to facilities and substantial aid to support a faith-based program, those religious organizations were considered to be state actors.¹⁹

Unauthorized actions by individuals, on the other hand, may be less likely to constitute state action. For example, in 1998 the Court of Appeals for the Ninth Circuit held that there was no state action when a prison officer, who was also a Christian minister, brought his Bible to work and put it in the view of incarcerated people, sang Christian songs, debated and discussed religion with incarcerated people, and tried to convert incarcerated people to Christianity.²⁰ The court found no Establishment Clause violation because the officer had no authority to make religious policies for the jail.²¹ Additionally, the jail had not ratified or endorsed the officer’s actions, had trained its staff to avoid such conduct, and had transferred the officer soon after the plaintiff complained.²²

After you show that the practice or regulation you are challenging constitutes government action, you will need to prove that this action violates the Establishment Clause. Courts use different tests to determine whether a prison regulation or practice violates the Establishment Clause.²³ These tests include the *Lee* coercion test²⁴ and the *Lemon* test.²⁵ Both tests are explained below. While some courts

that no incarcerated people were subjected to forced religious indoctrination).

17. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295, 121 S. Ct. 924, 930, 148 L. Ed. 2d 807, 817 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 453, 42 L. Ed. 2d 477 (1974)) (finding that a not-for-profit athletic association’s enforcement of penalties against a private school’s violation of athletic recruiting rules constituted “state action” because of the association’s significant connections to public institutions and public officials).

18. *See Monroe v. Pape*, 365 U.S. 167, 184, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492, 503 (1961) (finding that constitutional violations committed by state officers in performance of their duties were committed “under color of” state law, and rejecting the argument “that under color of state law included only action taken by officials pursuant to state law”), *overruled on other grounds by* *Monell v. Dep’t of Soc. Serv. of N.Y.*, 436 U.S. 658, 663, 98 S. Ct. 2018, 2022, 56 L. Ed. 2d 611, 619 (1978); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) (“Although [the defendant] and its employees are not strictly speaking public employees, state action is clearly present. Where a function which is traditionally the exclusive prerogative of the state ... is performed by a private entity, state action is present.”).

19. *Am. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 421–423 (8th Cir. 2007).

20. *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998).

21. *Canell v. Lightner*, 143 F.3d 1210, 1213–1214 (9th Cir. 1998).

22. *Canell v. Lightner*, 143 F.3d 1210, 1213–1214 (9th Cir. 1998).

23. *See Ross v. Keelings*, 2 F. Supp. 2d 810, 816–818 (E.D. Va. 1998) (noting that courts have sometimes used the *Lemon* test and other times declined to apply the *Lemon* test in favor of the *Lee* test).

24. *See Lee v. Weisman*, 505 U.S. 577, 578, 112 S. Ct. 2649, 2655, 120 L. Ed. 2d 467, 480 (1992); *Warner v. Orange Cty. Dep’t of Probation*, 115 F.3d 1068, 1074–1075 (2d Cir. 1997) (applying the *Lee* coercion test to determine whether a probation practice violates the Establishment Clause); *Warburton v. Underwood*, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998) (holding that while proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient).

25. *See Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); *Kaufman v. McCaughtry*,

have combined these tests,²⁶ the Supreme Court has yet to rule that either of these tests represents the only constitutional standard.²⁷ As a result, you should try to argue in your complaint that the challenged prison regulation or practice fails both of the Establishment Clause tests.

1. The *Lee* Coercion Test

To determine whether a prison regulation or practice violates the First Amendment's Establishment Clause, a court may ask whether it amounts to "coercion." In *Lee v. Weisman*, the U.S. Supreme Court announced that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise[.]"²⁸ Applying this rule, the Court held that it was unconstitutional for public schools to force students to participate in prayer at their graduation ceremonies.²⁹ More specifically, the court ruled that a policy that allowed public schools to invite clergy

members to recite prayer at graduation failed the coercion test because it constituted forced participation in religion.³⁰

Although *Lee* dealt with religious freedom in the school context, other lower courts have held that a showing of coercion alone may be sufficient to prove an Establishment Clause violation in the prison or probation context.³¹

For instance, in *Kerr v. Farrey*, an incarcerated person brought a federal civil rights claim against state corrections officials.³² The incarcerated person alleged that the officials required him to attend religious-based Narcotics Anonymous meetings as part of his rehabilitation.³³ The Seventh Circuit Court of Appeals applied the *Lee* coercion rule by asking three questions: (1) whether there was state action, (2) whether the action was coercive or forceful, and (3) whether the object of the coercion was religious or secular (meaning non-religious).³⁴

In answering these three questions, the court found that the prison program violated the Establishment Clause's prohibition against the state's favoring religion over non-religion. First, there was state action, because the state had acted through the prison officials by forcing the incarcerated person to participate in the Narcotics Anonymous meetings. Second, the state action was coercive or

419 F.3d 678, 683–684 (7th Cir. 2005) (applying the *Lemon* test to determine whether a prison practice violates the Establishment Clause). *But see* Gray v. Johnson, 436 F. Supp. 2d 795, 799 n.4 (W.D. Va. 2006) ("When deciding similar cases, the Second Circuit, the Seventh Circuit, and the Eastern District of Virginia have opted to apply a more basic coercion test in lieu of *Lemon*. These courts have simply examined whether the challenged program accomplished coerced religious participation, finding each time that the program did.").

26. *See, e.g.*, Gray v. Johnson, 436 F. Supp. 2d 795, 799 n.4 (W.D. Va. 2006) (explaining how the Fourth Circuit has incorporated both the coercion and endorsement tests into the *Lemon* test's second prong).

27. *See* Van Orden v. Perry, 545 U.S. 677, 685–686, 125 S. Ct. 2854, 2860–2861, 162 L. Ed. 2d 607, 615–616 (2005) (explaining that in many cases, the Supreme Court has either not relied on the *Lemon* test or has applied it only after concluding that a regulation was invalid under a different First Amendment Establishment test); *Lee v. Weisman*, 505 U.S. 577, 597, 112 S. Ct. 2649, 2660–2661, 120 L. Ed. 2d 467, 487 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one."); *County of Allegheny v. ACLU*, 492 U.S. 573, 595, 109 S. Ct. 3086, 3102, 106 L. Ed. 2d 472, 496 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S. Ct. 1355, 1370, 79 L. Ed. 2d 604, 623 (1984)) ("Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion."); *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S. Ct. 1355, 1362, 79 L. Ed. 2d 604, 613 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

28. *Lee v. Weisman*, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655, 120 L. Ed. 2d 467, 480 (1992).

29. *Lee v. Weisman*, 505 U.S. 577, 599, 112 S. Ct. 2649, 2661, 120 L. Ed. 2d 467, 488 (1992).

30. *Lee v. Weisman*, 505 U.S. 577, 599, 112 S. Ct. 2649, 2661, 120 L. Ed. 2d 467, 488 (1992).

31. *See, e.g.*, *Warburton v. Underwood*, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998) (holding proof of government coercion is sufficient but not necessary to prove an Establishment Clause violation).

32. *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996).

33. *Kerr v. Farrey*, 95 F.3d 472, 473–474 (7th Cir. 1996). For a more detailed discussion of faith-based addiction treatment options, see Part E of this Chapter.

34. *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996).

forceful, because the penalty for not attending the meetings was a higher security risk classification and negative effects on the incarcerated person's parole eligibility. And, third, the object of the coercion was religious, because the Narcotics Anonymous meetings contained a religious element.³⁵ Similarly, in *Warner v. Orange County Department of Probation*, the Second Circuit Court of Appeals concluded that because the department of probation had required an incarcerated person to attend a religious Alcoholics Anonymous program as a condition of probation, it "plainly constituted coerced participation in religious exercise" and thus violated the Establishment Clause.³⁶

2. The *Lemon* Test

If you are unable to show that the prison regulation or practice amounted to coercion, you might still have a valid First Amendment claim under the *Lemon* test.³⁷ This test, which comes from the U.S. Supreme Court's decision in *Lemon v. Kurtzman*,³⁸ is a "central tool" in the court's analysis of Establishment Clause cases³⁹ and is frequently cited. Therefore, you should be prepared to argue that the regulation that you are complaining about fails the *Lemon* test.

In order to demonstrate a violation of the Establishment Clause under the *Lemon* test, you must show one or more of the following:

- (1) The regulation has a non-secular (religious) purpose,
- (2) Its principal or primary effect is to advance or inhibit religion, or
- (3) It fosters excessive government entanglement with religion.⁴⁰

In assessing the first part, a court may be more likely to find that a prison regulation or practice has a non-religious purpose if it permits the presentation of more than one religious view. For example, in *Murphy v. Missouri Department of Corrections*, the Eighth Circuit Court of Appeals found that a prison had not violated the Establishment Clause when it allowed a "broad spectrum" of religious programming to be shown on prison television, but refused to show programs of a specific incarcerated person's religious group.⁴¹ A central tenet of the incarcerated person's religion was that "its members must all be Caucasian because they are uniquely blessed by God and must separate themselves from all non-Caucasian persons."⁴² The court explained that the prison's "purpose in providing the religious channel was to create a forum in which a large range of religious messages could air, subject only to

35. *Kerr v. Farrey*, 95 F.3d 472, 479–480 (7th Cir. 1996). *See also* *Warner v. Orange Cty. Dep't of Probation*, 115 F.3d 1068, 1074–1075 (2d Cir. 1996), *vacated on other grounds by* 115 F.3d 1068 (2d Cir. 1997) (holding that the county probation department could be held liable for violating the Establishment Clause by requiring a probationer to attend Alcoholics Anonymous meetings that contained religious content); *Ross v. Keelings*, 2 F. Supp. 2d 810, 818 (E.D. Va. 1998) (holding that prison officials violated the Establishment Clause by forcing an incarcerated person attend a drug rehabilitation program that included a religious study component). *But see* *Quigg v. Armstrong*, 106 F. App'x 555, 556 (9th Cir. 2004) (holding that a privately-run pre-release program that served as an alternative to prison was free to offer religion-based treatment without providing nonreligious alternatives because the program employees were not state actors).

36. *Warner v. Orange Cty. Dep't of Probation*, 115 F.3d 1068, 1076 n.8 (2d Cir. 1996), *vacated on other grounds by* 115 F.3d 1068 (2d Cir. 1997).

37. *See* *Alexander v. Schenk*, 118 F. Supp. 2d 298, 301 (N.D.N.Y. 2000) ("In cases not involving coercion courts are required to examine whether practice [satisfies the *Lemon* test].").

38. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) (finding that the state cannot give direct aid to parochial schools), *noted in* *Zelman v. Simmons-Harris*, 536 U.S. 639, 668–670, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627–628 (2002). The *Lemon* test has not been used recently by the Supreme Court, and some authors have suggested that the Supreme Court may abandon it. However, as recently as 2005, the Supreme Court affirmed a district court judge's use of the first factor of the test, and refused to abandon the "purpose" factor. *See* *McCreary Cty. v. ACLU*, 545 U.S. 844, 859, 125 S. Ct. 2722, 2733, 162 L. Ed. 2d 729, 746 (2005).

39. *Zelman v. Simmons-Harris*, 536 U.S. 639, 668, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627 (2002) (O'Connor, J., concurring).

40. *Lemon v. Kurtzman*, 403 U.S. 602, 612–613, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745, 755 (1971).

41. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 985 (8th Cir. 2004).

42. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 981 (8th Cir. 2004).

[the department of corrections'] economic and security concerns.”⁴³ The court found no evidence that the prison favored any one religion in its programming; the individual incarcerated person's religious programming posed a security risk that other religious programming did not.⁴⁴ Therefore, the prison did not violate the Establishment Clause when it aired other religious programming but refused to air the individual incarcerated person's religious programming.⁴⁵

Similarly, in *Gray v. Johnson*, a district court found that a prison substance abuse program that involved some discussion of religion at non-mandatory Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings and offered both secular and religious library materials did not amount to a violation of the Establishment Clause, even if some participants had sung a gospel song at a talent show and preached religion outside of the program.⁴⁶ The court held the residential substance abuse treatment program for incarcerated people passed the *Lemon* test because a reasonable observer would not interpret religious activities taking place within the broader program as advancement of religion by the state, since all activities involved free expression by program participants.⁴⁷ The program's dominant purpose was to rehabilitate inmates with a history of substance abuse, which the court found was not a sham secular purpose.⁴⁸

By contrast, the Seventh Circuit Court of Appeals found in *Kaufman v. McCaughtry* that a prison violated the Establishment Clause by refusing to allow incarcerated people to organize an atheist study group.⁴⁹ The prison had failed to show why such a gathering would pose a greater security risk than meetings of incarcerated people of other faiths.⁵⁰ Thus, the court vacated a grant of summary judgment for the prison because it had not given a non-religious purpose for discrimination against the atheist group.⁵¹

In assessing the second and third parts of the *Lemon* test, which some courts have treated as a single question,⁵² courts have looked to whether the challenged practice either endorses or disapproves of religion.⁵³

In summary, to bring a successful First Amendment Establishment Claim, you should be able to show:

- (1) The practice or regulation that you are challenging is a government action, and either;
- (2) The practice or regulation fails the *Lee* test because it has the effect of coercing you to practice religion, or;
- (3) If there is no coercion, the practice or regulation fails the *Lemon* test because it either (a) has a religious purpose; (b) endorses, advances, or inhibits a religion; or (c) constitutes an excessive government entanglement with religion.

43. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 985 (8th Cir. 2004).

44. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 985 (8th Cir. 2004).

45. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 985 (8th Cir. 2004).

46. *Gray v. Johnson*, 436 F. Supp. 2d 795, 800 (W.D. Va. 2006).

47. *Gray v. Johnson*, 436 F. Supp. 2d 795, 801 (W.D. Va. 2006).

48. *Gray v. Johnson*, 436 F. Supp. 2d 795, 800 (W.D. Va. 2006).

49. *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005).

50. *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005).

51. *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005).

52. *See Bader v. Wren*, 532 F. Supp. 2d 308, 313 (D.N.H. 2008) (“The second and third questions have been fused into one, because the same evidence often answers both questions.”); *Zelman v. Simmons-Harris*, 536 U.S. 639, 668–669, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627 (2002) (O'Connor, J., concurring) (“[T]he degree of entanglement has implications for whether a statute advances or inhibits religion.”); *Agostini v. Felton*, 521 U.S. 203, 232–233, 117 S. Ct. 1997, 2015, 138 L. Ed. 2d 391, 420 (1997) (combining excessive entanglement into the effects inquiry).

53. *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S. Ct. 1355, 1368, 79 L. Ed. 2d 604, 621 (1984) (O'Connor, J., concurring) (“The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.”).

C. The First Amendment Free Exercise Clause, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and the Religious Freedom Restoration Act (RFRA)

This section discusses your religious freedom rights under the First Amendment Free Exercise Clause and RLUIPA or RFRA.⁵⁴ Although this section begins with a description of the First Amendment Free Exercise Clause, it is absolutely critical that, when drafting a complaint, you state a claim for relief under RLUIPA or RFRA first. The RLUIPA or RFRA standards are easier to meet than the First Amendment standards, so you are more likely to receive relief under RLUIPA or RFRA than under the First Amendment.⁵⁵ After you make your RLUIPA or RFRA claim, you can then make an additional First Amendment claim.

1. First Amendment Free Exercise Clause

Before the enactment of the Religious Freedom Restoration Act, under the Free Exercise Clause of the First Amendment,⁵⁶ prison officials had to provide you with a “reasonable opportunity” for you to exercise your religious freedom without fear of penalty.⁵⁷

However, in certain circumstances, prison officials may restrict this right to exercise or practice your religious beliefs.⁵⁸ Specifically, a prison may lawfully impose rules or regulations that interfere with your sincerely held religious beliefs, provided that these rules or regulations are “reasonably related” to a “legitimate penological purpose or goal” of the prison.⁵⁹ These legitimate goals might include maintaining prison order, discipline, safety, and security, among others.⁶⁰

So, in order to successfully challenge a prison regulation or practice under the Free Exercise Clause, you must be able to show that:

- (1) Your belief is religious in nature,⁶¹

54. RLUIPA and RFRA provide essentially the same protections; the main difference is that RLUIPA applies to state and municipal incarcerated people, while RFRA applies to federal incarcerated people. *See* Cutter v. Wilkinson, 544 U.S. 709, 715, 125 S. Ct. 2113, 2118, 161 L. Ed. 2d 1020, 1030 (2005) (noting that courts of appeals have held that RFRA remains operative on the federal government and explaining that RLUIPA applies to state and local governments).

55. *See* Shakur v. Schriro, 514 F.3d 878, 888 (9th Cir. 2008) (“RLUIPA . . . mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment.]”).

56. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

57. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263, 268 (1972), *superseded by statute, RFRA*. In the *Cruz* case, a Buddhist incarcerated person was not allowed to use the prison chapel and was placed in solitary confinement for sharing his Buddhist religious materials with other inmates. The court found he was “denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts.”

58. *See* O’Lone v. Estate of Shabazz, 482 U.S. 342, 353, 107 S. Ct. 2400, 2406, 96 L. Ed. 2d 282, 292 (1987) (restricting incarcerated people who were on work detail from participating in Jumu’ah did not violate the Constitution because it was reasonably related to legitimate penological objectives of security and rehabilitation), *superseded by statute, RFRA*.

59. *See* O’Lone v. Estate of Shabazz, 482 U.S. 342, 349–350, 107 S. Ct. 2400, 2404–2405, 96 L. Ed. 2d 282, 290 (1987) (*superseded by statute, RFRA*); *Washington v. Harper*, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (1990).

60. *See* Pell v. Procunier, 417 U.S. 817, 822–823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501–502 (1974) (“[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as an incarcerated person or with the legitimate penological objectives of the corrections system,” including deterrence of crime, protection of society, rehabilitation of the inmate, and internal security within corrections facilities); *Procunier v. Martinez*, 416 U.S. 396, 412, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 239 (1974) (“The identifiable governmental interests at stake in [the maintenance of prison institutions] are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.”), *overruled on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401, 413–414, 109 S. Ct. 1874, 1881–1882, 104 L. Ed. 2d 459, 473 (1989).

61. *See* *Wisconsin v. Yoder*, 406 U.S. 205, 209, 92 S. Ct. 1526, 1530, 32 L. Ed. 2d 15, 21 (1972) (finding that the beliefs of Amish parents were (1) religious and (2) sincere enough to support their challenge of a state law

- (2) Your belief is sincerely held, and
- (3) The prison regulation is not reasonably related to a legitimate penological (prison) purpose or goal.⁶²

The answer to the first two questions must be “yes” before a court will consider whether the regulation is reasonably related to a legitimate purpose or goal.⁶³ The following section looks at each of these requirements in more detail.

(a) Religious Nature of Your Beliefs

The court will first decide whether your beliefs are religious.⁶⁴ The First Amendment only protects religious beliefs; therefore, if the court determines that your beliefs are simply moral or philosophical, it will not find any violation of the Free Exercise Clause.⁶⁵

While this rule is fairly clear, courts have had difficulty defining exactly what constitutes a religious belief.⁶⁶ The Supreme Court has cautioned that “[t]he determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task,”⁶⁷ and the court has not yet authoritatively or comprehensively defined “religion.”⁶⁸

Without a fixed definition, lower courts have adopted various approaches. For example, the Third Circuit has adopted an objective test to determine whether a belief is religious. In *Africa v. Pennsylvania*, the court identified three factors that help distinguish a religion:

that required school attendance for their children). *Yoder* was overruled by the Supreme Court in *Employment Division v. Smith*, 494 U.S. 872, 874 (1990). However, when Congress passed the RFRA, it intended to restore the principles of *Yoder* and prevent such burdens on religious exercise in the future. RFRA's stated purpose is to “restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1).

62. See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350, 107 S. Ct. 2400, 2405, 96 L. Ed. 2d 282, 291 (1987) (finding the prison’s restriction on incarcerated people who were on work detail from weekly Muslim religious services was reasonably related to legitimate penological goals. In addition, incarcerated people were able to participate in other religious ceremonies.).

63. See *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 983 (8th Cir. 2004) (“In analyzing [a First Amendment Free Exercise Claim], we consider first the threshold issue of whether the challenged governmental action ‘infringes upon a sincerely held religious belief,’ and then apply the *Turner* factors to determine if the regulation restricting the religious practice is ‘reasonably related to legitimate penological objectives.’” (internal citations omitted)).

64. See *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (considering first whether beliefs of Amish parents were religious and sincere enough to support their challenge of a state law that required children to attend school before considering whether state law was reasonably related to a legitimate purpose or goal).

65. See *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

66. See, e.g., *Cloutier v. Costco Wholesale*, 311 F. Supp. 2d 190, 196 (D. Mass. 2004) (“[C]ourts are poor arbiters of questions regarding what is religious and what is not.”).

67. *Thomas v. Review Bd.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624, 631 (1981).

68. See Scott C. Idleman, *The Underlying Causes of Divergent First Amendment Interpretations*, 27 Miss. C. L. Rev. 67, 73–79 (2008). The most the Supreme Court has been willing to describe religion is as in the following cases: *Davis v. Beason*, 133 U.S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637, 640 (1890), *overruled on other grounds* by *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (“The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593, 60 S. Ct. 1010, 1012, 84 L. Ed. 1375, 1378 (1940), *overruled on other grounds* by *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (describing religion as “the affirmative pursuit of one’s convictions about the ultimate mystery of the universe and man’s relation to it . . .”); *Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (stating that “philosophical and personal rather than religious” beliefs are not protected by the Constitution).

- (1) A religion addresses fundamental and ultimate questions having to do with deep and imponderable matters;
- (2) A religion is comprehensive in nature: it consists of a belief-system as opposed to an isolated teaching; and
- (3) A religion often can be recognized by the presence of certain formal and external signs.⁶⁹

By contrast, the Second Circuit has adopted a more subjective test, that looks towards the “individual’s inward attitudes towards a particular belief system” instead of the external features of the belief system.⁷⁰ In *Patrick v. LeFevre*, the court described religion as “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.”⁷¹ Thus, courts in the Second Circuit will probably look to whether your beliefs are religious in your “own scheme of things.”⁷²

These tests are not the only ones used in state or federal courts, so be sure to research the law in your state or federal circuit. Although predicting whether a particular court will recognize a particular belief system as a religion is hard, you should be aware of some guideposts.

First, the U.S. Supreme Court has stated that the main consideration in deciding whether beliefs are religious is the role they play in the life of the person making the claim.⁷³ Second, the Supreme Court has emphasized that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”⁷⁴ Likewise, your religion does not need to be organized like a traditional church,⁷⁵ conform to an established doctrine,⁷⁶ or otherwise meet any organizational or doctrinal test.⁷⁷

For example, a federal district court recently held that an incarcerated person who had invented his own religion had a potentially valid claim under the First Amendment and RLUIPA.⁷⁸ In

69. *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (citing *Malnak v. Yogi*, 592 F.2d 197, 207–210 (3d Cir. 1979)) (holding that although members of the MOVE organization, a “revolutionary organization absolutely opposed to all that is wrong,” held sincere beliefs, these beliefs did not amount to a religion).

70. *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (holding that subjective issues of sincerity of belief and the perceived religious nature of that belief are questions of fact, rather than law, and reversing and remanding the lower court’s grant of summary judgment for further consideration of the incarcerated person’s request for religious recognition).

71. *Patrick v. LeFevre*, 745 F.2d 153, 158 (2d Cir. 1984) (quoting *United States v. Sun Myung Moon*, 718 F.2d 1201, 1227 (2d Cir. 1983) (quoting W. James, *The Varieties of Religious Experience* 31 (1910))). This definition is similar to the Supreme Court’s description of religious belief as one “based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.” *United States v. Seeger*, 380 U.S. 163, 176, 85 S. Ct. 850, 859, 13 L. Ed. 2d 733, 743 (1965); accord *Welsh v. United States*, 398 U.S. 333, 339–341, 90 S. Ct. 1792, 1796–1797, 26 L. Ed. 2d 308, 318–320 (1970).

72. *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984); *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965)).

73. *See* *U.S. v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965) (“[C]ourts . . . are not free to reject beliefs because they consider them ‘incomprehensible.’ Their task is to decide whether the beliefs professed by a [prisoner] are sincerely held and whether they are, in his own scheme of things, religious.”).

74. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624, 631 (1981).

75. *See, e.g., Marria v. Broaddus*, No. 97 Civ. 8297, 2003 U.S. Dist. LEXIS 13329, at *26–29 (S.D.N.Y. July 31, 2003) (*unpublished*) (finding the incarcerated person’s beliefs as a member of the Nation of Gods and Earths to be sincere and religious, despite it being a non-traditional religious organization).

76. *See Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1163 (6th Cir. 1980) (finding that “there is no requirement that a religion meet any organizational or doctrinal test,” that “[o]rthodoxy is not an issue” and that “[t]he Cherokees have a religion within the meaning of the Constitution. . .”).

77. *See Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1163 (6th Cir. 1980) (finding that despite having “no written creeds and no man-made houses of worship . . . [t]he Cherokees have a religion within the meaning of the Constitution . . .”).

78. *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *13 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (finding that an incarcerated person who had created his own religion, which he referred to as the “Religious Society of Atlantis and the Sanctuary of the Yahweh,” had a potentially valid claim under the First Amendment and RLUIPA).

DeSimone v. Bartow, the incarcerated person argued that prison officials had violated his right to free exercise of religion when they prohibited him from keeping journals written in a language that he invented.⁷⁹ The incarcerated person asserted that he believed that biblical scripture commanded him to write in this language and that the act of writing was itself a religious act.⁸⁰ The court accepted his argument and allowed the suit to proceed, finding that the incarcerated person had set forth cognizable claims under both the First Amendment and RLUIPA.⁸¹

Note, however, that although courts have held that non-major religions are entitled to First Amendment protection,⁸² you may encounter greater difficulty if your religion is not well-known.

(b) Sincerity of Your Beliefs

If the court determines your belief is religious, it will next consider whether your belief is sincerely held.⁸³ Prison officials and courts may require that you demonstrate “sincerity,” meaning a true and deep commitment to your religion.⁸⁴

In making this decision, courts are not supposed to judge whether your beliefs are “accurate or logical,”⁸⁵ or rule on the correctness of your beliefs.⁸⁶ Thus, a court may still find your belief sincerely held, even if the clergy says you are not a member of the religion.⁸⁷ Indeed, “clergy opinion has generally been deemed insufficient to override an incarcerated person’s sincerely held religious belief.”⁸⁸

79. *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *10 (E.D. Wis. Aug. 12, 2008) (*unpublished*).

80. *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *12 (E.D. Wis. Aug. 12, 2008) (*unpublished*).

81. *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *13 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (“DeSimone’s allegations can be understood to allege that he considers writing in Atlantean as central to his faith, and that the Defendants have targeted his writing, as opposed to the writings of other inmates in foreign languages, because of his uncommon religious beliefs. Thus, Desimone will be permitted to proceed with his claims that by forbidding him from writing in Atlantean, the Defendants violated the First Amendment and RLUIPA.”), *dismissed on other grounds*, No. 08-C-638, 2009 U.S. Dist. LEXIS 48689 (E.D. Wis. June 10, 2009).

82. *See Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) (“[W]e must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs.”).

83. *See generally Wisconsin v. Yoder*, 406 U.S. 205, 207, 92 S. Ct. 1526, 1529, 32 L. Ed. 2d 15, 20 (1972) (holding that Amish children could be exempted from required high school attendance because formal education beyond eighth grade violated sincerely held Amish religious beliefs).

84. *Cf. United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965) (holding that a belief must be “sincerely held” to qualify a believer for exemption from service in the armed forces).

85. *See Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (“In determining whether a prisoner’s particular religious beliefs are entitled to free exercise protection, the relevant inquiry is not whether, as an objective matter, the belief is ‘accurate or logical.’” (quoting *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996))).

86. *Cf. Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 451–452, 89 S. Ct. 601, 607, 21 L. Ed. 2d 658, 666–667 (1969) (holding that the Constitution prohibits a court from interpreting church doctrine to settle a property dispute that depends upon whether a group is adhering to the doctrine); *Bear v. Nix*, 977 F.2d 1291, 1294 (8th Cir. 1992) (holding that a court would unconstitutionally intrude upon a good faith “application of religious doctrine by a recognized spiritual leader of the relevant faith” if it overruled a refusal to admit plaintiff into a Native American religion).

87. *See Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (remanding case in which a lower court incorrectly evaluated the incarcerated person’s claim that he was Jewish by relying on a chaplain’s report that the incarcerated person was not Jewish, rather than determining whether the incarcerated person’s belief was “sincerely held”).

88. *Koger v. Bryan*, 523 F.3d 789, 799–800 (7th Cir. 2008) (citing *Ford v. McGinnis*, 352 F.3d 582, 593–594 (2d Cir. 2003)) (holding that an incarcerated person’s belief regarding the importance of the Eid ul Fitr feast to his practice of Islam and not the testimony of Muslim clerics as to the proper celebration of the feast was determinative of whether the prison’s decision to deprive incarcerated people of a post-Eid meal constituted a substantial burden on his freedom of religion); *Jackson v. Mann*, 196 F.3d 316, 320–321 (2d Cir. 1999) (holding that it was the sincerity of an incarcerated person’s beliefs, and not the decision of Jewish religious authorities, that determined whether the incarcerated person was an adherent of Judaism entitled to a kosher meal); *cf.*

Instead, courts will look to factors including your familiarity with your faith's teachings,⁸⁹ your demonstrated observance of its rules,⁹⁰ and the length of time that you have practiced these religious beliefs.⁹¹ Thus, evidence that you are familiar with your religion, have practiced it for a long time, have participated in religious ceremonies when possible, or have otherwise acted on the basis of your religion can help to establish the sincerity of your religious beliefs.

(c) The Validity of Prison Rules and Regulations

If the court decides your belief is religious and sincerely held, it will then apply the *Turner* test to the prison regulation or practice that you are challenging by asking whether a prison regulation "is reasonably related to legitimate penological interests," and therefore does not violate your constitutional rights.⁹² Specifically, under *Turner*, a court will consider the following four factors:

- (1) Whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest used to justify it;
- (2) Whether there are other ways of exercising the right despite the regulation;
- (3) If, by allowing you to exercise your right, there will be a "ripple effect" on others such as prison personnel, other incarcerated people, and on the allocation of prison resources; and
- (4) Whether there is a different way for the prison to meet the regulation's goal without limiting your right in this way.⁹³

When evaluating the first factor, courts have deferred to the judgment of prison officials and found that prison security is a legitimate governmental interest.⁹⁴ This means courts are not likely to second-

Frazee v. Ill. Dept. of Employment Sec., 489 U.S. 829, 834, 109 S. Ct. 1514, 1517–1518, 103 L. Ed. 2d 914, 920 (1989) (holding that in the context of a denial of unemployment benefits, the plaintiff's refusal to work on Sundays based on his personal professed religious belief was entitled to protection even though "there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work").

89. *See, e.g., Robinson v. Foti*, 527 F. Supp. 1111, 1113 (E.D. La. 1981) (ruling against an incarcerated person who sought an exemption from prison rules against dreadlocks in part because the incarcerated person failed to demonstrate familiarity with Rastafarian practice, history, or teachings, which suggested that the incarcerated person's Rastafarian beliefs were not sincere).

90. *See, e.g., Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) ("Evidence of nonobservance is relevant on the question of sincerity, and is especially important in the prison setting, for an inmate may adopt a religion merely to harass the prison staff with demands to accommodate his new faith . . . But the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere.").

91. *See, e.g., Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990) (upholding lower court's conclusion that an incarcerated person's belief was sincerely held when the lower court "noted that [the prisoner] had maintained Sioux religious beliefs throughout his life, and that he had participated in religious ceremonies whenever possible").

92. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."), *superseded by statute, RFRA*.

93. *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987) ("First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it . . . A second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates . . . A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally . . . Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."), *superseded by statute, RFRA*.

94. *See Thornburgh v. Abbott*, 490 U.S. 401, 407–408, 109 S. Ct. 1874, 1878–1879, 104 L. Ed. 2d 459, 469 (1989) ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."); *Harbin-Bey v. Rutter*, 420 F.3d 571, 578 (6th Cir. 2005) ("Courts generally afford great deference to prison policies, regulations, and practices relating to the preservation of these interests."). *See also Pell v. Procunier*, 417 U.S. 817, 823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 502 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities

guess the reasons prison officials give for prison regulations. For example, one federal court of appeals used the *Turner* test to decide that prison officials could prohibit religious items like a bear tooth necklace and a medicine bag in cells to protect the safety of other incarcerated people, prison guards, and the incarcerated person himself.⁹⁵

For the fourth factor, you will want to show that a different policy could meet the prison's needs without affecting your religious exercise as severely, and therefore that the current regulation is unnecessary. However, the U.S. Constitution does not require that the prison prove that the current regulation is necessary.⁹⁶

2. RLUIPA and RFRA

In addition to the First Amendment protections described above, your right to religious freedom is also protected by federal laws. If you are in state prison, your right is protected by a law called the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁹⁷ If you are in federal prison, your right is protected by a law called the Religious Freedom Restoration Act (RFRA).⁹⁸

These laws prohibit the government from placing a substantial burden on the religious practices of incarcerated people, unless the government can demonstrate that the burden both (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.⁹⁹

Both federal laws provide a higher level of protection for incarcerated people to exercise their religion than the protection provided by the First Amendment Free Exercise Clause.¹⁰⁰ Therefore, you

themselves.”).

95. *See* Hall v. Bellmon, 935 F.2d 1106, 1113 (10th Cir. 1991) (upholding a prison policy that prohibited a Native American from wearing a bear tooth necklace and medicine bag on the grounds of prison security); *see also* Spies v. Voinovich, 173 F.3d 398, 405 (6th Cir. 1999) (upholding a prison's prohibition of certain Buddhist religious materials from an incarcerated person's cell and the chapel on the grounds of prison security).

96. *See, e.g.,* O'Lone v. Estate of Shabazz, 482 U.S. 342, 350, 107 S. Ct. 2400, 2405, 96 L. Ed. 2d 282, 291 (1987) (quoting *Turner v. Safley*, 482 U.S. 78, 90–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987)) (“Though the availability of accommodations is relevant to the reasonableness inquiry, we have rejected the notion that ‘prison officials . . . have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.’”), *superseded by statute, RFRA*. This case was decided before Congress passed RLUIPA and RFRA. These statutes, discussed in Part 4 of this Chapter, provide additional statutory protections for incarcerated people.

97. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc.

98. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-1. In 1997, the Supreme Court held that RFRA does not apply to claims against states. *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S. Ct. 2157, 2171, 138 L. Ed. 2d 624, 648 (1997) (holding that RFRA “is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens” and overturning it as unconstitutional in that regard). However, RFRA still applies to incarcerated peoples’ claims against federal prisons. *See, e.g.,* Hankins v. Lyght, 441 F.3d 96, 105–106 (2d Cir. 2006) (noting that since *Boerne*, “every appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies”) (citations omitted).

99. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (“No government shall impose a substantial burden upon the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that the imposition of the burden (1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”); *see also* Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1 (“[The] Government shall not substantially burden a person's exercise of religion...except...Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

100. *See* Shakur v. Schriro, 514 F.3d 878, 888 (9th Cir. 2008) (“RLUIPA . . . mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment]”; *see also* Cutter v. Wilkinson, 544 U.S. 709, 714, 125 S. Ct. 2113, 2117, 161 L. Ed. 2d 1020, 1029 (2005) (noting that RLUIPA provides a “heightened protection from government-imposed burdens” compared with 1st Amendment standards); *Desimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist.

should begin your complaint with an argument that the restriction violates RLUIPA, or, if you are in federal prison, RFRA. You may then make an argument that the restriction also violates the Free Exercise Clause of the First Amendment. In practice, if a court finds that a regulation does not violate RLUIPA or RFRA, it will also almost certainly find that it does not violate the First Amendment Free Exercise Clause.¹⁰¹

Although RLUIPA and RFRA are separate laws, a court deciding a case under one law may also look to how a court decided a case under the other law. In other words, RLUIPA cases will be looked at by courts deciding RFRA cases and vice versa.¹⁰² This is because both laws prohibit laws and policies that substantially burden the exercise of your religion, unless the restrictions further a compelling governmental interest using the least restrictive means available.¹⁰³ Additionally, both statutes protect the same type of “religious exercise.”¹⁰⁴ So, although this Chapter primarily refers to RLUIPA, if you are incarcerated in a federal prison, this discussion of RLUIPA should help you to determine if you have a viable claim under RFRA.

The sections below will explain what you need to show to establish a RLUIPA or RFRA violation. In general, you first need to show that you meet the jurisdictional requirements of the law. Second, you will need to show (1) you are seeking to engage in an exercise of religion, (2) the prison regulation or practice you are challenging “substantially burdens” that exercise of religion, and (3) prison officials cannot show that the regulation is the “least restrictive means” of achieving a “compelling government interest.”¹⁰⁵

(a) Jurisdictional Requirements

(i) RLUIPA

If you are incarcerated in a state facility and bringing a claim under RLUIPA, you must first show that the law applies to the prison regulation or practice you are challenging. RLUIPA provides that its protections apply only when “(1) the substantial burden is imposed in a program or activity that receives federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.”¹⁰⁶

LEXIS 64419, at *11 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (“RLUIPA provides more expansive protection [than the 1st Amendment], prohibiting institutions that receive federal funding from substantially burdening an inmate’s exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.”).

101. See, e.g., *Fegans v. Norris*, 537 F.3d 897, 906–908 (8th Cir. 2008) (finding a prison’s grooming policy did not violate either RLUIPA or the 1st Amendment); *Borzych v. Frank*, 439 F.3d 388, 390–391 (7th Cir. 2006) (finding a prison’s refusal to provide access to books did not violate either RLUIPA or the 1st Amendment since the books in question were not religious texts related to the incarcerated person’s religion (Odinism) but were, instead, secular works promoting racism); *Nelis v. Kingston*, No. 06-C-1220, 2007 U.S. Dist. LEXIS 86036, at *17 (E.D. Wis. Nov. 19, 2007) (*unpublished*) (finding a prison’s eligibility rule for religious activities did not violate either RLUIPA or the 1st Amendment); *Daker v. Wetherington*, 469 F. Supp. 2d 1231, 1238 (N.D. Ga. 2007) (finding a prison’s shaving policy did not violate either RLUIPA or the 1st Amendment).

102. See *Hoevenaar v. Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005) (“RFRA cases according deference to prison decisions [are] applicable to cases brought pursuant to the RLUIPA.”); see also *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004) (noting that RLUIPA and RFRA apply the same standard); *Congregation Kol Ami v. Abington Twp.*, No. 01-1919, 2004 U.S. Dist. LEXIS 16397, at *45, n.11 (E.D. Pa. Aug. 12, 2004) (*unpublished*) (“Cases involving establishment clause challenges to the RFRA are as relevant as those involving the RLUIPA.”).

103. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1; Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb–bb-1.

104. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7); Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-2(4).

105. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)–(2); Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-1(a)–(b).

106. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(b).

This means that you will need to show that the prison regulation you are challenging either (a) is imposed in a program or activity that receives federal funds (called “Spending Clause jurisdiction”) or (b) affects interstate commerce (called “Commerce Clause jurisdiction”).¹⁰⁷

In order to meet the Spending Clause jurisdictional requirement, the regulation that you are challenging must be imposed in the context of a program or activity that receives federal financial assistance.¹⁰⁸ “Program or activity” means “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or local government.”¹⁰⁹ Basically, this means that whenever a state or local prison or department of corrections accepts federal funding, RLUIPA will apply to all of its programs.¹¹⁰ Virtually every prison and jail system accepts some federal money, so you can and should plead in good faith in your complaint that the court has Spending Clause jurisdiction. After you have filed your complaint, you can then request proof of that fact from the defendants during the discovery phase.

A court also has RLUIPA jurisdiction under the Commerce Clause if the substantial burden placed on your religious exercise “substantially affects interstate commerce.”¹¹¹ However, because, as explained above, nearly all prison and jail systems accept some federal funds, it is very unlikely that you will need to rely upon Commerce Clause jurisdiction.

(ii) RFRA

If you are a person incarcerated in a federal prison and bringing a lawsuit under RFRA, these jurisdictional requirements do not apply. Instead, you must say that your free exercise of religion rights were violated at a federal prison or by a federal agent.¹¹²

(b) Religious Exercise

Assuming you have met the jurisdictional requirements, a court will next assess whether the activity you want to do is a religious practice. To constitute a religious practice, the activity you want to do must be (1) rooted in a sincerely held belief that is (2) religious in nature.¹¹³

107. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (“[RLUIPA] applies in any case in which (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.”). If you are a federal incarcerated person bringing a claim under RFRA, these jurisdictional requirements do not apply to you; instead, you must allege that your Free Exercise rights were violated at a Federal prison or by an agent of the Federal Government.

108. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(b)(1).

109. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(6) (“[T]he term ‘program or activity’ means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964.”); *See* Civil Rights Act of 1964, 42 U.S.C. § 2000d-4a(1)(A) (“For the purposes of this title, the term ‘program or activity’ and the term ‘program’ mean all of the operations of...a department, agency, special purpose district, or other instrumentality of a State or of a local government...any part of which is extended Federal financial assistance.”).

110. *See* *Orafan v. Goord*, 2003 U.S. Dist. LEXIS 14277, at *24 (N.D.N.Y. Aug. 11, 2003) (*unpublished*) (“[Nowhere] in this definition [of program and activity] does it state that a receiver of federal funds is at liberty to decide which programs are under the auspice of RLUIPA. Quite the contrary, as the statute clearly applies to [all of the operations.]”).

111. *United States v. Lopez*, 514 U.S. 549, 558–559, 115 S. Ct. 1624, 1629–1630, 131 L. Ed. 2d 626, 637 (1995) (describing the types of commerce authority enjoyed by Congress, including “the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”). This means that if other people in the same situation as you experienced the same burden, the total effect of all of those situations combined would affect interstate commerce. *See* *Wickard v. Filburn*, 317 U.S. 111, 128, 63 S. Ct. 82, 90, 87 L. Ed. 122, 136 (1942) (holding that interstate effect is measured by evaluating the activity in question “together with that of many others similarly situated”).

112. Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-1–3.

113. *See* *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (“RLUIPA is a guarantor of sincerely held religious beliefs”); *see also* *Porter v. Burnett*, No. 1:05-cv-562, 2008 WL 3050011, at *5 (W.D. Mich. Aug. 4, 2008)

Congress has defined “religious exercise” broadly, to mean “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹¹⁴ This broad definition, which applies to both RLUIPA and RFRA,¹¹⁵ greatly increases the likelihood your lawsuit will succeed, or at least make it through a summary judgment motion.¹¹⁶

Under this definition, RLUIPA also protects religious practices that are not necessarily central to your religion, such as practices that are a small part of your religion or not of great importance to your religion.¹¹⁷ This means that, as a general rule, courts will not try to determine whether your religious belief is accurate or supported by your religious teachings, but will simply decide if it is a sincerely held belief and religious in nature.¹¹⁸

The current definition of religious exercise prevents courts and government officials from deciding what types or levels of religious exercise are necessary or appropriate for membership in a certain religion. This definition also incorporates the idea that the judicial system is not able (or competent) to decide whether a particular act is central to a person’s faith.¹¹⁹

(c) Substantial Burden

If the court finds that you have engaged in religious exercise, it will then evaluate whether the prison regulation that you are challenging substantially burdens this religious exercise.¹²⁰

Although Congress did not define what “substantial burden” means, the Supreme Court has interpreted “substantial burden” to mean that the government action or regulation at issue either (1) puts great pressure on you to change your behavior and violate your beliefs, or (2) prevents you from

(*unpublished*) (“While [RLUIPA’s] definition of religious exercise is broad, it does require that [p]laintiff’s religious beliefs be ‘sincerely held.’”) (citing *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 700 (E.D. Mich. 2004) (citation omitted); *Lovelace v. Lee*, 472 F.3d 174, 187 n.2 (4th Cir. 2006) (“In assessing this burden, courts must not judge the significance of the particular belief or practice in question . . . RLUIPA does not, however, preclude inquiry into ‘the sincerity of a prisoner’s professed religiosity.’”) (citations omitted)); *Starr v. Cox*, No. 05-cv-368-JD, 2008 U.S. Dist. LEXIS 34708, at *21 (D.N.H. Apr. 28, 2008) (*unpublished*) (“[C]ourts have construed RLUIPA to require a plaintiff to show that the exercise of religion is part of a (1) system of religious belief and (2) that the plaintiff holds a sincerely held belief in the religious exercise.”) (citing *Guzzi v. Thompson*, 470 F. Supp. 2d 17, 26 (D. Mass. 2007))).

114. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7)(A).

115. Congress amended RFRA through § 7 of RLUIPA. This amendment ensures that the type of “religious exercise” protected by RLUIPA is identical to that protected by RFRA. *See* Pub.L. 106-274, § 7(b), 114 Stat. 803, (2000);

42 U.S.C. § 2000bb-2(4). As a result, RFRA now defines “exercise of religion” as “religious exercise, as defined in § 2000cc-5 [RLUIPA].” Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000bb-2(4).

116. Because the determination of whether your belief is sincere and religious in nature is a fact-specific inquiry, some courts have expressed reluctance to grant summary judgment motions. *See, e.g.,* *Porter v. Caruso*, 479 F. Supp. 2d 687, 691–692 (W.D. Mich. 2007) (holding that even when there is evidence in the record to suggest that defendant’s practices are better characterized as cultural rather than religious, summary judgment is inappropriate because the religious nature of the practices is a factual dispute that must be resolved at trial).

117. *See* Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7) (“[R]eligious exercise’ includes any exercise of religion, whether or not ... [it is] central to a system of religious belief.”).

118. *See* *Thomas v. Review Bd.*, 450 U.S. 707, 716, 101 S. Ct. 1425, 1431, 67 L. Ed. 2d 624, 632 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *see also* *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699, 109 S. Ct. 2136, 2148, 104 L. Ed. 2d 766, 786 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

119. *See* *Thomas v. Review Bd.*, 450 U.S. 707, 716, 101 S. Ct. 1425, 1431, 67 L. Ed. 2d 624, 632 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”).

120. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1.

engaging in religious actions in a way that more than just inconveniences you.¹²¹ The legislative history of RLUIPA indicates that Congress wanted courts to follow this interpretation.¹²²

Although courts have emphasized that the question of whether a regulation imposes a substantial burden is a fact-specific inquiry requiring a case-by-case determination,¹²³ the examples discussed below in Part C(3) can help you assess whether a court would find a regulation to be a substantial burden.

(d) Compelling Government Interest and Least Restrictive Means

Once you have established that a prison rule or regulation places a substantial burden on your religious exercise, RLUIPA shifts the burden to produce evidence and the burden of persuasion to the government.¹²⁴ This means that in order to defeat your claim, the government needs to show that:

- (1) the substantial burden it has placed on your religious exercise is necessary because of a “compelling government interest,” and
- (2) the burden it placed on your religious exercise is the “least restrictive means” of achieving its goal.¹²⁵

In order to meet the first requirement, the government must show that it has a compelling interest in restricting your religious exercise. The Supreme Court has defined “compelling interest” as “only those interests of the highest order.”¹²⁶ The government’s interest in maintaining prison safety and security is a compelling interest.¹²⁷ However, other examples of state interests, such as reducing expenses, are less likely to be considered “compelling.”¹²⁸

121. See *Thomas v. Review Bd.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624, 634 (1981) (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”); see also *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (summarizing the Supreme Court’s interpretation of “substantial burden” and noting that “a ‘substantial burden’ must place more than an inconvenience on religious exercise; a ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.”); *Coronel v. Paul*, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (holding that “state action substantially burdens the exercise of religion within the meaning of the RLUIPA when it prevents a religious adherent from engaging in conduct both important to the adherent and motivated by sincere religious belief.”).

122. See 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (stating that the term “substantial burden” is to “be interpreted by reference to [existing] Supreme Court jurisprudence”).

123. See, e.g., *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004) (“We recognize that our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden on an adherent’s religious exercise; however, we perceive this kind of inquiry to be unavoidable under the RLUIPA and the circumstances that it addresses. This is why we make no effort to craft a bright-line rule.”). See *Jova v. Smith*, 582 F.3d 410, 415 (2d Cir. 2009) (“Where a plaintiff adduces evidence sufficient to show that the government practice substantially burdens her religious exercise, the onus shifts to the government to demonstrate that the practice furthers a compelling governmental interest, and that the burden imposed on religion is the least restrictive means of achieving that interest.”)

124. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a); see also *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008).

125. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a).

126. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972).

127. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13, 125 S. Ct. 2113, 2124 n.13, 161 L. Ed. 2d 1020, 1036 n.13 (2005) (“[P]rison security is a compelling state interest, and . . . deference is due to institutional officials’ expertise in this area.”); *Pell v. Procunier*, 417 U.S. 817, 823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 502 (1974) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.”).

128. Some courts, however, have held that expense is a compelling governmental interest. See, e.g., *Baranowski v. Hart*, 486 F.3d 112, 125–126 (5th Cir. 2007) (holding “controlling costs” to be a compelling

In order to show that the challenged rule or restriction is the least restrictive means, the government must do more than just say that there is no less restrictive means available.¹²⁹ The government must also do more than simply speculate as to the possible negative effects that could occur if it were to accommodate your religious practice.¹³⁰ Moreover, in at least some courts, the government must demonstrate that “it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.”¹³¹ Like the compelling interest test, the least restrictive means test is very strict and well established in constitutional law.¹³²

Although you do not have the burden of proof, you can, and should, challenge the government’s argument that the regulation is the least restrictive means. For example, if the government allows other types of practices in the prison that harm its stated compelling interest, or if other prisons allow the religious exercise you are seeking, you can use this evidence in an effort to overcome the government’s argument.¹³³ Several courts have recognized that evidence of what other prisons have done to accommodate incarcerated peoples’ religious practices is relevant to RLUIPA claims.¹³⁴ But

governmental interest), *cert. denied*, 552 U.S. 1062, 128 S. Ct. 707, 169 L. Ed 553 (2007).

129. *See* *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005) (finding the government’s unsupported statements insufficient to meet its burden that it had adopted the least restrictive means to achieve its interest in maintaining prison security).

130. *See* *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (holding that a governmental body that imposes a “substantial” burden on a religious practice cannot simply assert that the rule is least restrictive means of achieving a compelling governmental interest, instead they must show the rule is the least restrictive means of achieving that interest); *see also* *Ali v. Stephens*, 822 F.3d 776, 793 (5th Cir. 2016) (noting that a trial court was not required to believe the predications made by a prison to create a rule that would prevent Muslim men from growing 4-inch beards, in accordance with their religion, because of “speculative nature of the testimony” of the prison’s witness.); *Scott v. Pierce*, No. H-09-3991, 2012 U.S. Dist. LEXIS 190126, at *15 n.11 (S.D. Tex. May 7, 2012) (*unpublished*) (“Under RLUIPA, prison officials must do more than speculate that the accommodation of a religious practice will lead to safety and security problems.”).

131. *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005) (rejecting government’s argument that prison had a compelling interest in keeping male incarcerated persons’ hair short when it could not demonstrate that it considered possible alternatives); *see, e.g., Spratt v. R.I. Dept. of Corr.*, 482 F.3d 33, 41 n.11 (1st Cir. 2007) (“[T]o meet the least restrictive means test, prison administrators generally ought to explore at least some alternatives.”); *see also* *City of Richmond v. J.A. Croson*, 488 U.S. 469, 507, 109 S. Ct. 706, 729–730, 102 L. Ed. 2d 854, 890–891 (1989) (holding that city’s minority set-aside program was not narrowly tailored in part because the city had not considered whether race-neutral measures would have achieved the government’s interest); *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1078 (9th Cir. 1999) (concluding that government “neglected to undertake any consideration—let alone serious, good faith consideration” of race-neutral alternatives) (citation omitted).

132. The “least restrictive means” test is a form of a common test used in constitutional cases known as the “narrowly tailored” test, which tells courts to evaluate whether a proposed regulation or law is carefully designed to achieve its goals. *See* *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255 (11th Cir. 2004) (noting that law could be written to meet the least restrictive means test where the “government . . . tailor[s] its regulation more closely to fit . . . conduct likely to threaten the harms it fears.”).

133. For example, the Court of Appeals for the Ninth Circuit found that a grooming restriction that required all male incarcerated persons to maintain their hair no longer than three inches was not the least restrictive means of ensuring prison security when other prisons did not impose such restrictions. In *Warsoldier v. Woodford*, the court noted that “other prison systems, including the Federal Bureau of Prisons, do not have such hair length policies, or, if they do, provide religious exemptions.” *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). The court also noted that the Department of Corrections had failed to explain why it did not impose the same grooming restriction on female incarcerated persons at its women’s prisons. *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005).

134. *See, e.g., Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (finding that prison’s limitation on the number of books allowed in a cell was not the least restrictive means to ensure safety because, in part, other prisons permitted a greater number of books); *see also* *Fowler v. Crawford*, 534 F.3d 931, 942 (8th Cir. 2008) (noting that policies of other prisons are “relevant” but do not determine the outcome of the “least restrictive means” inquiry).

“[c]ourts have repeatedly recognized that ‘evidence of policies at one prison is not *conclusive* proof that the same policies would work at another institution.’”¹³⁵

3. Examples of Common Challenges to Prison Restrictions

This Section provides examples of common challenges to prison restrictions, including restrictions on attending religious services or worship areas, receiving visits from religious advisors, sending and receiving religious mail, changing one's name or diet for religious reasons, refusing to receive medical treatment for religious reasons, and wearing special religious attire. It describes how courts have applied the *Turner* test to examine First Amendment Free Exercise claims as well as how courts have applied, or might in the future apply, the RLUIPA standards outlined above.

Because RLUIPA generally provides more protection to your religious freedom than the First Amendment Free Exercise Clause,¹³⁶ you should think of the discussion of the Free Exercise Clause as protecting your basic rights to freely exercise your religion in prison. At times, RLUIPA will provide you with more rights than the First Amendment. Also, because the law in this area is constantly changing, be sure to check for new RLUIPA cases that support your particular claim.

(a) Restrictions on Attending Religious Services, Group Worship, and Receiving Visits from Religious Advisors

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, prisons must provide you with a reasonable opportunity to worship according to what you think is required by your religion.¹³⁷ This right to worship applies even if only a minority of incarcerated people practice the religion.¹³⁸ However, courts have long held that this right may be restricted in certain cases.

For example, courts have said that prison officials may limit or prohibit religious group services when these services would be a threat to prison security.¹³⁹ For example, in *Thomas v. Gunter*, a

135. *Fowler v. Crawford*, 534 F.3d 931, 940–942 (8th Cir. 2008) (quoting *Spratt v. R.I. Dept. of Corr.*, 482 F.3d 33, 41 n.11 (1st Cir. 2007) (emphasis added) (holding that officials met their burden under RLUIPA by showing adequately considered alternatives and did not have to install a sweat lodge because “prohibiting a sweat lodge at JCCC is the least restrictive means by which to further the institution’s compelling interest in safety and security.”).

136. *See Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) (“RLUIPA . . . mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness test [used to review regulations under the 1st Amendment]”); *see also Smith v. Allen*, 502 F.3d 1255, 1266 (11th Cir. 2007) (noting that RLUIPA gives more “protection from government-imposed burdens” than the 1st Amendment standards) (citation omitted); *DeSimone v. Bartow*, 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *11 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (“RLUIPA provides more expansive protection [than the 1st Amendment], prohibiting institutions that receive federal funding from substantially burdening an inmate’s exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.”).

137. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1081 n.2, 31 L. Ed. 2d 263, 368 n.2 (1972) (finding that where an incarcerated person was denied the reasonable opportunity of pursuing his faith comparable to the opportunity of prisoners who adhered to conventional religions, then there was palpable discrimination); *compare Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir. 1991) (holding that the failure to provide a Unitarian Universalist chaplain for an incarcerated person did not violate the 1st Amendment, reasoning that “the Constitution does not necessarily require prisons to provide each inmate with the spiritual counselor of his choice,” but that “[p]risons need only provide inmates with a reasonable opportunity to worship in accord with their conscience”) (citations omitted).

138. *See Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263, 268 (1972) (noting that an incarcerated person must be given “a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts”).

139. *See Brown v. Johnson*, 743 F.2d 408, 412 (6th Cir. 1984) (holding that a blanket ban against group religious services by a church that ministered to homosexual persons did not violate the 1st Amendment because the ban was reasonably related to the prison’s interest in maintaining internal security and reducing prison violence); *see also Johnson v. Collins*, 2009 U.S. Dist. LEXIS 47844, at *14–15 (N.D. Ohio May 2, 2009)

federal court of appeals said prison officials could deny a Native American incarcerated person daily access to the prison sweat lodge for prayer.¹⁴⁰ Applying *Turner*, the court held the denial was reasonably related to a legitimate prison interest in security. The sweat lodge was near a truck delivery entrance in use during weekday afternoons, and the court accepted the prison's argument that frequent use of the sweat lodge created a security risk. The court noted that daily access to the sweat lodge would also have interfered with scheduled educational and vocational activities.¹⁴¹

Courts have also said that prison officials may attend the religious group services of incarcerated people, provided their presence is reasonable and consistent with prison security measures and does not unreasonably restrict the way in which the services are conducted.¹⁴² Prison officials may also regulate the time, place, and sometimes the manner in which religious services are conducted, as long as the restrictions are rationally related to legitimate prison goals.¹⁴³ Similarly, courts have said that prison officials may limit or prohibit visits by religious advisors and counselors when such visits would undermine prison security, prison administration, or both.¹⁴⁴ The time, length, and manner of these visits are also subject to reasonable regulation by prison officials.

For example, in *Ha'min v. Montgomery County Sheriff's*, an incarcerated person sued law enforcement officials alleging violations of his First Amendment right to freely exercise his religion.¹⁴⁵ Friday Muslim prayer services were not regularly conducted during the period of the person's incarceration, despite being authorized by prison regulations. Further, he was not allowed to conduct the Muslim service for himself as a result of a rule that only volunteer religious leaders from outside could perform such services, regardless of the religion. Since the incarcerated person could keep his Holy Quran in his cell and pray alone, he had alternative means to exercise his religion. In light of this, the court held that the incarcerated person's First Amendment rights were not violated.¹⁴⁶

Note that although your right to attend services or receive visits from ministers may be restricted, you do not have to be a presently affiliated or professed member of a religion to attend such services and receive visits from ministers of that faith. You may also receive visits from the clergy of your choice even if you were not a member of that faith before being incarcerated.¹⁴⁷ Instead, you may simply be thinking about joining the religion and want to attend services or talk to a minister in order to learn

(*unpublished*) (granting summary judgment for prison officials where an incarcerated person claimed a violation of his right to freely exercise his religious beliefs when he was denied permission to maintain his dreadlocks in accordance with Rastafarianism principles, noting that "substantial deference is given to prison officials in terms of their discretion to impose regulations" and that "prison officials need only demonstrate potential danger, not actual danger.") (citations omitted).

140. *Thomas v. Gunter*, 103 F.3d 700 (8th Cir. 1997).

141. *Thomas v. Gunter*, 103 F.3d 700, 703 (8th Cir. 1997).

142. *See Butler-Bey v. Frey*, 811 F.2d 449, 452 (8th Cir. 1987) (holding, in part, that a prison regulation requiring a guard to be present at religious meetings did not violate the 1st Amendment where the regulation applied to all prison group meetings, both secular and non-secular).

143. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 358, 107 S. Ct. 2400, 2409, 96 L. Ed. 2d 282, 296 (1987) ("[I]f a regulation merely restricts the time, place, or manner in which prisoners may exercise a right, a prison regulation will be invalidated only if there is no reasonable justification for official action.").

144. *See Brown v. Johnson*, 743 F.2d 408, 412 (6th Cir. 1984) (affirming that prison authorities can restrict visits by officials of a church that ministers to the spiritual and religious needs of homosexuals because "a strong correlation existed between inmate homosexuality and prison violence").

145. *Ha'min v. Montgomery Cty. Sheriff's*, 440 F. Supp. 2d 715 (M.D. Tenn. 2006).

146. *Ha'min v. Montgomery Cty. Sheriff's*, 440 F. Supp. 2d 715, 718–720 (M.D. Tenn. 2006) (finding that the government showed a "valid, rational connection between the jail's action in not providing a regular Friday Muslim service and the legitimate governmental interest" and that plaintiff had an "alternative means of exercising his right to the free exercise of religion").

147. *See Pell v. Procunier*, 417 U.S. 817, 824–825, 94 S. Ct. 2800, 2805, 41 L. Ed. 2d 495, 503 (1974) (allowing restricted visits from "members of their families, the clergy, their attorneys, and friends of prior acquaintance" as long as "such visits will aid in the rehabilitation of the inmate").

about the religion. However, a religious advisor may examine the sincerity of your belief and restrict your access to religious services of that particular faith.¹⁴⁸

Finally, although prisons must provide a reasonable opportunity to incarcerated people whose religious practices are observed by a minority of those incarcerated,¹⁴⁹ many courts have held that the accommodation a prison must make for a particular religion is proportional to the number of believers of that particular faith.¹⁵⁰ For example, in *Cruz v. Beto*,¹⁵¹ a Buddhist incarcerated person alleged that prison officials violated his constitutional rights when they prohibited him from conducting Buddhist services in the prison chapel, offering religious materials to other incarcerated people, and corresponding with his religious advisor. The U.S. Supreme Court reversed the decision of the federal court of appeals, which had dismissed the incarcerated person's claims. The Supreme Court held that the prison must give Cruz the same reasonable opportunity to pursue his faith as the prison gives to followers of other religions.¹⁵² However, the Court also stated that prisons were not required to provide every religion with identical facilities and accommodate each equally.¹⁵³

(ii) RLUIPA

A federal law known as RLUIPA prohibits prisons from imposing a “substantial burden” on your access to religious services and/or worship areas, except under certain circumstances.¹⁵⁴ The prison *can* substantially limit your access to religious services and/or worship areas if (1) the limitation furthers a “compelling” interest of the prison, and (2) the prison limits your access to religious services and/or worship areas in the least restrictive way possible.¹⁵⁵ However, if a court determines that a regulation does not impose a substantial burden or that the activity you are pursuing is not a religious exercise, it will dismiss your challenge.¹⁵⁶

Keep in mind, however, that a court's determination of whether a rule imposes a substantial burden on your right to religious worship will depend on the specific facts of your case. In at least two instances, the Court of Appeals for the Fifth Circuit has found that a policy requiring volunteers to attend incarcerated peoples' religious group meetings did not impose a substantial burden, when the

148. See *Montano v. Hedgepeth*, 120 F.3d 844, 850–851 (8th Cir. 1997) (allowing a prison chaplain to deny participation in Protestant services to a Messianic Jew for spreading false doctrine).

149. See, e.g., *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008) (“We have long held that [t]he rights of inmates belonging to minority or non-traditional religions must be respected to the same degree as the rights of those belonging to larger and more traditional denominations.” (quoting *Al-Alamin v. Gramley*, 926 F.2d 680, 686 (7th Cir. 1991))).

150. See *Cruz v. Beto*, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1081 n.2, 31 L. Ed. 2d 263, 268 n.2 (1972) (“[The Court does not suggest] that every religious sect or group within a prison—however few in number—must have identical facilities or personnel . . . [N]or must a chaplain, priest, or minister be provided without regard to the extent of the demand.”).

151. *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972).

152. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081–1082, 31 L. Ed. 2d 263, 268 (1972).

153. *Cruz v. Beto*, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1081 n.2, 31 L. Ed. 2d 263, 268 n.2 (1972) (“We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size . . .”).

154. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) § 2(a), 42 U.S.C. § 2000cc-1(a).

155. 42 U.S.C. § 2000cc-1(a).

156. See Part C(2)(c) above. For example, the Court of Appeals for the Fifth Circuit has dismissed at least two RLUIPA challenges because it determined that a prison policy that required an outside volunteer to attend group religious meetings of incarcerated people did not impose a substantial burden on the incarcerated peoples' religious exercise. See *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004) (“The requirement of an outside volunteer—which is a uniform requirement for all religious assemblies at Coffield with the exception of Muslims—does not place a substantial burden on Adkins's religious exercise.”); *Baranowski v. Hart*, 486 F.3d 112, 124–125 (5th Cir. 2007) (finding that there was not a substantial burden on the prisoner's free exercise of his faith within the meaning of RLUIPA because, on the days that services were not provided, no rabbi or approved religious volunteer was available to lead the services).

incarcerated people were able to engage in other means of worship.¹⁵⁷ For example, in *Baranowski v. Hart*,¹⁵⁸ the court found that a volunteer requirement did not impose a substantial burden on Jewish incarcerated people who wanted more meetings on Sabbaths and other Jewish holy days than their volunteer could attend. In a more recent case, however, the same court of appeals concluded that a volunteer requirement could impose a substantial burden. In that case, there was evidence that no new volunteers would be available to provide group religious worship, the prison applied the volunteer requirement differently for different religious groups, and the incarcerated person did not have access to other options for worship.¹⁵⁹

If you are able to show there is a substantial burden on your religious exercise, the government will need to demonstrate that the restriction on group worship or religious services is the least restrictive way to promote the compelling government interest.¹⁶⁰ Although the court will require the prison to provide some evidence showing that the policy meets this standard, the Supreme Court has told courts to give “due deference to the experience and expertise of prison and jail administrators” while interpreting RLUIPA.¹⁶¹ In other words, courts have to respect what prison administrators think is the least restrictive way to promote its interests.

For example, in *Murphy v. Missouri Department of Corrections*,¹⁶² the Eighth Circuit Court of Appeals found that the prison had not met its burden when the only reason it gave for denying an incarcerated person the right to practice group worship was that the incarcerated person was a racist whose religion limited participation to Anglo-Saxons. In contrast, the same court found a prison had met its burden in a case involving a Native American incarcerated person who had been denied access to a sweat lodge.¹⁶³ There, the prison provided the court with evidence that it had suggested alternative religious means to the incarcerated person. In that case, officials had offered the incarcerated person an outdoor area where he could smoke a ceremonial pipe, suggested a medicine wheel, and sought to locate a volunteer to oversee a Native American group.¹⁶⁴ Based in part on this evidence, the court concluded that the ban on accessing the sweat lodge was the least restrictive means to furthering the prison’s interest in security.

These cases suggest that if you can show that the prison denied your request for group worship or attendance of religious services, and did not offer you any other options to your preferred method of worship, you may have a better chance of defeating the government’s arguments that the restriction is the least restrictive means of furthering a compelling interest.

(b) Mail Censorship

(i) First Amendment Free Exercise Clause

Under the First Amendment Free Exercise Clause, a prison may censor the religious mail that you receive or send, depending on the purpose the censorship serves. For a summary of the Supreme Court’s decisions on incarcerated peoples’ use of the postal system, including receipt of religious

157. *Adkins v. Kaspar*, 393 F.3d 559, 564, 571 (5th Cir. 2004); *Baranowski v. Hart*, 486 F.3d 112, 121, 124 (5th Cir. 2007).

158. *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007).

159. *Mayfield v. Tex. Dept. of Corr.*, 529 F.3d 599, 614–615 (5th Cir. 2008) (finding that summary judgment was inappropriate when there was evidence that no new volunteers would be available, the incarcerated person did not have alternative means of worship, and prison officials were unevenly applying the requirement).

160. 42 U.S.C. § 2000cc-2(b); *see also Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (“Once the plaintiff establishes this *prima facie* case, the defendants ‘bear the burden of persuasion on any [other] element of the claim,’ namely whether their practice ‘is the least restrictive means of furthering a compelling governmental interest.’” (alteration in original) (citations omitted)).

161. *Cutter v. Wilkinson*, 544 U.S. 709, 723, 125 S. Ct. 2113, 2123, 161 L. Ed. 2d 1020, 1035 (2005).

162. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004).

163. *Fowler v. Crawford*, 534 F.3d 931, 942 (8th Cir. 2008).

164. *Fowler v. Crawford*, 534 F.3d 931, 939–940 (8th Cir. 2008).

materials and correspondence about religious materials, see Chapter 19 of the *JLM*, “Your Right to Communicate with the Outside World.”

In general, prison officials may censor *incoming* religious mail in any manner reasonably related to the legitimate needs of prison administration.¹⁶⁵ To determine whether the censorship is appropriate, courts apply the *Turner* test.¹⁶⁶ Under this test, courts have allowed prison officials to withhold mail that advocates racial violence and hatred, even if the mail contains religious content or is from a religious organization. For example, in *Chriceol v. Phillips*, the Fifth Circuit Court of Appeals allowed a Louisiana prison to withhold mail that the Aryan Nations and its affiliate church, the Church of Jesus Christ Christian, had sent to incarcerated people.¹⁶⁷ The court explained that the mail encouraged racial violence and hatred, and that the “purpose of the rule [was] to eliminate potential threats to the security or order of the facility,” which “[c]learly ... is a legitimate interest.”¹⁶⁸

Similarly, in *Shabazz v. Parsons*, the Tenth Circuit Court of Appeals applied the *Turner* test and held that Oklahoma prison officials had a rational basis for denying an incarcerated person access to an entire issue of a religious magazine, which officials determined would create a danger of violence based on racial, religious, and national hatred.¹⁶⁹ Furthermore, the court denied the incarcerated person’s claim that merely deleting the offending portions of the magazine was a good alternative. The court reached this decision because such deletions would be very expensive and would “prevent the prisoner from obtaining meaningful administrative review” of the decision to delete certain sections.¹⁷⁰

Prison officials may also regulate *outgoing* mail, provided that the regulation is “generally necessary” to protect one or more legitimate governmental interests.¹⁷¹ Note that it may be easier for you to successfully challenge a restriction on outgoing mail, as the Supreme Court has recognized that outgoing correspondence that includes “grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison.”¹⁷²

Note also that although prisons can censor mail if there are legitimate prison interests at stake, indiscriminate censorship or an absolute ban on correspondence with a religious advisor is unconstitutional. See Chapter 19 of the *JLM*, “Your Right to Communicate with the Outside World.”

(ii) RLUIPA

Under RLUIPA, a prison may censor the religious mail you receive or send, provided that, if the censorship substantially burdens your religious exercise, it (1) furthers a compelling government interest (2) by the least restrictive means available.¹⁷³ The Supreme Court has noted that “[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions” and “anticipated that courts would apply the Act’s standard with due deference to the experience and expertise of prison and jail administrators.”¹⁷⁴ Thus, it is unclear whether courts

165. See *Thornburgh v. Abbott*, 490 U.S. 401, 404–405, 109 S. Ct. 1874, 1876–1877, 104 L. Ed. 2d 459, 467 (1989) (applying the *Turner* standard to determine whether regulations censoring incoming mail violate incarcerated peoples’ 1st Amendment rights).

166. *Turner v. Safley*, 482 U.S. 78, 91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987) (holding that the rule banning correspondence between incarcerated people was reasonably related to legitimate security concerns of prison officials and was not invalid).

167. *Chriceol v. Phillips*, 169 F.3d 313, 317 (5th Cir. 1999).

168. *Chriceol v. Phillips*, 169 F.3d 313, 316 (5th Cir. 1999).

169. *Shabazz v. Parsons*, 127 F.3d 1246, 1247, 1249 (10th Cir. 1997).

170. *Shabazz v. Parsons*, 127 F.3d 1246, 1249 (10th Cir. 1997).

171. See *Thornburgh v. Abbott*, 490 U.S. 401, 411–412, 109 S. Ct. 1874, 1880–1881, 104 L. Ed. 2d 459, 471–472 (1989) (noting that a regulation that restricts outgoing mail must “close[ly] fit” the interest it is supposed to serve (citing *Procunier v. Martinez*, 416 U.S. 396, 414, 416, 94 S. Ct. 1800, 1812–1813, 40 L. Ed. 2d 224, 240–241 (1974))).

172. *Thornburgh v. Abbott*, 490 U.S. 401, 411–412, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472 (1989) (emphasis in original).

173. 42 U.S.C. § 2000cc-1(a).

174. *Cutter v. Wilkinson*, 544 U.S. 709, 723, 125 S. Ct. 2113, 2123, 161 L. Ed. 2d 1020, 1035 (2005) (internal

are likely to reach different outcomes under a RLUIPA standard than they would under a Free Exercise standard.

(c) Shaving, Haircuts, and Grooming Restrictions

(i) First Amendment Free Exercise Clause

The First Amendment does not generally prevent a prison from restricting how you choose to wear your hair or beard, even if this choice is part of your religious practice. To determine whether a prison grooming restriction is acceptable under the Free Exercise Clause, a court will look at various factors to ask whether the prison's restriction is "reasonably related" to a legitimate interest of the prison.¹⁷⁵ For example, one court upheld a rule that banned incarcerated people from having a beard longer than ¼-inch because the rule was "reasonably related" to promoted prison security. Specifically, the ban was allowed under the First Amendment because the rule made it harder for inmates to hide contraband, because incarcerated people could participate in their religion in other ways, because guards would need to conduct more searches if incarcerated people could have long beards, and other reasons.¹⁷⁶ If the prison grooming requirement does not reasonably relate to a legitimate penological (prison-related) interest, then the prison cannot keep the rule.¹⁷⁷

Although all courts apply the same test, the results of cases have differed. Some courts have recognized the rights of incarcerated people to grow beards or wear their hair in accordance with their religious beliefs.¹⁷⁸ For example, the Court of Appeals for the Second Circuit upheld a Rastafarian incarcerated person's right to avoid getting an initial haircut when first received as an incarcerated person in a New York prison.¹⁷⁹

In another case, however, the same court was less willing to recognize these types of religious practices. For example, in *Fromer v. Scully*,¹⁸⁰ the Court of Appeals for the Second Circuit upheld a New York Department of Correctional Services (now the Department of Corrections and Community Supervision) directive forbidding incarcerated people from wearing beards longer than one inch. The *Fromer* court also noted that other courts had "recognized a 'valid, rational connection' between beard restrictions and a legitimate penological interest in inmate identification," emphasizing that the plaintiff had the burden of proving that the prison's concerns were irrational.¹⁸¹ Explaining its decision to defer to the judgment of the prison administrators, the court noted that "[i]t is certainly not irrational to believe that a full beard, which may well extend for significant lengths sideways from the cheeks as well as downwards from the chin, may impede identification more than a one-inch beard."¹⁸²

quotation marks omitted).

175. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987).

176. *Kuperman v. Wrenn*, 645 F.3d 69, 75–77 (1st Cir. 2011); *see also Hines v. S.C. Dep't of Corr.* 148 F.3d 353, 358 (4th Cir. 1998) (upholding a grooming policy that all male incarcerated people keep their hair short and faces shaven in order to "suppress contraband, limit gang activity, maintain discipline and security, and prevent prisoners from quickly changing their appearance"); *Zargary v. City of New York*, 607 F. Supp. 2d 609, 613 (S.D.N.Y. 2009) (holding that an orthodox Jewish woman could be required to briefly remove her headscarf to further the government's legitimate interest in accurate identification of incarcerated people).

177. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 90 (1987).

178. *See, e.g., Teterud v. Burns*, 522 F.2d 357, 359 (8th Cir. 1975) (regarding the braided hair of a Native American); *Moskowitz v. Wilkinson*, 432 F. Supp. 947, 950–952 (D. Conn. 1977) (regarding the beard of an Orthodox Jew).

179. *Benjamin v. Coughlin*, 905 F.2d 571, 576–577 (2d Cir. 1990) (finding the legitimate prison goal of obtaining an initial identification photograph could be accomplished by pulling back an incarcerated person's hair rather than cutting it off).

180. *Fromer v. Scully*, 874 F.2d 69, 73–74, 76 (2d Cir. 1989).

181. *Fromer v. Scully*, 874 F.2d 69, 74 (2d Cir. 1989).

182. *Fromer v. Scully*, 874 F.2d 69, 74 (2d Cir. 1989).

(ii) RLUIPA

Under RLUIPA, even if a grooming requirement substantially burdens your religious exercise, a prison may restrict how you choose to style your hair or beard if it (1) furthers a compelling governmental interest (2) by the least restrictive means.¹⁸³ These dual requirements may make it easier for you to challenge prison regulations regarding shaving, haircuts, and grooming under RLUIPA than under the First Amendment.

For example, in *Fluellen v. Goord*, an incarcerated person brought a successful RLUIPA challenge against a New York Department of Corrections (now the Department of Corrections and Community Supervision) policy prohibiting all non-Rastafarian incarcerated people from wearing dreadlocks.¹⁸⁴ The incarcerated person, a member of the Nation of Islam, argued his refusal to cut his dreadlocks was based upon a specific verse of the Quran. In response, DOCS asserted that the Nation of Islam does not mandate dreadlocks, that the incarcerated person's interpretation of the Quran was incorrect, and that allowing the incarcerated person to wear dreadlocks potentially threatened security.¹⁸⁵

In considering these arguments, the magistrate judge in *Fluellen* rejected DOCS's assertion, explaining that it is not for the courts to question the importance of particular religious beliefs or practices, nor is it necessary for judges to determine the accuracy of a plaintiff's interpretation of his religion's teachings.¹⁸⁶ While the magistrate judge acknowledged that prison safety and security constituted a compelling government interest under RLUIPA, it found that the fact that DOCS permitted Rastafarians to wear dreadlocks meant that dreadlocks do "not impose an insurmountable threat to DOCS' security, safety or sanitation."¹⁸⁷ The magistrate judge further noted that "DOCS does not appear to have any concerns that permitting this particular plaintiff to wear dreadlocks would threaten DOCS' security, safety or sanitation,"¹⁸⁸ and therefore held that the incarcerated person could not be forced to cut his dreadlocks, nor could he be punished if he refused to change his religious affiliation.¹⁸⁹

Similarly, in *Smith v. Ozmint*, the Fourth Circuit Court of Appeals reviewed a RLUIPA claim brought by a Rastafarian incarcerated person challenging a prison policy that forced him to shave his head.¹⁹⁰ The court reversed a grant of summary judgment for the prison on the grounds that the prison had not met its burden of proving that its policy furthered a compelling interest by the least restrictive means.¹⁹¹

However, other courts have reached different conclusions, finding that prison grooming requirements do not violate RLUIPA. For example, in *Fegans v. Norris*, the Eighth Circuit Court of Appeals found that a prison policy prohibiting male incarcerated people from wearing hair below the collar and from wearing beards did not violate RLUIPA, even though the department of corrections

183. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a).

184. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *1 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

185. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *6, *9–10, *15 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

186. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *16 (W.D.N.Y. Mar. 12, 2007) (*unpublished*) (citing *McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2004)).

187. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

188. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19–20 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

189. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *24 (W.D.N.Y. Mar. 12, 2007) (*unpublished*); see also *Warsoldier v. Woodford*, 418 F.3d 989, 991–992, 1002 (9th Cir. 2005) (finding that a Native American incarcerated person at a minimum-security prison, whose faith taught that hair should only be cut upon the death of a close relative, could not be punished for violating a rule prohibiting incarcerated people from having hair longer than three inches without the prison proving that the policy was the least restrictive way of promoting safety).

190. *Smith v. Ozmint*, 578 F.3d 246, 248–249 (4th Cir. 2009).

191. *Smith v. Ozmint*, 578 F.3d 246, 254 (4th Cir. 2009).

did not impose the same requirement on women.¹⁹² The court found that the grooming requirements were the least restrictive means to furthering prison safety and security. Specifically, the court noted that incarcerated people had used their hair to conceal contraband (banned items), and to change their appearance after escaping.¹⁹³ The court further concluded that there was no less restrictive means to prevent these risks, as “longer hair created a greater opportunity for inmates to conceal contraband, and because correctional officers are placed at risk of assault if required to search through the long hair of individual inmates.”¹⁹⁴ Applying a similar analysis to the beard restriction, the court also concluded that the prison had a compelling interest in restricting incarcerated people from wearing an uncut beard, as a beard could create a better guise for an escapee and allow for contraband.¹⁹⁵ Although the court recognized that the prison did not impose the same requirement in the women’s barracks, the court noted that the women were housed in a single unit and thus had less opportunity to conceal contraband.¹⁹⁶

(d) Name Restrictions

(i) First Amendment Free Exercise Clause

Under the First Amendment Free Exercise Clause, a prison may refuse to recognize your choice of a religious name, provided that the refusal is “reasonably and substantially justified by considerations of prison discipline and order.”¹⁹⁷ If you have legally changed your name, courts are more likely to recognize your right to be called by your new name.¹⁹⁸

For example, in *Malik v. Brown*, a federal court of appeals recognized that an incarcerated person has a clear constitutional interest in using his religious name, at least in addition to his committed name.¹⁹⁹ While the court did not require the prison to revise its filing system after the incarcerated person changed his name, the court at least recognized the incarcerated person’s right to include his religious name on outgoing mail.²⁰⁰

Note that although courts may be willing to recognize a religious name, courts are unlikely to question the way in which prison officials choose to organize their administrative prison records.²⁰¹

192. *Fegans v. Norris*, 537 F.3d 897, 900–901 (8th Cir. 2008).

193. *Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008).

194. *Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008).

195. *Fegans v. Norris*, 537 F.3d 897, 906 (8th Cir. 2008).

196. *Fegans v. Norris*, 537 F.3d 897, 904 (8th Cir. 2008).

197. *Barrett v. Virginia*, 689 F.2d 498, 503 (4th Cir. 1982) (finding that a Virginia statute that placed a flat ban on the recognition of religious name changes was unreasonable given that incarcerated people were already known by several names, and the addition of newly adopted religious names into existing records would not threaten the reliability and efficiency of correctional records).

198. *See Salahuddin v. Coughlin*, 591 F. Supp. 353, 359 (S.D.N.Y. 1984) (upholding prison policy that recognizes statutory court-ordered name changes but not common law name changes, in light of speedy and easily proven statutory name changes and “legitimate [state] interest in avoiding confusion and simplifying record-keeping”) (citation omitted). *But see Barrett v. Virginia*, 689 F.2d 498, 503 (4th Cir. 1982) (finding that adding a newly adopted religious name to prison records would not be overly burdensome or disruptive to record-keeping procedures).

199. *Malik v. Brown*, 16 F.3d 330, 334 (9th Cir. 1994).

200. *Malik v. Brown*, 16 F.3d 330, 334 (9th Cir. 1994) (finding minimal burden on the prison and “no legitimate penological interest in preventing Malik from using *both* his religious and his committed names” on correspondence).

201. *See, e.g., Barrett v. Virginia*, 689 F.2d 498, 503 (4th Cir. 1982) (holding that while the prison must recognize a legally adopted religious name and add it to the incarcerated person’s file, it does not have to reorder the files according to the new name).

(ii) RLUIPA

Under RLUIPA, a prison may refuse to recognize your choice of a religious name, provided that if the refusal substantially burdens your religious exercise, it (1) furthers a compelling governmental interest and (2) uses the least restrictive means.²⁰²

Some courts are reluctant to find that the refusal to recognize a name is a substantial burden on your religious exercise.²⁰³ Therefore, it may be difficult for you to show that the refusal to recognize your name violates RLUIPA. Remember that under RLUIPA, the government can impose rules that burden your religious exercise; it is only not allowed to adopt rules that *substantially* burden your religious exercise.

In order to show that the refusal to recognize your name constitutes a substantial burden, you should try to provide the court with concrete examples of the obstacles you face because you cannot change your name. For example, if an unchanged name will exclude you from participating in religious ceremonies, subject you to harsh treatment or exclusion by your co-believers, or make it so that you cannot “rise through the ranks” of your religion, the court may be more willing to find that the restriction constitutes a substantial burden.²⁰⁴

If the court determines that not allowing your name change does significantly burden your religious exercise, the government would then be required to show that not allowing you to change your name served a “compelling governmental interest” and that it did so by the “least restrictive means.”²⁰⁵ As noted above, prison safety and security are compelling governmental interests.²⁰⁶ So, if the prison claims that not allowing your name change is the least restrictive way of maintaining safety and security, the court may uphold the prison’s refusal to grant your name-change request.²⁰⁷

If you can show that other incarcerated people in your prison or similar prisons were permitted to change their names, you may be able to demonstrate that not permitting you to change your name for religious reasons is not the least restrictive means by which the prison can maintain order.²⁰⁸

202. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a).

203. *See* *Amun v. Culliver*, No. 04-0131-BH-M, 2006 U.S. Dist. LEXIS 75949, at *1 (S.D. Ala. Oct. 18, 2006) (*unpublished*) (holding that prison’s refusal to add incarcerated person’s religious name to visitor list, incarcerated persons’ location list, and prison correspondence was not a “substantial burden” on the incarcerated person’s exercise of religious beliefs).

204. Two federal district court cases suggest that these factors may have supported a conclusion that a refusal to recognize a changed name constitutes a substantial burden. *Compare* *Scott v. Cal. Supreme Court*, No. CIV S-04-2586 LKK GGH P, 2008 U.S. Dist. LEXIS 117662 at *26–27 (E.D. Cal. July 17, 2008) (*unpublished*); *with* *Ashanti v. Cal. Dept of Corr.*, No. CIV S-03-0474 LKK GGH P, 2007 U.S. Dist. LEXIS 10612, at *53–54 (E.D. Cal. Feb. 15, 2007) (*unpublished*) (determining that prison’s refusal to change certain prison records to reflect incarcerated person’s religious name does not amount to a substantial burden, after noting that incarcerated person failed to “show that any use of his original unchanged name subjects him to ostracism from his co-believers, or that he is thereby hampered in any way in navigating the tenets of his religion”).

205. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-1(a)(1)–(2).

206. *Fawaad v. Jones*, 81 F.3d 1084, 1087 (11th Cir. 1996) (“[M]aintaining security in a prison constitutes a compelling governmental interest. The control of contraband into and out of the prison is a fundamental part of maintaining prison security, and the requirement of dual names on incoming and outgoing mail is the least restrictive means of satisfying that compelling interest”). *See also* *Fegans v. Norris*, 537 F.3d 897, 902 (8th Cir. 2008) (holding that institutional security and deterrence of crime are valid penological interests, and noting that the Supreme Court has noted that “context matters” in the application of this ‘compelling governmental interest’ standard, and that RLUIPA does not ‘elevate accommodation of religious observances over an institution’s need to maintain order and safety’) (citation omitted).

207. *See, e.g.*, *Thacker v. Dixon*, 784 F. Supp. 286, 297 (E.D.N.C. 1991) (holding that prison official’s use of plaintiff’s religious name followed by “A/K/A” and the plaintiff’s former name did not violate plaintiff’s constitutional rights); *see e.g.*, *Fawaad v. Jones*, 81 F.3d 1084, 1087 (11th Cir. 1996) (holding that a prison may require an incarcerated person to use both his chosen name and the name under which he was committed on incoming and outgoing mail). Although this case was decided under RFRA, the holding would similarly apply to cases brought under RLUIPA.

208. *Cf.* *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19–20 (W.D.N.Y. Mar. 12, 2007) (*unpublished*) (noting that the prison allowed some incarcerated people to wear dreadlocks, which

(e) Special Diet Restrictions

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison can refuse to accommodate your request for a special diet if the restriction is rationally connected to legitimate penological goals. To determine whether a prison may refuse to accommodate your request for a special diet, a court will apply the *Turner* test.²⁰⁹ Under this test, the court will first determine whether your special diet request is based on sincerely held religious beliefs. The court may also examine whether or not your special diet is absolutely required by your religion.²¹⁰ It will then look to whether the prison's denial of that request is rationally connected to any legitimate prison concerns. If so, the court will balance the reasonableness of the refusal with the prison's legitimate interests, looking to effects on the prison community, use of resources, and alternative means of satisfying the meal request.²¹¹

(ii) RLUIPA

Under RLUIPA, a prison can refuse to accommodate your request for a special diet, provided that, if the refusal substantially burdens your religious exercise, the refusal (1) furthers a compelling interest and (2) uses the least restrictive means.²¹²

In order for your special diet to be protected, you will first need to show your special diet is a religious exercise, one that is based on sincerely held religious beliefs and practices and not simply a concern for your bodily health.²¹³ Remember that your beliefs do not need to be affiliated with any organized religion to constitute religious beliefs, and you do not need to show the religion absolutely requires you to follow a special diet.²¹⁴

suggests that refusing to allow others to wear dreadlocks was not the least restrictive means to achieving compelling government interests).

209. *See generally* DeHart v. Horn, 227 F.3d 47, 54–55 (3d Cir. 2000) (holding that where a prison regulation limits an incarcerated person's ability to engage in a particular religious practice, the second prong of *Turner* requires an examination of whether there are other means available to the incarcerated person for expressing his religious beliefs. If the prison affords the incarcerated person alternative means of expressing his religious beliefs, that fact tends to support the conclusion that the regulation at issue is reasonable).

210. *See* Spies v. Voinovich, 173 F.3d 398, 407 (6th Cir. 1999) (holding that plaintiff was not entitled to a strict vegan diet because it was not required by Zen Buddhism and because a vegetarian diet, which the prison already provided, sufficed); *see also* Dawson v. Burnett, 631 F.Supp.2d 878, 895 (W.D. Mich. 2009) (noting that “there is a legitimate fact question as to whether Plaintiff's religious beliefs require that he participate in a strict vegetarian diet”).

211. *See* DeHart v. Horn, 227 F.3d 47, 49–54, 61 (3d Cir. 2000) (balancing the *Turner* factors and holding that although there is a legitimate penological interest in having an efficient food system and avoiding jealousy among incarcerated people, accommodating the Buddhist incarcerated person's request for a cup of soy milk with each meal was not administratively prohibitive and not unreasonable in light of these penological interests, but that on remand the district court was required to examine whether there were other means available to the incarcerated person for expressing his religious beliefs); *see also* Williams v. Morton, 343 F.3d 212, 217–218 (3d Cir. 2003) (holding that the denial of a Muslim incarcerated person's request for Halal meals with meat, rather than prison-provided vegetarian meals, was valid in light of legitimate prison interests in “simplified food service, prison security, and budgetary constraints”). *But see* McEachern v. McGuinnis, 357 F.3d 197, 198–199, 203–204 (2d Cir. 2004) (holding that incarcerated person who claimed that he was subjected to a disciplinary diet of “loaf”, which happened over during Ramadan, when Muslims are required to break their fast each day with Halal food, stated a claim for violation of his religious beliefs).

212. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-1(a)(1)–(2).

213. *See* Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008) (hypothesizing that if an incarcerated person's desire for a non-meat diet “was rooted solely in concerns for his bodily health, it would not be protected by RLUIPA”); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (holding that where fundamental claims of religious freedom are at stake, the court must searchingly examine the interests that the State seeks to promote and the impediment to those objectives that would flow from recognizing the claim).

214. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A).

One way that you may try to prove that a diet is a religious exercise is to submit paperwork from your religious organization, stating that adherents to the religion often choose to follow special dietary restrictions. For example, in *Koger v. Bryan*, the Seventh Circuit Court of Appeals found that an incarcerated person who submitted paperwork from his religious organization, stating that individual members of the faith “may, from time to time, include dietary restrictions as part of his or her personal regimen of spiritual discipline,” had established that his dietary request was “squarely within the definition of religious exercise set forth by RLUIPA.”²¹⁵

When determining whether you are “being sincere about your religious beliefs,” courts have also looked to how long ago you asked to have your request for a special diet accommodated. For example, in *Koger*, the court pointed out that the incarcerated person had continued to request a non-meat diet accommodated for a long time; the incarcerated person had first filed a request nearly eight years before the case reached the court of appeals.²¹⁶ The court also noted that the fact that the incarcerated person had remained committed to his original religious affiliation throughout this time—rather than changing to another religion that *required* non-meat diets—indicated that his religious belief was sincerely held.²¹⁷

Once you show you are seeking accommodation of a religious exercise based on sincerely held beliefs, you must then show that the refusal to provide the diet substantially burdens this religious exercise.²¹⁸ At least one court has found that repeated refusal to accommodate a request for a special diet adhered to by some members of a religion counts as a substantial burden, even if the religion does not actually require the diet.²¹⁹

If you are able to prove that the prison substantially burdens your religious exercise by not providing your requested diet, the prison must then show that its reason for not fulfilling your request is based on a compelling government interest and that not permitting the diet is the “least restrictive means” of accomplishing these goals.

To date, courts have recognized orderly administration of a prison dietary system as a valid concern of prison officials.²²⁰ In *Jova v. Smith*, the Second Circuit Court of Appeals seemed to assume that such administrative interests could be compelling.²²¹ The plaintiffs had requested a vegan diet, specific foods on individual days of the week, and preparation of the food by Tulukshe adherents.²²² The ability of a prison to meet your dietary needs may affect whether a court will find that the government’s interest is compelling. This idea is also supported by *Jova*. In *Jova*, the appeals court reversed the district court’s grant of summary judgment because the prison had not demonstrated that providing a vegan diet was too burdensome.²²³ Generally, the orderly administration of a prison dietary system is not a compelling interest.²²⁴ Moreover, if the prison already serves meals that could satisfy your request for a special diet, the court may be more likely to find that the prison did not meet its burden of showing the refusal is based on a compelling government interest.²²⁵

215. *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

216. *Koger v. Bryan*, 523 F.3d 789, 793–797 (7th Cir. 2008).

217. *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

218. *See Muhammad v. Warithu-Deen Umar*, 98 F. Supp. 2d 337, 345 (W.D.N.Y. 2000) (finding that prison’s refusal to provide Muslim incarcerated person with a kosher cold alternative meal rather than the religious alternative meal was not a substantial burden on the incarcerated person’s religious exercise).

219. *Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008).

220. *See, e.g., Resnick v. Adams*, 348 F.3d 763, 769 (9th Cir. 2003) (“The legitimate governmental interest at stake here is the orderly administration of a program that allows federal prisons to accommodate the religious dietary needs of thousands of prisoners.”) (citations omitted); *DeHart v. Horn*, 227 F.3d 47, 52 (3d Cir. 2000) (agreeing with prison officials that “a simplified and efficient food service” is a legitimate penological interest).

221. *Jova v. Smith*, 582 F.3d 410, 416–417 (2d Cir. 2009).

222. *Jova v. Smith*, 582 F.3d 410, 416–417 (2d Cir. 2009).

223. *Jova v. Smith*, 582 F.3d 410, 417 (2d Cir. 2009).

224. *Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) (“[N]o appellate court has ever found these [legitimate concerns for orderly administration of a prison dietary system] to be compelling interests.”).

225. *Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008).

(f) Special Attire

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison may prevent you from wearing certain attire required by your religion, like prayer hats or head coverings, or keeping facial hair in a certain way as required by your religion. This can be done if there is a “reasonable” relationship between the regulation and a “legitimate” prison interest.²²⁶ Many courts have held the right to wear head coverings must be weighed against the state’s security concern that weapons and drugs can be concealed under a hat.²²⁷

For example, a New York court held that a prison could prohibit incarcerated people from wearing Rastafarian “crowns” (loose fitting headgear worn over dreadlocks) in some or all areas of the prison because of the legitimate security interests of the prison, even though Jewish and Muslim incarcerated people could wear their respective religious headgear (that are smaller and more closely fitted) throughout the prison.²²⁸ The court determined that the prison had a legitimate security interest in the different treatment because Rastafarian crowns are large and shapeless enough to conceal weapons and contraband, as compared to the smaller, closely fitting head coverings worn by members of other religions.²²⁹

(ii) RLUIPA

Under RLUIPA, you will first need to show that the prison has substantially burdened your religious exercise by not allowing you to wear your religious attire.²³⁰ If you make such a showing, the court will then decide whether the restriction furthers compelling governmental interests by the least restrictive means available. Because prison safety and security are considered compelling governmental interests, the court will need to determine whether the challenged regulations are the least restrictive means of accomplishing the safety and security goals. Ultimately, the outcome may be similar to raising a First Amendment challenge, where objects that threaten security are banned while those that do not are permitted.

In *Haley v. R.J. Donovan Correctional Facility*, a federal court held that while the facility’s grooming regulation for male incarcerated people did not violate incarcerated peoples’ First Amendments free expression rights, the regulation violated RLUIPA: “[A]lthough prison security constitutes a compelling government interest, the [California Department of Corrections] has failed to meet its burden of showing that this regulation is the least restrictive means of furthering that interest.”²³¹ In *Warsoldier v. Woodford*, the court held that the prison’s grooming policy requiring male

226. See *Davis v. Clinton*, 74 F. App’x 452, 455 (6th Cir. 2003) (upholding prison policy prohibiting Muslim incarcerated person from wearing religious garb every day due to the policy’s reasonable relationship to valid security concerns).

227. See, e.g., *Boles v. Neet*, 486 F.3d 1177, 1178–1179 (10th Cir. Colo. 2007) (holding that the incarcerated person established a violation of his First Amendment rights when the prison prohibited him from wearing a yarmulke while in transport between the prison and hospital). But see *Young v. Lane*, 922 F.2d 370, 375–377 (7th Cir. 1991) (holding that the policy of allowing Jewish incarcerated people to wear their yarmulkes only inside cells and during religious services did not violate incarcerated peoples’ First Amendment rights because this policy “reasonably relates to legitimate penological interests” and incarcerated people have other means for expression); *Standing Deer v. Carlson*, 831 F.2d 1525, 1526–1528 (9th Cir. 1987) (holding that the ban of Native American headgear, including religious headbands, in dining hall did not violate First Amendment rights because the headgear ban is “logically connected to legitimate penological interests” because of sanitation, security and safety concerns).

228. *Benjamin v. Coughlin*, 905 F.2d 571, 578–579 (2d Cir. 1990) (holding that restricting wearing of Rastafarian crowns did not violate the 1st Amendment or Equal Protection); *Bunny v. Coughlin*, 187 A.D.2d 119, 122–123, 593 N.Y.S.2d 354, 356–357 (3d Dept. 1993) (holding that wearing of Rastafarian crown was properly denied).

229. *Benjamin v. Coughlin*, 905 F.2d 571, 579 (2d Cir. 1990); *Bunny v. Coughlin*, 187 A.D.2d 119, 123, 593 N.Y.S.2d 354, 357 (3d Dept. 1993).

230. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a).

231. *Haley v. R.J. Donovan Corr. Facility*, 152 F. App’x 637, 638–639 (9th Cir. 2005) (applying *Turner v.*

incarcerated people to maintain hair no longer than three inches imposed substantial burden on Native American incarcerated peoples' religious practice within RLUIPA and that the California Department of Corrections had failed to explain "why prisons in other jurisdictions and its own women's prisons are able to meet the same compelling interests of prison safety and security without requiring short hair or permitting a religious exemption."²³²

As shown in the above cases, if you can show that prison officials allow other incarcerated people to wear the religious attire you wish to wear, you may be able to convince the court that the prison's regulation is not the least restrictive means of achieving its desired goals.

(g) Medical Tests

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison may refuse to accommodate your request not to receive medical procedures, such as the tuberculosis skin test, based on religious objections. To determine whether an injunction is appropriate, a court will apply the *Turner* standard.²³³ In most cases, courts have upheld mandatory tuberculosis testing policies as reasonably related to legitimate objectives of prison administration.²³⁴

Because medical testing and vaccination requirements affect the well-being of the entire prison population and not just the rights of an individual incarcerated person, courts apply an analysis that is somewhat different from the one applied to other limitations of incarcerated peoples' rights. Some courts give significant weight to the fact that vaccination and medical testing requirements are general, do not burden or support one religion over any others, and are related to maintaining the health and safety of the prison population and officials.²³⁵

Many courts have also upheld a state statute that required an incarcerated person to provide a DNA sample against a religious challenge. For example, in *Shaffer v. Saffle*,²³⁶ an Oklahoma statute required individuals convicted of certain offenses (sex-related crimes, violent crimes, and other crimes where biological evidence was recovered) to provide a DNA sample for the state's DNA Offender Database. The purpose of this sample was so that the state could more easily identify and prosecute criminals. An incarcerated person challenged the statute, contending that it would force him "to submit to a practice that will require him to deny his faith and condemn him to eternal damnation."²³⁷ The court held that the incarcerated person's First Amendment Free Exercise right had not been violated because the statute was a neutral, generally-applicable law that did not discriminate against him based on his particular religious beliefs.

Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.")). For more information on the *Turner* standard, see Part C(1)(c) of this Chapter.

232. *Warsoldier v. Woodford*, 418 F.3d 989, 998–1001 (9th Cir. 2005).

233. For more information on the *Turner* standard, see Part C(1)(c) of this Chapter. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

234. *See, e.g., Ballard v. Woodard*, 641 F. Supp. 432, 437 (W.D.N.C. 1986) (holding that the free religious exercise rights of a Muslim incarcerated person were not violated when he was subjected to tuberculosis testing during the holy month of Ramadan since the state had a "paramount interest in maintaining the health of its prison population.").

235. *See generally Ballard v. Woodard*, 641 F. Supp. 432, 437 (W.D.N.C. 1986); *see also McCormick v. Stalder*, 105 F.3d 1059, 1061–1062 (5th Cir. 1997) (holding that prison officials could constitutionally quarantine an incarcerated person who tested positive for tuberculosis and force him to undergo treatment).

236. *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998).

237. *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998).

(ii) RLUIPA

Under RLUIPA, a prison may refuse to accommodate your request not to receive medical procedures even if refusing constitutes a substantial burden on your religious exercise, so long as the refusal (1) furthers a compelling government interest (2) by the least restrictive means.²³⁸

As in other RLUIPA cases, you must prove that the medical testing or vaccination requirement substantially burdens your religious exercise.²³⁹ The prison must then prove that the regulation furthers a compelling government interest by the least restrictive means.²⁴⁰ Because most medical procedures potentially affect the entire prison population's health, and not just the individual incarcerated person's rights, the court will likely conclude that many procedures protect the health of the prison population and thus further a compelling government interest. Your best chance of successfully challenging a medical testing or vaccination requirement may be that the specific medical procedure is not the least restrictive means of testing you. For example, in *Jolly v. Coughlin*, a Rastafarian incarcerated person was placed in medical keeplock for refusing to take a tuberculosis test.²⁴¹ The court held that, although the government's interest in preventing the spread of tuberculosis was compelling, keeping the incarcerated person in medical keeplock violated RFRA. This was because even if the incarcerated person had tested positive for latent tuberculosis and refused to take the medication, he would have been placed back in the general population.²⁴² Results like *Jolly*, however, are fact-specific, and your chance of successfully challenging a medical testing or inoculation requirement under RLUIPA, just like under the First Amendment Free Exercise Clause, is probably minimal.²⁴³

D. Your Rights Under New York State Statutes

In addition to federal law, many states have laws protecting incarcerated peoples' rights to practice their religion. This Part specifically reviews relevant New York statutes that are different from what is explained in the rest of this Chapter. State statutes are not exclusive and provide some, but not all, of the remedies available. In other words, you may sue under a state statute, a federal statute, and/or

238. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a)(1)–(2).

239. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a). See also *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 1432 (1981) (stating that when the state "[put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (stating that a substantial burden exists when the state puts substantial pressure on a incarcerated person to modify his behavior and to violate his beliefs).

240. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a)(1)–(2).

241. See *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (granting an injunction, pending plaintiff's claim under RFRA, to release plaintiff from a "medical keeplock" where he had been held for three-and-a-half years after he refused a tuberculosis test on religious grounds. The court found that despite his confinement, he was breathing the same air as other incarcerated people, and incarcerated people who tested positive were not kept in a "medical keeplock"). But see *Redd v. Wright*, 597 F.3d 532, 537 (2d Cir. 2010) (holding that the plaintiff's TB hold in 2001 was not in violation of his First Amendment right or RLUIPA. The court distinguished its case from *Jolly*, saying that while "*Jolly* rejected the state's contention that the mandatory [purified protein derivative] test is a reasonable way of preventing the spread of TB in prisons, that court nevertheless recognized that administering an effective TB screening program might be a compelling state interest and that this interest might justify a TB hold policy.").

242. *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

243. *Soder v. Williamson*, No. 4:07-CV-1851, 2008 U.S. Dist. LEXIS 68513, at *14–17 (M.D. Pa. Aug. 7, 2008) (*unpublished*) (finding no grounds for an RLUIPA violation where prison officials had tested an incarcerated person for tuberculosis using a chest X-ray—the method that the incarcerated person requested—and observing that the state has a particularly "clear and compelling interest in detecting" highly contagious and potentially dangerous diseases); See also *Johnson v. Sherman*, No. CIV S-04-2255 LKK EFB P, 2007 U.S. Dist. LEXIS 24098, at *12 (E.D. Cal. Mar. 30, 2007) (*unpublished*) (denying injunction to Rastafarian incarcerated person challenging prison's requirement that he undergo a tuberculin skin test to test for latent tuberculosis because "[t]he tuberculosis skin test is the only medically accepted test available to discover latent tuberculosis in California's prisons.").

the U.S. Constitution. Make sure that you check for the most recent version of the law in your state before you file a claim.

Section 610(1) of the New York Corrections Law declares that you are “entitled to the free exercise and enjoyment of religious profession and worship, without discrimination or preference.”²⁴⁴ Subdivision (3) of this law provides that the rules and regulations of correctional institutions must allow religious services, spiritual advice, and private support from recognized clergy members.”²⁴⁵ But, the law also authorizes correctional institutions to reasonably restrict this right if necessary for proper institutional management.²⁴⁶

A New York court applying this law has required the Commissioner of Correction to redraft rules and regulations to allow clergy members to be admitted into a prison to conduct religious services, and to entirely remove rules and regulations that prevented potential members of a faith group from attending services.²⁴⁷ However, these exercise rights are subject to reasonable limitations by the Commissioner of the Department of Corrections and Community Supervision (“DOCCS”) and by prison wardens to protect prison security, discipline, or other legitimate prison interests.²⁴⁸ Note that courts have also interpreted Section 610(1) to require the presence of a “non-inmate spiritual leader” at all religious congregations in prison, and the non-inmate spiritual leader must be registered and approved pursuant to prison directives.²⁴⁹ You should read Section 610 carefully, along with the cases cited in the corresponding Notes of Decisions. These Notes can be found in the same volume of McKinney’s Consolidated Laws as the law, just after the law’s text.

In addition to Section 610, you may also bring claims under the New York State Constitution. To determine if a restriction limiting your right to free exercise of religion is legal under the New York State Constitution, courts will balance the “importance of the right asserted and the extent of the infringement ... against the institutional needs and objectives being promoted.”²⁵⁰ In general, New York courts follow the same analysis as claims brought under the U.S. Constitution. Therefore, if you believe a New York law or DOCCS directive interferes with your right to free exercise of religion, you

244. N.Y. CORRECT. LAW § 610(1) (McKinney 2014).

245. N.Y. CORRECT. LAW § 610(3) (McKinney 2014).

246. *See also* Brown v. McGinnis, 10 N.Y.2d 531, 535–536, 180 N.E.2d 791, 793, 225 N.Y.S.2d 497, 500–501 (1962) (finding that the freedom to exercise religion is not absolute because the law allows for the reasonable curtailment of this freedom if necessary for the “proper discipline and management” of the prison). *See also* N.Y. Correct. Law § 610(3) (McKinney 2014).

247. *See* Samarion v. McGinnis, 55 Misc. 2d 59, 61–62, 284 N.Y.S.2d 504, 508 (Sup. Ct. Erie County 1967) (requiring the Commissioner to remove or revise certain rules and regulations, required under New York Correct. Law § 610, after Black Muslims alleged they were denied their right to practice their religion).

248. *See* Samarion v. McGinnis, 55 Misc. 2d 59, 61–62, 284 N.Y.S.2d 504, 508 (Sup. Ct. Erie County 1967) (allowing the Commissioner and Warden to limit the diet of inmates in some ways and to supervise religious practice if reasonable and consistent with prison security and not an undue restriction on the manner in which Muslim services could be conducted).

249. State of New York, Department of Corrections and Community Supervision, Directive No. 4750, Volunteer Services Program § V-A-4 (2019) (dealing with “Volunteer Services Programs,” and including guidelines for “Religious Volunteer and Spiritual Advisor”); State of New York, Department of Corrections and Community Supervision, Directive 4202, Religious Programs and Practices § VI-B-2-a, b (2015) (providing that, with specific authorization of the facility Superintendent, incarcerated people may “observe their congregational worship services when led by employee Chaplains or outside religious volunteers” and “attend religious classes facilitated by a Chaplain, an approved volunteer, or an approved facilitator”). *See also* Benjamin v. Coughlin, 905 F.2d 571, 577, (2d. Cir. 1990) (“DOCS has interpreted section 610 to mean that inmate religious groups are permitted to congregate for religious observance only under the supervision of a non-inmate spiritual leader known as a ‘free-world sponsor’”).

250. Lucas v. Scully, 71 N.Y.2d 399, 406, 521 N.E.2d 1070, 1073, 526 N.Y.S.2d 927, 930 (1988) (stating the balancing test mentioned above but noting that the judgment of prison officials receives “a measure of judicial deference”, and finding that even though a prison policy that allowed the inspection of incarcerated peoples’ mail sent to businesses implicated First Amendment rights, the policy did not violate the New York State Constitution).

should be prepared to make an argument using the constitutional analysis provided earlier in this Chapter.

Although New York state courts follow the same general constitutional analysis as federal courts, there are some differences that you should be aware of when evaluating whether you have a legitimate claim.

For example, New York courts and DOCCS have adopted a specific rule dealing with initial haircuts and shaves for purposes of obtaining identification photographs.²⁵¹ Under this rule, a prison may not require all incarcerated people to have their hair cut upon admission, as there are less intrusive alternatives available that do not increase any administrative burden (for example, tying one's hair back).²⁵² An initial haircut requirement is therefore an unconstitutional violation of religious rights under New York law. But, a prison can still require incarcerated people to undergo an initial facial hair shave, since there are "no less intrusive alternatives for photographing the underlying facial features."²⁵³ Note, however, that DOCCS seems to recognize computer imaging as a viable alternative to the initial shave requirement.²⁵⁴

DOCCS has also adopted specific rules for shaving your facial hair after being processed. Under this rule, although incarcerated people cannot grow facial hair longer than one inch from the face, there is a religious exemption for the one-inch requirement for those whose religious rules prohibit the cutting of facial hair.²⁵⁵

Likewise, DOCCS has adopted specific dietary rules. For example, in many instances, New York incarcerated people may avoid eating foods forbidden by their religious beliefs, and the prison must provide them with a nutritionally adequate substitute diet.²⁵⁶ DOCCS policy also provides Muslim, Buddhist, and Orthodox Jewish incarcerated people special meals during certain holidays.²⁵⁷ Despite these provisions, there are limitations to the religious meals and ceremonies an incarcerated person can get. For example, a court held a Jewish incarcerated person could not insist on preparing his meals himself, nor could he require that only a Jewish or Muslim cook prepare them.²⁵⁸ Because the prison

251. State of New York, Department of Corrections and Community Supervision, Directive 4914, Inmate Grooming Standards (2019).

252. See *People v. Lewis*, 115 A.D.2d 597, 598, 496 N.Y.S.2d 258, 260 (2d Dept. 1985), *aff'd*, 68 N.Y.2d 923, 502 N.E.2d 988, 510 N.Y.S.2d 73 (1986) ("[T]he identification objective would be fully achieved by pulling respondent's locks back tightly behind the head for a photograph so they could not be seen . . . the asserted objectives of a haircut can be achieved through alternatives that impinge less drastically on respondent's First Amendment rights than directing him to cut his hair.").

253. See *People v. Lewis*, 115 A.D.2d 597, 598, 496 N.Y.S.2d 258, 260 (2d Dept. 1985), *aff'd*, 68 N.Y.2d 923, 502 N.E.2d 988, 510 N.Y.S.2d 73 (1986); see also *Phillips v. Coughlin*, 586 F. Supp. 1281, 1285 (S.D.N.Y. 1984) (denying Rastafarian's claim for damages after an initial shave pursuant to Directive 4914, since a single shave is the "simplest, quickest and most comfortable method" of satisfying the security need for a clean-shaven identification photograph).

254. See *Helbrans v. Coombe*, 890 F. Supp. 227, 230 (S.D.N.Y. 1995) (noting that DOCCS and incarcerated person reached an agreement in which DOCCS allowed a Jewish incarcerated person to pay for a computer-generated photograph that displayed his image without his beard as an alternative to the initial shave requirement).

255. See State of New York, Department of Corrections and Community Supervision, Directive 4914, Inmate Grooming Standards § III-D-1-b (2019), available at <http://www.doccs.ny.gov/Directives/4914.pdf> (last visited Feb. 11, 2020).

256. See State of New York, Department of Corrections and Community Supervision, Directive 4202, Religious Programs and Practices § XVI (2015), available at <http://www.doccs.ny.gov/Directives/4202.pdf> (last visited Feb. 11, 2020). But see *Bunny v. Coughlin*, 187 A.D.2d 119, 123, 593 N.Y.S.2d 354, 357 (3d Dept. 1993) (holding that a Rastafarian incarcerated person was not entitled to dietary restrictions because the prison did not have the resources to accommodate him).

257. See *Benjamin v. Coughlin*, 905 F.2d 571, 574, 579–580 (2d Cir. 1990) (noting that under DOCCS policy, alternative portions are offered to all incarcerated people whenever pork is served, and special kosher meals are provided for incarcerated people at some facilities. Muslim and Buddhist incarcerated people are provided special meals during certain holidays.).

258. *Malik v. Coughlin*, 158 A.D.2d 833, 834–835, 551 N.Y.S.2d 418, 419 (3d Dept. 1990).

provided the incarcerated person with pork-free meals, it did not have to meet his other preparation demands given the prison's valid budgetary reasons.²⁵⁹

E. Faith-Based Rehabilitation Programs

In the past few years, there has been an increase in the number of faith-based rehabilitation programs within state prison facilities, many initiated by volunteer evangelical Christian organizations (the Prison Fellowship Ministries, in particular).²⁶⁰ What makes these faith-based programs different from other religious-based organizations within the prison is their implementation by the state and the "special treatment" participating incarcerated people seem to receive.

These faith-based programs raise serious constitutional questions. While the Supreme Court has not yet decided on the constitutionality of faith-based rehabilitation programs, several state and federal courts have.²⁶¹ In *Americans United for Separation of Church and State v. Prison Fellowship Ministries*,²⁶² an Iowa federal district court held that the challenged faith-based program violated the Establishment Clause, which is explained above in Part B of this Chapter.²⁶³

Much of the court's decision in that case, however, turned on the fact that the program was state-funded, conducted in a state prison by a private religious organization, and all instruction (with the exception of one subject) was presented from the viewpoint of Evangelical Christianity.²⁶⁴ It is unclear how a similar case would be decided if the program was privately funded, or if the program was less religiously focused.

Courts generally treat faith-based prison addiction treatment programs differently (primarily Alcoholics Anonymous and Narcotics Anonymous, which "are rooted ... in a regard for a 'higher power'").²⁶⁵ Rather than holding that these programs violate the Establishment Clause, courts tend to simply say that incarcerated people cannot be required to participate in faith-based programs.²⁶⁶ However, some courts have required that secular alternatives to faith-based treatment programs be available to incarcerated people.²⁶⁷

259. *Malik v. Coughlin*, 158 A.D.2d 833, 834–835, 551 N.Y.S.2d 418, 419 (3d Dept. 1990).

260. *See* Daniel Brook, *When God Goes to Prison*, Legal Aff. (May–June, 2003) at 22; Samantha M. Shapiro, *Jails for Jesus*, Mother Jones (Nov.–Dec. 2003) at 54.

261. *See, e.g.,* *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 934 (S.D. Iowa 2006) (holding that a faith-based prison program violated incarcerated peoples' Establishment Clause rights under the 1st Amendment and the Iowa Constitution), *aff'd in part, rev'd on other grounds*, 509 F.3d 406 (8th Cir. 2007); *Williams v. Huff*, 52 S.W.3d 171, 192, 44 Tex. Sup. J. 998 (Tex. 2001) (holding that a faith-based prison program violated incarcerated peoples' Establishment Clause rights under the 1st Amendment).

262. *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006), *aff'd in part, rev'd on other grounds*, 509 F.3d 406 (8th Cir. 2007).

263. *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 933 (S.D. Iowa 2006), *aff'd in part, rev'd on other grounds*, 509 F.3d 406 (8th Cir. 2007).

264. *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 918–921 (S.D. Iowa 2006), *aff'd in part, rev'd on other grounds*, 509 F.3d 406 (8th Cir. 2007).

265. *Inouye v. Kemna*, 504 F.3d 705, 712–714 (9th Cir. 2007) (holding that a parolee cannot be ordered into a treatment program that has pronounced religious overtones, including references to God, a higher power, and prayer).

266. *See, e.g.,* *Kerr v. Farrey*, 95 F.3d 472, 478–480 (7th Cir. 1996) (holding that incarcerated person could not be required to participate in Narcotics Anonymous, nor could he have his security classification raised for refusing to do so); *Turner v. Hickman*, 342 F. Supp. 2d 887, 895–98 (E.D. Cal. 2004) (holding that requiring incarcerated person to participate in Narcotics Anonymous in order to be eligible for parole violated the Establishment Clause).

267. *See, e.g.,* *Warner v. Orange Cty. Dep't of Prob.*, 115 F.3d 1068, 1081 (2d Cir. 1997) (holding that forced attendance at Alcoholics Anonymous as a probation condition violated the Establishment Clause and requiring the county to make a non-religious treatment alternative available).

APPENDIX A

LIST OF RELIGIOUS ORGANIZATIONS

Below is a list of organizations that might be able to assist you in exercising your freedom to practice your religion while in prison. Most of these organizations do not provide legal assistance, and unless otherwise stated, probably do not have an outreach program specifically for incarcerated people. The *JLM* makes no endorsement or recommendation of any of the following organizations or religions and does not guarantee that they will be able to help you.

Antiochian Orthodox ChristianOrthodox Christian Prison Ministry

P.O. Box 468
Fleetwood, PA 19522
(610) 777-1552

Armenian ApostolicArmenian Church of America, Eastern Diocese

630 Second Ave.
New York, NY 10016
(212) 686-0710; FAX: (212) 779-3558

Bahá'íNational Spiritual Assembly of the Bahá'ís
of the United States

536 Sheridan Road
Wilmette, IL 60091
(847) 733-3400

BuddhistTu An Zen Temple

4310 W. 5th St.
Santa Ana, CA 92703
(714) 265-2357
Vietnamese and Chinese speakers available.

Byzantine CatholicByzantine Catholic Church

Most Rev. Archbishop Basil Schott
66 Riverview Ave.
Pittsburgh, PA 15214-2253
(412) 231-4000; FAX: (412) 231-1697

Chinese CatholicAscension Chinese Catholic Church

4605 Jetty Lane
Houston, TX 77072
(281) 575-8855; FAX: (281) 575-6940

Croatian CatholicCroatian Church of St. Cyril & Methodius

502 W. 41st St.
New York, NY 10036
(212) 563-3395; FAX: (212) 868-1203

**Roman Catholic (including Spanish and
French-Speaking)**Catholic League for Religious and Civil
Rights

450 Seventh Ave.
New York, NY 10123
(212) 371-3191; FAX: (212) 371-3394
*This group does not provide legal assistance.
However, it will advocate informally on your
behalf by contacting your prison warden if
you are Roman Catholic and prevented in
some way from practicing your religion.*

Asociación Nacional de SacerdotesHispanos en USA

(The National Association of Hispanic
Priests of the USA)
2472 Bolsover, Suite 442
Houston, TX 77005
(713) 528-6517; FAX: (713) 528-6379

Coptic ChristianSt. Mark's Coptic Orthodox Church

1600 S. Robertson Blvd.
Los Angeles, CA 90035
(310) 275-3050; FAX: (310) 276-6333

Greek OrthodoxGreek Orthodox Church

Archdiocese of America
8 E. 79th St.
New York, NY 10075
(212) 570-3500; FAX: (212) 570-3569

HinduHinduism Today

Kauai's Hindu Monastery

107 Kaholalele Rd.

Kapaa, HI 96746-9304

(808) 822-3012; FAX: (808) 822-4351

Subscriptions are available to Hinduism Today.

Hindu Temple Society of Southern California

1600 Las Virgenes Canyon Rd.

Calabasas, CA 91302

(818) 880-5552; FAX: (818) 880-5583

IslamicBelievers' Bail OutCouncil on American Islamic RelationsMuslim AdvocatesJustice for Muslims CollectiveIslamic Society of North America

P.O. Box 38

Plainfield, IN 46168

(317) 839-8157; FAX: (317) 839-1840

JainistFederation of Jain Associations in
North America (JAINA)

JAINA Headquarters

43-11 Ithaca Street

Elmhurst, NY 11373

(718) 606-2885

JewishAleph Institute

Executive Director of Legal Affairs

9540 Collins Ave.

Surfside, FL 33154

(305) 864-5553; FAX (305) 864-5675

This organization serves the needs of Jews of all backgrounds who are in institutional environments, including the military, hospitals, and prisons. Volunteers conduct prison visits, particularly in conjunction with religious holidays. It provides religious education, legal advocacy on behalf of religious rights, and assistance to incarcerated peoples' families.

Serbian OrthodoxSaint Steven's Serbian Orthodox Cathedral

1621 W. Garvey Ave.

Alhambra, CA 91803

(626) 284-9100; FAX: (626) 281-5045

Shi'a MuslimShi'a Ithna Asheri Jamaat of New York

48-67 58th St.

Woodside, NY 11377

(718) 507-7680

Miscellaneous/**Interdenominational**Prison Ashram Project

Human Kindness Foundation

P.O. Box 61619

Durham, NC 27715

(919) 383-5160

Native American/Indigenous See Appendix IV of the *JLM* for a list of several organizations that work with Native Americans and address some Native American religious concerns.

CHAPTER 28

RIGHTS OF INCARCERATED PEOPLE WITH DISABILITIES*

A. Introduction

This Chapter explains the protections and legal rights available to incarcerated people with disabilities. As an incarcerated person with one or more disabilities—whether physical, cognitive, or both—you have legal rights based in the U.S. Constitution, federal civil rights laws, and some state laws. These laws forbid discrimination against you because of your disability.

Part A of this Chapter summarizes the laws protecting incarcerated people with disabilities. Part B of this Chapter explains the two major federal laws against disability discrimination: (1) Section 504 of the Rehabilitation Act of 1973 (“Section 504”)¹ and (2) Title II of the Americans with Disabilities Act (“ADA,” “Title II,” or “ADA Title II”).² Part B of this Chapter also explains what you need to prove in a legal claim under the ADA.³ Your rights are mostly the same under Section 504 and Title II,⁴ so you should consult both statutes and consider seeking relief under both.⁵ Part C of this Chapter explains how to enforce your rights under both Section 504 and Title II. It explains what a court can and cannot order, taking into account some restrictions that have developed over the last decade.

If, because you have a disability, you either (1) are not receiving the services you need, or (2) are being discriminated against, you may have a constitutional claim (in addition to Section 504 and Title II claims). For example, the way prison officials treat incarcerated people with disabilities—particularly in denying them medical care—can violate the Eighth Amendment’s prohibition against “cruel and unusual punishment.”⁶ As an incarcerated person with disabilities, you also have important constitutional rights to medical care. This Chapter does *not* talk about your constitutional rights. To

* This Chapter was revised by Zahava Blumenthal with the help of Prof. Betsy Ginsburg at the New York University School of Law. It is based on previous versions by Amy E. Lowenstein and Robert Lougy. Special thanks to Lowenstein, now of Disability Advocates, Inc., and James Harrington of the Texas Civil Rights Project.

1. Rehabilitation Act of 1973, 29 U.S.C. § 701, amended by 29 U.S.C. § 794.

2. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213.

3. The ADA contains many sections, called “titles.” Title II of the ADA is the most important ADA section for your claims. It protects you from disability discrimination by state and local government entities, including prisons and jails. Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134. It provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” Americans with Disabilities Act, 42 U.S.C. § 12132.

4. Americans with Disabilities Act, 42 U.S.C. § 12133 (stating that the “remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Title II of the ADA].”).

5. Part B(1) of this Chapter, below, explains the details of when you would seek relief under only one of these laws. Generally, you cannot not sue the federal government under the ADA. If you are in a privately run prison, you most likely can sue under Title II of the ADA, but you may also want to sue under Title III of the ADA. See notes 14–26 of this Chapter and accompanying text.

6. See, e.g., *Allah v. Goord*, 405 F. Supp. 2d 265, 275–277 (S.D.N.Y. 2005) (holding that a paraplegic incarcerated person stated an 8th Amendment claim in alleging that, while he was in his wheelchair, his wheelchair had been strapped into a vehicle too loosely, and thus he had been injured when the vehicle stopped suddenly); see also *Lawson v. Dallas County*, 286 F.3d 257, 263–264 (5th Cir. 2002) (holding that a prison’s failure to provide a paraplegic incarcerated person with rehabilitation therapy, adequate toilet facilities, and a bed with an adequate mattress was medical neglect and inhumane treatment that violated the incarcerated person’s 8th Amendment rights); *LaFaut v. Smith*, 834 F.2d 389, 392–394 (4th Cir. 1987) (holding that not offering prescribed rehabilitation therapy and adequate toilet facilities violated the 8th Amendment); *Miller v. King*, 384 F.3d 1248, 1261–1263 (11th Cir. 2004) (holding that allegations by a wheelchair-using paraplegic that he was denied wheelchair repairs, physical therapy, medical consultations, leg braces and orthopedic shoes, wheelchair-accessible showers and toilets, opportunity to bathe, urinary catheters, and assistance in using the toilet raised a material factual issue under the 8th Amendment), *vacated and superseded on other grounds*, *Miller v. King*, 449 F.3d 1149, 1150 (11th Cir. 2006).

learn more about your constitutional rights, including your right to adequate medical care, you should read Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care,” Chapter 26 of the *JLM*, “Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prison,” and Chapter 29 of the *JLM*, “Special Issues for Incarcerated People with Mental Illness.” Other chapters especially useful for all incarcerated people include Chapter 4 of the *JLM*, “How to Find a Lawyer,” Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,”⁷ Chapter 15 of the *JLM*, “Inmate Grievance Procedures,” and Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

Although your protections under Section 504 and the ADA have been weakened by the courts, they are still important civil rights and antidiscrimination laws. Using these laws, incarcerated people with disabilities have won important victories in many federal judicial circuits, through both individual and class action suits. This Chapter will explain how you, as an incarcerated person with a disability, can use these laws to protect your rights.

B. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

1. Introduction

If you are an incarcerated person in a state or local facility and have one or more disabilities, Section 504⁸ and Title II⁹ are two different laws that protect you in similar ways. Section 504 was enacted by Congress in 1973. It applies both to the federal government and to state and local entities that receive federal funding. In 1990, Congress passed the ADA, which expanded and strengthened Section 504’s protections.¹⁰ The language of Section 504 is very similar to the language of Title II; courts read them as prohibiting the same basic forms of discrimination.¹¹ You should start researching your claim by reading the two laws carefully, because most cases focus on how to interpret the laws. Since these two laws offer you similar protections, much of the discussion of Title II of ADA in this Chapter will apply to Section 504, and vice versa.

If you are an incarcerated person in a federal prison, or a non-citizen detainee in a federal detention center, you can file suit only under Section 504. You cannot use the ADA because the ADA cannot be used to sue the federal government.¹² Also, if you sue a federal agency under Section 504,

7. Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” is particularly relevant as it discusses restrictions on incarcerated people’s lawsuits that could affect your § 504 or ADA claim.

8. Rehabilitation Act of 1973, 29 U.S.C. § 701.

9. Americans with Disabilities Act, 42 U.S.C. § 12101.

10. In some areas of the law, the ADA provides much broader protections for the disabled than Section 504 does. For instance, the ADA specifically requires places like stores, restaurants, and banks to accommodate (make adaptations for) persons with disabilities. *See* 42 U.S.C. § 12181. The ADA also provides persons with disabilities protection against employment discrimination because of their disabilities. *See* 42 U.S.C. § 12112. But for prisons, jails, and state and local government entities, the ADA and § 504 give basically the same protections.

11. Congress passed the ADA Amendments Act of 2008 because it was displeased that the courts were interpreting the definition of disability differently under the ADA than under Section 504. The ADA Amendments Act states, “Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973” and that, in particular, courts have “interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress” (ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), (7), 122 Stat. 3553, 3554) (2008). The result of this amendment is that it is now easier to meet the qualifications for having a disability than it was before 2008. Also, you may be more likely to win under the ADA if you win under Section 504, since the two laws are now more similar. As a result of the new law, the Equal Employment Opportunity Commission (which defines, in its regulations, many of the terms you will use in your ADA suit) changed its definition of “substantially limits” to be interpreted “broadly in favor of expansive coverage,” as it is “not meant to be a demanding standard.” 29 C.F.R. § 1630.2(j)(1)(i) (2020).

12. The ADA only protects against discrimination by a “public entity.” 42 U.S.C. § 12132. The ADA defines “public entity” as “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131(1)(A)–(B). This definition does not include agencies of the federal government. *See* Cellular Phone Taskforce v. FCC, 217 F.3d 72, 73 (2d Cir. 2000) (noting that the ADA does not apply to the federal government); Disability Rights Section, *Americans with Disabilities Act: Title II Technical Assistance Manual, II-1.2000*, U.S. DEPT. OF JUSTICE, available at <http://www.ada.gov/taman2.html> (last visited Nov. 23, 2020).

you can ask only for an injunction, not money damages.¹³ An injunction is a court order requiring the prison or agency to correct the violation.

Even if you are an incarcerated person in a privately-operated prison you should probably bring suit under Title II. According to the Department of Justice regulations, Title II prohibits discrimination on the basis of one's disability when a service, program, or activity is provided directly by a public entity, as well as when it is provided indirectly by a public entity through a contract, license, or other arrangement.¹⁴ The ADA defines "Public Entity" as (1) any State or local government, (2) any department . . . or other instrumentality of a State or States or local government."¹⁵ Many courts have found that Title II does not apply to claims against private prisons on the grounds that such prisons do not meet the definition of public entity,¹⁶ however, such cases frequently also find that the public entity (i.e., state or local government contracting with the private entity) still may have some responsibility for the actions of the private entity, on the grounds that the public entity cannot contract away its responsibility to avoid discrimination.¹⁷

If you are being held in a privately-run prison, you may also want to sue under Title III¹⁸ of the ADA in case Title II arguments are rejected. Title II and Title III are very similar. While Title II prohibits discrimination on the basis of disability by public entities, Title III prohibits discrimination on the basis of disability by "any place of public accommodation."¹⁹ More specifically, the implementing regulations for Title III state that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation."²⁰ The Title III regulations define "place of public accommodation" as "a facility operated by a private entity whose operations affect commerce and fall within at least one of" several noted categories.²¹ Such categories include "place[s] of lodging," and "social service center establishment[s]."²²

You can get Department of Justice (DOJ) printed materials on the ADA for free by contacting the DOJ by mail or phone. Publications are available in standard print and alternate format. Some publications are available in foreign languages. To order by mail, write to:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave., N.W.
Disability Rights Section -- NYAV
Washington, D.C. 20530.

In your letter, include the name of the publication you want. To order by phone, call the ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY). At these numbers, you can hear recorded information and order publications twenty-four hours a day. You can reach someone who can answer specific questions about the ADA, in English or Spanish, if you call on Mondays, Tuesdays, Wednesdays, and Fridays between 9:30 a.m. and 5:30 p.m. (Eastern Time) (and on Thursdays, when the hours are 12:30 p.m. to 5:30 p.m. (Eastern Time)).

13. *Lane v. Pena*, 518 U.S. 187, 200, 116 S. Ct. 2092, 2100, 135 L. Ed. 2d 486, 498 (1996) (holding that Congress did not waive the federal government's immunity against monetary damages for violations of the Rehabilitation Act).

14. 28 C.F.R. § 35.130(b)(1) (2020).

15. 28 C.F.R. § 35.104 (2020).

16. *See, e.g.*, *Edison v. Doublerly*, 604 F.3d 1307, 1310 (11th Cir. 2010) (holding that "a private corporation is not a public entity merely because it contracts with a public entity to provide some service."); *see also* *Lee v. Corrections Corporation of America*, 61 F.Supp.3d. 139, 142–144 (D.D.C. 2014) (holding that plaintiffs fail to state a claim against a "public entity" under Title II because defendant is a private prison company).

17. *Wilkins-Jones v. Cty. of Alameda*, 859 F. Supp. 2d 1039, 1048 (N.D. Cal. 2012) (finding that the plaintiff could bring suit against the government when a private contractor with the government violates the ADA).

18. 42 U.S.C. §§ 12181–12189.

19. 42 U.S.C. § 12181(7).

20. 28 C.F.R. § 36.201(a) (2020).

21. 28 C.F.R. § 36.104 (2020).

22. 28 C.F.R. § 36.104 (2020).

It is unclear whether the definition of public accommodation includes prisons, though many courts have found that prisons are not places of public accommodation for purposes of Title III.²³ While it appears unlikely that a Title III claim arising out of disability discrimination in a prison context will be successful, it may be nonetheless worth including a Title III claim, as such claims can be brought against private entities (avoiding the limitation of Title II).²⁴ One limitation on Title III claims is that individuals suing under Title III can seek only injunctive relief, not monetary damages.²⁵ Additionally, a prison sued under Title III can defend itself by arguing that accommodating your disability is not “readily achievable,” meaning that the accommodation cannot be easily accomplished and is not able to be carried out without much difficulty or expense. When considering whether or not such accommodation is readily achievable, courts will look to several factors.²⁶

(a) Section 504 of the 1973 Rehabilitation Act

Section 504 of the 1973 Rehabilitation Act states:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.²⁷

Section 504 guarantees that anyone qualified to participate in a program, service, or activity will have meaningful access to it when it is offered either by the federal government or by a state or local recipient of federal funds.²⁸ Under Section 504, a “program or activity” is defined broadly to include “all of the operations” of a state or local government.²⁹ So, Section 504 applies not only to federal facilities, but also to any state, county, or city prison or jail that receives federal financial assistance,

23. *Livingston v. Beeman*, 408 S.W.3d 566, 577–578, 581 (Ct. App. Tex. 2013) (finding that Texas Department of Criminal Justice prison facilities do not fall into the definition of public facilities just because they are owned by the government); *see also* *Edison v. Douberley*, No. 2:05-cv-307-FtM-2 9SPC, 2008 U.S. Dist. LEXIS 68152, at *13 (M.D. Fla., Sep. 9, 2008) (*unpublished*) (finding that public accommodation under Title III does not include state prisons).

24. *Wilkins-Jones v. Cty. of Alameda*, 859 F. Supp. 2d 1039, 1047 (N.D. Cal. 2012).

25. 42 U.S.C. § 12188(a).

26. (A) the nature and cost of the action needed under [the] chapter; (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity. 42 U.S.C. § 12181(9). *See also* 42 U.S.C. § 12182(b)(2)(A)(iv)–(v).

27. Rehabilitation Act of 1973, 29 U.S.C. § 794(a).

28. *Alexander v. Choate*, 469 U.S. 287, 301, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661, 672 (1985) (noting that Section 504 requires state and local governments receiving federal aid to provide “meaningful access to the benefit” they offer), *superseded by statute on other grounds*, 28 C.F.R. §§ 35.160–35.164 (2020), 28 C.F.R. § 42.503(e)–(f) (2020).

29. Rehabilitation Act of 1973, 29 U.S.C. § 794(b)(1)(A)–(B) (2012) (defining program or activity as “all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government”).

either directly or through a state or local government.³⁰ It includes almost every state prison and many jails.³¹

(b) Title II of the Americans with Disabilities Act

A major ADA goal is to end disability discrimination by public and private actors.³² The ADA has three main sections (called “Titles”), only one of which applies to state and local entities. If you pursue an ADA claim against a state prison or county jail, you will file under Title II, which applies to all state and local governments. The antidiscrimination protections provided by Title II and Section 504 are very similar, but the ADA has stronger regulations. Title II provides:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.³³

The ADA defines many of the terms in the above paragraph, including: “qualified individual with a disability,”³⁴ “disability,”³⁵ and “public entity.”³⁶ However, the statute does not define the key phrase “services, programs, or activities.” It is important that you understand how courts have interpreted and applied both the defined and the undefined terms to claims made by incarcerated people with disabilities. Parts B(3)–(5) of this Chapter will discuss these terms.

(c) Necessary Elements of Your Title II and Your Section 504 Claims

You must include several basic elements in your Title II or Section 504 complaint. If you do not, the court will dismiss your lawsuit. Fortunately, most of the elements are the same for both statutes, so a well-pleaded complaint under one statute will probably meet the requirements of the other, as

30. Rehabilitation Act of 1973, 29 U.S.C. § 794(b); *Bellamy v. Roadway Exp., Inc.*, 668 F. Supp. 615, 618 (N.D. Ohio 1987) (noting that “the term ‘federal financial assistance’ has been very broadly construed to encompass assistance of any kind, direct or indirect”); *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (noting that acceptance of funds by one state agency does not constitute a waiver by the entire state, which would make the whole state subject to suit).

31. See ACLU Nat’l Prison Project, *Know Your Rights: Legal Rights of Disabled Prisoners*, 2 (Nov. 2012), available at https://www.aclu.org/files/assets/know_your_rights_-_disability_november_2012.pdf (last visited Nov. 22, 2020); see also Brief of the United States as Amicus Curiae at 2, *Westcott v. Gardner*, No. 1:96-CV-69-2 (M.D. Ga. Sep. 30, 1996), available at <https://www.ada.gov/briefs/westcotbr.pdf> (last visited Nov. 22, 2020) (arguing that the protections of “section 504 of the Rehabilitation Act do apply to inmates in state prisons because the statutes apply to all public entities and all recipients of federal financial assistance, respectively”).

32. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (stating that one of the goals of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”). The ADA’s implementing regulations also prohibits discrimination against you because of your association with a person with a disability. 28 C.F.R. § 35.130(g) (2020); *Niece v. Fitzner*, 922 F. Supp. 1208, 1216 (E.D. Mich. 1995) (finding a possible ADA violation when prison officials refused to make accommodations for an incarcerated person to communicate with his deaf fiancée).

33. Americans with Disabilities Act, 42 U.S.C. § 12132.

34. Americans with Disabilities Act, 42 U.S.C. § 12131(2) (defining “qualified individual with a disability” as anyone “with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity”).

35. Americans with Disabilities Act, 42 U.S.C. § 12102(1)(A)–(C) (defining “disability” as “a physical or mental impairment that substantially limits one or more of major life activities of [a person] . . . ; a record of such an impairment; or being regarded as having such an impairment”).

36. Americans with Disabilities Act, 42 U.S.C. § 12131(1)(A)–(B) (defining “public entity” as “any State or local government” or “any department, agency, special purpose district, or other instrumentality of a State or States or local government”).

well. For a court to accept your complaint, the complaint must set forth a claim for relief.³⁷ A court can throw out your complaint if it is not well-pleaded. A well-pleaded complaint must meet the requirements of Rule 8(a) of the Federal Rules of Civil Procedure (F.R.C.P.). According to F.R.C.P. 8(a):

A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.³⁸

More simply put, you should write a clear statement that explains why the issue you face would deserve the courts listening to and fixing the problem. You should try to include in your statement, what the prison did wrong, why you think you should get help under Section 504 or the ADA, and what you want the court to do about the problem.

To state a Title II claim, your complaint must say that:

- (1) You are an individual with a disability;
- (2) You are "qualified to participate in or receive the benefit of" the particular service, program, or activity at the prison or jail that discriminated against you;
- (3) You were excluded from participation in or denied the benefits of the service, program, or activity at your prison/jail, or you were discriminated against in some other way; and
- (4) This exclusion, denial of benefits, or discrimination was because of your disability.³⁹

A claim under Section 504 has one additional requirement. Section 504 covers all federal facilities, but only those state and local facilities that receive federal funding. So your complaint must state that the facility receives federal funding.⁴⁰

Your Section 504 complaint must say that:

- (1) You are an individual with a disability;
- (2) You are "otherwise qualified" for the program, activity, or service you were excluded from;
- (3) You were denied benefits or discriminated against solely because of your disability; and
- (4) The program, activity, prison, or jail receives federal financial assistance.⁴¹

Of course, you should make sure to list the four facts listed above. But your complaint should also include other information, both to make your situation clear and to get the judge to sympathize with the problems you face in prison. You should (1) discuss your disability in detail, (2) explain the accommodations you need, and (3) describe the discrimination you have experienced. You should also mention any other facts you think are relevant and will make your argument stronger.

37. FED. R. CIV. P. 8.

38. For a case in which the court addresses the meaning of "well-pleaded complaint," see, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–556, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 940 (U.S. 2007).

39. See, e.g., *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (discussing the requirements for an ADA Title II claim).

40. See, e.g., *Thomas v. Nakatani*, 128 F Supp.2d 684, 694 (dismissing a Section 504 claim because it did not allege the state agency received federal funds); *Hamilton v. Illinois Cent. R.R.*, 894 F. Supp. 1014, 1017 (S.D. Miss. 1995) (dismissing a Section 504 claim because the plaintiff failed to allege the private facility received federal funds). When you file your complaint, you may not know whether the jail or prison receives federal funding (this is something you should learn during discovery). When you are giving the court documents about something you believe, but do not know, to be true, you should begin your statement with the phrase, "Upon information and belief." For example, in your Section 504 complaint, you could say, "Upon information and belief, [the jail or prison you are suing] receives federal funding."

41. *Doe v. Pfrommer*, 148 F. 3d 73, 82 (2d Cir. 1998) (describing the essential elements of a Section 504 claim).

If your claim is about physical access within a prison or jail, your Section 504 claim should point out that the prison or jail is in violation of a statute that has been the law for more than forty years. By pointing this out, you will be showing that the prison or jail has little basis for arguing that it did not know it had to be accessible to individuals with disabilities.

Many of the terms above will be explained later in detail. For now, know that the ADA and Section 504 are antidiscrimination laws, so your complaint should be clear as to how prison staff have discriminated against you because of your disability. The rest of Part B of this Chapter shows how courts have interpreted the ADA and Section 504 in the prison context.

2. What Qualifies as Discrimination under the ADA?

The ADA regulations describe certain actions taken by public entities as “discrimination” under the ADA. The categories are broad, and they clarify what the ADA prohibits. Keeping in mind the main goals of the ADA—(1) preventing discrimination, (2) integrating people with disabilities into “mainstream” society, and (3) providing strong and consistent enforceable standards addressing disability discrimination⁴²—can help you understand why particular actions are considered discrimination. The following paragraphs discuss types of actions that the ADA describes as discriminatory.

According to the ADA, it is discrimination for public entities to deny an otherwise qualified person with a disability “the opportunity to participate in or benefit from” a program or service solely because of his disability.⁴³ For instance, if you meet the requirements for participating in a job-training program, the prison cannot exclude you from the program just because of your disability.⁴⁴

According to the ADA, it is discrimination for public entities, like prisons and jails, to offer individuals with disabilities any benefits or services that are worse than those offered to individuals without disabilities.⁴⁵ For instance, the ADA prohibits prisons from providing only one therapy session per week to a paraplegic prisoner, while providing two therapy sessions per week to incarcerated people without this disability (if the disability is the reason for providing fewer sessions). Similarly, if a prison offers GED classes for individuals with hearing disabilities, it cannot offer those individuals a lower-quality program than it offers to individuals without hearing disabilities. That said, the ADA does not prohibit the prison from canceling both programs.

According to the ADA, a prison can only provide “different or separate aids, benefits, or services” to individuals with disabilities if the programs *must* be separate to be effective.⁴⁶ In addition, the prison cannot exclude individuals with disabilities from other programs just because special programs are available for persons with disabilities.⁴⁷

According to the ADA, a public entity also discriminates if it provides “significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity’s program.”⁴⁸ So if a state or local government provides “significant assistance” to a prison—including a private prison—that discriminates on the basis of disability, then the state or local government can be in violation of the ADA. If you are in a private prison, this type of claim will help you sue the state or local entity that contracts with the prison.

42. Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1)–(8), (b)(1)–(2)).

43. 28 C.F.R. § 35.130(b)(1)(i) (2020).

44. *See, e.g.,* Montez v. Romer, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (noting incarcerated people’s claim that the incarcerated individual could not participate in vocational training because the prison did not accommodate his disabilities).

45. 28 C.F.R. § 35.130(b)(1)(ii) (2020).

46. 28 C.F.R. § 35.130(b)(1)(iv) (2020); *see also* 28 C.F.R. Pt. 35, App. A, at 527 (2020), which explains that the DOJ “recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted.”

47. 28 C.F.R. § 35.130(b)(2) (2020).

48. 28 C.F.R. § 35.130(b)(1)(v) (2020).

According to the ADA, it is discrimination for public entities to use criteria or methods of administration that defeat or substantially impair the accomplishment of the objectives of the public entity's program with respect to people with disabilities.⁴⁹ In other words, a prison cannot run its programs in a way that keeps incarcerated people with disabilities from being able to participate, even if disabled incarcerated people are not explicitly excluded. For instance, if a visually impaired incarcerated person could not enroll in a business class because the print on the enrollment application was too small for him to read, this would be discrimination. The prison would have to provide the incarcerated person with a way to enroll in the business class.

Although the ADA regulations prohibit these forms of discrimination in prisons, not all of the above categories have come up in lawsuits by incarcerated people. So, you may have to argue by analogy to discrimination cases in other areas, like employment.

3. What is a Disability under the ADA and Section 504?

Under both the ADA and Section 504, you have a disability if: (1) a physical or mental impairment substantially limits one or more of your major life activities, (2) you have a record of such an impairment, or (3) you are regarded as having such an impairment.⁵⁰ If you satisfy any of these tests, you are considered an individual with a disability under the ADA and Section 504. If you currently have a disability, such as an uncorrectable hearing impairment, you would be disabled under the first test. Under the second test, you might be considered disabled if, for example, you once had cancer that substantially limited your ability to care for yourself, but the cancer is now in remission.⁵¹ Finally, you may have a claim under the third test if prison officials discriminate against you because they believe you have a mental impairment that substantially limits your ability to learn when, in fact, you do not have a mental impairment, or you have an impairment but it does not substantially limit your ability to learn.⁵²

The definition of "disability" has two parts. First, the disability at issue must be a physical or mental impairment. The meaning of "physical or mental impairment" is explored in Subsection (a) below. Second, the impairment must substantially limit one or more major life activities. The meanings of "substantially limits" and "major life activity" are discussed in Subsection (b).

(a) What is a "Physical or Mental Impairment"?

The ADA implementing regulations (rules spelling out the details of the law), from the U.S. Department of Justice ("DOJ"), define a "physical or mental impairment" to include a wide range of

49. 28 C.F.R. § 35.130(b)(3)(ii) (2020).

50. Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(B); Americans with Disabilities Act, 42 U.S.C. § 12102(1). Most of the cases establishing the list of disabilities that qualify for ADA antidiscrimination protection have been employment discrimination suits. Those employment discrimination suits may be useful to your case even though you are not suing as an employee. Many people have brought ADA incarcerated person discrimination suits that rely on the outcomes of ADA employment discrimination suits. This is because the right of a disabled person to be free from discrimination is a right that he can enforce in many situations, including when he is an employee, or when he is incarcerated. *See, e.g.,* Carter v. Taylor, 540 F. Supp. 2d 522, 528 (D. Del. 2008) (citing Toyota Motor Mfg. Inc. v. Williams, 534 U.S. 184, 198, 122 S. Ct. 681, 692, 151 L. Ed.2d 615, 632 (2002)) (applying the "case-by-case manner" standard from *Williams*, an ADA employment discrimination suit, to an incarcerated person's ADA disability claim); Smith v. Masterson, 538 F. Supp. 2d 653, 657 (S.D.N.Y. 2008) (adopting the "major life activity" requirement from an employment suit for a suit by an incarcerated person, Colwell v. Suffolk County Police Dept., 158 F.3d 635, 641 (2d Cir. 1998)).

51. *See, e.g.,* EEOC v. R.J. Gallagher Co., 181 F.3d 645, 655–656 (5th Cir. 1999) (noting that a man with a record of cancer may have a disability under the ADA if the cancer or treatment substantially limited him in one or more major life activities). *But see* Shaw v. Greenwich Anesthesiology Assocs., 137 F. Supp. 2d 48, 58 (D. Conn. 2001) (rejecting the analysis in *R.J. Gallagher Co.* and requiring that the plaintiff suffer from a disability *currently*).

52. *Milholland v. Sumner County Bd. of Education*, 569 F.3d 562, 566–567 (6th Cir. 2009) (reading the 2008 ADA Amendments as expanding the Act's reach to include cases where "[an] individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*") (emphasis added).

physical and mental conditions. More specifically, the regulations define physical or mental impairment as “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine . . . [or] [a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”⁵³ The regulations also list specific things that qualify as physical or mental impairments. More specifically, the regulations state that the phrase “physical or mental impairment” includes, but is not limited to, contagious and non-contagious diseases and conditions such as: orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, and diabetes; mental retardation, emotional illness, and specific learning disabilities; HIV (whether symptomatic or asymptomatic) and tuberculosis; drug addiction and alcoholism.⁵⁴

If you are HIV-positive, you should note that the definition of physical impairment includes asymptomatic HIV (testing positive for HIV, but not showing symptoms).⁵⁵ For example, if you are asymptomatic HIV-positive and the prison denies you trustee status because you have HIV, you may have Title II and Section 504 claims.⁵⁶

Drug addiction is also considered an impairment, but not if you are currently addicted. If you have stopped using drugs and have completed or are participating in a drug rehabilitation program, the prison cannot discriminate against you on the basis of your past drug addiction.⁵⁷ However, the laws and regulations do not prohibit discrimination based on *current* illegal use of drugs.⁵⁸

53. 28 C.F.R. §35.108(b)(1)–(2) (2020).

54. 28 C.F.R. § 35.108(b)(2) (2020).

55. 28 C.F.R. § 35.108(b)(2) (2020); *see* *Bragdon v. Abbott*, 524 U.S. 624, 637–641, 118 S. Ct. 2196, 2204–2207, 141 L. Ed.2d 540, 556–559 (1998) (holding that (1) under the ADA, HIV infection is a physical impairment “from the moment of infection,” and (2) in this case, an asymptomatic HIV-positive woman was disabled under the ADA).

56. *Harris v. Thigpen*, 941 F.2d 1495, 1524 (11th Cir. 1991) (holding that HIV-positive status is a disability under Section 504 because the correctional system treated HIV-positive people as if they were disabled); *Dean v. Knowles*, 912 F. Supp. 519, 522 (S.D. Fla. 1996) (allowing an asymptomatic HIV-positive incarcerated person to go forward with a discrimination suit against prison officials who denied him trustee status, a status granting incarcerated people who have proven themselves trustworthy the opportunity to assist in the operation of the jail or prison in exchange for certain privileges).

57. 28 C.F.R. § 35.131(a)(2)(i)–(iii) (2020) (“A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who (i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully; (ii) Is participating in a supervised rehabilitation program; or (iii) Is erroneously regarded as engaging in such use”).

58. 28 C.F.R. § 35.131(a)(1) (2020) (“this part does not prohibit discrimination against an individual based on that individual’s current illegal use of drugs”). Section 504 contains similar language. Rehabilitation Act of 1973, 29 U.S.C. §705(20)(C)(i). “Current illegal use of drugs” is defined as the illegal use of drugs “recent[] enough to justify a reasonable belief that a person’s drug use is current or that continuing use is a real and ongoing problem.” 28 C.F.R. § 35.104(4) (2020). According to the regulation, “[t]he term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.” 28 C.F.R. § 35.104(4) (2020).

Other conditions and diseases that courts have found *could be* physical or mental impairments include: asthma,⁵⁹ deafness and other hearing impairments,⁶⁰ quadriplegia,⁶¹ paraplegia,⁶² amputations or artificial limbs,⁶³ certain stomach and digestive problems,⁶⁴ blindness or other vision impairments,⁶⁵ degenerative disk condition⁶⁶ and other disabilities. In many of the cases in the footnotes below (dealing with possible impairments), the court either did not decide whether the individual was disabled, or ruled that the plaintiff was not disabled at all. These cases simply give examples of the types of impairments courts have said *could* qualify as disabilities—as long as the claims were backed up with facts, and the impairment substantially limited the individual in a major life activity. (What it means to be *substantially limited* in a *major life activity* is discussed in Subsection (b) below.)

Being gay, lesbian, bisexual, or transgender is not a “physical or mental impairment” under the ADA.⁶⁷ (For information on special issues for incarcerated people who identify as gay, lesbian, bisexual, transgender, and transsexual, see Chapter 30 of the *JLM*, “Special Information for Lesbian, Gay, Bisexual, Transgender, and/or Queer Incarcerated People.”) Furthermore, the ADA regulations explicitly exclude certain “conditions”—including “transvestism, transsexualism,” “sexual behavior disorders,” and “gender identity disorders not resulting from physical impairments”⁶⁸—from the

59. *See, e.g.*, King v. England, No. 3:05CV949 (MRK), 2007 U.S. Dist. LEXIS 45345, at *17–21 (D. Conn. June 22, 2007) (*unpublished*) (listing different cases surrounding asthma in multiple jurisdictions and the different approaches regarding the ADA’s applicability to asthmatics); McIntyre v. Robinson, 126 F. Supp. 2d 394, 408 (D. Md. 2000) (noting that although asthma can be considered a disability in the prison context, it is especially subject to case-by-case analysis because it is an easily controlled ailment).

60. *See, e.g.*, Duffy v. Riveland, 98 F.3d 447, 454–455 (9th Cir. 1996) (finding that a deaf incarcerated person was disabled under the ADA and Section 504, and allowing him to go forward with claim against prison for failure to provide a qualified interpreter in prison disciplinary and classification hearings); Calloway v. Glassboro Dept. of Police, 89 F. Supp. 2d 543, 554 (D.N.J. 2000) (finding that a deaf arrestee could go forward with her ADA and Section 504 case for failure to provide a qualified interpreter during questioning at the police station); Niece v. Fitzner, 922 F. Supp. 1208, 1217 (E.D. Mich. 1995) (recommending that an incarcerated person be allowed to proceed with his case against the department of corrections for failure to provide a Telecommunications Device for the Deaf (“TDD”), which would allow him to communicate with his deaf girlfriend over the phone); Clarkson v. Coughlin, 898 F. Supp. 1019, 1036–1038 (S.D.N.Y. 1995) (finding that a prison’s failure to accommodate hearing-impaired incarcerated people violated the ADA and Section 504).

61. *See, e.g.*, Love v. Westville Corr. Ctr., 103 F.3d 558, 560 (7th Cir. 1996) (affirming judgment of damages for a quadriplegic who was denied access to prison programs based on his disability).

62. *See, e.g.*, Pierce v. County of Orange, 526 F.3d 1190, 1214–1222 (9th Cir. 2008) (finding that an incarcerated person with paraplegia could go forward with his ADA claim).

63. *See, e.g.*, Schmidt v. Odell, 64 F. Supp. 2d 1014, 1032 (D. Kan. 1999) (finding that a double amputee could proceed with his ADA and Section 504 claims that he was denied the benefit of some basic jail services because of his disability); Kaufman v. Carter, 952 F. Supp. 520, 533 (W.D. Mich. 1996) (refusing to issue summary judgment against a double amputee because of conditions alleged in his complaint); Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 U.S. Dist. LEXIS 21063, at *10 (M.D. Ala. Apr. 27, 1993) (*unpublished*) (noting that the defendant did not disagree that an incarcerated person with an artificial leg was a “qualified individual with a disability”).

64. *See, e.g.*, Scott v. Garcia, 370 F. Supp. 2d 1056, 1074–1075 (S.D. Cal. 2005) (holding that eating is a major life activity, and a plaintiff with stomach and digestive problems raised a material factual issue under the ADA when he submitted evidence that he was denied access to the prison meal service by not being given enough time to eat or the option to eat smaller, more frequent meals).

65. *See, e.g.*, Williams v. Ill. Dept. of Corr., No. 97 C 3475, 1999 U.S. Dist. LEXIS 18190, at *15 (N.D. Ill. Nov. 16, 1999) (*unpublished*) (holding that the defendant’s extreme myopia constituted a disability where the defendant agreed that the condition was disabling); Armstrong v. Davis, 275 F.3d 849, 857–863 (9th Cir. 2001) (finding that a parole board provided inadequate accommodations for the visually impaired during the parole process, and that this constituted a valid part of an ADA claim).

66. *See, e.g.*, Saunders v. Horn, 960 F. Supp. 893, 901 (E.D. Pa. 1997) (finding that an incarcerated person with degenerative disk disorder stated a claim under Section 504 and the ADA).

67. 28 C.F.R. § 35.108(b)(3), (g) (2020).

68. 28 C.F.R. § 35.108(g) (2020).

definition of “physical or mental impairment” or “disability.”⁶⁹ If you file a complaint in federal court alleging that one of these conditions or identities is a disability, the court will almost certainly dismiss your case.⁷⁰ However, one of these conditions or identities may be considered a disability under state law; you should consult statutes and case law for the state in which you live.

(b) When Is an Impairment a Disability?

To be considered disabled under the ADA and Section 504, it is not enough for you to have a physical or mental impairment. The impairment has to substantially limit you in at least one major life activity.⁷¹ The decision of whether an impairment substantially limits a major life activity or not is made on a case-by-case basis. In other words, the court will look at how an impairment limits *you*, and not at how an impairment usually limits a person.⁷² If you have an impairment that affects different people in different ways, you must show that your particular limitation is substantial in your own case.⁷³

The impairment does not have to be current. If you are discriminated against because you have a record of an impairment, that is still considered discrimination under the ADA.⁷⁴ A record of an impairment is when you have a history of having an impairment that substantially limits a major life activity, or when you have been misclassified as having an impairment that substantially limits a major life activity.⁷⁵ In addition, even if you have no history of the impairment, you are disabled under the ADA if you are “regarded as having such an impairment.”⁷⁶ You will be “regarded as having such an impairment” if you are discriminated against because of an actual or perceived disability, whether or not that disability limits or is perceived to limit you in a major life activity.⁷⁷

Under the ADA Amendments Act of 2008, Congress has tried to make clear what “substantially limits” means. The Act says that an impairment can count as a disability even if it (1) only substantially limits you in *one* major life activity, or (2) is episodic or in remission, *if* it would substantially limit you in at least one major life activity if it were active.⁷⁸ Additionally, the ADA Amendments Act of 2008 rejects earlier Supreme Court decisions that said “substantially limits” must be interpreted strictly, as to mean the impairment must “prevent” or even “severely or significantly restrict” an individual. The ADA Amendments Act of 2008 suggested that the standard for

69. 28 C.F.R. § 35.108(a)–(b), (g) (2020).

70. See Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” for a discussion of the “three strikes rule” and other negative consequences of filing a suit that is dismissed.

71. Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(B); Americans with Disabilities Act, 42 U.S.C. § 12102(1)–(2); 28 C.F.R. § 35.108 (2020).

72. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566, 119 S. Ct. 2162, 2169, 144 L. Ed.2d 518, 530 (1999) (noting that there is a “statutory obligation to determine the existence of disabilities on a case-by-case basis”), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. 110–325, 122 Stat. 3553. Although *Albertson's, Inc.* was superseded by the 2008 ADA amendments, courts are still obligated to examine disabilities claims on an individual basis. 42 U.S.C. § 12102.

73. *Gillen v. Fallon Ambulance Servs., Inc.*, 283 F.3d 11, 24 (1st Cir. 2002) (noting that an individual bringing an Americans with Disabilities Act claim must give evidence that a major life activity has been impaired); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566, 119 S. Ct. 2162, 2169, 144 L. Ed.2d 518, 530–531 (1999) (noting that some impairments may limit people's major life activities in different ways and to different degrees), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. 110–325, 122 Stat. 3553.

74. 28 C.F.R. § 35.108(a)(1)(i)–(ii) (2020) (“[D]isability means . . . a physical or mental impairment that substantially limits one or more of the major life activities . . . [or] a record of such impairment.”) (emphasis added).

75. *A Helping Hand, LLC v. Baltimore Cty.*, No. CCB-02-2568, 2005 U.S. Dist. LEXIS 22196, at *46 (D. Md. Sept. 30, 2005) (*unpublished*) (“[T]he phrase *has a ‘record of’ such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”) (emphasis added) (citing 28 C.F.R. § 35.104).

76. *Saunders v. Horn*, 959 F. Supp. 689, 697 (E.D. Penn. 1996) (citing 42 U.S.C. § 12102(2)).

77. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3, 122 Stat. 3553, 3555 (2008).

78. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3, 122 Stat. 3553, 3556 (2008).

“substantially limits” should be broad, the ability to ease the hardships of the impairment shouldn’t be considered, and courts should not extensively analyze “substantially limits” in ADA cases.⁷⁹

When considering whether an impairment substantially limits a major life activity, courts are not allowed to assume that having certain aids, including medication, medical supplies, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics, hearing aids, mobility devices, oxygen therapy equipment, assistive technology, and auxiliary aids and services (such as interpreters and readers), makes it such that you are not substantially limited in a major life activity.⁸⁰ The one exception is that courts will consider the effect of ordinary eyeglasses or contact lenses when considering whether a visual impairment substantially limits a major life activity.⁸¹

When you start doing legal research to help you argue that your impairment counts as a disability, you will probably find that most of the cases discussing the term “substantially limits” have been about employment discrimination, which falls under a different ADA section: Title I.⁸² Courts considering whether an impairment substantially limits a major life activity for an incarcerated person frequently look to Title I cases and regulations for guidance.⁸³ Right now, the regulations for Title I set forth nine rules to be used in determining whether an impairment substantially limits a major life activity.⁸⁴ The rules state that⁸⁵:

- (1) The term “substantially limits shall be construed broadly . . . [and is] not meant to be a demanding standard;
- (2) An impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting;
- (3) The primary object of attention . . . should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis;
- (4) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADA Amendments Act;
- (5) The [analysis] of an individual’s performance of a major life activity . . . usually will not require scientific, medical, or statistical analysis;
- (6) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the [effects of certain aids other than ordinary eyeglasses and contact lenses];
- (7) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- (8) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment; and
- (9) The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

79. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b)(4), 122 Stat. 3553–3554 (2008).

80. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3(4)(E)(i), 122 Stat. 3556 (2008).

81. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3(4)(E)(ii), 122 Stat. 3556 (2008).

82. Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117 (Title I of the ADA, covering discrimination in private employment).

83. *See, e.g. Mingus v. Butler*, 591 F.3d 474, 482 (6th Cir. 2010).

84. 29 C.F.R. § 1630.2(j)(1) (2020).

85. 29 C.F.R. § 1630.2(j)(1) (2020).

After the ADA Amendments Act of 2008, courts have interpreted “substantially limits” more broadly than before. In fact, a seven-month long impairment, which previously would not have been long enough to qualify, was found to be substantially limiting because temporary impairments can be substantially limiting under the ADA Amendments Act of 2008.⁸⁶ Since “substantially limits” is to be viewed expansively, courts recognize that the test for “substantially limits” is easier to meet than in cases occurring before the ADA Amendments Act of 2008,⁸⁷ though they occasionally conclude that “minor impairments” are excluded from coverage.⁸⁸ As previously mentioned, while there have been a few cases that define “substantially limits” in a prison disability context after the enactment of the ADA Amendments Act of 2008, many of the cases that have occurred since the Act have used the Title I regulations listed above, so it would be wise to consider them when determining whether or not your disability “substantially limits” a major life activity.

The Supreme Court has defined “major life activities” as “those activities that are of central importance to [most people’s] daily li[ves].”⁸⁹ Under the ADA Amendments Act of 2008, major life activities “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”⁹⁰ For example, if you have vision problems and cannot read regular-size print, or require braille materials, then your condition limits the major life activity of seeing. The 2008 Act states that major life activities also include “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”.⁹¹ Courts have found other important activities, such as eating⁹² and reproduction,⁹³ to be major life activities.

86. *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 330 (4th Cir. 2014).

87. *See, e.g., Matthews v. Pa. Dept. of Corr.*, 613 F. App’x 163, 167–168 (3d Cir. 2015) (*unpublished*); *Borwick v. Univ. of Denver*, 569 F. App’x 602, 604–605 (10th Cir. 2014) (*unpublished*); *Neely v. PSEG Tex., Ltd. P’ship*, 735 F.3d 242, 245 (5th Cir. 2013); *Kravtsov v. Town of Greenburgh*, No. 10-CV-3142 (CS), 2012 U.S. Dist. LEXIS 94819, at *35 (S.D.N.Y. July 9, 2012) (*unpublished*); *Anderson v. Nat’l Grid, PLC*, 93 F. Supp. 3d 120, 135 (E.D.N.Y. 2015) (citation omitted).

88. *See, e.g., Steele v. Stallion Rockies, LTD*, 106 F. Supp. 3d 1205, 1219 (D. Colo. 2015) (finding that the plaintiff’s Lumbar Degenerative Disc Disease did not substantially impair a major life activity); *Clark v. Western Tidewater Reg’l Jail Auth.*, No.: 2:11cv228, 2012 U.S. Dist. LEXIS 9497, at *21–22 (E.D. Va. 2012) (*unpublished*) (finding that a three week restriction on the ability to stand for prolonged periods of time was not a substantial limitation on the major life activity of standing).

89. *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 197, 122 S. Ct. 681, 691, 151 L. Ed.2d 615, 631 (2002) (holding that, to be considered substantially limited in performing manual tasks, an “individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”). But Congress has used the ADA Amendments Act of 2008 to criticize the Supreme Court on this point. The new law rejects the Court’s ruling “that the terms ‘substantially’ and ‘major’ . . . need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554 (2008). Newer cases have found that “the ADA Amendments Act’s . . . regulations indicate that a substantial limitation need not severely restrict an individual’s ability to perform a major life activity,” but that “minor impairments” are not considered substantial limitations on major life activities. *Clark v. Western Tidewater Reg’l Jail Auth.*, No.: 2:11cv228, 2012 U.S. Dist. LEXIS 9497 at *21 (E.D. Va. 2012) (*unpublished*). In other words, now that Congress has stepped in to protect the rights of people with disabilities, many courts are no longer using the *Toyota* standard to determine whether a major life activity is substantially impaired.

90. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3(2)(A), 122 Stat. 3553, 3555 (2008).

91. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3(2)(B), 122 Stat. 3553, 3555 (2008).

92. *Scott v. Garcia*, 370 F. Supp. 2d 1056, 1074 (S.D. Cal. 2005) (holding that while eating is a major life activity, a plaintiff with stomach and digestive problems must show that his dietary restrictions are serious enough to constitute a disability).

93. *Bragdon v. Abbott*, 524 U.S. 624, 637–642, 118 S. Ct. 2196, 2204–2207, 141 L. Ed. 2d 540, 556–559 (1998) (holding that an asymptomatic HIV-positive woman had a disability because her HIV infection substantially limited her ability to reproduce, but refusing to decide whether HIV infection is always a disability).

Note that the ADA Amendments Act includes “working” as a major life activity. Previously, the Supreme Court had questioned whether working was a major life activity, at least in employment discrimination cases.⁹⁴ The pre-2008 test for whether you were substantially limited in your ability to work required that you be limited in performing a “class of jobs” that made use of your skills, not just a “single, particular job.”

The Title I regulations that apply to employment discrimination, but that have also been used by courts in an incarcerated person disability discrimination context further define working as a major life activity. The regulations keep the original “class or broad range of jobs” standard, though they explain how the standard must be applied in ways that are different from how the standard was applied before the ADA Amendments Act. They state: “the determination of whether a person is substantially limited in working is more straightforward and simple than it was prior to the Act.”⁹⁵ The broader category of “major life activity,” created by the 2008 Act means that, frequently, even if you cannot show substantial impairment of working, you will be able to show substantial impairment of another major life activity.⁹⁶ Because of this, the major life activity of working will probably be used less frequently. Nonetheless, the Title I regulations state that you can show substantial impairment of the major life activity of working by “showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities.”⁹⁷ This standard, while similar to the older standard used by courts, is not meant to be as strict. That said, showing substantial impairment in “performing the unique aspects of a single specific job is not sufficient.”⁹⁸ A court may define a class of jobs by looking to the nature of the work (e.g., food service jobs or clerical jobs), or to the job-related requirements (e.g., heavy lifting or driving).⁹⁹

In the prison context, the “substantially limits” and “major life activities” requirements are not usually a focus in ADA and Section 504 cases. If you sue the prison or prison officials, alleging discrimination on the basis of your disability, the case likely will focus on whether you are (1) a “qualified individual with a disability,” and (2) whether you were “excluded from participation in or . . . denied the benefits of the services, programs, or activities” of the prison, or discriminated against by the prison.¹⁰⁰ The next two Sections discuss how courts interpret these questions in your disability discrimination claim.

(c) Who is a Qualified Individual under the ADA and Section 504?

Not everybody who has a disability under the ADA and Section 504 is protected from discrimination.

The ADA and Section 504 prohibit discrimination based on your disability only if you are a “*qualified individual* with a disability.”¹⁰¹ The ADA defines the phrase “qualified individual with a disability” as:

An individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the

under the ADA); *Mullen v. New Balance Ath., Inc.*, No. 1:17-cv-194-NT, 2019 U.S. Dist. LEXIS 30967, at *12 (D. Me. Feb. 27, 2019) (*unpublished*) (noting that reproduction is a major life activity under the ADA)

94. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492, 119 S. Ct. 2139, 2151, 144 L. Ed. 2d 450, 468–469 (1999) (noting that “there may be some conceptual difficulty in defining ‘major life activities’ to include work”).

95. 29 C.F.R. § Pt. 1630, App. (2020).

96. *See, e.g., Corley v. Dept. of Veterans Affairs ex rel. Principi*, 218 F. App’x 727, 738 (10th Cir. 2007) (*unpublished*) (finding no substantial impairment of major life activity of working for employee with seizure disorder when employee was not foreclosed from certain jobs; employee would now be limited in neurological function according to Title I Regulations.).

97. 29 C.F.R. § Pt. 1630, App. (2020).

98. 29 C.F.R. § Pt. 1630, App. (2020).

99. 29 C.F.R. § Pt. 1630, App. (2020).

100. Americans with Disabilities Act, 42 U.S.C. § 12132; *see also* Rehabilitation Act of 1973, 29 U.S.C. § 794(a).

101. Americans with Disabilities Act, 42 U.S.C. § 12132; Rehabilitation Act of 1973, 29 U.S.C. § 794(a).

essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.¹⁰²

So, in addition to having a disability, you also must be eligible to participate in or benefit from a particular program, service, or activity. If you decide to file suit under either the ADA or Section 504, your complaint must include: (1) generally what your disability is, and (2) that you are a “qualified individual with a disability” within the meaning of the ADA and Section 504. In its answer to your complaint, the prison might say that even if you have a disability, you are not a qualified individual. If the prison convinces the court that you are not a qualified individual, the court will dismiss your case.

The fact that you are an incarcerated person does not mean you are disqualified from programs or services. The Supreme Court has firmly established that an incarcerated person is not excluded from being a qualified individual with a disability just because he is in prison.¹⁰³ Incarcerated people are covered by the ADA and Section 504 if they can meet the definition of disability discussed in Section B(3), above, and can show that they are qualified individuals.

The definition of “qualified individual” has several parts, each of which the prison might use to try to defeat your case. Below, Subsection (a) explains what it means generally to be a “qualified individual with a disability.” Subsection (b) describes the meaning of “reasonable modifications” and the factors courts consider when deciding what is reasonable. Subsection (c) discusses auxiliary aids and services. Subsection (d) addresses the removal of barriers.

(d) Who is a “Qualified Individual with a Disability?”

To be a “qualified individual with a disability,” you must meet “the essential eligibility requirements for . . . participation in programs or activities.”¹⁰⁴ For example, if incarcerated people convicted of a certain offense are not allowed to participate in work release, then a person with a disability who is convicted of that offense is not “qualified” for that program.

There are some situations in which you will not be considered a qualified individual even if you meet program or activity requirements. You are not a qualified individual if the prison can show that, because of your disability, your participation makes you a “direct threat to the health or safety of others.”¹⁰⁵ The appendix to the DOJ’s Title II regulations defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”¹⁰⁶

If prison officials are trying to decide whether someone with a disability poses a direct threat, they must determine “the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will” reduce or eliminate the risk.¹⁰⁷ (The meaning of “reasonable modifications” is discussed in Subsection (b), below.) In making this determination, prison officials must use “reasonable judgment that relies on current medical evidence or on the best available objective evidence.”¹⁰⁸ The prison may *not* rely on “generalizations or stereotypes about the effects of a disability”—instead, it must assess the particular individual with the disability.¹⁰⁹

Courts use the direct threat analysis in Title II and Section 504 cases even though the direct threat language is not clearly stated in the laws.¹¹⁰ The direct threat argument is a defense the prison may

102. Americans with Disabilities Act, 42 U.S.C. § 12131(2) (defining “qualified individual with a disability”).

103. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210–211, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219–220 (1998) (holding that people incarcerated by the state are protected by the ADA).

104. Americans with Disabilities Act, 42 U.S.C. § 12131(2).

105. 28 C.F.R. § 35.139 (2020) (analyzing the ADA Title II regulations).

106. 28 C.F.R. § 35.104 (2020).

107. 28 C.F.R. § 35.139(b) (2020).

108. 28 C.F.R. § 35.139(b) (2020).

109. 28 C.F.R. § 35.104 (2020).

110. See, e.g., Doe v. Cnty. of Centre, 242 F.3d 437, 447 (3d Cir. 2001) (explaining the “direct threat”

raise. Because the argument is a defense, the prison will have the burden of showing that you are a direct threat.¹¹¹ If the court accepts the prison's defense that you are a direct threat, you will not be considered a qualified individual.

The direct threat defense to discrimination often comes up for people with infectious diseases, especially HIV. A few courts have decided that incarcerated people who are HIV-positive, although they are "individuals with a disability," are not "qualified" for various prison programs or activities.¹¹²

For example, in *Onishea v. Hopper*, the Eleventh Circuit rejected constitutional and Section 504 claims of incarcerated people who were not allowed to participate in prison recreational, religious, and educational programs because they were HIV-positive.¹¹³ These incarcerated people could participate only in a limited number of programs, which were separate from the programs available to the general population.¹¹⁴ The lower court had ruled that the HIV-positive incarcerated people were not "otherwise qualified" to participate in programs with the general population because of the possibility of high-risk behaviors like violence, intravenous drug use, and sex.¹¹⁵ The Eleventh Circuit agreed, finding that the risk of HIV transmission is "significant" because of the severe consequences of HIV infection, even if the probability of transmission is low.¹¹⁶

The *Onishea* opinion allows a prison to disqualify HIV-positive incarcerated people from participating in many programs, and significantly reduces Section 504 and Title II protections for these incarcerated people.¹¹⁷ The *Onishea* court claimed to require judges to make program-by-program decisions about whether HIV-positive incarcerated people were qualified to participate.¹¹⁸ But the ruling has had the effect of preventing HIV-positive incarcerated people from participating in most programs with the general population. Beyond the Eleventh Circuit, it appears that only a few other federal courts have considered the issue of whether an HIV-positive incarcerated person can be a "direct threat."¹¹⁹ Notably, the court in *Henderson v. Thomas* found that the *Onishea* analysis no longer applies because of the effect of modern medicine in reducing the harm from HIV as well as the likelihood of transmission.¹²⁰

analysis in an ADA Title II and § 504 case); *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 840 n.6 (7th Cir. 2001) (stating that whether an individual is "otherwise qualified" depends on whether he poses a threat to the safety of others that cannot be reduced by reasonable accommodation); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 735 (9th Cir. 1999) (holding that a person who poses a direct threat or "significant risk" to others is not a qualified individual under Title II).

111. *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 840 (7th Cir. 2001) (holding that the burden of showing a direct threat due to a disability is on the party that claims there is a direct threat).

112. See Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prison," for additional information on the rights of HIV-positive incarcerated people.

113. *Onishea v. Hopper*, 171 F.3d 1289, 1296–1297 (11th Cir. 1999) (reading Section 504's definition of "individual with a disability" as not including a person "who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals"). The *Onishea* court relied on 29 U.S.C. § 705(20)(D), a section of the Rehabilitation Act that excludes from employment protection people who are a direct threat to others because they have a currently contagious disease or infection.

114. *Onishea v. Hopper*, 171 F.3d 1289, 1292–1293 (11th Cir. 1999).

115. *Onishea v. Hopper*, 171 F.3d 1289, 1293–1295 (11th Cir. 1999).

116. *Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that "when transmitting a disease inevitably entails death, the evidence supports a finding of 'significant risk' if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease. . . . [E]vidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk").

117. *Onishea v. Hopper*, 171 F.3d 1289, 1305 (11th Cir. 1999) (Barkett, J., dissenting). A dissenting opinion is an opinion, written by a judge on the court, that disagrees with the court's decision. A dissenting opinion is not controlling law, but it may suggest arguments other courts will make in future rulings.

118. *Onishea v. Hopper*, 171 F.3d 1289, 1293 (11th Cir. 1999).

119. *Onishea v. Hopper*, 171 F.3d 1289, 1293 (11th Cir. 1999).

120. *Henderson v. Thomas*, 913 F.Supp.2d 1267, 1289–1290 (M.D. Ala. 2012) (finding HIV to not constitute a direct threat justifying segregation of HIV-positive incarcerated people at correctional facilities).

Other courts have looked at specific programs to decide whether HIV-positive incarcerated people are qualified.¹²¹ For more information on segregation (separation) of HIV-positive incarcerated people from the general population, and other issues of special interest to HIV-positive incarcerated people, see Chapter 26 of the *JLM*, “Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prison.”

4. Your Right to “Reasonable Modifications” of Prison Policy under the ADA

The ADA requires state and local entities to make “reasonable modifications” to policies, rules, and practices so that people with disabilities can participate in public programs and services.¹²² A reasonable modification should allow you, as a person with a disability, to take part in a program or activity, or gain access to a facility. Reasonable modifications may be simple—for example, creating an exception to the rule forbidding incarcerated people from storing food in their cells, so a diabetic person can keep his “blood sugar at an appropriate level.”¹²³ Other modifications are more complicated.

Whether a modification is considered reasonable depends on the specific circumstances and modification you ask for. To decide what a “reasonable modification” is, courts weigh the needs of incarcerated people with disabilities against the structural, financial, and administrative concerns of the prison. In particular, courts look at: (1) whether the modification will “fundamentally alter” a program or activity,¹²⁴ (2) the cost of the modification, and (3) the burden the modification would have on administration of the prison.¹²⁵ Some courts also look at concerns relating to prison management and incarcerated person rehabilitation, such as safety.¹²⁶

You should be prepared for the prison to make these kinds of arguments. The prison has the burden of showing that a modification would “result in a fundamental alteration in the nature of a service, program, or activity or in undue [extreme] financial and administrative burdens.”¹²⁷ Even if the prison succeeds in showing that changes would fundamentally alter a program, or cause an undue financial or administrative burden, it must still “take any other action” that would “ensure that individuals with disabilities receive the benefits or services provided” by the prison.¹²⁸ This means they are supposed to come up with other ways for you to get the benefits offered. The following Subsections describe the fundamental alteration defense, the undue burden defense, and the “penological interests” (relating to prison management or incarcerated person rehabilitation) defense to incarcerated people’s ADA and Section 504 claims.

121. *Bullock v. Gomez*, 929 F. Supp. 1299, 1305 (C.D. Cal. 1996) (finding that the prison’s reasons for excluding the incarcerated person from the conjugal visit program—transmission of tuberculosis and other strains of HIV—might not be justified, given that evidence showed low risk of transmission) *dismissed as settled*. See also *Doe v. Coughlin*, 71 N.Y.2d 48, 61, 518 N.E.2d 536, 544, 523 N.Y.S.2d 782, 790 (1987) (reviewing specific program requirements before deciding that an HIV-positive incarcerated person was not qualified for the family reunion program because the program required applicants to be free of communicable diseases).

122. Americans with Disabilities Act, 42 U.S.C. § 12131(2).

123. This example was taken from the Disability Rights Section of the Department of Justice Civil Rights Division. *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement*, U.S. DEPT. OF JUSTICE (2006), available at http://www.ada.gov/q%26a_law.htm (last visited Oct. 6, 2019). Contact information for the DOJ can be found at footnote 12.

124. 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164 (2020).

125. 28 C.F.R. §§ 35.150(a)(3), 35.164 (2020).

126. See, e.g., *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999) (noting that the prison could present evidence that providing an interpreter for a deaf incarcerated person at disciplinary hearings created safety and security concerns); *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 561 (7th Cir. 1996) (noting that the prison could justify its refusal to make reasonable accommodations because the overall demands of running a prison made it impossible to make such accommodations).

127. See 28 C.F.R. § 35.130(b)(7) (2020) (defining the general application of fundamental alteration defense); 28 C.F.R. § 35.150(a)(3) (2019) (defining the fundamental alteration and undue burden defenses for existing facilities); 28 C.F.R. § 35.164 (2020) (defining the fundamental alteration and undue burden defense to providing effective communication). Furthermore, the “decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.” 28 C.F.R. §§ 35.150(a)(3), 35.164 (2020).

128. 28 C.F.R. §§ 35.150(a)(3), 35.164 (2020).

(a) Modifications Are Not Reasonable if They Result in a Fundamental Alteration to the Prison's Programs, Services, or Activities

A prison does not have to make modifications to a service, program, or activity if doing so would “fundamentally alter the nature of the service, program, or activity.”¹²⁹ A fundamental alteration has to be so big that something essential is lost. This allows prisons to balance the rights of incarcerated people with disabilities against the integrity of its services, programs, and activities.¹³⁰ If you are seeking a change that would make it difficult for the prison to provide the particular service, program, or activity to other incarcerated people, this could be considered a fundamental alteration that the prison does not have to provide.¹³¹

Courts will likely consider the circumstances surrounding a modification when determining if such modification is a fundamental alteration,¹³² and will expect the prison to provide support for their claim that a modification is a fundamental alteration.¹³³ Examples of modifications that might not be considered fundamental alterations include the provision of a shower chair, a non-slip shower floor, and installation of shower handrails.¹³⁴ The determination of whether a modification is a fundamental one is very dependent on the facts of a given case, and courts will look closely to the specific circumstances surrounding your situation.¹³⁵

(b) Modifications Are Not Reasonable if They Cause Undue Financial or Administrative Burden

Prisons also do not have to make modifications that would result in “undue financial and administrative burdens.”¹³⁶ For example, in *Onishea v. Hopper*, the court found that hiring additional guards to prevent high-risk behavior (so that HIV-positive incarcerated people could participate in programs with the general population) would not be a “reasonable accommodation,” because it would be too expensive, causing undue financial burden.¹³⁷

129. 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164 (2020).

130. See *Galusha v. N.Y. State Dept. of Envtl. Conservation*, 27 F. Supp. 2d 117, 123 (N.D.N.Y. 1998) (noting that the Supreme Court struck this balance in *Alexander v. Choate*, 469 U.S. 287, 300, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661, 671 (1985)).

131. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604, 119 S. Ct. 2176, 2189, 144 L. Ed. 2d 540, 560 (1999) (“[s]ensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities”). See also *Raines v. Florida*, 983 F.Supp 1362, 1372 (N.D. Fla. 1997) (rejecting the prison’s defense that allowing incarcerated people with disabilities into the work portion of the Incentive Gain Time program would fundamentally alter the program’s incentives).

132. See, e.g., *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1087–1088 (11th Cir. 2007) (finding that waiting for an oral interpreter after arresting deaf person was not a reasonable modification, given the demanding circumstances of such an arrest).

133. See, e.g., *Frederick L. v. Dept. of Pub. Welfare of Pa.*, 422 F.3d 151, 157–159 (3rd Cir. 2005) (discussing the defendant’s obligation to raise fundamental-alteration arguments as affirmative defenses).

134. See, e.g., *Kaufman v. Carter*, 952 F.Supp. 520, 532 (W.D. Mich. 1996) (noting the insufficiency of shower and toilet accommodations for wheelchair users).

135. *Norfleet v. Walker*, No. 09-cv-347-JPG-PMF, 2011 U.S. Dist. LEXIS 29817 (S.D. Ill. Mar. 22, 2011) (“[the determination of whether a modification is a fundamental alteration] is both fact-intensive and context-specific”). See, e.g., *Kaufman v. Carter* 952 F.Supp. 520, 523–524 (W.D. Mich. 1996) (repeating in great detail the plaintiff’s complaints regarding the shower and toilet specifications).

136. 28 C.F.R. §§ 35.150(a)(3), 35.164 (2020).

137. *Onishea v. Hopper*, 171 F.3d 1289, 1303–1304 (11th Cir. 1999). See also, e.g., *Spurlock v. Simmons*, 88 F. Supp. 2d 1189, 1196 (D. Kan. 2000) (holding that a deaf incarcerated person had “meaningful access” to TDD when he was allowed to use it at least twice a week, and more frequently if he had a legitimate reason); see also *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 397 n.43 (D. Md. 2011) (expressing skepticism that it would be an undue financial or administrative burden to provide an interpreter, when the State provided interpreters as a matter of policy).

The DOJ seems to believe that the undue burden test is hard for a prison to pass—that it would apply only in “the most unusual cases.”¹³⁸ While some courts (as in *Onishea* and *Spurlock*) may allow defendant prisons to pass the test in situations the DOJ would not consider unusual, others are requiring more than “administrative or fiscal convenience” to segregate services under Title II.¹³⁹ For example, in *Pierce v. County of Orange*, the court found no evidence that allowing incarcerated people access to an adjacent “Inmate Programming Building” would impose undue financial or administrative burdens.¹⁴⁰ As with the “fundamental alteration” defense, the determination of whether a modification will cause undue financial or administrative burden is very dependent on the facts of a given case, and courts will look closely to the specific circumstances surrounding your situation.¹⁴¹

(c) Modifications Are Not Reasonable if They Impact Overall Institutional Concerns (Penological Interests)

The ADA regulations only mention fundamental alterations and undue burdens as the two arguments prisons can use to avoid making modifications for incarcerated people with disabilities. However, courts have permitted prisons to make a third argument to avoid making those modifications: “overall institutional requirements,” such as “[s]ecurity concerns, safety concerns, and administrative” needs.¹⁴² In considering these institutional requirements, some courts strongly presume that prison policies are acceptable.¹⁴³ (This is called “deference to prison management.”) In jurisdictions that use this approach, you will have to overcome this strong presumption that the prison’s concerns are legitimate.¹⁴⁴

Not all courts recognizing the defense of “overall institutional concerns” will show deference to prison officials. For example, in *Armstrong v. Schwarzenegger*, defendants argued that they had legitimate “penological” (relating to prison management or criminal rehabilitation) reasons to house a class of incarcerated people in county jails rather than state prisons, and that they were entitled to deference. The court, however, found that prison management “demand[ed] deference to which they

138. 28 C.F.R. § Pt. 35, App. B (2020) (discussing 28 C.F.R. § 35.150 and noting that “Congress intended the ‘undue burden’ standard in Title II to be significantly higher than the ‘readily achievable’ standard in Title III” and that “the program access requirement of Title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases”); see also *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement*, Question 22, U.S. DEPT. OF JUSTICE (2003), available at http://www.ada.gov/q%26a_law.htm (last visited Nov. 23, 2020) (noting that new jails and prisons “must be made fully accessible to, and usable by, individuals with disabilities”; that there is “no undue burden limitation for new construction”; and that “if an agency alters an existing facility for any reason—including reasons unrelated to accessibility—the altered areas must be made accessible to individuals with disabilities”). Contact information for the DOJ can be found at footnote 12.

139. See, e.g., *Greist v. Norristown State Hosp.*, Civil Action No. 96-CV-8495, 1997 U.S. Dist. LEXIS 16320 (E.D. Penn. Oct. 16, 1997). See also *Blunt v. Lower Merion School Dist.*, 767 F.3d 247, 274 (3rd Cir. 2014) (noting that “mere administrative or fiscal convenience does not constitute a sufficient justification for providing separate or different services to a handicapped child”).

140. *Pierce v. County of Orange*, 761 F. Supp. 2d 915, 936 (C.D. Cal. 2011).

141. *Norfleet v. Walker*, No. 09-cv-347-JPG-PMF, 2011 U.S. Dist. LEXIS 29817 (S.D. Ill. Mar. 22, 2011) (“[the determination of whether a modification would cause undue financial or administrative burden] is both fact-intensive and context-specific”).

142. *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 561 (7th Cir. 1996) (noting that the prison could have attempted to justify its refusal to make reasonable accommodations because of the overall needs of running a prison); *Miller v. King*, 384 F.3d 1248, 1266 (11th Cir. 2004) (“courts must be mindful of the necessary balance between the ADA’s worthy goal of integration and a prison’s unique need for security, safety, and other penological concerns”), *vacated and superseded on other grounds*, *Miller v. King*, 449 F.3d 1149 (11th Cir. 2006).

143. *Wilkinson v. Austin*, 545 U.S. 209, 228, 125 S. Ct. 2384, 2397, 162 L. Ed. 2d 174, 193 (2005) (finding that “courts must give substantial deference to prison management decisions”); see also *Gates v. Rowland*, 39 F.3d 1439, 1448 (9th Cir. 1994) (noting that separation of powers, especially with regard to state penal systems, favors judicial deference to prison authorities).

144. *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001) (noting that the incarcerated person has the burden of refuting the defense that there were legitimate penological interests behind prison action); see also *Gates v. Rowland*, 39 F.3d 1439, 1447 (9th Cir. 1994).

are not entitled” and did not find any penological reasons for such housing.¹⁴⁵ Additionally, some courts require more than penological interests alone for a modification to qualify as unreasonable. For example, in *Henderson v. Thomas*, the court stated that prior cases did not “require this court to treat penological interests as a trump on the plaintiffs’ [ADA] statutory rights,” before finding that, while the prison had a legitimate penological interest in diminishing the spread of HIV to other incarcerated people, they could prevent HIV transmissions while still allowing reasonable modifications for the plaintiff.¹⁴⁶ Because of the variety of approaches used by courts, as well as the fact-specific nature of the courts’ determinations, you should see how courts have ruled in your jurisdiction when making a claim.

(d) The *Turner* Test in ADA and Section 504 Claims for Incarcerated People with Diabetes.

Circuit courts have used the *Turner v. Safley*¹⁴⁷ test in ADA and Section 504 cases to decide when a prison policy can legally discriminate against incarcerated people with disabilities. Under this test, prison policies are acceptable if they are “reasonably related to legitimate penological interests,” meaning that the policies make sense and are related to a valid prison concern or goal.¹⁴⁸ Some courts have used this test to decide what is a reasonable modification under the ADA for incarcerated people with disabilities.¹⁴⁹

The *Turner* test is usually used to decide incarcerated people’s *constitutional* claims, not *statutory* claims like the ADA and Section 504. Some experts believe the *Turner* test is inappropriate in ADA cases.¹⁵⁰ It is better for incarcerated people when courts do *not* use *Turner*, because the ADA and

145. *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1069 (9th Cir. 2010) (finding that defendant’s practice of placing certain classes of incarcerated people in county jails as opposed to state jails did not have a legitimate penological interest).

146. *Henderson v. Thomas*, 913 F.Supp.2d 1267, 1313–1314 (M.D. Ala. 2012).

147. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987) (establishing a reasonableness test for courts to apply to incarcerated people’s constitutional challenges to prison regulations).

148. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987). In *Turner*, the Supreme Court identified four factors used to determine the “reasonableness” of a challenged prison regulation: (1) whether there is a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are other ways an incarcerated person could exercise the right at issue; (3) “the impact [that] accommodation . . . will have on guards and other inmates, and on the allocation of prison resources generally”; and (4) whether there are “ready alternatives” to the regulation. The *Turner* test generally is used when incarcerated people claim that their constitutional rights have been violated. For further discussion of the *Turner* test, see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

149. *See, e.g., Thompson v. Davis*, 295 F.3d 890, 898 n.4 (9th Cir. 2002) (noting that a prison might be able to give legitimate penological justifications for considering certain disabilities in parole decisions, particularly when the disability is a history of substance abuse); *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999) (noting that a prison should be allowed to present evidence that providing an interpreter for a deaf incarcerated person at disciplinary hearings created security concerns); *Onishea v. Hopper*, 171 F.3d 1289, 1300 (11th Cir. 1999) (allowing the use of a test almost identical to the *Turner* test, despite explicitly stating that the *Turner* test “does not, by its terms, apply to” the ADA); *Crawford v. Ind. Dept. of Corr.*, 115 F.3d 481, 487 (7th Cir. 1997) (noting that what is “reasonable” or an “undue” burden is different in the prison context and that security concerns are relevant to whether accommodations for incarcerated people with disabilities are “feasible”); *Gates v. Rowland*, 39 F.3d 1439, 1447–1448 (9th Cir. 1994) (applying the *Turner* test to uphold a policy of excluding HIV-positive incarcerated people from food service assignments); *Kaufman v. Carter*, 952 F. Supp. 520, 532 (W.D. Mich. 1996) (finding it sensible that incarcerated people’s ADA rights are limited by “legitimate penological interests”).

150. *See* Christopher J. Burke, Note, *Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners’ Statutory Claims Under the Americans with Disabilities Act*, 98 MICH. L. REV. 482, 495–498 (1999) (arguing that (1) *Turner*’s rationale regarding the restrictions on constitutional rights are not applicable to statutory rights, because statutes represent congressional determinations of policy and resource allocation; (2) statutory rights allow Congress to provide guidance to prison administrators and allow flexibility and modification if the statute is unworkable; and (3) legislation like the ADA provides much detail to courts and prison administrators, whereas constitutional rights necessarily are dependent on judicial determinations).

Section 504 require defendants to make any reasonable accommodations for incarcerated people's disabilities. Also, reasonable accommodations or modifications under the ADA often include expensive physical renovations or other expenditures.¹⁵¹ In comparison, the *Turner v. Safley* reasonableness standard prescribes only "*de minimis* cost" (minor cost) solutions. (So a prison would have to make more accommodations for you under the ADA and Section 504, and fewer and cheaper accommodations under *Turner*.) However, some courts have held that the ADA/Section 504 standard must be interpreted consistently with the *Turner* standard,¹⁵² or at least may be influenced by the *Turner* standard.¹⁵³

Gates v. Rowland is an early case in which a court applied the *Turner* test to an incarcerated person's Section 504 claim. In *Gates*, HIV-positive incarcerated people sued under Section 504 to be allowed to work as food preparers and servers in a prison food service program. The prison argued that it was justified in excluding the incarcerated people based solely on their HIV status because other incarcerated people "frequently have irrational suspicions or phobias" about people with HIV, and these suspicions or phobias cannot be reversed by educating incarcerated people about HIV.¹⁵⁴ Prison officials claimed that allowing HIV-positive incarcerated people to serve food could lead to violence against HIV-positive food workers and the prison staff.¹⁵⁵

The *Gates* court concluded that the *Turner* test was the correct test for deciding incarcerated people's rights under Section 504, even though the *Turner* test normally is used only for incarcerated people's constitutional claims.¹⁵⁶ Under the *Turner* test, the court upheld the policy discriminating against HIV-positive incarcerated people, stating that the prison had a "reasonable basis for [the] restriction based on legitimate penological concerns."¹⁵⁷

Courts following the *Gates* approach do not always uphold challenged discriminatory conduct.¹⁵⁸ In your complaint, be sure to provide the court with appropriate language from the ADA, Section 504, and the regulations that cover those laws. Generally speaking, the ADA and Section 504 (written by Congress) and the ADA regulations (written by the DOJ) protect your rights as an incarcerated person with disabilities more than many courts recognize. You should emphasize the extent to which the laws and regulations plainly protect your rights.¹⁵⁹

151. *But see* *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607, 119 S. Ct. 2176, 2190, 144 L. Ed. 2d 540, 562 (1999) (holding that a state's ADA obligations are determined by "taking into account the resources available to the State").

152. *Gates v. Rowland*, 39 F.3d 1439, 1446–1447 (9th Cir. 1994) (holding the *Turner* standard applicable under the ADA). *Contra* (decided exactly the opposite in) *Amos v. Md. Dept. of Public Safety & Corr. Servs.*, 178 F.3d 212, 220 (4th Cir. 1999) (rejecting application of *Turner* as inconsistent with *Yeskey*), *dismissed as settled*, *Amos v. Md. Dept. of Public Safety & Corr. Servs.*, 205 F.3d 687 (4th Cir. 2000).

153. *Onishea v. Hopper*, 171 F.3d 1289, 1300–1301 (11th Cir. 1999) (holding that the *Turner* standard can be "properly considered" when applying the ADA).

154. *Gates v. Rowland*, 39 F.3d 1439, 1448 (9th Cir. 1994).

155. *Gates v. Rowland*, 39 F.3d 1439, 1447–1448 (9th Cir. 1994).

156. *Gates v. Rowland*, 39 F.3d 1439, 1447 (9th Cir. 1994).

157. *Gates v. Rowland*, 39 F.3d 1439, 1448 (9th Cir. 1994).

158. *See, e.g., Chisolm v. McManimon*, 275 F.3d 315, 327 (3d Cir. 2001) (refusing to decide whether the *Turner* test is appropriate in ADA and Section 504 claims, but noting that the prison's mention of "security" concerns, without evidence that these security concerns were real, would not be enough under the *Turner* test even if the test were used); *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001) (finding that the state failed to meet its burden under the *Turner* test by not presenting "any justification, rational or not," for its parole hearing policies that discriminated against incarcerated people and parolees with hearing and vision impairments, and learning and developmental disabilities).

159. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843–844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694, 703 (1984) (holding that when Congress gives authority to an agency to interpret a law through regulations, the regulations have "controlling weight unless they are arbitrary, capricious," or are clearly contrary to the law as written by Congress).

(e) If Your Claim Involves Architectural Barriers at the Prison

If your complaint is about physical access within your prison, keep in mind that the ADA implementing regulations do not allow the undue burden defense for facilities built or significantly altered after January 26, 1992.¹⁶⁰ For example, if you are housed in a cellblock built or significantly altered any time after 1992, and you cannot use your wheelchair to get into the bathroom because the doorway is too narrow, the prison cannot say, “It would cost too much to enlarge the doorway.” If you are in (or need access to) a unit, cellblock, or compound significantly altered after 1992—even if the rest of the prison was built before 1992—and your complaint is about your ability to physically access those parts of the facility, your complaint should (1) cite to the regulations, and (2) state that significant changes have been made since 1992.

If your disability restricts your movement or requires that you use a cane, wheelchair, or other device, many courts have said prisons must make reasonable accommodations for your disability. Some courts have found that the ADA does not create any right for an incarcerated person to be housed at a specific prison.¹⁶¹ But at least one court has ruled that if there is a specific unit that treats incarcerated people with specific disabilities, it is a violation of the ADA and Section 504 to (1) transfer eligible incarcerated people out of, or (2) refuse to transfer eligible incarcerated people into that unit unless the prison can provide the treatment at other facilities.¹⁶² This applies even if the prison wants to do so for disciplinary, safety, medical, or mental health reasons.¹⁶³

Even if no special unit exists for incarcerated people with disabilities, prisons and jails must make reasonable accommodations for incarcerated people with mobility impairments. Courts have found that using bathroom facilities is a basic prison activity, and that prisons violate the ADA and Section 504 if they do not provide incarcerated people with disabilities such things as shower chairs, handrails, guard rails, and shower hoses.¹⁶⁴ Any architectural barrier that restricts access or creates risks of

160. 28 C.F.R. § 35.151(a)–(b) (2020) (“Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992”).

161. *Garrett v. Angelone*, 940 F. Supp. 933, 942 (W.D. Va. 1996), *aff’d*, *Garrett v. Angelone*, 107 F.3d 865 (4th Cir. 1997) (finding that “inmates . . . have no constitutional right to be housed in any particular prison or housing unit”).

162. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1050–1051 (S.D.N.Y. 1995) (finding that transferring incarcerated people from facilities with appropriate accommodations, even for “disciplinary, safety, and/or medical reasons,” violates both the ADA and Section 504).

163. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995).

164. *See, e.g., United States v. Georgia*, 546 U.S. 151, 157, 126 S. Ct. 877, 881, 163 L. Ed. 2d 650, 658 (2006) (“[I]t is quite plausible that the alleged deliberate refusal of prison officials to accommodate Goodman’s disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs constituted ‘exclusion’ from participation in or . . . denial of the benefits of the prison’s ‘services, programs, or activities.’”); *Pierce v. County of Orange*, 526 F.3d 1190, 1196 (9th Cir. 2008) (holding that “because of physical barriers that deny disabled inmates access to certain prison facilities (bathrooms, showers, exercise and other common areas), and because of disparate programs and services offered to disabled versus non-disabled inmates, the County is in violation of the ADA”); *Kiman v. N.H. Dept. of Corr.*, 451 F.3d 274, 286–288 (1st Cir. 2006) (holding that denial of access to a shower chair, as well as other necessary accommodations, to an incarcerated person with disabilities raised an issue of material fact regarding defendant’s failure to provide the incarcerated person with reasonable accommodations as required by the ADA); *Grant v. Schuman*, No. 96-3760, 1998 U.S. App. LEXIS 16852, at *4, 7–8 (7th Cir. July 16, 1998) (*unpublished*) (allowing an incarcerated person with paralysis and nerve damage to proceed with an ADA claim regarding lack of handrails in toilet and shower areas); *Cotton v. Sheahan*, No. 02 C 0824, 2002 U.S. Dist. LEXIS 20539, at *9 (N.D. Ill. Oct. 24, 2002) (*unpublished*) (allowing incarcerated person who used a wheelchair to bring the claim that he was denied access to a shower); *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1032–1033 (D. Kan. 1999) (noting a possible ADA violation even though the incarcerated person was able to use most of the services, because doing so required exceptional and painful exertion against his doctor’s orders); *Cooper v. Weltner*, No. 97-3105-JTM, 1999 U.S. Dist. LEXIS 17292, at *19–20 (D. Kan. Oct. 27 1999) (*unpublished*) (allowing an incarcerated person who used a wheelchair to bring an ADA claim that the prison discriminated against him by failing to provide assistive devices for the shower); *Kaufman v. Carter*, 952 F. Supp. 520, 523, 532–533 (W.D. Mich. 1996) (allowing a bilateral amputee incarcerated person to go forward with his claim that the jail violated the ADA by failing to provide an accessible shower and toilet);

injury to incarcerated people with disabilities also violates the ADA.¹⁶⁵ In your complaint, make sure to describe any barriers carefully and in detail—do not just state they exist.¹⁶⁶

(f) Provision of Auxiliary Aids and Services

The ADA and Section 504 also require prisons and jails to provide incarcerated people with disabilities auxiliary (extra) aids or services to help them participate in the facility's programs and activities. As with modifications, the prison or jail only has to provide these aids or services if they are reasonable. Examples of aids and services for hearing-impaired people include:

(A) qualified interpreters or other effective methods of making aurally [able to be heard] delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; and (D) other similar services and actions.¹⁶⁷

Examples of aids and services for people with visual impairments include: “[q]ualified readers; taped texts; audio recordings; Brailled materials . . . ; [and] large print materials.”¹⁶⁸ Other aids and services

might include providing an incarcerated person who is an amputee with a wheelchair, shower seat, and similar assistive devices.¹⁶⁹

If you meet all of the eligibility requirements for a program, but cannot participate without an aid or service like the ones mentioned above, then the ADA requires the prison to provide any aids and services that will allow you to participate. However, as with modifications, a prison may justify not providing aids and services by saying the request is not reasonable, and then use the undue burden defense, or even the *Turner* test, to justify its action or lack of action.

Incarcerated people with hearing impairments have been particularly successful with ADA and Section 504 claims that argue prisons discriminated by failing to provide auxiliary aids and services to help them communicate. Courts have found that prisons violated the ADA and Section 504 by failing to provide qualified interpreters during reception and classification, counseling sessions, administrative and disciplinary hearings, and medical treatment and diagnosis.¹⁷⁰ Some courts also

Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 U.S. Dist. LEXIS 21063, at *11 (M.D. Ala. Apr. 27, 1993) (*unpublished*) (holding that the ADA required the city jail to make its showers accessible to and usable by incarcerated people with disabilities).

165. See, e.g., *Montez v. Romer*, 32 F. Supp. 2d 1235, 1237, 1243 (D. Colo. 1999) (allowing incarcerated people to go forward with an ADA and Section 504 suit claiming that physical barriers in the prison created safety risks).

166. See, e.g., *Barr v. Abrams*, 810 F.2d 358, 363 (2d Cir. 1987) (“[C]omplaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning.”); *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 443 (S.D.N.Y. 2004) (dismissing the suit because the incarcerated person’s claim did not allege that he was prevented from accessing the law library and infirmary due to his disability).

167. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 4(1)(A)–(D), 122 Stat. 3553, 3556 (2008).

168. 28 C.F.R. § 35.104(2) (2020).

169. See *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1031–1033 (D. Kan. 1999) (allowing a double amputee incarcerated person to go forward with his ADA and Section 504 suit against a county jail that delayed in providing him with a shower chair and refused to transfer him to a jail that had enough space for him to use a wheelchair).

170. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1034–1035 (S.D.N.Y. 1995) (holding that not providing incarcerated people with hearing-impaired with qualified interpreters and other assistive devices for numerous programs, services, and activities violates the ADA and Section 504); *Bonner v. Ariz. Dept. of Corr.*, 714 F. Supp. 420, 423 (D. Ariz. 1989) (holding that not providing a deaf, mute, and vision-impaired incarcerated person with a qualified interpreter for prison counseling, medical treatment, and disciplinary and administrative hearings violates Section 504 unless the prison can prove that the incarcerated person could communicate effectively without a qualified interpreter); see also *Duffy v. Riveland*, 98 F.3d 447, 453–456 (9th Cir. 1996) (allowing a deaf

have found that a lack of interpreters in such settings violates incarcerated people's constitutional due process, Eighth Amendment, and privacy rights.¹⁷¹ The term "qualified interpreter" is defined as "an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."¹⁷² This means that a prison guard who knows only basic sign language is not a qualified interpreter, because he is neither impartial nor able to interpret effectively. Also, someone who knows Signed English is not a qualified interpreter for a hearing-impaired incarcerated person who communicates in American Sign Language, and vice versa.¹⁷³

Access to interpreters is not the only service that hearing-impaired incarcerated people have demanded successfully under the ADA and Section 504. The ADA also requires that public entities (1) provide persons with disabilities the opportunity to request the auxiliary aids and services of their choice, and (2) give "primary consideration to the requests of individuals with disabilities."¹⁷⁴ The regulations require prisons to notify persons with disabilities of their ADA protections,¹⁷⁵ and to have a grievance process for people who believe their prison has failed to make programs and services accessible to disabled individuals.¹⁷⁶ For example, one court held that a prison violated the ADA and Section 504 by failing to provide various adaptations for the deaf, including TDDs, closed-caption decoders for televisions, and fire alarms that alert people visually.¹⁷⁷ Another court has held that failure to provide TDD for the deaf fiancée of an incarcerated person may be a violation of the ADA.¹⁷⁸

5. What are "Services, Programs, or Activities?"

Under both the ADA and Section 504, prison authorities cannot exclude you from participating in services, programs, or activities if reasonable modifications would allow you to participate. Almost everything you do in prison—from your work assignment, to your use of the recreation yard, to your use of the library to your visitation privileges—is considered a program or service offered by the

incarcerated person to go forward with his claim that the prison failed to provide him with a qualified interpreter for classification and disciplinary hearings, in violation of the ADA and Section 504).

171. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1034, 1042–1043 (S.D.N.Y. 1995) (holding that, by failing to provide qualified interpreters or other assistive devices necessary for medical and mental health treatment, the Department of Corrections and prison officials violated deaf incarcerated people's 14th Amendment substantive due process right and constitutional right to privacy, and the 8th Amendment's ban on cruel and unusual punishment).

172. 28 C.F.R. § 35.104 (2020).

173. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1026–1027 (S.D.N.Y. 1995) (indicating that an interpreter who uses Signed English is not qualified to interpret for an incarcerated person who uses American Sign Language).

174. 28 C.F.R. § 35.160(b)(1)–(2) (2020); *see* Disability Rights Section, *Americans with Disabilities Act: Title II Technical Assistance Manual, II-1.2000*, U.S. DEPT. OF JUSTICE, available at <http://www.ada.gov/taman2.html> (last visited Nov. 23, 2020) (indicating that the individual's preferences should be considered when deciding what aids to provide for him).

175. 28 C.F.R. § 35.106 (2020) (describing the requirement that public entities notify people with disabilities of their rights under the ADA); *see also* 28 C.F.R. § 35.163(a) (2020) ("A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities").

176. 28 C.F.R. § 35.107(b) (2020) ("A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.").

177. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1047 (S.D.N.Y. 1995). *But see* *Spurlock v. Simmons*, 88 F. Supp. 2d 1189, 1196 (D. Kan. 2000) (holding that providing a deaf incarcerated person with only limited telephone access, while permitting other incarcerated people unlimited access, did not violate the ADA because the deaf incarcerated person's request was unreasonable). *Clarkson* also held that deaf female incarcerated people were discriminated against on the basis of their sex because New York had a special prison unit that could accommodate many of the needs of deaf and hearing-impaired male incarcerated people, but did not have a similar unit for female incarcerated people. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995).

178. *Niece v. Fitzner*, 922 F. Supp. 1208, 1217–1219 (E.D. Mich. 1995) (finding a possible ADA violation in prison officials' refusal to provide accommodations for an incarcerated person to communicate with his deaf fiancée).

prison.¹⁷⁹ Incarcerated people with disabilities have argued that prisons and jails must accommodate their needs in the use of the following programs: boot camp,¹⁸⁰ conjugal visitation programs,¹⁸¹ libraries and law libraries,¹⁸² educational programs,¹⁸³ vocational training,¹⁸⁴ job opportunities,¹⁸⁵ the commissary and dispensary,¹⁸⁶ transition programs,¹⁸⁷ dining halls,¹⁸⁸ visitations,¹⁸⁹ telephone calls,¹⁹⁰ church services,¹⁹¹ eligibility for trustee status,¹⁹² substance abuse classes,¹⁹³ access to reading

179. See *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (stating that “[m]odern prisons provide inmates with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the prisoners”).

180. See *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (noting that the prison’s motivational boot camp for first-time offenders is a program).

181. See *Bullock v. Gomez*, 929 F. Supp. 1299, 1303–1304 (C.D. Cal. 1996) (noting that the incarcerated person was able to show that he was excluded from the conjugal visit program, although the issue of whether he was “otherwise qualified” was not yet resolved).

182. See *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 558–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person’s ADA rights had been violated when he was denied access to prison libraries).

183. See *Crawford v. Ind. Dept. of Corr.*, 115 F.3d 481, 483 (7th Cir. 1997) (“[T]here is no doubt that an educational program is a program.”). While *Crawford* recognizes educational programs as programs, some courts have held that the ADA does not require a prison to implement a specific type of rehabilitation or education program that is not already available. *Garrett v. Angelone*, 940 F. Supp. 933, 942 (W.D. Va. 1996), *aff’d*, *Garrett v. Angelone*, 107 F.3d 865 (4th Cir. 1997).

184. See *Montez v. Romer*, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (noting that incarcerated people argue that they were unable to participate in vocational training because the prison did not accommodate their disabilities).

185. See *Montez v. Romer*, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (noting that incarcerated people argue that they were excluded from employment programs because of their disabilities); *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person’s rights under the ADA had been violated when he was denied access to “work programs”).

186. See *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person’s ADA rights had been violated when he was denied access to the prison commissary); *Kiman v. N.H. Dept. of Corr.*, 451 F.3d 274, 284 (1st Cir. 2006) (finding that access to medication is one of the “services, programs, or activities” covered by the ADA).

187. See *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 559–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person’s rights under the ADA were violated when he was denied access to transition programs).

188. See *Crawford v. Ind. Dept. of Corr.*, 115 F.3d 481, 483 (7th Cir. 1997) (noting that use of the dining hall is an activity under the ADA); *Rainey v. County of Delaware*, No. CIV.A.00-548, 2000 U.S. Dist. LEXIS 10700, at *4–5, *10, *14 (E.D. Pa. Aug. 1, 2000) (*unpublished*) (permitting the claim that a disabled incarcerated person was given insufficient time to travel to the dining hall, thereby depriving him of food).

189. See *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 558–559 (7th Cir. 1996) (upholding a decision that a quadriplegic incarcerated person’s ADA rights were violated when he was denied access to “visitation facilities that were open to the general inmate population”); *Love v. Westville Correctional Ctr.*, 103 F.3d 558, 558–561 (7th Cir. 1996) (allowing an incarcerated person who used a wheelchair to bring the claim that being housed in an infirmary unit cut off his access to many prison facilities, including visitation rooms).

190. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1032–1033 (S.D.N.Y. 1995) (granting summary judgment under the ADA where deaf incarcerated people were denied amplified headsets or telephone communication devices for the deaf).

191. See *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 558–561 (7th Cir. 1996) (upholding a decision that a quadriplegic incarcerated person’s ADA rights were violated when he was denied access to church services).

192. See *Dean v. Knowles*, 912 F. Supp. 519, 522 (S.D. Fla. 1996) (allowing an asymptomatic HIV-positive incarcerated person to bring a discrimination suit against prison officials who denied him trustee status).

193. See *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 558–561 (7th Cir. 1996) (upholding a decision that a quadriplegic incarcerated person’s ADA rights were violated when he was denied access to substance abuse programs).

materials and television,¹⁹⁴ college classes,¹⁹⁵ and access to medical care.¹⁹⁶ At least one court has determined that granting parole is an “activity,” and thus the actions of the parole board must comply with the ADA.¹⁹⁷ Even disciplinary measures like shackling have been challenged as violating the ADA and the Constitution if, although they apply to all incarcerated people, they have a disparate (uniquely unfair) impact on incarcerated people with disabilities.¹⁹⁸ Prison disciplinary hearings are also subject to the ADA.¹⁹⁹

Because programs and services vary from prison to prison, the ADA and Section 504 define programs and activities very broadly. Courts rarely dismiss suits because the activity in question did not qualify as a program.²⁰⁰ If you have a disability, are qualified for the activity or program (even if it is not listed above), and the prison refuses to allow you to participate, you may have a claim under the ADA and Section 504.

6. State Accessibility Laws and Regulations

Many states have accessibility and anti-disability discrimination statutes similar to the ADA. If you live in a state with a law that provides such protection, you should sue under state law as well. Most states require public and government facilities to be physically accessible to people with disabilities.²⁰¹ Some states have laws that clearly require state services or programs to provide

194. *See* Walker v. Snyder, 213 F.3d 344, 345 (7th Cir. 2000) (stating that the district court had found an ADA violation in the prison’s failure to provide books on tape); Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–1033 (S.D.N.Y. 1995) (finding ADA violation where deaf in incarcerated people were denied a closed-caption decoder for televisions).

195. *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 559–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person’s ADA rights were violated when he was denied access to prison educational programs).

196. Most courts have held that the ADA does not provide a cause of action for inappropriate medical care. *See, e.g.,* Moore v. Prison Health Servs., Inc., 24 F. Supp. 2d 1164, 1168 (D. Kan. 1998) (holding that a claim of inadequate medical care is not appropriate under the ADA), *aff’d*, Moore v. Prison Health Servs., 201 F.3d 448 (10th Cir. 1999). However, courts have upheld claims alleging discriminatory access to medical care because of the incarcerated person’s disability. *See, e.g.,* Roop v. Squadrito, 70 F. Supp. 2d 868, 877 (N.D. Ind. 1999) (allowing an incarcerated person to go forward with ADA claim that, among other things, the prison did not dispense his medication properly, due to his HIV-positive status); McNally v. Prison Health Servs., 46 F. Supp. 2d 49, 58–59 (D. Me. 1999), *reh’g denied*, McNally v. Prison Health Servs., 52 F. Supp. 2d 147, 148 (D. Me. 1999) (allowing an incarcerated person to go forward with his claim that the prison violated the ADA by refusing to administer HIV medication because of his HIV status). The 8th Amendment may provide an alternative cause of action for inappropriate or inadequate medical care. *See, e.g.,* Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–1033 (S.D.N.Y. 1995) (holding that failure to provide sign language interpreters prevented deaf incarcerated people from receiving adequate medical care, in violation of their due process and 8th Amendment rights).

197. Thompson v. Davis, 295 F.3d 890, 898–899 (9th Cir. 2002) (holding that parole proceedings are subject to the ADA’s requirements).

198. Armstrong v. Davis, 275 F.3d 849, 859 (9th Cir. 2001) (affirming the district court’s injunction ordering a prison to stop shackling, during parole hearings, incarcerated people with hearing impairments or who used sign language).

199. Duffy v. Riveland, 98 F.3d 447, 455 (9th Cir. 1996) (holding that prison disciplinary hearings are subject to the ADA’s requirements).

200. *But see* Aswegan v. Bruhl, 113 F.3d 109, 110 (8th Cir. 1997) (holding that cable television is not a “service, program or activity” within the meaning of the ADA).

201. *See* ALA. CODE §§ 21-4-1–4 (2011); ALASKA STAT. § 35.10.015 (2007); ARIZ. REV. STAT. ANN. §§ 41-1492.0–1492.05. (2008); CAL. CIV. CODE § 54 (WEST 2007); CONN. GEN. STAT. ANN. § 46A-7 (2018); DEL. CODE ANN. tit. 16 § 9502 (WEST 2018); FLA. STAT. ANN. § 255.21 (WEST 2017), §§ 553.501–553.513 (WEST 2013); GA. CODE ANN. §§ 30-3-2–5 (2011); HAW. REV. STAT. ANN. § 103-50 (2008); KAN. STAT. ANN. §§ 58-1303–1304 (WEST 2008); KY. REV. STAT. ANN. § 198B.260 (2007); LA. REV. STAT. ANN. §§ 40:1731–1736 (2018); ME. REV. STAT. ANN. tit. 5, § 4591 (2013); MASS. GEN. LAWS ANN. CH. 22, § 13A (WEST 2019); MO. ANN. STAT. § 8.620 (WEST 2000); MONT. CODE ANN. § 50-60-201 (WEST 2009); N.J. STAT. ANN. § 52:32-4 (WEST 2010); N.M. STAT. ANN. § 28-7-3 (WEST 2011); N.Y. PUB. BLDGS. § 51 (2007); N.C. GEN. STAT. § 168-2 (WEST 2007); N.D. CENT. CODE ANN. § 48-01.2-24 (WEST 2008); OHIO. REV. CODE. ANN. § 3781.111 (WEST 2018); OKLA. STAT. tit. 61, § 11 (2008); OR. REV. STAT. ANN. §§ 447.210–280 (WEST 2011); PA. STAT. ANN. tit. 35, § 7210.102 (2008); R.I. GEN. LAWS § 37-8-15 (2007); S.C. CODE ANN. §§ 10-5-210–330 (2007); S.D.

modifications or accommodations for people with disabilities.²⁰² When researching state laws to see if they apply to you—if they cover the type of discrimination you are encountering—be sure to (1) read the statutory language carefully, and (2) review cases interpreting the statute.²⁰³ Some state laws have broader definitions of “disability” than the ADA does. Also, the constitutional challenges to the ADA (discussed at the beginning of this Chapter) do not apply to state accessibility statutes.

C. Enforcing Your Rights Under the ADA and Section 504

This Part discusses other issues you should consider when deciding whether to file a claim. These issues are: (1) finding an attorney, (2) filing a complaint with the DOJ instead of in court, (3) figuring out the damages you can ask for, and (4) determining whether you can also sue under your state’s antidiscrimination laws.

Before deciding to file a lawsuit under the ADA, Section 504, or any other civil rights statute, you should read Chapter 14 of the *JLM*, about the Prison Litigation Reform Act (“PLRA”). If you fail to follow the PLRA’s requirements, you may lose your good time credit and/or your right to bring future claims without paying the full filing fee. Make sure your attorney also knows about the PLRA—many attorneys do not.

1. Finding an Attorney

There are not enough lawyers willing and able to represent incarcerated people, in part because most lawsuits by incarcerated people do not pay lawyers well. But the ADA and Section 504 *do* allow the recovery of attorney’s fees;²⁰⁴ attorneys (and plaintiffs who are representing themselves) can ask for attorney’s fees from defendants after winning a case. Courts have found that the PLRA rule that limits recovery of attorney’s fees in lawsuits by incarcerated people do *not* apply to ADA or Section 504 claims.^{205,206} Even if you do not have a lawyer, you should ask for compensation for lawyer’s fees under the ADA and Section 504. You are also entitled to recover your court, or “*in pauperis*,” fees.

If you decide to sue under the ADA and Section 504, you should contact lawyers or disability rights groups in the area to see if they can assist you. You also might want to contact your state’s

CODIFIED LAWS § 5-14-12 (2004); TENN. CODE ANN. §§ 68-120-201–205 (2015); TEX. GOV’T CODE ANN. §§ 469.001–469.003 (2004); UTAH CODE ANN. §§ 26-29-1–4 (2007); VT. STAT. ANN. tit. 20, §§ 2900–2907 (2007); WASH. REV. CODE §§ 70.92.100–170 (2007); WIS. STAT. ANN. § 101.13 (2010).

A number of states have laws that simply require equal rights: people with disabilities have full and free use of facilities. *See, e.g.*, ARK. CODE ANN. § 20-14-303 (2017); COLO. REV. STAT. § 24-34-601 (2010); IOWA CODE § 216C.3 (WEST 2017); MD. CODE ANN. HUMAN SERVS. § 7-704 (WEST 2007); MICH. COMP. LAWS. § 37.1102 (2008); MINN. STAT. § 363A.11 (2008); NEB. REV. STAT. § 20-127 (WEST 2000); NEV. REV. STAT. § 233.010 (2016); VA. CODE ANN. § 51.5-44 (2018); WYO. STAT. ANN. § 35-13-201 (2007).

202. *See, e.g.*, CONN. GEN. STAT. § 46A-7 (2018); FLA STAT. § 110.215 (2014); 775 ILL. COMP. STAT. 5/5-101, 102 (2001 & SUPP. 2008); LA. REV. STAT. ANN. §§ 46:2252 to 2254 (2015); MD. CODE ANN. HUMAN SERVS. §§ 7-127 to 132 (2007); N.C. GEN. STAT. § 168A-7 (WEST 2007); OR. REV. STAT. § 410.060 (WEST 2012); R.I. GEN. LAWS § 42-87-2 (2007); S.C. CODE ANN. § 43-33-520 (2015); S.D. CODIFIED LAWS § 20-13-23.7 (2016); TEX. HUM. RES. CODE ANN. §§ 22.010–.011 (VERNON 2001); UTAH CODE ANN. § 62A-5-102 (2012); VA. CODE ANN. § 51.5-40 (2018).

203. For more information on legal research, see *JLM*, Chapter 2, “An Introduction to Legal Research.”

204. 29 U.S.C. § 794a(b) (“In any action or proceeding to enforce or charge a violation of [the Rehabilitation Act] . . . , the court, in its discretion, may allow the prevailing party . . . reasonable attorney’s fee as part of the costs.”); Americans with Disabilities Act, 42 U.S.C. § 12205 (“In any action or administrative proceeding commenced pursuant to this Chapter, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs.”); *see also* 28 C.F.R. § Pt. 35, App. B. (2020) (discussing 28 U.S.C. § 35.175 and specifying that “attorneys fees” include “litigation expenses and costs,” including “items such as expert witness fees, travel expenses, etc.”).

205. Prison Litigation Reform Act, 42 U.S.C. § 1997e(d) (discussing attorney’s fees in incarcerated person suits).

206. *Armstrong v. Davis*, 318 F.3d 965, 974 (9th Cir. 2003) (holding that the PLRA restrictions on attorney’s fees do not apply to claims brought under the ADA or Section 504 because the two laws have their own attorney’s fees provisions); *Beckford v. Irvin*, 60 F. Supp. 2d 85, 88 (W.D.N.Y. 1999) (holding that the PLRA’s restrictions on attorneys fees do not apply to incarcerated people’s ADA claims).

Protection & Advocacy (“P&A”) organization for advice and/or representation. P&As, which are usually non-profit organizations, advocate on behalf of persons with disabilities, including those in criminal and civil institutions.²⁰⁷ Your P&A may help you by providing information, referrals, or advice; helping you file your complaint; or even representing you. To find the P&A in your area, contact:

The National Disability Rights Network
820 First Street NE, Suite 740
Washington, DC 20002
Tel: 202-408-9514

2. Filing a Complaint

If you believe you have been discriminated against because of your disability, you can file a complaint with the DOJ²⁰⁸ and/or bring a lawsuit in court.²⁰⁹ Neither Title II nor Section 504 requires you to file with the DOJ, but the PLRA may require you to file with the DOJ before you sue in state court. In New York, prior to the 2005 *Rosario v. Goord* decision, several federal courts had held that incarcerated people must file a complaint with the DOJ before filing a complaint in federal court, because the PLRA requires incarcerated people to exhaust all administrative remedies.²¹⁰ However, in a 2005 decision by the Second Circuit Court of Appeals, the New York Department of Correctional Services (“DOCS”)²¹¹ said it would stop requiring incarcerated people to file their ADA claims with the DOJ before bringing suits in federal court.²¹² Since most courts have not decided whether the PLRA’s administrative exhaustion requirement demands that incarcerated people first file with the DOJ, you probably should do it anyway, to avoid having your ADA or Section 504 lawsuit dismissed. For more information on the PLRA, see Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

207. Protection and Advocacy of Individual Rights (PAIR), 29 U.S.C. § 794e(a)(1) (supporting “a system in each State to protect the legal and human rights of individuals with disabilities”); Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10803, 10805 (requiring that each state establish systems designed “to protect and advocate the rights of individuals with mental illness . . . [and] investigate incidents of abuse and neglect of individuals with mental illness”); 42 U.S.C. § 15043 (listing the systems’ requirements, and noting that each system “shall have the authority to . . . pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation”).

208. 28 C.F.R. § 35.170(a), (c) (2020).

209. 28 C.F.R. § 35.172(d) (2020).

210. *See, e.g.,* Porter v. Nussle, 534 U.S. 516, 532, 122 S. Ct. 983, 992, 152 L. Ed.2d 12, 26, (2002) (holding that the PLRA requires incarcerated people to exhaust all administrative remedies before filing an ADA claim); William G. v. Pataki, No. 03-8331, 2005 U.S. Dist. LEXIS 16716, at *15 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (“The DOJ remedies, to the extent that they are available to Plaintiffs, must be exhausted pursuant to the plain language of the PLRA.”); Burgess v. Garvin, No. 01 Civ. 10994, 2003 U.S. Dist. LEXIS 14419, at *3, *7–9 (S.D.N.Y. Aug. 19, 2003) (*unpublished*) (holding that the PLRA requires incarcerated people to exhaust all administrative remedies, including DOJ remedies, before filing an ADA claim: “[t]he plain language of [the PLRA] requires the prisoner to exhaust ‘such administrative remedies as are available.’ It is not limited to administrative redress within the prison system in which the prisoner is being held, or to administrative remedies provided by any particular sovereign.”).

211. The New York State Department of Correctional Services is now called the New York State Department of Corrections and Community Supervision (“DOCCS”).

212. *Rosario v. Goord*, 400 F.3d 108, 109 (2d Cir. 2005) (*per curiam*) (stating that DOCS does not intend to challenge ADA lawsuits on the ground that administrative remedies have not been exhausted because complaints were not first filed with the DOJ). *But see* William G. v. Pataki, 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716, at *1–4 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (where a court, post-*Rosario*, applied the DOJ exhaustion requirement to a proposed class action on behalf of parole detainees with disabilities housed in New York city jails, and where defendants were not DOCS but the State of New York and the New York State Division of Parole and Offices of Mental Health and of Alcohol and Substance Abuse Services).

(a) Filing a Claim with the DOJ

Starting from the date of the discrimination you experienced, you have 180 days to file a complaint with the DOJ.²¹³ The DOJ will either investigate the complaint,²¹⁴ or, if you include a Section 504 claim and the DOJ thinks another agency can investigate better, the DOJ will refer your complaint to another agency.²¹⁵ If the agency or the DOJ finds a violation of your rights, it will try to negotiate with the prison to get them to comply with the law.²¹⁶ If the prison does not comply, the agency will refer your case to the U.S. Attorney General.²¹⁷ The Attorney General can sue the prison, but they do not have to—and in most cases, they will not.

To file a disability discrimination complaint, contact the DOJ and ask for a “Title II of the Americans with Disabilities Act Section 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form.”²¹⁸ The contact information for the DOJ is:

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Civil Rights Division
Disability Rights Section - NYA
Washington, D.C. 20530
Tel.: (202) 307-0663
ADA Information Line (voice): (800) 514-0301
TTY: (800) 514-0383

If you do not have time to request a form, send a letter to the DOJ that includes the following:

- (1) Your name, full address, and telephone number;
- (2) The name of the institution that discriminated against you (for example, the prison);
- (3) The address and phone number of the institution that discriminated against you;
- (4) The date(s) you encountered the discrimination (and whether the discrimination is ongoing);
- (5) A description of the acts of discrimination, including the names of any individuals who discriminated against you;
- (6) Whether you have filed a complaint or formal grievance, and, if you have, what the status of your complaint or grievance is;
- (7) Whether you have complained to any other agencies (such as a state human rights commission or another bureau of the Department of Justice) or filed with a court about the discrimination (and if you have complained or filed, give the names, addresses, and telephone numbers of the agencies or courts and the date(s) you filed the claim(s));
- (8) Whether you plan to file with another agency or court, and, if you plan to file, the name, address, and telephone number of the agency or court (even if you say you do not plan to file with any other agency or court, you can change your mind and file later on); and
- (9) Your signature and the date.

(b) Filing a Lawsuit

As mentioned above, the ADA and Section 504 do not require that you file with the DOJ, although, because of the PLRA, you may have to do so anyway. If you are in a jurisdiction that does not require

213. 28 C.F.R. § 35.170(a)–(b) (2020).

214. 28 C.F.R. § 35.172(a) (2020).

215. 28 C.F.R. § 35.171(a)(2)(ii) (2020).

216. 28 C.F.R. § 35.173(a)(2) (2020).

217. 28 C.F.R. § 35.174 (2020).

218. U.S. Dept. of Justice, Civil Rights Division, Form No. 1190-0009, *Americans with Disabilities Act Discrimination Complaint Form* (last updated May 2019), available at <http://www.ada.gov/t2cmpfrm.htm> (last visited Nov. 23, 2020).

you to file first with the DOJ, you may go directly to court if you have first completely used your prison's internal grievance process.²¹⁹ If you do file with the DOJ, you can bring a lawsuit even if the DOJ does not find a violation of your rights, but you must also completely use your prison's internal grievance process. The statute of limitations (deadline) for filing a lawsuit under Title II and Section 504 depends on your state. Because neither law has its own statute of limitations, most federal courts use the statute of limitations for personal injury claims in the state.²²⁰ Other federal courts use the statute of limitations for the most similar state law.²²¹ Note that some of these deadlines²²² are fairly long (six years in Minnesota),²²³ while others are very short (180 days in North Carolina).²²⁴

3. What Kind of Damages Can You Seek Against a State

What you can win in court depends on the facts of your case, and on whether you sue under Title II or Section 504. You should carefully consider what you want the court to do before you file your suit.

(a) Money Damages

Courts are divided over whether you can sue a state for money damages under the ADA and Section 504. This is because they are split as to states' Eleventh Amendment immunity (also known as "sovereign immunity").

219. *Jones v. Bock*, 549 U.S. 199, 202, 127 S. Ct. 910, 914, 166 L. Ed.2d 798, 805 (2007) (requiring exhaustion of prison's internal grievance process before suit can be brought).

220. *See Everett v. Cobb Cty. Sch. Dist.*, 138 F.3d 1407, 1409 (11th Cir. 1998) (holding that Georgia's two-year personal injury statute of limitations applies to ADA and § 504 claims since Georgia has no law "identical to the Rehabilitation Act").

221. *See Wolsky v. Med. Coll. of Hampton Rds.*, 1 F.3d 222, 223–224 (4th Cir. 1993) (holding that the statute of limitations for the most similar state statute should be applied to Rehabilitation Act suits). However, in addressing the lack of uniformity among the states and the difficulty in identifying the most similar state statute, Congress enacted a four-year statute of limitations for causes of actions "arising under an Act of Congress enacted after December 1, 1990". 28 U.S.C. § 1658. While Title II and Section 504 were enacted before December 1990, post-1990 amendments have been made to the statutes and it is your duty to show that your claim arises out of post-1990 amendments in order for the Section 1658 statute of limitations to apply. *Frame v. City of Arlington*, 657 F.3d 215, 236–237 (5th Cir. 2011). For Section 1658 to apply, you must determine whether the post-1990 enactment creates "a new right" or "new rights of action and corresponding liabilities", or if your claim "was made possible by a post-1990 enactment". *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 381–382, 124 S. Ct. 1836, 1844–1845, 158 L. Ed. 2d 645, 656–657 (2004).

222. In New York, the deadline is three years. *Noel v. Cornell Univ. Med. Coll.*, 853 F. Supp. 93, 94 (S.D.N.Y. 1994). In California, the deadline is one year, although the issue remains to be definitively settled. *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1137 n.2 (9th Cir. 2002). In Illinois, the deadline is two years. *Winfrey v. City of Chicago*, 957 F. Supp. 1014, 1023 (N.D. Ill., 1997). In Georgia, the deadline is two years. *Everett v. Cobb Co. Sch. Dist.*, 138 F.3d 1407, 1409 (11th Cir. 1998). In Texas, the deadline is two years. *Hickey v. Irving Ind. Sch. Dist.*, 976 F.2d 980, 982–983 (5th Cir. 1992). In Pennsylvania, the deadline is two years. *Disabled in Action of Penn. v. Southeastern Penn. Transp. Co.*, 539 F.3d 199, 208 (3d Cir. 2008). In Louisiana, the deadline is one year. *Joseph v. Port of New Orleans, Civil Action No. 99-1622 Section "N"*, 2002 U.S. Dist. LEXIS 4133, *49–51 (E.D. La. Mar. 4, 2002) (*unpublished*).

223. *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 802 (8th Cir. 2002) (holding that Minnesota's six-year personal injury statute of limitations applies to Rehabilitation Act suits).

224. *McCullough v. Branch Banking & Tr. Co.*, 35 F.3d 127, 132 (4th Cir. 1994) (holding that the statute of limitations for Rehabilitation Act claims is determined by the most similar state law; in North Carolina, the most similar state law was a state antidiscrimination law with a deadline of 180 days, so the deadline for filing a Section 504 complaint became 180 days). The *McCullough* court noted that it was following its decision in *Wolsky v. Med. Coll. of Hampton Rds.*, 1 F.3d 222, 223–224 (4th Cir. 1993), where the court found that, because (1) Virginia had its own act protecting disabled individuals, and (2) that act had the same purpose as the federal Rehabilitation Act, the Virginia Act was the most analogous statute, and its one-year statute of limitations should be used, rather than the statute of limitations for personal injury suits. *McCullough v. Branch Banking & Trust Co.*, 53 F.3d 127, 130 (4th Cir. 1994).

Under the Eleventh Amendment, states (but not federal or local government) have what is called “sovereign immunity.”²²⁵ This means individuals cannot sue them for money in federal court—unless Congress creates an exception. It is true that both the ADA and Section 504 apply to state incarcerated people.²²⁶ But it is not clear whether states have waived their immunity, so that you can sue them for money damages under those laws.

States do not want to have to pay money when they lose lawsuits. So, they argue that, in enacting the ADA and Section 504, Congress did not have the authority to create an Eleventh Amendment exception to sovereign immunity. Therefore, states argue, people bringing claims under the ADA and Section

504 should not be able to win money damages against the states. Once courts decide that states cannot be sued for money damages, individuals suing states can only receive “injunctive relief,”²²⁷ discussed in subsection (b), below.

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504 should not be able to win money damages against the states. Once courts decide that states cannot be sued for money damages, individuals suing states can only receive “injunctive relief,”²²⁸ discussed in subsection (b), below.

(b) Sovereign Immunity and the ADA

The Supreme Court has taken the middle road between allowing and not allowing state prisons to be sued for money damages under Title II of the ADA. Recently, in *Tennessee v. Lane*, the Supreme Court held that states may be sued for money damages for violations of Title II, at least when the violations relate to court access for a disabled person.²²⁹ Before *Lane*, most federal courts had held that states could not be sued for money damages at all.²³⁰ Then after *Lane*, in *United States v. Georgia*, the

225. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363, 121 S. Ct. 955, 962, 148 L. Ed. 2d 866, 877 (2001).

226. *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956, 141 L. Ed.2d 215, 221 (1998) (holding that Title II of the ADA applies to incarcerated people in state prisons); *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (ruling that Section 504 applies to incarcerated people in state prisons because state prisons receive money from the federal government); *Bonner v. Lewis*, 857 F.2d 559, 562–563 (9th Cir. 1988) (ruling that Section 504 applies to state correctional institutions that receive federal funding).

227. *United States v. Georgia*, 546 U.S. 151, 155, 126 S. Ct. 877, 879, 163 L. Ed. 2d 650, 657 (2006); *Miller v. King*, 384 F.3d 1248, 1263–1267 (11th Cir. 2004), *vacated and superseded on other grounds*, *Miller v. King*, 449 F.3d 1149 (11th Cir. 2006).

228. *United States v. Georgia*, 546 U.S. 151, 155, 126 S. Ct. 877, 879, 163 L. Ed. 2d 650, 657 (2006); *Miller v. King*, 384 F.3d 1248, 1263–1267 (11th Cir. 2004), *vacated and superseded on other grounds*, *Miller v. King*, 449 F.3d 1149 (11th Cir. 2006).

229. *Tennessee v. Lane*, 541 U.S. 509, 531, 124 S. Ct. 1978, 1993, 158 L. Ed. 2d 820, 842 (2004).

230. Prior to *Lane*, the First, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals ruled that individuals may not receive money damages under Title II. Many of these cases stated that Congress created a remedy that was not “congruent” nor “proportional,” meaning the remedy was inappropriate, to the harm the remedy was supposed to address. *See Kiman v. N.H. Dept. of Corr.*, No.01-134-B, 2001 U.S. Dist. LEXIS 21894, *2–3 (D.N.H. Dec. 19, 2001) (*unpublished*) (agreeing with the Second, Fifth, and Tenth Circuits that, under *Garrett*, the 11th Amendment does not allow courts to hear Title II claims against states), *aff’d*, *Kiman v. N.H. Dept. of Corr.*, 332 F.3d 29 (1st Cir. 2003) (en banc), *vacated*, *Kiman v. N.H. Dept. of Corr.*, 541 U.S. 1059, 124 S. Ct. 2387, 158 L. Ed. 2d 961 (2004); *Wessel v. Glendening*, 306 F.3d 203, 215 (4th Cir. 2002) (holding that while Congress expressed its intent to diminish state sovereign immunity, it acted without enough information and created a remedy that was not proportionate nor congruent), *overruled by Constantine v. Rectors & Visitors of George Mason Univ.*, 441 F.3d 474, 486 n.8 (4th Cir. 2005); *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001) (holding that Title II and Section 504 are not proportional and congruent responses to legislative findings of unconstitutional discrimination by the states against the disabled), *overruled by Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277 n.14 (5th Cir. 2005); *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001) (holding that Title II cannot be found to be a proportional and congruent response to constitutional violations if Congress has not identified a history and pattern of unconstitutional discrimination by the states); *Walker v. Snyder*, 213

Supreme Court held that incarcerated people may sue states for money damages under Title II, at least in situations where the alleged misconduct *actually* violates the parts of the Constitution that apply to the states.²³¹ In that case, the plaintiff alleged Eighth Amendment violations.²³² However, the ruling is broad, and applies to more than just the Eighth Amendment. The court did not say whether the waiver of sovereign immunity under the Eleventh Amendment also applies to ADA violations that do not involve constitutional violations.²³³

So the current rule is that incarcerated people may sue states for money damages under Title II when a state prison system (1) violates any of the rights that are part of the Fourteenth Amendment *and* (2) violates Title II.²³⁴ The Fourteenth Amendment makes most of the rights in the first eight amendments to the Constitution apply against the states. Specifically, it includes the following rights from the first eight amendments:

- (1) Guarantee against establishment of religion;²³⁵
- (2) Guarantee of free exercise of religion,²³⁶
- (3) Guarantee of freedom of speech,²³⁷
- (4) Guarantee of freedom of the press,²³⁸
- (5) Guarantee of freedom of assembly,²³⁹
- (6) Right to keep and bear arms,²⁴⁰
- (7) Right to be free from unreasonable search and seizure,²⁴¹
- (8) Warrant requirements,²⁴²
- (9) Protection against double jeopardy,²⁴³
- (10) Privilege against self-incrimination,²⁴⁴
- (11) Protection against taking of private property without just compensation,²⁴⁵

F.3d 344, 346–347 (7th Cir. 2000) (holding that, like Title I, Title II is barred by the 11th Amendment), *overruled by* Bruggeman v. Blagojevich, 324 F.3d 906, 912–913 (7th Cir. 2003); Alsbrook v. City of Maumelle, 184 F.3d 999, 1002 (8th Cir. 1999) (finding that Title II is not a valid exercise of Congress’ power under Section 5 of the 14th Amendment, and so Arkansas retains its 11th Amendment immunity). The Second Circuit has ruled that individuals may not receive money damages under Title II of the ADA unless they can show that the state acted with “discriminatory animus or ill will” toward the disabled. Garcia v. State Univ. of N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 111 (2d Cir. 2001). The Sixth Circuit has allowed money damages against the state under Title II only if the discrimination amounted to a violation of an individual’s due process rights under the 14th Amendment. Lane v. Tennessee, 315 F.3d 680, 682–683 (6th Cir. 2003) (holding that “it was reasonable for Congress to conclude that it needed to enact [the ADA] to prevent states from unduly burdening” rights protected by the 14th Amendment), *aff’d*, Lane v. Tennessee, 541 U.S. 509, 534, 124 S. Ct. 1978, 1994, 158 L. Ed. 2d 820, 844 (2004). Only the Ninth Circuit has held that individuals may sue the state for money damages under Title II. Hason v. Med. Bd. of Cal., 279 F.3d 1167, 1171 (9th Cir. 2002) (holding that Congress validly diminished states’ 11th Amendment immunity when enacting Title II).

231. United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006).

232. United States v. Georgia, 546 U.S. 151, 160–161, 126 S. Ct. 877, 883, 163 L. Ed. 2d 650, 661 (2006) (Stevens, J., concurring).

233. United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006); Miller v. King, 384 F.3d 1248, 1263–1267 (11th Cir. 2004), *vacated and superseded on other grounds*, Miller v. King, 449 F.3d 1149 (11th Cir. 2006).

234. United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006).

235. Everson v. Bd. of Educ., 330 U.S. 1, 14–15, 67 S. Ct. 504, 511, 91 L. Ed. 711, 723 (1947).

236. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1217–1218 (1940).

237. Hustler Magazine v. Falwell, 485 U.S. 46, 50–51, 108 S. Ct. 876, 879, 99 L. Ed. 2d 41, 48–49 (1988).

238. Near v. Minnesota, 283 U.S. 697, 707, 51 S. Ct. 625, 628, 75 L. Ed. 1357, 1363 (1931).

239. De Jonge v. Oregon, 299 U.S. 353, 364, 57 S. Ct. 255, 260, 81 L. Ed. 278, 284 (1937).

240. McDonald v. City of Chicago, 561 U.S. 742, 749–750, 130 S. Ct. 3020, 3026, 177 L. Ed. 2d 894, 903 (2010).

241. Mapp v. Ohio, 367 U.S. 643, 654–655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1089–1090 (1961).

242. Aguilar v. Texas, 378 U.S. 108, 110, 84 S. Ct. 1509, 1512, 12 L. Ed. 2d 723, 726 (1964).

243. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 2058, 23 L. Ed. 2d 707, 711 (1969).

244. Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964).

245. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236–237, 17 S. Ct. 581, 584–585, 41

- (12) Right to a speedy trial,²⁴⁶
- (13) Right to a public trial,²⁴⁷
- (14) Right to trial by jury,²⁴⁸
- (15) Right to question opposing witnesses,²⁴⁹
- (16) Right to assistance of counsel,²⁵⁰
- (17) Protection against cruel and unusual punishment.²⁵¹

Additionally, the Fourteenth Amendment itself provides that:

- (1) No State shall make or enforce any law which shall abridge the privileges or immunities of U.S. citizens;
- (2) No State shall deprive any person of life, liberty, or property without due process of the law; and
- (3) No State shall deny equal protection of the law.²⁵²

If any of these rights are violated in addition to a violation of Title II, you may be able to sue for money damages. It appears that, after *Lane* and *Georgia*, lower courts will take a case-by-case approach, considering the particular circumstances, in determining whether the plaintiff can sue the state for money damages.²⁵³ Some courts will be more likely than others to permit money damages.²⁵⁴

If you are considering bringing a disability discrimination claim under Title II, you should look at how the decisions in *Lane* and *Georgia* have been analyzed and interpreted by other courts, disability rights organizations, and academics. See Chapter 2 of the *JLM*, "Introduction to Legal Research," for information on performing legal research.

L. Ed. 979, 984–985 (1897).

246. *Klopfer v. North Carolina*, 386 U.S. 213, 222–223, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 7–8 (1967).

247. *In re Oliver*, 333 U.S. 257, 266–268, 68 S. Ct. 499, 504–505, 92 L. Ed. 682, 690–691 (1948).

248. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (1968).

249. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965).

250. *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 795, 9 L. Ed. 2d 799, 804 (1963).

251. *Robinson v. California*, 370 U.S. 660, 667, 82 S. Ct. 1417, 1420–1421, 8 L. Ed. 2d 758, 763 (1962).

252. U.S. CONST. amend. XIV, § 1.

253. *See United States v. Georgia*, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006). In *United States v. Georgia*, the Supreme Court held that lower courts were in the best position to determine (1) which aspects of the State's alleged conduct violated Title II of the ADA, and (2) to what extent such conduct also violated the 14th Amendment. Additionally, the Supreme Court held that when lower courts find that the State's conduct violated Title II but did not violate the 14th Amendment, lower courts should determine whether Congress intended that people should still have a right to sue the states for money damages. Since *United States v. Georgia*, a number of courts have allowed incarcerated people to sue for monetary damages when they establish both that (1) the state prison system violated Title II of the ADA, and (2) the actions of the state prison system violated incarcerated people's 14th Amendment rights. *Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 411–413 (S.D.N.Y. 2006) (ruling that an incarcerated person could bring a claim for money damages against his prison system for confiscating and destroying his hearing aid; the prison's actions might have violated the incarcerated person's 8th Amendment right to be free from cruel and unusual punishment).

However, in the past, courts have been hesitant to allow incarcerated people to sue for monetary damages when a State's actions violate Title II but not a 14th Amendment constitutional right. *See, e.g., Miller v. King*, 384 F.3d 1248, 1272–1275 (11th Cir. 2004), *vacated and superseded on other grounds*, *Miller v. King*, 449 F.3d 1149 (11th Cir. 2006) (noting that Title II damages suits may only be brought where the ADA provides an "appropriate . . . response to [a] . . . history and pattern of unconstitutional treatment. . . . "specifically in the prison context," and finding that because "Title II addresses all prison services, programs, and activities—and goes well beyond the basic, humane necessities guaranteed by the Eighth Amendment," incarcerated person could not bring a Title II damages suit against the state); *Flakes v. Franks*, 322 F. Supp. 2d 981, 983 (W.D. Wisc. 2004) (noting that it was not clear whether the incarcerated person's Title II claim for money damages against the state could go forward because the court had not yet reviewed all of the facts the incarcerated person might include in his complaint).

254. *See, e.g., Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792–793 (9th Cir. 2004) (upholding a prior decision permitting an incarcerated person to bring a Title II claim for damages against the state); *see also Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 442 (S.D.N.Y. 2004) (noting that *Lane* permits Title II claims for money damages against state and local governments, but dismissing the claim on other grounds).

(c) Sovereign Immunity and Section 504

Courts are divided over whether states are protected by sovereign immunity under Section 504. Most courts of appeals that have addressed this issue have held that you *can* seek monetary damages under Section 504.²⁵⁵ But the Second Circuit has held that you *might* not be able to get monetary damages from states under Section 504, since states only agreed to be sued for money damages under Title II, and not Section 504.²⁵⁶

Overall, though, the arguments supporting Section 504 sovereign immunity are weak. This is because so many state agencies receive federal funding, and Congress only offers them federal funding in exchange for complying with Section 504—and in doing so waiving their state’s sovereign immunity. Therefore, even Second Circuit courts would find that, in reality, most states have waived their sovereign immunity under Section 504 and can be sued for money damages. However, in some courts, you may still not be able to get money damages against a state under Section 504.²⁵⁷

(d) Some Practical Tips

To receive money damages, you have to convince the court that the state has waived its sovereign immunity. Generally, this is easier under Section 504 than under the ADA. However, this area of the law is changing. *If you plan to file a Title II or Section 504 lawsuit, you should research this issue thoroughly to determine current law in your circuit.* See Chapter 2 of the *JLM*, “Introduction to Legal Research,” for help in determining what is “current law.” (Although “Shepardizing” cases in LexisNexis is a good place to start, you should do additional research to make sure you are using up-to-date laws.)

If you find that you live in a federal circuit that prohibits money damages in such suits, you still can file a lawsuit against the state. However, you will only be able to receive relief that is injunctive (ordering the prison to take certain actions) and/or declaratory (determining applicable rights under the statute) and not money damages.²⁵⁸ Even if you are able to sue for money damages, you cannot receive punitive damages under Title II or Section 504.²⁵⁹

255. See *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003) (explaining that states waive their 11th Amendment immunity to § 504 suits when they receive federal funds); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 238 (3d Cir. 2003) (stating that Congress clearly required states to waive their immunity if they accepted federal funding); *Doe v. Nebraska*, 345 F.3d 593, 604 (8th Cir. 2003) (holding that the state knowingly waived its immunity by accepting federal funds, despite the state’s claims that it thought it had already waived immunity through prior actions); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (stating that “it is clear that a state waives its immunity from suit under the Rehabilitation Act by accepting federal funds”); *Carten v. Kent State Univ.*, 282 F.3d 391, 398 (6th Cir. 2002) (finding, as it did in an earlier case, that the state “unambiguously waived Eleventh Amendment immunity against Rehabilitation Act claims when it agreed to accept federal funds pursuant to” a federal act requiring states that accept such funds to waive their immunity); see also *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 280–287 (5th Cir. 2005) (en banc) (holding that, by accepting federal financial assistance, the state waived its 11th Amendment immunity to suits under Section 504).

256. *Garcia v. State Univ. of N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 114 (2d Cir. 2001). *Garcia* does not say that the state can *never* be sued for money damages under Section 504, but it requires that the state—when it accepted federal funds—believed it was giving up its immunity from suits for money damages. It is not clear at what point courts will find that states *knew* they could be sued. See *Press v. State Univ. of N.Y.*, 388 F. Supp. 2d 127, 132–133 (E.D.N.Y. 2005) (discussing subsequent treatment of *Garcia* in the Second Circuit after *Lane*). As such, if you are in the Second Circuit, you may want to include a claim for money damages under § 504. But keep in mind the “three strikes” provision of the PLRA (see Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” to learn more about the PLRA).

257. See *Howard v. Bureau of Prisons*, No. 3:05-CV-1372, 2008 U.S. Dist. LEXIS 7997, at *12–13 (M.D. Pa. Feb. 1, 2008) (*unpublished*).

258. Remember that in lawsuits against the federal government, you can seek only injunctive relief (a court-ordered act or prohibition) and declaratory relief (the judge’s determination of each party’s rights). You cannot get money damages. For a reminder of this information, see Part B(1) of this Chapter.

259. See *Barnes v. Gorman*, 536 U.S. 181, 189, 122 S. Ct. 2097, 2103, 153 L. Ed. 2d 230, 239 (2002) (stating that “punitive damages may not be awarded . . . in suits brought under Section 202 of the ADA and Section 504 of the Rehabilitation Act.”).

You should probably cite both the ADA and Section 504 when filing your claim (so long as both of those laws apply to you). Then, if the Supreme Court ever rules that Congress exceeded its power in enacting one of those laws, your claim for money damages still will be viable against a state prison if (1) it includes claims against the law that is still in effect, and (2) you are in a jurisdiction that allows suits for money damages under the law that is still in effect.

(e) Injunctive Relief

Even when you cannot sue the state for money damages, you can ask for injunctive relief.²⁶⁰ Injunctive relief is when the court orders the prison to take certain actions (for example, to provide interpreters to hearing-impaired incarcerated people during disciplinary hearings)²⁶¹ or not to take certain actions (for example, to stop excluding incarcerated people with HIV from certain programs).²⁶² If you are seeking injunctive relief, you *must* make your claim for an injunction against individual prison officials in their *official capacities*.²⁶³ Under the ADA and Section 504, you cannot sue individual officials in their *individual capacities*. For example, if you sue Prison Warden John Smith, you will be suing him as the Warden (who represents the state), not as Mr. John Smith (who just represents himself). Although *the state* will be providing the injunctive relief the court orders, the law requires you to request the injunctive relief from *specific officials*. (If you are suing a *county*, however, you can ask for injunctive relief directly from the county or the county jail.)

4. Filing an ADA or Section 504 Claim Against a County, City, or Town

The Eleventh Amendment/sovereign immunity challenges to the ADA and Section 504 do not apply to local entities like counties, cities, and towns.²⁶⁴ So you can ask for money damages (as well as injunctive relief) if you sue a county, city, or town for violating your rights under these laws. Also, if you are in a private prison that receives federal financial assistance, you can sue the prison for money damages and injunctive relief under Section 504. But punitive damages are never available under Title II or Section 504.²⁶⁵

260. See *Randolph v. Rodgers*, 253 F.3d 342, 345 (8th Cir. 2001) (noting that a “private party may seek prospective injunctive relief in federal court against a state official, even if the state is otherwise protected by Eleventh Amendment immunity”). “Eleventh Amendment immunity” means sovereign immunity. When you sue a state official in his official capacity for injunctive relief, it is called an *Ex parte Young* suit. *Ex parte Young* is the Supreme Court case allowing state officials to be sued for injunctive relief even when the state itself cannot be sued. *Ex parte Young*, 209 U.S. 123, 155–156, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

261. *Duffy v. Riveland*, 98 F.3d 447, 454–455 (9th Cir. 1996) (finding that a deaf incarcerated person was disabled and could make a claim under Section 504 where the incarcerated person might be entitled to a certified interpreter at disciplinary hearings).

262. See Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law,” which discusses the different types of relief and remedies available in a lawsuit.

263. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 287–288 (2d Cir. 2003) (distinguishing between individual and official capacity, and explaining that defenses that apply to individuals do not apply to entities); *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 912–913 (7th Cir. 2003) (explaining that *Ex Parte Young* permits state officials (and not just states) to be sued in their official capacities for injunctive relief); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187–1188 (9th Cir. 2003) (finding “no difference between declaring that a named officer in her official capacity represents the ‘State’ for purposes of the Fourteenth Amendment, and declaring that the same officer represents a ‘public entity’ under Title II,” and “holding that Title II’s statutory language does not prohibit Miranda B.’s injunctive action against state officials in their official capacities”); *Carten v. Kent State Univ.*, 282 F.3d 391, 395–396 (6th Cir. 2002) (affirming that *Ex Parte Young* creates “an exception to Eleventh Amendment immunity for claims for injunctive relief against individual state officials in their official capacities,” so that the plaintiff chose his defendant correctly in this suit); *Randolph v. Rodgers*, 253 F.3d 342, 345 (8th Cir. 2001) (affirming lower court’s ruling that prison officials could be sued in their official capacities despite 11th Amendment immunity); see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9, 121 S. Ct. 955, 968 n.9, 148 L. Ed. 2d 866, 884 n.9 (2001) (noting that its decision that states may not be sued for money damages under ADA Title I does not prevent a person from bringing a claim for injunctive relief).

264. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369, 121 S. Ct. 955, 965, 148 L. Ed.2d 866, 880 (2001) (noting that “the Eleventh Amendment does not extend its immunity to units of local government,” so local entities are “subject to private claims for damages under the ADA”).

265. *Barnes v. Gorman*, 536 U.S. 181, 189, 122 S. Ct. 2097, 2103, 153 L. Ed.2d 230, 239 (2002) (stating

5. Filing in State or Federal Court

Most suits about the rights of incarcerated people with disabilities have been brought in federal court. However, in recent years, the Supreme Court has weakened the protections of the ADA (and federal courts have followed the Supreme Court). This makes *state* courts an appealing alternative. As explained above, state laws (1) can incorporate or expand ADA protections, and (2) do not have the constitutional weaknesses of the ADA and Section 504. If you are in a state where federal case law has limited your ability to sue the state, you should research the possibility of filing in state court and using state law. You should make sure to find out how your state's courts have dealt with suits by incarcerated people brought after the decisions in *Lane* and *Georgia* (discussed in subsection (c), above), which dealt with Eleventh Amendment/sovereign immunity. See Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit", for general information about state versus federal court.

D. Conclusion

If you are an incarcerated person with a physical or mental disability, Section 504 and the ADA (and maybe state law as well) guarantee you certain rights and protections. To realize your protections under these laws, you must meet the elements of the two laws. You may be able to hire an attorney to assist you with your complaint, because both Section 504 and the ADA allow you to recover attorney's fees. Although you might not be able to recover money damages, you may be able to change the practices that are denying you a particular prison service, program, or activity. Before filing your complaint, make sure to refer to Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for information about the PLRA (which may impose additional requirements before filing a lawsuit). Also, if you claim a violation of a state statute, make sure you meet your state's statute of limitations.

that, "[b]ecause punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act").

CHAPTER 29

SPECIAL ISSUES FOR INCARCERATED PEOPLE WITH MENTAL ILLNESS*

A. Introduction

This Chapter will explain your rights as an incarcerated person with a mental illness. Part A discusses basic information you will need in order to understand how the law applies to incarcerated people with a mental illness (including the definitions of important terms such as “mental illness” and “treatment”). Part B explains your right to receive treatment for a mental illness. Part C explains how and when you can refuse unwanted treatment and transfer, and the consequences of transfer for hospitalization. Part D gives details about conditions of confinement, and explains how they overlap with mental health issues. Part E describes things to consider if you are a pretrial detainee with a mental illness. Part F explains the resources that are available to help you plan for your release. Part G describes resources available to you as an incarcerated person.

For more information on topics that might be important to incarcerated people with a mental illness, see Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care,” and Chapter 28, “Rights of Incarcerated People with Disabilities.” You should also read Part E of Chapter 23 to learn more about your right to medical privacy.

In addition, if you decide to file a lawsuit based on your rights in federal court, you *must* read *JLM*, Chapter 14, “The Prison Litigation Reform Act.” Failing to do so does not follow the requirements of the Prison Litigation Reform Act can lead to negative consequences such as the loss of your good-time credits or the loss of your right to bring future claims in federal court without immediately paying the full filing fee. Also, if you plan to bring a lawsuit because you believe your federal constitutional rights have been violated, you should read *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.” “Section 1983” (42 U.S.C. § 1983) is the law that allows you to sue when your constitutional rights are violated. Although this manual is intended to help you file your own lawsuit, keep in mind that it is always useful, if possible, to get assistance with your claims from a family member, friend, fellow incarcerated person, or lawyer. For advice on how to find a lawyer to help with your civil claims against the prison, please see Part C of Chapter 4 of the *JLM*, “How to Find a Lawyer.”

1. Defining “Mental Illness” and “Treatment”

(a) What Is Mental Illness?

This Chapter is written for incarcerated people with behavioral (involving the way that you act or behave) or psychological (involving your mental or emotional state) illnesses and symptoms or risks that can be diagnosed by a doctor. You might have heard people use the terms mental illness, serious mental illness, major mental illness, mental disorder, mental abnormality, mental sickness, serious and persistent mental illness, or mentally retarded. People (including courts and legislatures) use the terms as if they mean the same thing, but they do not. Many people say “mentally ill prisoners” or “prisoners with a mental illness” when they are referring to different groups of people, such as people who are not guilty by reason of insanity (also known as “NGIs”), those incompetent to stand trial, or people with developmental disabilities (that is, low intellectual function that usually starts at childhood). When you read this Chapter, pay close attention to the way different terms are used to mean different things. The differences between different terms are important for you and any lawsuit you may decide to file.

There are many kinds of “mental illness,” but some common types include Bipolar Disorder, Borderline Personality Disorder, Major Depression, Obsessive-Compulsive Disorder (“OCD”), Panic

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Disorder, Post-Traumatic Stress Disorder (“PTSD”), and Schizophrenia. Others include Dissociative Disorders, Dual Diagnosis or MICA (Mentally Ill and Chemically Addicted—mental illness with substance abuse), Eating Disorders, Schizoaffective Disorder, Tourette’s Syndrome, and Attention-Deficit/Hyperactivity Disorder.¹ This Chapter will not discuss the separate issues of NGIs, sexual offenders, incarcerated people with developmental disabilities, or incarcerated people who do not identify with the biological gender they were given at birth. For more information on issues related to sex offenders, see Chapter 32 of the *JLM*, “Special Considerations for Sex Offenders.”

Many state laws define “mental illness” to include only behavioral or psychological problems with noticeable symptoms. According to the American Psychiatric Association (“APA”), a person has a mental disorder if he suffers from a significant disturbance in “behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning . . . mental disorders are usually associated with significant distress or disability in social and occupational activities.”² This definition of a mental disorder refers to daily activities and not psychological responses to particular events (like the death of a loved one) or certain behaviors (like sexual offenses).³ Mental illnesses may last for varying periods of time. Some last for a short period and then disappear; others are constantly ongoing. Courts have also recognized that immediate psychological trauma (a sudden event that causes a lot of stress) also deserves mental health treatment,⁴ generally “serious” mental illnesses last longer, affect behavior, and have noticeable symptoms or risks.

In order to prove that you have a mental disorder, most state laws require you show that you have (1) a behavioral or psychological problem; (2) a symptom as a result of the problem; and (3) a diagnosis of mental illness by a professional, such as a doctor.⁵ For instance, in New York, “mental illness” means having “a mental disease or mental condition which is [expressed as] . . . a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person with the illness afflicted

1. See *Mental Health Conditions*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-Conditions> (last visited Feb. 1, 2020).

2. Awais Aftab, *Mental Disorders and Naturalism*, 11 AM. J. OF PSYCHIATRY RESIDENTS’ J. 10, 11 (2016).

3. See, e.g., *Kansas v. Crane*, 534 U.S. 407, 412–413, 122 S. Ct. 867, 870–871, 151 L. Ed. 2d 856, 862–853 (2002) (requiring the state to distinguish dangerous sexual offenders with mental illnesses from ordinary criminals for civil commitment purposes); AM. PSYCHIATRIC ASS’N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5 18 (2013), available at: https://psychiatry.msu.edu/_files/docs/Changes-From-DSM-IV-TR-to-DSM-5.pdf (last visited Oct. 4, 2020) (explaining that in the DSM-5, paraphilias (intense sexual arousal to objects, children, or nonconsenting adults) are not automatically considered mental disorders).

4. See *Carnell v. Grimm*, 872 F. Supp. 746, 756 (D. Haw. 1994) (holding that “an officer who has reason to believe someone has been raped and then fails to seek medical *and psychological* treatment for the victim after taking her into custody manifests deliberate indifference to a serious medical need”) (emphasis added), *appeal dismissed in part, aff’d in part*, 74 F.3d 977, 979 (9th Cir. 1996) (finding that the 8th Amendment prohibition of cruel and unusual punishment, which includes denying medical and psychological care, applies to pretrial detainees).

5. See, e.g., Public Welfare & Related Activities, MINN. STAT. ANN. §253B.02(13) (2015) (“an organic disorder of the brain or a substantial psychiatric disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand that is manifested by instances of grossly disturbed behavior or faulty perceptions.”); OHIO PUBLIC WELFARE ANN. § 5122.01(A) (Baldwin 2010) (“Mental illness” means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life.”); TEX. HEALTH & SAFETY CODE ANN. § 571.003(14) (Vernon 2012) (“[I]llness, disease, or condition, other than epilepsy, substance abuse or intellectual disability that: (A) substantially impairs a person’s thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior.”).

requires care and treatment.”⁶ Like the APA approach, some state laws specifically exclude sexual offenses, substance abuse, and mental retardation from the definition of mental illness.⁷

(b) What the Law and This Chapter Mean by “Treatment”

The definition of “treatment” under the law generally includes three steps: (1) diagnosis (a finding by a doctor or mental health specialist that there is a mental illness), (2) intervention (a decision to treat the illness with therapy, drugs, or other care), and (3) planning (developing a method to relieve suffering or find a cure for their illness).⁸

A particular medical action is considered as “treatment” when it is medically necessary and whether it will substantially help or cure your medical condition. An action is medically necessary when it involves a serious medical need, which “could well result in the deprivation of life itself” if untreated.⁹ The test to determine whether an incarcerated person should go to a mental health facility is not whether the person suffers from mental illness but instead whether that mental illness “requires care and treatment.”¹⁰

The law assumes that doctors are the best people to make medical choices to treat mental illness. Therefore, whether something is an appropriate treatment is a decision that judges and lawmakers leave to medical professionals. Just because an incarcerated person or a judge prefers a particular course of action to treat mental illness does not mean it is a *necessary* course of treatment under the law.¹¹ In New York, the Commissioner of the Department of Correctional Services and the Commissioner of the Office of Mental Health (the head of the department that handles mental illness issues) are responsible for establishing treatment plans that can be done in correctional facilities rather than in hospitals. Although treatment plans need only satisfy what the Commissioner of the Department of Correctional Services “deem[s] appropriate” for the treatment of incarcerated people with mental illnesses, the law does require that “[i]nmates with serious mental illnesses shall receive therapy and programming in settings that are appropriate to their clinical (activities relating to the observation and treatment of patients) needs while maintaining the safety and security of the facility.”¹² While adequate medical and health services must always be provided,¹³ different states require different levels of psychiatric care.¹⁴

6. N.Y. CORR. LAW § 400(6) (McKinney 2014). Additionally, the private settlement agreement in the case Disability Advocates, Inc. v. N.Y. State Office of Mental Health, No. 1:02-cv-04002 (S.D.N.Y. 2007) includes a definition of “serious mental illness” that provides a heightened level of care for prisoners in Special Housing Units and keeplock. The settlement requires that the heightened level of care take effect after several different programs and facilities, including a residential mental health unit, are established. After the settlement, New York passed a statute defining “serious mental illness” for prisoners who are in disciplinary segregated confinement in a way that closely resembles the settlement agreement’s definition. Case profile is available at: <https://www.clearinghouse.net/detail.php?id=5560> (last visited Feb. 2, 2020). The statute went into effect on July 1, 2011. See N.Y. CORR. LAW § 137(e) (McKinney 2014). The settlement agreement is available at <https://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf> (last visited Feb 2, 2020).

7. See, e.g., ALABAMA STAT. § 22-52-1.1(1) (2012) (stating that mental illness “excludes the primary diagnosis of epilepsy, mental retardation, substance abuse, including alcoholism, or a developmental disability”).

8. 88 N.Y. Jur. 2d Public Welfare and Elder Assistance §24 (2014).

9. Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (finding that an incarcerated person must rely on prison authorities to treat his medical needs, and in the worst case, failure to treat “may actually produce physical ‘torture or a lingering death’”); Bowring v. Goodwin 551 F.2d 44, 47 (4th Cir. 1977) (finding that federal courts have required provision of treatment for serious medical needs and that “the failure or refusal to treat ‘could well result in the deprivation of life itself’”); Fitzke v. Shappell, 468 F.2d 1072, 1076 fn. 5 (6th Cir. 1972) (quoting McCollum v. Mayfield, 130 F. Supp. 112, 115 (N.D. Cal. 1955)).

10. See, e.g., U.S. ex rel. Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969) (holding that, before a prisoner may be transferred to a mental health facility, it must be shown that he suffers from a mental disease that requires “care and treatment”).

11. See Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977) (“We disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment.”); see also Russell v. Sheffer, 528 F.2d 318, 318–319 (4th Cir. 1975) (stating that a prisoner must show that his medical mistreatment or the correctional facility’s denial of medical treatment can be characterized as “cruel and unusual punishment” to bring a § 1983 claim).

12. N.Y. Correct. Law § 401 (McKinney 2014).

13. Estelle v. Gamble, 429 U.S. 97, 103–104, 97 S. Ct. 285, 290–291, 50 L. Ed. 2d 251, 259–260 (1976) (citing Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)) (“It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”).

14. See, e.g., Ariz. Rev. Stat. Ann. § 31-201.01(B) (2002) (“In addition to the medical and health services to

You do not have a right to decide your treatment plan,¹⁵ however, you do have access to the following rights. You have the right to mental health care that meets the standards of the medical profession.¹⁶ Next, you have the right to information about your treatment's risks and alternatives. Finally, you have a limited right to refuse treatment (see Part C of this Chapter). Once a decision to treat your mental illness has been made, you cannot specify which treatment alternatives (such as medication, counseling, or therapy) you should receive.¹⁷ You may, however, be able to protect yourself against unfair medical treatment by arguing that a certain treatment is not necessary.

2. Understanding Treatment Facilities

There are three basic types of psychiatric care that are used to treat incarcerated people:¹⁸

- (1) Acute (or crisis) care, which is twenty-four hour care for incarcerated people whose symptoms of psychosis (losing contact with reality), suicide risk, or dangerousness justify intensive care and forced medication;
- (2) Sub-acute (or intermediate) care, usually outside of a hospital for incarcerated people suffering from severe and chronic conditions that require intensive care management, psychosocial interventions (treatment that is both social and psychological), crisis management, and psychopharmacology (drugs that affect the mind) in a safe and contained environment; and
- (3) Outpatient care is for incarcerated people who can function relatively normally. It can—but does not have to—include medication, psychotherapy (meeting with a psychiatrist or other trained mental health professional), supportive counseling, and other interventions.

The most common type of care that incarcerated people receive is outpatient care. If you require more intensive care, you may be treated in a hospital within the prison system or at an off-site medical facility set up specifically to treat people with mental illnesses. The severity of mental illness, the types and availability of facilities, and the doctor's medical diagnosis will all determine where, of the three facilities, you will receive treatment.

The Division of Forensic Services at the New York State Office of Mental Health (“OMH”) runs the New York psychiatric facility system. There are four forensic psychiatric care centers, which are medical facilities that provide examinations for and treat incarcerated people with mental health issues. One of them, Central New York Psychiatric Center, is both a regional forensic unit and the inpatient psychiatric hospital that services all incarcerated people in the state prisons and operates the many “satellite mental health units” and “mental health units” located within New York State prisons.¹⁹ You should note that administrative segregation, such as solitary confinement or

be provided pursuant to [this statute], the director may . . . provide to prisoners psychiatric care and treatment.”) (emphasis added).

15. See *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285–286 (D.N.H. 2003) (noting that the right to adequate medical care “does not mean that an inmate is entitled to the care of his or her choice, simply that the care must meet minimal standards of adequacy”); see also *Estelle v. Gamble*, 429 U.S. 97, 107–108, 97 S. Ct. 285, 292–293, 50 L. Ed. 2d 251, 262 (1976) (rejecting a prisoner's claim of mistreatment based on the number of care options that were not pursued).

16. *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) (noting that adequate medical treatment requires qualified medical personnel to provide services that meet “prudent professional standards in the community” and that meet the particular needs of prisoners).

17. See, e.g., *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285–286 (D.N.H. 2003) (noting the right to adequate medical care “does not mean that an inmate is entitled to the care of his or her choice, simply that the care must meet minimal standards of adequacy”); see also *Estelle v. Gamble*, 429 U.S. 97, 107, 97 S. Ct. 285, 292–293, 50 L. Ed. 2d 251, 262 (1976) (rejecting a prisoner's claim of mistreatment based on the fact that a number of care options were not pursued).

18. *Ill Equipped: U.S. Prisons and Offenders with Mental Illness*, HUMAN RIGHTS WATCH 128 (2003). Available at: <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf> (last visited Feb. 1, 2020).

19. The New York Office of Mental Health's forensic facilities include Mid-Hudson Forensic Psychiatric Center, Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit located within Rochester Psychiatric Center, and Central New York Psychiatric Center and Northeast Regional Forensic Unit located within Central New York Psychiatric Center. Within State correctional facilities, OMH operates 29 satellite and mental health units. *New York State Office of Mental Health Division of Forensic Services*, NEW YORK STATE OFFICE OF MENTAL HEALTH, <http://www.omh.ny.gov/omhweb/forensic/bfs.htm> (last visited Feb. 2, 2020).

disciplinary segregated confinement in “special housing units” (“SHUs”) or “keeplock,” is not a treatment facility. Many mental health experts, advocates, and clinicians believe that those forms of isolated confinement make mental health conditions worse, and courts also recognize the harm they cause. For more information on isolation and mental health, see Part D(1) of this Chapter.

(a) Treatment Facility Admissions in New York

In New York, whenever the doctor of a prison, jail, or other correctional institution believes you need hospitalization because of a mental illness, the doctor must tell the facility superintendent, who will then submit a commitment order to a judge to request that you be taken to a hospital. The judge will require two other doctors to examine you.²⁰ In New York City, the two doctors may examine you in your prison or you may be transferred to a county hospital for the examination.²¹ First, the doctors have to consider whether options other than taking you to a hospital would provide appropriate treatment for your mental illness.²² If not, the doctors must both agree that you have a mental illness and need care or treatment in order for you to be hospitalized.²³ If you were previously treated by a doctor for mental illness, then the doctors performing your evaluation while you are currently incarcerated must try to contact your previous doctor.²⁴

If the two doctors agree that you need to be hospitalized to treat a mental illness, the prison superintendent will apply to a judge for permission to commit you.²⁵ You should receive notice of any court order and have a chance to challenge it.²⁶ In addition, your wife, husband, father, mother, or nearest relative must also receive notice of the decision to commit you. If you have no known relatives within the state, that notice must be given to any known friend of yours.²⁷ If you decide to challenge the decision, you have a right to know the hospital's placement procedure. You also have the right to a lawyer, a hearing, an independent medical opinion, and judicial review including a jury trial.²⁸ However, you do not have a right to a hearing in an emergency, during which two doctors agree that your mental illness is likely to result in serious immediate harm to you or to other incarcerated people.²⁹ In that case, you are still entitled to notice, a lawyer, an independent medical opinion, a hearing, and a jury trial, but only *after* you arrive at a hospital.³⁰

B. Your Right to Receive Treatment

This Part explains two doctrines (that is, rules) that relate to your right to psychiatric medical care. Section 1 of this Part discusses whether the prison must provide psychiatric care, and how much care the prison must provide. Section 1 also mentions special considerations for incarcerated people with substance-related disorders and what medical treatment they should receive. Section 2 addresses your rights if psychiatric medical care is delayed or denied.

1. What to Do if the Psychiatric Medical Care You Receive Is Inadequate

This Subsection discusses situations in which an incarcerated person claims that the medical care he received is inadequate. You have a right to adequate medical care and treatment. Under the Eighth Amendment of the Constitution,³¹ the federal government has an obligation to provide medical care to

20. N.Y. CORR. LAW § 402(1) (McKinney 2014).

21. N.Y. CORR. LAW § 402(1) (McKinney 2014).

22. N.Y. CORR. LAW § 402(1) (McKinney 2014).

23. *See generally* N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2020); *see also* U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969) (suggesting that to be found in need of care and treatment through inpatient hospitalization, you must be found, after proper procedures, to be so mentally ill that you pose a danger to yourself or others).

24. N.Y. CORR. LAW § 402(1) (McKinney 2014).

25. N.Y. CORR. LAW § 402(1), (3) (McKinney 2014).

26. N.Y. CORR. LAW § 402(3) (McKinney 2014).

27. N.Y. CORR. LAW § 402(3) (McKinney 2014).

28. N.Y. CORR. LAW § 402(3) (McKinney 2014).

29. N.Y. CORR. LAW § 402(9) (McKinney 2014).

30. N.Y. CORR. LAW § 402(9) (McKinney 2014).

31. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*”) (emphasis added).

incarcerated people.³² This right includes the regular medical care that is necessary to maintain your health and safety. Many states also have state laws requiring prisons to provide medical care to incarcerated people.³³ For more information about this general right, see Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.”

(a) Your Right to Adequate Psychiatric Care

The Eighth Amendment requires that mental health care of incarcerated people be governed in the same way as physical health care. Most federal circuits have held the right to adequate medical care includes any *psychiatric* care that is necessary to maintain incarcerated people’s health and safety.³⁴ In *Bowring v. Godwin*, the Fourth Circuit Court of Appeals included treatment of mental illnesses as part of the right to medical care. The court noted that there is “no underlying distinction between the right [of an incarcerated person] to medical care for physical ills and its psychological or psychiatric counterpart.”³⁵

The *Bowring* court developed a three-part test to determine whether an incarcerated person has a right to psychiatric care. Under the test, an incarcerated person who suffers from a mental illness is likely to have a right to mental health treatment if a health care provider decides that:

- (1) the incarcerated person has the symptoms of a serious disease or injury;
- (2) that disease or injury can be cured, or can be substantially improved; and
- (3) the likelihood of harm to the incarcerated person (in terms of safety and health, including mental health) is substantial if treatment is delayed or denied.³⁶

However, the right to psychiatric treatment is still limited to reasonable medical costs and a reasonable length of time for treatment.³⁷ Therefore, psychiatric treatment will be given to the incarcerated person on the basis of what is necessary, not what is desirable.³⁸

You should note that the *Bowring* test is the law only in the Fourth Circuit, which only includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia. Therefore, the only courts that *must* apply the *Bowring* test are federal courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. However, other courts are likely to consider using the *Bowring* test in

32. *Estelle v. Gamble*, 429 U.S. 97, 103–104, 97 S. Ct. 285, 290–291, 50 L. Ed. 2d 251, 259–260 (1976) (holding that the 8th Amendment prohibits the denial of needed medical care).

33. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-201.01(D) (West 2002 & Supp. 2012); GA. CODE ANN. § 42-5-2 (2009).

34. *See Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (finding that a prisoner is entitled to psychiatric treatment where a doctor has concluded that the prisoner has a serious disease that might be curable, and where a delay in treatment might cause potential harm); *Clark-Murphy v. Foreback*, 439 F.3d 280, 292 (6th Cir. 2006) (stating that a prisoner’s right to mental health care, not just physical medical care, is clearly established under the 8th Amendment); *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (“The states have a constitutional duty to provide necessary medical care to their inmates, including psychological or psychiatric care.”); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) (“In balancing the needs of the prisoner against the burden on the penal system, the district court should be mindful that the essential test is one of medical necessity and not one simply of desirability.”); *Doty v. Cnty. of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994) (“[W]e now hold that the requirements for mental health care are the same as those for physical health care needs.”); *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991) (“The extension of the Eighth Amendment’s protection from physical health needs, as presented in *Estelle v. Gamble*, to mental health needs is appropriate because, as courts have noted, there is no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.” (internal quotation marks omitted)); *Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir. 1989) (“We think it plain that from the legal standpoint psychiatric or mental health care is an integral part of medical care. It thus falls within the requirement of *Estelle v. Gamble* . . . that it must be provided to prisoners.”); *Gates v. Cook*, 376 F.3d 323, 332, 343 (5th Cir. 2004) (“[M]ental health needs are no less serious than physical needs.”); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979) (explaining that prisoners with serious mental illness have a right to adequate treatment, and that psychiatric or psychological treatment should be held to the same standard as medical treatment for physical ills).

35. *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

36. *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

37. *Bowring v. Godwin*, 551 F.2d 44, 47–48 (4th Cir. 1977) (stating that the right to treatment is limited by reasonable cost and time, and that the test is what is medically necessary, not what is “merely desirable”); *but see Kosilek v. Maloney*, 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (noting that it is not permissible to deny a prisoner adequate medical care just because the treatment is costly).

38. *Bowring v. Godwin*, 551 F.2d 44, 47–48 (4th Cir. 1977).

similar cases,³⁹ especially because no court has issued a disagreeing opinion. So, you should still cite to *Bowring* even if you are not bringing a case in the Fourth Circuit, because the court in your circuit might find *Bowring* persuasive. For more information on what you may cite in your jurisdiction, see Chapter 2 of the *JLM*, “Introduction to Legal Research.”

(b) Your Right to Treatment for Substance Abuse

The American Psychiatric Association incorporates in its definition of mental illness “substance-related disorders,” as illnesses like substance use, abuse, and withdrawal.⁴⁰ The law, however, does not always consider such diseases as serious enough⁴¹ to require prison authorities to provide medical care to treat the diseases.⁴² However, many courts have found that incarcerated people have the right to treatment for substance abuse in certain circumstances. The sections below describe these situations.

(i) You Have No Right to Drug and Alcohol Rehabilitation in Prison

As a general rule, you have no right to rehabilitation while in prison.⁴³ Individual states or corrections departments may decide that rehabilitation is an important goal and may implement programs to achieve that aim, but the Constitution does not require them to do so because one application of this rule is that there is no right to narcotics or alcohol treatment programs in prison.⁴⁴ However, courts have at times ordered prisons to implement drug and alcohol treatment programs where the denial of these programs would otherwise lead to conditions that were so bad that they violated incarcerated people’s rights to medical care. Incarcerated people often raise these issues successfully when filing broader claims about unconstitutional conditions of confinement.⁴⁵ Additionally, at least one court has found that incarcerated people should be “free to attempt

39. See *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (citing the *Bowring* test).

40. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 481 (5th ed. 2013).

41. A prisoner having a “serious medical need” triggers an analysis under *Estelle v. Gamble*, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976), which provides that deliberate indifference to that serious medical need violates the 8th Amendment’s ban on cruel and unusual punishment. Cases like *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977), have extended this rule requiring treatment to the psychiatric context, but only where the prisoner has an illness that might be curable and where delay might cause substantial harm. For more information on your rights when necessary treatment has been denied or delayed, please see Part B(2) of this Chapter, “Denied or Delayed Treatment.”

42. See, e.g., *Pace v. Fauver*, 479 F. Supp. 456, 458–459 (D.N.J. 1979) (“The Court does not regard plaintiffs’ desire to establish and operate an alcoholic rehabilitation program within . . . [p]rison as a serious medical need for purposes of Eighth Amendment and § 1983 analysis.”), *aff’d*, 649 F.2d 860 (3d Cir. 1981). But see *Marshall v. United States*, 414 U.S. 417, 432 n.3, 94 S. Ct. 700, 709 n.3, 38 L. Ed. 2d 618, 629 n.3 (1974) (Marshall, J., dissenting) (citing Senate Report characterizing drug addiction as a disease); *State v. Sevelin*, 554 N.W.2d 521, 524, 204 Wis. 2d 127, 134 (Wis. Ct. App. 1996) (“The unambiguous meaning of ‘medical care’ includes treatment of all diseases. Alcoholism is a disease.”).

43. *Marshall v. United States*, 414 U.S. 417, 421–422, 94 S. Ct. 700, 704, 38 L. Ed. 2d 618, 623 (1974) (explaining that there is no “fundamental right” to rehabilitation from narcotics addiction after conviction of a crime and confinement in a penal institution rather than in a civil facility); see also *Hutto v. Finney*, 437 U.S. 678, 686 n.8, 98 S. Ct. 2565, 2571 n.8, 57 L. Ed. 2d 522, 531 n.8 (1978) (“[T]he Constitution does not require that every aspect of prison discipline serve a rehabilitative purpose.”); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982) (finding that a lack of rehabilitative programs does not violate the Constitution).

44. See, e.g., *Gibson v. Fed. Bureau of Prisons*, 121 F. App’x 549, 551 (5th Cir. 2004) (holding that an incarcerated person does not have a protected liberty interest in participating in a drug treatment program); *Abraham v. Danberg*, 832 F. Supp. 2d 368, 375 (D. Del. 2011) (“Prisoners have no constitutional right to drug treatment or other rehabilitation.”); *Bullock v. McGinnis*, 5 F. App’x 340, 342 (6th Cir. 2001) (“[A] prisoner has no constitutional right to rehabilitation[.]”); *Pace v. Fauver*, 479 F. Supp. 456, 460 (D.N.J. 1979) (stating that prison authorities, not the court, should decide whether to provide alcoholism treatment to incarcerated people), *aff’d*, 649 F.2d 860 (3d Cir. 1981).

45. See, e.g., *Palmigiano v. Garrahy*, 443 F. Supp. 956, 989 (D.R.I. 1977) (ordering prison to establish drug and alcohol treatment program conforming to public health standards); *Alberti v. Sheriff of Harris Cnty.*, 406 F. Supp. 649, 677 (S.D. Tex. 1975) (requiring prison to establish treatment program for prisoners suffering from alcoholism and drug abuse in consultation with trained specialist); *Barnes v. Gov’t of Virgin Islands*, 415 F. Supp. 1218, 1235, 13 V.I. 122, 158 (D.V.I. 1976) (ordering prison to introduce drug and alcohol rehabilitation program); see also *Laaman v. Helgemoe*, 437 F. Supp. 269, 316–317 (D.N.H. 1977) (“The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation” (internal citations omitted)).

rehabilitation or the cultivation of new socially acceptable and useful skills and habits.”⁴⁶ It might be possible to argue that failure to receive drug treatment violates that freedom.

There is also no right to methadone or to the establishment of methadone maintenance programs in prison.⁴⁷ On the other hand, a few courts have found that if you are already participating in a drug treatment program, then you *do* have the right to continue drug treatment.⁴⁸ This right primarily protects you pretrial.⁴⁹ Pretrial detainees are people who have not been found guilty but still must remain in jail because they cannot afford to post bail or they have been determined to be a flight risk or danger to the community. These individuals cannot be punished beyond detention.⁵⁰ Courts view forced rehabilitation as a punishment. They also view the pain suffered when methadone is discontinued as a punishment. For more information on your right to treatment as a pretrial detainee, please see Part E(1) of this Chapter.

(ii) Your Right to Avoid Deterioration (Getting More Sick) While Incarcerated

Many courts have held that even if you do not have an absolute constitutional right to treatment for certain illnesses like substance abuse; you do have a right to avoid having your illness get worse while you are in prison.⁵¹ Some courts have not found a right that protect incarcerated people getting sicker while incarcerated, several have at least found that where conditions are “so bad that serious physical or psychological deterioration is inevitable,” you can state an Eighth Amendment claim of cruel and unusual punishment.⁵²

So, if your drug or alcohol addiction is likely to worsen your condition, you might be able to make a claim that failure to receive adequate treatment violates your right to avoid getting sicker while in prison. Even though different federal circuits have established different rules as to the extent of that right, at a minimum, if your deterioration results from the State’s intent to cause harm,⁵³ you can claim the State violated your rights.

(iii) Your Right to Care for Withdrawal from Drugs and Alcohol

Another exception to the general rule that prisons do not need to provide medical care for substance-related disorders is that prisons *do* need to provide care for withdrawal, which can be excessively painful and dangerous, and is therefore considered a serious medical condition.⁵⁴ Because

46. *Laaman v. Helgemoe*, 437 F. Supp. 269, 316–317 (D.N.H. 1977) (explaining that the absence of training and rehabilitative programs may have significance where their absence causes significant deterioration).

47. *See, e.g., Norris v. Frame*, 585 F.2d 1183, 1188 (3d Cir. 1978) (overturned on other grounds) (“There is no constitutional right to methadone ...”); *Hines v. Anderson*, 439 F. Supp. 12, 17 (D. Minn. 1977) (stating that even though prisons cannot take away prescriptions without doctor’s approval, prisons are not required to administer methadone as part of a maintenance program).

48. *See Norris v. Frame*, 585 F.2d 1183, 1189 (3d Cir. 1978) (stating that interference with pretrial detainee’s status as recipient of methadone infringed his rights); *Cudnik v. Kreiger*, 392 F. Supp. 305, 312–313 (N.D. Ohio 1974) (stating that it violates fundamental due process rights to deny pretrial detainees methadone that they are already receiving as part of drug treatment).

49. *Cudnik v. Kreiger*, 392 F. Supp. 305, 313 (N.D. Ohio 1974) (stating that it violates due process to deny pretrial detainees methadone that they are already receiving as part of drug treatment).

50. *See Cudnik v. Kreiger*, 392 F. Supp. 305, 311 (N.D. Ohio 1974) (explaining that since pretrial detainees are considered innocent in the eyes of the law, they should be entitled to all liberties they would have were they not imprisoned, except that which is necessarily lost through detention).

51. *Battle v. Anderson*, 564 F.2d 388, 403 (10th Cir. 1977) (“We believe that while an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well-being.”); *Ramos v. Lamm*, 639 F.2d 559, 566 (10th Cir. 1980) (extending the right to avoid deterioration established in *Battle* to medical care context); *Laaman v. Helgemoe*, 437 F. Supp. 269, 316 (D.N.H. 1977) (holding prisoners have an interest in avoiding physical and mental deterioration). *But see Reddin v. Israel*, 561 F.2d 715, 718 (7th Cir. 1977) (“[T]he state need not avoid conduct which may result in detrimental psychological effects unless the state acts in a torturous or barbarous manner or with a wanton intent to inflict pain” (internal citation omitted)).

52. *Grubbs v. Bradley*, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982).

53. *See Reddin v. Israel*, 561 F.2d 715, 718 (7th Cir. 1977) (“[T]he state need not avoid conduct which may result in detrimental psychological effects unless the state acts in a torturous or barbarous manner or with a wanton intent to inflict pain.”).

54. *See, e.g., Kelley v. Cnty. of Wayne*, 325 F. Supp. 2d 788, 791 (E.D. Mich. 2004) (“Heroin withdrawal is

of the seriousness of withdrawal symptoms, you are entitled to treatment.⁵⁵ Most of the cases have come up in the context of pretrial detainees going through withdrawal just after arrest, but the courts have not explicitly limited the right to treatment to pretrial detainees. If a convicted incarcerated person experiences a serious medical need due to withdrawal then he should receive treatment.

2. What to do if Treatment is Denied or Delayed

This Subsection focuses on your rights when the treatment you need has been *deliberately* (purposely) denied or delayed.⁵⁶ Although courts do not like second-guessing doctors' decisions,⁵⁷ a prison official who denies or delays treatment knowing that you need that treatment might be violating your constitutional right to be free of "cruel and unusual punishment" under the Eighth Amendment.⁵⁸ A court that finds this deliberate denial or delay will step in to help you. Not every delay in medical care is a violation of the Constitution.

A prison official only violates the Eighth Amendment when two requirements are met.⁵⁹ The first requirement is that the denial of your medical care is "sufficiently serious." The second requirement is that the prison official must have acted with a culpable (bad) state of mind and ignored your health needs on purpose.⁶⁰ To meet this standard you must show that you have actually been deprived of adequate medical care, and that the lack of treatment has caused you harm, or will cause you harm in the future.⁶¹ The second requirement for an Eighth Amendment violation is that the prison official acted with "deliberate indifference" to your medical or mental health needs.⁶² These requirements are discussed in more detail below. If care has been denied, the court will look at whether "a reasonable doctor or patient would find [it] important and worthy of comment," whether the condition significantly affects your daily activities, and whether it causes "chronic and substantial pain."⁶³ In cases where treatment has been delayed or interrupted, the question of how serious the situation is focuses on the impact of the delay and not on the main medical condition alone.⁶⁴

(a) You Must Satisfy the Deliberate Indifference Standard

The Supreme Court has decided that a prison official shows deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety."⁶⁵ For example, an

a serious medical condition."); *Morrison v. Washington County*, 700 F.2d 678, 681 (11th Cir. 1983) (finding that *delirium tremens* is a severe form of alcohol withdrawal that should be monitored because of the risk of death).

55. See, e.g., *Pedraza v. Meyer*, 919 F.2d 317, 319–320 (5th Cir. 1990) (finding that pretrial detainee who had not received treatment for his heroin withdrawal symptoms could have stated a claim of deliberate indifference to serious medical needs); *Walker v. Fayette Cnty.*, 599 F.2d 573, 576 (3d Cir. 1979) (*per curiam*) (where pretrial detainee had informed jail that he was addicted to heroin, failure to treat him for withdrawal could show deliberate indifference).

56. See, e.g., *Pinon v. Wisconsin*, 368 F. Supp. 608, 610 (E.D. Wis. 1973) (explaining that courts usually refuse to second-guess whether a prisoner's treatment is adequate, but that the situation is different where the prisoner alleges that the facility has completely denied him treatment). See Part B(3) of Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," for more information on delayed or denied medical treatment.

57. See, e.g., *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (finding prisoner's disagreement with medical treatment did not rise to the level of violating his rights); *Smith v. Marcantonio*, 910 F.2d 500, 502 (8th Cir. 1990) (granting doctor immunity where prisoner disagreed with the doctor-ordered treatment).

58. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain . . . proscribed by the [8th] Amendment.'").

59. See *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 832 (1994) ("[A] prison official may be held liable under the [8th] Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk . . .").

60. *Wilson v. Seiter*, 501 U.S. 294, 298–299, 111 S. Ct. 2321, 2324–2325, 115 L. Ed. 2d 271, 278–280 (1991).

61. *Helling v. McKinney*, 509 U.S. 25, 32–33, 113 S.Ct. 2475, 2480–2481, 125 L. Ed. 2d 22, 30–31 (1993) (holding that prisoners may complain about both current harm and "very likely" future harm).

62. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) ("[A] prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.").

63. *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998).

64. *Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003) ("[I]t's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition . . . that is relevant for Eighth Amendment purposes.").

65. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) ("[A] prisoner must

incarcerated person might submit evidence that prison officials “refused to treat him, ignored his complaints, [or] intentionally treated him incorrectly.”⁶⁶

A prison official can be “deliberately indifferent” by: (1) taking action (doing something), or (2) refusing to act (not doing something).⁶⁷ An example of an act showing deliberate indifference might be *knowingly* taking away an incarcerated person’s asthma inhaler, knowing that it will really harm the incarcerated person. An example of a deliberate failure to act might be refusing to provide necessary medication⁶⁸ or refusing to treat a prisoner’s cavity.⁶⁹

Although the deliberate indifference standard traditionally applied to physical injury and medical care, it also applies to medically necessary treatment for mental illnesses.⁷⁰ Deliberate indifference to the serious mental health needs of a prisoner violates the Eighth Amendment just as much as deliberate indifference to physical medical needs.⁷¹

Many deliberate indifference claims about inadequate prison mental health care argue that the facility’s mental health staff is too small to meet prisoners’ needs or that the staff members are unqualified.⁷² Several courts have found that the lack of an on-site psychiatrist in a large prison is

allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”).

66. *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985) (refusing to hold for plaintiff where he did not present evidence of deliberate indifference).

67. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) (“In order to state a cognizable claim [of deliberate indifference], a prisoner must allege *acts or omissions* sufficiently harmful to evidence deliberate indifference to serious medical needs.”) (emphasis added).

68. *McElligott v. Foley*, 182 F.3d 1248, 1257 (11th Cir. 1999) (holding that a jury could find that the medication provided to a prisoner was so cursory as to amount to a deliberate indifference to the prisoners’ serious medical needs); *see also West v. Keve*, 571 F.2d 158, 162 (3d Cir. 1978) (finding that a prisoner’s post-operative treatment, which consisted of aspirin but no prescription-strength medication, may constitute deliberate indifference to his serious medical needs).

69. *Harrison v. Barkley*, 219 F.3d 132, 137 (2d Cir. 2000) (holding that prison officials’ refusal to treat cavity in one of prisoner’s teeth unless he consented to extraction of another tooth constituted deliberate indifference).

70. *See Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991) (reiterating that there is no underlying distinction between medical care for physical and psychological ills); *Belcher v. City of Foley*, 30 F.3d 1390, 1396 (11th Cir. 1994) (holding that the right to treatment “encompasses a right to psychiatric and mental health care”).

71. *See, e.g., Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (“Th[e] duty to provide medical care encompasses detainees’ psychiatric needs.”); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986) (“A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills.”).

72. *Greason v. Kemp*, 891 F.2d 829, 837–840 (11th Cir. 1990) (stating that prison clinic director, prison system mental health director, and prison warden could be found deliberately indifferent based on their knowing toleration of a “clearly inadequate” mental health staff); *Waldrop v. Evans*, 871 F.2d 1030, 1036 (11th Cir. 1989) (finding that doctor’s failure to refer a suicidal prisoner to a psychiatrist could constitute deliberate indifference); *Cabrales v. Cnty. of L.A.*, 864 F.2d 1454, 1461 (9th Cir. 1988) (deliberate indifference was established where mental health staff could only spend “minutes per month” with disturbed prisoners); *vacated*, 490 U.S. 1087, 109 S. Ct. 2425, 104 L. Ed. 2d 982 (1989), *reinstated*, 886 F.2d 235, 236 (9th Cir. 1989); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 868 (D.D.C. 1989) (“woefully short” mental health staffing supported a finding of unconstitutionality), *rev’d in part sub nom. Brogdsdale v. Barry*, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability, since they could not reasonably have known their conduct in permitting overcrowding violated prisoners’ rights); *Tillery v. Owens*, 719 F. Supp. 1256, 1302–1303 (W.D. Pa. 1989) (stating that “gross staffing deficiencies” and lack of mental health training of nurses supported finding of deliberate indifference), *aff’d*, 907 F.2d 418 (3d Cir. 1990); *Langley v. Coughlin*, 715 F. Supp. 522, 539–540 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989) (use of untrained or unqualified personnel with inadequate supervision by psychiatrist supported constitutional claims); *Inmates of Allegheny Cnty. Jail v. Peirce*, 487 F. Supp. 638, 643 (W.D. Pa. 1980) (holding that systemic deficiencies in mental health staffing can be held to constitute deliberate indifference); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980) (setting forth six components of a minimally adequate mental health treatment program), *aff’d in part and rev’d in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982).

unconstitutional.⁷³ The failure to train correctional staff to work with prisoners with mental illness can also be considered deliberate indifference.⁷⁴

Courts have considered the following issues with prison mental health care to be “deliberately indifferent”:

- (1) the lack of or inadequate mental health screening on intake,⁷⁵
- (2) the failure to follow up with prisoners who have known or suspected mental disorders,⁷⁶
- (3) the failure to hospitalize prisoners whose conditions cannot adequately be treated in prison,⁷⁷
- (4) failing to follow professional standards in treatment,⁷⁸ and
- (5) the failure to separate prisoners with severe mental illness from those without mental illness.⁷⁹

73. *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1577 (D. Idaho 1984) (“There must be at least the equivalent of one full-time psychiatrist to provide treatment to those inmates capable of deriving benefit and to establish written procedures whereby inmates are analyzed and their progress monitored.”).

74. *Langley v. Coughlin*, 709 F. Supp. 482, 483–485 (S.D.N.Y. 1989) (finding deliberate indifference where, among other reasons, officers lacked the training necessary to address issues of abuse, stress, and unsanitary living conditions); *Kendrick v. Bland*, 541 F. Supp. 21, 25–26 (W.D. Ky. 1981) (holding that incidents arising from failure to adequately train staff constituted cruel and unusual punishment); *see also Sharpe v. City of Lewisburg*, 677 F. Supp. 1362, 1367–1368 (M.D. Tenn. 1988) (upholding jury verdict based on city and county’s failure to train police to deal with mentally disturbed individuals).

75. *Ruiz v. Estelle*, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980), *aff’d in part and rev’d in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982); *see also Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 868 (D.D.C. 1989), *rev’d in part sub nom. Brogsdale v. Barry*, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability, since they could not reasonably have known their conduct in permitting overcrowding violated prisoners’ rights); *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1577 (D. Idaho 1984) (adopting the *Ruiz v. Estelle* elements of minimally adequate care, which include screening on intake); *Inmates of Allegheny Cnty. Jail v. Peirce*, 487 F. Supp. 638, 642–644 (W.D. Pa. 1980); *Pugh v. Locke*, 406 F. Supp. 318, 324 (M.D. Ala. 1976), *aff’d in part and modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev’d in part sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978).

76. *Clark-Murphy v. Foreback*, 439 F.3d 280, 289–292 (6th Cir. 2006) (holding certain staff members were not entitled to qualified immunity for failing to get psychiatric assistance for an obviously psychotic prisoner); *see also Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 943–944 (E.D. Ark. 2002) (holding lengthy delays in transferring detainees with mental illness to mental hospital were unconstitutional); *Arnold ex rel. H.B. v. Lewis*, 803 F. Supp. 246, 257 (D. Ariz. 1992) (finding 8th Amendment violation in part because of the lack of an adequate system for referring prisoners with behavioral problems to psychiatric staff).

77. *Arnold v. Lewis*, 803 F. Supp. 246, 257–258 (D. Ariz. 1992) (holding that prison officials’ actions constituted deliberate indifference to serious medical needs which violated the 8th Amendment).

78. *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (holding that care which “so deviated from professional standards that it amounted to deliberate indifference” would violate the Constitution); *see also Greason v. Kemp*, 891 F.2d 829, 835 (11th Cir. 1990) (“grossly inadequate psychiatric care” can be deliberate indifference); *Waldrop v. Evans*, 871 F.2d 1030, 1033–1035 (11th Cir. 1989) (finding that “grossly incompetent or inadequate care”—here, that prisoner’s medication was discontinued abruptly and without reason—can constitute deliberate indifference); *Langley v. Coughlin*, 715 F. Supp. 522, 540–541 (S.D.N.Y. 1989) (stating that “consistent and repeated failures ... over an extended period of time” could establish deliberate indifference).

79. *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 560–561 (1st Cir. 1988) (holding that transferring a prisoner with mental illness to general population in a crowded jail with no psychiatric facilities constituted deliberate indifference); *see also Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 868 (D.D.C. 1989) (stating that prisoners with mental health problems must be placed in a separate facility and not in the administrative/punitive segregation area), *rev’d in part sub nom. Brogsdale v. Barry*, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability); *Langley v. Coughlin*, 709 F. Supp. 482, 484–485 (S.D.N.Y. 1989) (placement of prisoners with mental illness in punitive segregation resulted in conditions that might violate the 8th Amendment), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); *Tillery v. Owens*, 719 F. Supp. 1256, 1303–1304 (W.D. Pa. 1989) (holding that the Constitution requires separate unit for those with severe mental illness, i.e., those who will not take their medication regularly, maintain normal hygienic practices, accept dietary restrictions, or report symptoms of illness), *aff’d*, 907 F.2d 418 (3d Cir. 1990); *Finney v. Mabry*, 534 F. Supp. 1026, 1036–1037 (E.D. Ark. 1982) (finding that the Constitution requires separate facility for the “most severely mentally disturbed” prisoners); *Inmates of Allegheny Cnty. Jail v. Peirce*, 487 F. Supp. 638, 644 (W.D. Pa. 1980) (requiring that jail must establish a separate area for prisoners who “are seriously disturbed and require observation, protection, or restricted confinement”); *see also Morales Feliciano v. Hernandez Colon*, 697 F. Supp. 37, 48 (D.P.R. 1988) (stating that prisoners with mental illness may not be housed in a jail for more than 24 hours), *aff’d on other grounds sub nom. Morales-Feliciano v. Parole Bd. of P.R.*, 887 F.2d 1 (1st Cir. 1989); *Delgado v. Cady*, 576 F. Supp. 1446, 1452, 1456 (E.D. Wis. 1983) (upholding the housing of psychotic prisoners in segregation unit and finding unconstitutional the coerced double celling of suicidal prisoners with other prisoners: “[I]t is cruel and unusual punishment to force an inmate to share a cell with a suicidal person solely to act as a prophylactic agent. It is the duty of the staff and not the inmates to provide

Mixing incarcerated people with mental illness with those who do not have mental illnesses might violate the constitutional rights of both groups.⁸⁰ Courts have also held that housing incarcerated people with mental illness under conditions of extreme isolation is unconstitutional.⁸¹ However, for this claim, some courts may ask you to show that prison officials *knew* about the risk that isolation would harm your mental health. Another common violation is stopping psychiatric medications without reason, often with terrible results.⁸²

In a landmark decision in 2011, *Brown v. Plata*, the Supreme Court held that California prisons provided inadequate mental health care, which violated the Eighth Amendment.⁸³ However, the Supreme Court did not say whether any *particular* delay or lack of medical treatment would itself violate the Constitution.⁸⁴ Instead, the Court looked at the combination of problems that put incarcerated people at risk of “substantial risk of serious harm.”⁸⁵ The elements considered by the Court included similar factors as those mentioned above, such as not enough staff, not enough space for the staff to perform their jobs, delays in treatment, and “unsafe and unsanitary living conditions,” which prevent effective delivery of medical and mental health care.⁸⁶

It is important to remember that the “deliberate indifference” standard applies to a *significant denial or delay*⁸⁷ of adequate medical care. If you feel that you have been denied mental health treatment, or if you feel that it has been unnecessarily delayed, and you wish to claim deliberate indifference, you must:

surveillance over suicidal inmates.”).

80. *DeMallory v. Cullen*, 855 F.2d 442, 444–446 (7th Cir. 1988) (finding the allegation of an incarcerated person without mental illness that he was knowingly housed in a high-security unit with prisoners with mental illness, where those mentally ill prisoners caused filthy and dangerous conditions, stated an 8th Amendment claim against prison officials); *Nolley v. Cty. of Erie*, 776 F. Supp. 715, 738 (W.D.N.Y. 1991) (finding that the automatic segregation of an HIV-positive prisoner with prisoners with mental illness violated the prisoner’s due process rights because “the stigma associated with being involuntarily placed in [the segregated ward, which was] known to house inmates who were ... psychologically unstable [in addition to HIV-positive] ... could have engendered serious adverse consequences for her” and, therefore, her confinement “was qualitatively different from the punishment normally suffered by a person convicted of a crime”), *rev’d in part on other grounds*, 798 F. Supp. 123 (W.D.N.Y. 1992); *Tillery v. Owens*, 719 F. Supp. 1256, 1303 (W.D. Pa. 1989) (citing increased tension for prisoners without mental illness and danger of retaliation against those with mental illness), *aff’d*, 907 F.2d 418 (3d Cir. 1990); *Langley v. Coughlin*, 709 F. Supp. 482, 484–485 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); *Langley v. Coughlin*, 715 F. Supp. 522, 543–544 (S.D.N.Y. 1988); *see* *Hassine v. Jeffes*, 846 F.2d 169, 178 n.5 (3d Cir. 1988) (holding prisoners could seek relief from the consequences of other prisoners’ failure to receive adequate mental health services).

81. *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of prisoners with serious mental illness from “supermax” prison, where inmates spend all but four hours per week in their cells); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265–1266 (N.D. Cal. 1995) (holding keeping prisoners with mental illness or those at a high risk of suffering injury to mental health in Pelican Bay isolation unit unconstitutional), *rev’d in part on other grounds*, 190 F.3d 990 (9th Cir. 1999). *But see* *Scarver v. Litscher*, 434 F.3d 972, 976–977 (7th Cir. 2006) (holding that prison officials who were not shown to have known that keeping a psychotic prisoner under conditions of extreme isolation and heat would aggravate his mental illness could not be found deliberately indifferent).

82. *See* *Greason v. Kemp*, 891 F.2d 829, 831–833 (11th Cir. 1990) (holding the law protects incarcerated people from deliberate indifference to their psychiatric needs in case in which prisoner killed himself); *see also* *Waldrop v. Evans*, 871 F.2d 1030, 1032 (11th Cir. 1989) (holding there was a factual issue as to whether prison psychiatrist acted with deliberate indifference by withholding depression medication where prisoner blinded and castrated himself); *Wakefield v. Thompson*, 177 F.3d 1160, 1164 (9th Cir. 1999) (holding 8th Amendment requires prison officials to provide prisoners with mental illness with a supply of medication upon release). *But see* *Campbell v. Sikes*, 169 F.3d 1353, 1367–1368 (11th Cir. 1999) (holding discontinuation of medication by doctor who misdiagnosed a prisoner, having not obtained her medical records but having read a summary, was not deliberate indifference).

83. *Brown v. Plata*, 563 U.S. 493, 543–544, 131 S. Ct. 1910, 1947, 179 L. Ed. 2d 969, 1007–1008 (2011) (holding California’s medical and mental health care fell below standard of decency required by 8th Amendment and that no remedy could be achieved without a reduction in overcrowding).

84. *Brown v. Plata*, 563 U.S. 493, 494, 131 S. Ct. 1910, 1918, 179 L. Ed. 2d 969, 976 (2011) (holding California had violated 8th Amendment with respect to entire class of mentally ill prisoners in California and entire class of California prisoners with serious medical conditions).

85. *Brown v. Plata*, 563 U.S. 493, 551, 131 S. Ct. 1910, 1951, 179 L. Ed. 2d 969, 1012 (2011).

86. *Brown v. Plata*, 563 U.S. 493, 495, 131 S. Ct. 1910 at 1919, 179 L. Ed. 2d 969, 978 (2011).

87. *See, e.g.,* *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346–347 (3d Cir. 1987) (holding that prison officials are deliberately indifferent if they delay care “in order to make [you] suffer,” or if they “erect arbitrary and burdensome procedures that result in interminable delays” to care) (internal citations omitted).

- (1) state facts that allege a serious medical need for which medical care has not been provided; and
- (2) claim that a prison official must have been aware of the need for medical care, or at least aware of facts which might have led the official to believe there was a need for medical care.⁸⁸

(i) You Must Show Serious Medical Need

The first part of your deliberate indifference claim must include facts that show you had a serious medical need and did not receive treatment. A medical need is “serious” when there is a large risk that you will suffer serious harm without adequate treatment.⁸⁹ Courts have also found a need diagnosed as requiring treatment or a need that is so obvious a non-doctor could easily recognize it to be a “serious medical need.”⁹⁰ For example, where a prisoner has attempted suicide, the court has found a serious medical need.⁹¹

(ii) You Must Show Actual Knowledge of Your Serious Medical Need

For the second part of your deliberate indifference claim, you must show that prison officials *actually knew* you needed mental health care but still did not treat you.⁹² In *Farmer v. Brennan*, the Supreme Court explained a prison official “knows” of a risk when he is not only aware of facts that would lead him to conclude that an incarcerated person faces a substantial risk of serious harm, but also actually comes to that conclusion.⁹³ In other words, this part of the deliberate indifference test is subjective (from the point of view of that particular prison official); he must actually believe you will suffer some serious harm before a court will find he had “knowledge” of the risk.⁹⁴ But, if the risk is *extremely* obvious, a jury can assume the prison official knew of the risk. For example, the *Farmer* Court noted that if a plaintiff shows the risk of prisoner attacks was “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus ‘must have known’ about it,” that evidence could be enough to show actual knowledge of the risk.⁹⁵

(c) What *Does Not* Count as Deliberate Indifference?

Courts will refuse to find deliberate indifference in some situations. The deliberate indifference standard is meant to deal with “unnecessary and wanton infliction of pain.”⁹⁶ Acts or failures to act that are not on purpose, or where the prison officials had no reason to know you might suffer serious

88. *Farmer v. Brennan*, 511 U.S. 825, 845–846, 114 S. Ct. 1970, 1983–1984, 128 L. Ed. 2d 811, 830–831 (1994).

89. *Harrison v. Barkley*, 219 F.3d 132, 136–137 (2d Cir. 2000) (holding that prison officials are deliberately indifferent when they refuse to treat a cavity in a prisoner’s tooth unless the prisoner consents to the extraction of another tooth which he wishes to keep).

90. *See, e.g.*, *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987).

91. *See, e.g.*, *Perez v. Oakland Cty.*, 466 F.3d 416, 423–425 (6th Cir. 2006) (finding that the prisoner’s suicide attempts raised a genuine issue as to whether the treating doctor had been deliberately indifferent to a serious medical need); *see also Sanville v. McCaughtry*, 266 F.3d 724, 733 (7th Cir. 2001) (holding that the “serious need” element was met where the prisoner suffered from a mental illness that led him to commit suicide, and finding that mental illness more generally poses a serious medical need).

92. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (“[A] prison official cannot be found liable under the [8th] Amendment . . . unless the official knows of and disregards an excessive risk to inmate health or safety.”).

93. *Farmer v. Brennan*, 511 U.S. 825, 838, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (“[A]n official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.”).

94. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (“[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”).

95. *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 829 (1994) (“[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”).

96. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)).

harm, will not satisfy the standard.⁹⁷ A complaint claiming inadequate psychiatric care because officials did not provide the treatment you would have personally chosen will not meet the deliberate indifference standard.⁹⁸ This is because prison officials have leeway to decide what treatment is adequate for a serious medical need. Courts will not find deliberate indifference when prison officials were merely negligent,⁹⁹ made a mistake, or had a difference of opinion regarding adequate medical care.¹⁰⁰

Similarly, a complaint based on malpractice (improper or negligent treatment by a doctor) or misdiagnosis (a medical mistake) will not meet the high deliberate indifference standard.¹⁰¹ So, “a complaint that a [doctor] has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.”¹⁰² You may instead be able to file a medical malpractice claim for negligence. See *JLM*, Chapter 17, “The State’s Duty to Protect You and Your Property: Tort Actions,” for more information about negligence and how to file a tort claim.

(d) How to Bring a Deliberate Indifference Claim Under Section 1983

If you think your case meets the legal standard as described above, you may bring a claim of deliberate indifference to your personal health and wellbeing under 42 U.S.C. § 1983 (“Section 1983”). You can use Section 1983 to sue cities and local governments for constitutional violations including, for example, the government body in charge of the institution where the violation took place.¹⁰³ For detailed information on bringing a claim under Section 1983, please read Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.” If you plan to file your suit in federal court, you should also read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

You can also use Section 1983 to challenge inadequate prison medical care under the Eighth Amendment.¹⁰⁴ To prove inadequate care, you must show: (1) you have a mental health need that is serious enough that denial of treatment violates the Constitution; and (2) the prison was “deliberately indifferent” to this serious mental health need.¹⁰⁵ You must show the policy or custom at the prison directly caused the constitutional violation.

When the complaint is for inadequate mental health care, you should keep a few things in mind. First, if you believe you suffer from a mental illness and want medical treatment, you should tell prison officials. If you are afraid you will hurt yourself or other people, you should tell prison officials that too. Prison officials can only be held responsible under the deliberate indifference standard if they

97. *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (“An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.”).

98. *See United States v. DeCologero*, 821 F.2d 39, 42 (1st Cir. 1987) (“[T]hough it is plain that an inmate deserves *adequate* medical care, he cannot insist that his institutional host provide him with the most sophisticated care that money can buy.”).

99. *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824 (1994) (“[D]eliberate indifference entails something more than mere negligence, [but] the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.”).

100. *See Banuelos v. McFarland*, 41 F. 3d 232, 235 (5th Cir. 1995) (finding that, except in exceptional circumstances, a prisoner’s disagreement with his medical treatment is not enough for a deliberate indifference claim).

101. *See, e.g., Domino v. Tex. Dept. of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (“It is indisputable that an incorrect diagnosis by prison medical personnel does not suffice to state a claim for deliberate indifference.”); *U.S. ex rel. Hyde v. McGinnis*, 429 F.2d 864, 867 (2d Cir. 1970) (finding that the “faulty judgment on the part of the prison doctor in choosing to administer one form of the same medication instead of another” is not deliberate indifference).

102. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976).

103. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694–695, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978) (holding that “when execution of a government’s policy or custom...inflicts the injury...the government as an entity is responsible under § 1983”).

104. *Gil v. Vogilano*, 131 F. Supp. 2d 486, 492–493 (S.D.N.Y. 2001) (holding that a prisoner who was denied access to treatment despite repeated requests and obvious pain had stated a valid claim under § 1983).

105. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994); *see also Letterman v. Does*, 789 F.3d 856, 861 (8th Cir. 2015).

have actual knowledge of, or some other reason to believe, that you have a mental illness that requires treatment.¹⁰⁶

C. What to Do if You Receive Unwanted Treatment

While the previous Parts of this Chapter focused on your right to receive medical treatment for your mental illness, this Part discusses treatment that you do not want. You should also look at Part C(5)(a) and (E)(1) of Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.”

1. You Have the Right to Informed Consent

You have a right to receive enough information about a potential medical treatment to make a reasonable decision whether to try the treatment.¹⁰⁷ After you learn about the treatment, you can choose whether or not to give permission for the doctor to treat you.¹⁰⁸ This right is known as informed consent. “Informed consent” means that you have the right to learn about all treatment options and the risks associated with each option *before* you allow mental health doctors or other caregivers to treat you. Informed consent is a way of making sure that you understand, before you start the treatment, what a treatment includes, and what effects it may have on you.¹⁰⁹ Informed consent is an important part of your right to refuse treatment.¹¹⁰ If you do not give your consent, you are refusing treatment; however, informed consent does have some limits. If you pose a danger to yourself or others, the doctor may be able to treat you in a way that the doctor believes will immediately help and benefit you.¹¹¹

Doctors have a duty to obtain informed consent from patients, including incarcerated people,¹¹² before treating them. A doctor must almost always tell you about the options and risks when there is penetration of the body (such as with a scalpel, needle, or pill).¹¹³ Also, when the direct side effects of

106. *Spruill v. Gillis*, 372 F.3d 218, 222 (3d Cir. 2004) (finding that prison officials who did not believe an inmate’s symptoms were serious could not be deliberately indifferent).

107. *Pabon v. Wright*, 459 F.3d 241, 246 (2d Cir. 2006) (holding that since prisoners have a right to refuse treatment, they have a right to get enough information about the treatment “to make an informed decision” whether to accept or refuse it). To prove that officials violated this right, you must show: (1) government officials did not tell you enough about the treatment for you to make an informed decision, (2) because you couldn’t make an informed decision, you were given treatment that you would have refused if you had been informed, and (3) the prison officials acted with deliberate indifference to your right to be informed.

108. See *In re Ingram*, 689 P.2d 1363, 1368, 102 Wash. 2d 827, 836 (Wash. 1984) (en banc) (finding a person has a right to choose one medical treatment over another, or to refuse treatment, even if the treatment she refuses is more likely to cure her); *Schloendorff v. Soc’y of N.Y. Hospital* 211 N.Y. 125, 130, 105 N.E. 92, 93 (1914) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault.”), *abrogated by* *Bing v. Thunig*, 2 N.Y.2d 656, 665, 143 N.E.2d 3, 8, 163 N.Y.S.2d 3, 10 (finding that hospitals are not immune for the negligence of its employees for medical acts); *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728, 738–739, 370 N.E.2d 417, 424 (Mass. 1977) (finding that both the Constitution and other laws protect a person from “nonconsensual invasion of his bodily integrity.”).

109. *Zebarth v. Swedish Hosp. Med. Ctr.*, 499 P.2d 1, 8, 81 Wash. 2d 12, 23 (Wash. 1972) (en banc) (defining “informed consent” as enough information to let a patient decide his treatment “by reasonably balancing the probable risks against the probable benefits”), *superseded by statute*, RCW 7.70.050(1)(a), *as recognized in* *Flyte v. Summit View Clinic*, 183 Wash. App. 559, 573, 333 P.3d, 566, 574 (2014) (noting that the statute expanded the duty to disclose to patient a material fact relating to the treatment); see also *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1048 (S.D.N.Y. 1995) (referring to New York’s statutory definition of informed consent, which requires the medical professional to tell the patient about “such alternatives [to the treatment or medication in question] and the reasonably foreseeable risks and benefits involved as a reasonable [medical or dental] ... practitioner under similar circumstances would have disclosed in a manner permitting the patient to make a knowledgeable evaluation”) (citing N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 2013)).

110. *Pabon v. Wright*, 459 F.3d 241, 246 (2d Cir. 2006) (holding prisoners’ constitutionally protected liberty interest in refusing medical care encompasses a right to receive information that would enable a reasonable person to decide).

111. See *Washington v. Harper*, 494 U.S. 210, 225–226, 110 S. Ct. 1028, 1039, 108 L. Ed. 2d 178, 201 (1990) (holding that in order to protect other prisoners, a prison can give anti-psychotic medication against a prisoner’s will).

112. See *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071, 1084 (2d Cir. 1969) (finding a constitutional violation of prisoner’s rights where he received different procedural treatment than civilians receive).

113. See *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 269, 110 S. Ct. 2841, 2846, 111 L. Ed. 2d 224, 236 (1990) (“[T]his notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment.”); See also N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 2012).

treatment are painful or serious, your informed consent is usually required.¹¹⁴ Some states specifically require by law that doctors consider other possible forms of care,¹¹⁵ and inform you of the procedures and risks associated with each option. You should research what the law is in your state.

You should carefully consider whether or not to give your consent to be treated. State law varies as to whether informed consent must be given for each treatment. Some states will allow informed consent to cover all risks associated with a particular procedure or additional procedures that a doctor believes will help you. In New York, if you have not consented to a previous treatment, doctors cannot assume they have consent for a different or additional treatment, even in an emergency.¹¹⁶ Similarly, in California, consent to a previous treatment does not mean consent to another treatment plan; there, a court held that a prisoner who consented to shock treatment did not necessarily consent to receive drugs that produced nightmares.¹¹⁷

2. Medication Over an Incarcerated Person's Objection

Medication is one form of treatment. Incarcerated people have a right to refuse antipsychotic or psychotropic drugs, with some exceptions.¹¹⁸ Such medications help cure symptoms of mental illness, but these drugs also alter a person's perception, emotions, or behavior. For example, psychotropic drugs can have serious side effects, such as nightmares and muscle tics (sudden movements). The law provides protection against the unwanted use of serious drugs by giving incarcerated people the right to refuse treatments that significantly interfere with the body. However, this right is not absolute, meaning there are some circumstances when medication can be given to you, even over your objection.¹¹⁹

(a) Your Right to Refuse Medication Under the Due Process Clause

The Due Process Clause of the U.S. Constitution says that, "no State shall ... deprive any person of life, liberty, or property, without due process of law."¹²⁰ Some deprivations are so important that the Constitution requires states to create processes (such as a court hearing) to ensure that you are not deprived unfairly. For example, in *Vitek v. Jones*, the Supreme Court found that classifying an

(discussing what constitutes lack of informed consent); N.Y. PUB. HEALTH LAW § 2805-d (McKinney 2012).

114. See, e.g., *Clites v. State*, 322 N.W.2d 917, 922–923 (Iowa Ct. App. 1982) (en banc) (rejecting administration of "major tranquilizers" to patient with a mental illness without consent where the medical industry standard required written consent from patient or guardian).

115. N.Y. CORRECT. LAW § 402(2) (McKinney 2014) (stating that before committing a prisoner, a doctor must "consider alternative forms of care and treatment available"); see also *Cobbs v. Grant*, 502 P.2d 1, 9–10, 8 Cal. 3d 229, 242–243 (1972) (finding doctors must reasonably disclose alternatives to a proposed treatment plan and the risks of any treatment).

116. *In re Storar*, 52 N.Y.2d 363, 376, 420 N.E.2d 64, 70, 438 N.Y.S.2d 266, 272 (1981) (finding that "[t]he basic right of a patient to control the course of his medical treatment has been recognized by the Legislature."), *superseded by statute on other grounds*, Surrogate's Court Procedure Act, SCPA 1750(2), *as recognized in* *In re M.B.*, 6 N.Y.3d 437, 441, 846 N.E.2d 794, 796 (2006).

117. *Mackey v. Procunier*, 477 F.2d 877, 877–879 (9th Cir. 1973).

118. *Washington v. Harper*, 494 U.S. 210, 221–223, 110 S. Ct. 1028, 1036–1038, 108 L. Ed. 2d 178, 197–199 (1990) (holding antipsychotic drugs can be administered only if "a mental disorder exists which is likely to cause harm if not treated" and if one psychiatrist has prescribed and another reviewed the treatment); *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 2851, 111 L. Ed. 2d 224, 242 (1990) (stating that "prisoners possess 'a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.'") (quoting *Washington v. Harper*, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990)).

119. *Washington v. Harper*, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–1040, 108 L. Ed. 2d 178, 201–202 (1990) (holding that "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."). The government may also medicate criminal defendants to make them competent to stand trial for certain serious charges, as long as the treatment is medically appropriate, unlikely to have serious side effects, and necessary "significantly to further important governmental trial-related interests." *Sell v. United States*, 539 U.S. 166, 179, 123 S. Ct. 2174, 2184–2185, 156 L. Ed. 2d 197, 211 (2003); See *United States v. Baldovinos*, 434 F.3d 233, 241–242 (4th Cir. 2006) (finding that involuntarily medicating a mentally ill defendant was not in his best interests but was solely done to make him competent to stand trial, but upholding the conviction after finding that a procedural mistake did not seriously affect the fairness, integrity, or public reputation of the judicial process), *cert. denied*, 546 U.S. 1203, 126 S. Ct. 1407, 164 L. Ed. 2d 107 (2006).

120. U.S. CONST. amend. XIV, § 1.

incarcerated person as mentally ill and moving him to a psychiatric hospital were such serious (“grievous”) losses that the State was required to have procedural protections in place to make sure that the loss was fair.¹²¹ These losses included the harm to the prisoner’s reputation and the change in conditions of confinement.¹²²

Similarly, before the State can force you to take medication, the state must have “procedural protections” in place to make sure you are not receiving the medication randomly or unfairly. You must receive these procedures, including notice and a hearing, before you can be involuntarily medicated.¹²³ A decision to treat you with drugs requires these procedural due process protections because drugs can produce serious and irreversible side effects.¹²⁴ These side effects are considered a significant State intrusion into your body.¹²⁵

(b) Your Right to Refuse Medication Based on State Law

Your right to refuse medication may come not only from the Constitution, but also from state laws that specifically require procedural protections (such as notice and a hearing) before you can be forcibly medicated.¹²⁶ If your state has such a law, the state must follow the procedures set out by the law.¹²⁷ If your state wishes to avoid the process that is laid out by state law, it must have a rational reason for doing so. If the state does not have a rational reason, the avoidance will be considered a due process violation. In other words, your state must show that it has good reasons, reasonably related to its interests, before it may take away a process that was granted to you through its own law.

Unless your state can show both that you have a mental illness and are dangerous,¹²⁸ or that your state’s law has so many protections that it is unlikely that you will receive medication unfairly,¹²⁹ it cannot force you to take medication without some procedural protections.

121. Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

122. Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

123. Washington v. Harper, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036–1037, 108 L. Ed. 2d 178, 198 (1990); see, e.g., Mills v. Rogers, 457 U.S. 291, 299 n.16, 102 S. Ct. 2442, 2448 n.16, 73 L. Ed. 2d 16, 23 n.16 (1982) (noting that involuntary administration of psychotropic drugs bears on liberty interests), *cert. denied*, 484 U.S. 1010, 108 S. Ct. 709, 98 L. Ed. 2d 660 (1988).

124. Washington v. Harper, 494 U.S. 210, 229–231, 110 S. Ct. 1028, 1041, 108 L. Ed. 2d 178, 203–204 (1990) (describing the side effects of antipsychotic drugs, including severe spasms and neurological dysfunction); see also *Mental Health Medications*, NAMI <http://www.nami.org/Learn-More/Treatment/Mental-Health-Medications> (last visited Feb. 03, 2020); Nat’l Inst. of Mental Health, U.S. Dept. of Health & Human Servs., *Medications*, NIH (2016), available at <https://www.nimh.nih.gov/health/topics/mental-health-medications/index.shtml> (last visited Nov. 18, 2019). To order National Institute of Mental Health publications, call (301) 443-4513 or (866) 615-6464 (toll-free), or (301) 443-8431 (TTY), or write to the National Institute of Mental Health, Office of Communications, 6001 Executive Blvd., Room 8184, MSC 9663, Bethesda, MD 20892-9663.

125. Youngberg v. Romeo, 457 U.S. 307, 316, 102 S. Ct. 2452, 2458, 73 L. Ed. 2d 28, 37 (1982) (“[Liberty] from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”) (quoting *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 18, 99 S. Ct. 2100, 2109, 60 L. Ed. 2d 668, 682–683 (1979)); Washington v. Harper, 494 U.S. 210, 229, 110 S. Ct. 1028, 1041, 108 L. Ed. 2d 178, 203 (1990) (stating that “The forcible injection of medication into a non-consenting person’s body represents a substantial interference with that person’s liberty.”).

126. See, e.g., WASH. REV. CODE ANN. § 71.05.215(1) (West 2008 & Supp. 2009) (“Right to Refuse Antipsychotic Medication”).

127. Washington v. Harper, 494 U.S. 210, 221, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990) (finding that a Washington state policy requiring a finding of mental illness and dangerousness before a prisoner can be forcibly medicated with antipsychotic drugs “creates a justifiable expectation on the part of the inmate that the drugs will not be administered unless those conditions exist”); Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561–562 (1980) (“We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.”).

128. Washington v. Harper, 494 U.S. 210, 232–233, 110 S. Ct. 1028, 1042–1043, 108 L. Ed. 2d 178, 204–205 (1990) (finding that a state policy was consistent with Due Process because review of medical treatment required asking (1) whether the prisoner had a mental illness, and (2) whether the mental illness made the prisoner a danger to himself or to others, and it required constant monitoring of drug dosage).

129. Washington v. Harper, 494 U.S. 210, 222, 235, 110 S. Ct. 1028, 1037, 1044, 108 L. Ed. 2d 178, 198, 207 (1990) (upholding a state policy that required psychiatric evaluation, notice, and hearing for a prisoner before forcible medication); see also *Lappe v. Loeffelholz*, 815 F.2d 1173, 1176–1178 (8th Cir. 1987) (finding that prisoner’s constitutional rights were not violated by a treatment transfer where he had access to written notice, an adversarial hearing with an independent decision maker, and legal counsel).

(c) Your Right to Refuse Medication Under the Eighth Amendment

In some circumstances, you also have a right to refuse medication under the Eighth Amendment, which prohibits cruel and unusual punishment.¹³⁰ Administering drugs as a means of punishment (rather than as treatment) is unconstitutional.¹³¹

Forcible treatment with psychotropic medication that causes pain or fear can be considered cruel and unusual punishment, violating the Eighth Amendment.¹³² The district court in *Souder v. McGuire* cited cases in the Eighth and Ninth Circuits¹³³ that held that treating incarcerated people with drugs without consent may raise Eighth Amendment claims. In those cases, the courts found that drugs causing pain or fright could invade the body and mental processes to an unconstitutional degree.

While some courts have emphasized that an allegation that you were given a particular kind of medicine is not enough to prove that giving you the drug was cruel and unusual (and thus a violation of the Eighth Amendment),¹³⁴ the Supreme Court has held that states may not avoid the obligations of the Eighth Amendment just by calling a medical act a “treatment.”¹³⁵

(d) Limitations on Your Right to Refuse Medication

The right to refuse medication does not mean that the State can never medicate you against your will. Instead, it means that the State must provide a process (such as a hearing) that reduces the chance that the decision to medicate you will be random or arbitrary.

One important limitation on an incarcerated person’s right to refuse medication is danger or emergency. Prisons may administer psychotropic drugs over a prisoner’s objection if the incarcerated person poses a danger to himself or others. Receiving medication against your will is called “medication over objection.” In *Washington v. Harper*,¹³⁶ the Supreme Court upheld a policy allowing the state to medicate an incarcerated person without consent if a licensed psychiatrist found that the incarcerated person suffered from a mental disorder, and the incarcerated person was “gravely disabled”¹³⁷ or posed a “likelihood of serious harm”¹³⁸ to himself or others. Therefore, situations in which an incarcerated person presents a danger to himself or the general prison population are an exception to the right to refuse treatment. A good example is a Kansas incarcerated person who objected to psychotropic medication but was not allowed to refuse treatment because he had previously destroyed his prison cell and started fights with other prisoners.¹³⁹

130. U.S. CONST. AMEND. VIII.

131. *Washington v. Harper*, 494 U.S. 210, 241, 110 S. Ct. 1028, 1047, 108 L. Ed. 2d 178, 211 (1990) (“Forced administration of antipsychotic medication may not be used as a form of punishment.”).

132. *Souder v. McGuire*, 423 F. Supp. 830, 831–832 (M.D. Pa. 1976) (“[I]nvuntary administration of drugs which have a painful or frightening effect can amount to cruel and unusual punishment, in violation of the [8th] Amendment.”).

133. *Knecht v. Gillman*, 488 F.2d 1136, 1139–1140 (8th Cir. 1973) (holding that a drug that caused prisoners to vomit for 15 minutes to an hour “can only be regarded as cruel and unusual unless the treatment is being administered to a patient who knowingly and intelligently has consented to it”); *Mackey v. Procunier*, 477 F.2d 877, 878 (9th Cir. 1973) (finding that “serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes” could be raised where a prisoner who had consented to shock treatment was given extra drugs, without his consent, that caused fright and nightmares).

134. See, e.g., *Gittlemacker v. Prasse*, 428 F.2d 1, 6 (3d Cir. 1970) (“It is only where an inmate’s complaint of improper or inadequate medical treatment depicts conduct so cruel or unusual as to approach a violation of the [8th] Amendment’s prohibition of such punishment that a colorable constitutional claim is presented.”).

135. See *Trop v. Dulles*, 356 U.S. 86, 95, 78 S. Ct. 590, 595, 2 L. Ed. 2d 630, 639 (1958) (finding that substance—not a label—determines the meaning of a statute).

136. *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990).

137. WASH. REV. CODE ANN. § 71.05.020(22) (Supp. 2009) (defining that term as a condition resulting from a mental disorder where there is a danger of serious physical harm from inability to provide for one’s “essential human needs” like health or safety, or where there is a severe decrease in function evidenced by repeated and increasing loss of control over actions).

138. WASH. REV. CODE ANN. § 71.05.020(35) (Supp. 2009) (defining the term as a substantial risk that a person will physically harm himself, others, or property of others evidenced by threats or suicide attempts or actual harm to himself, others, or property).

139. *Sconiers v. Jarvis*, 458 F. Supp. 37, 38–39 (D. Kan. 1978) (finding that the prison physician and psychiatrist possessed the authority to provide incarcerated person with involuntary medical treatment in order to protect him and other incarcerated people from a substantial possibility of harm and that the physician and psychiatrist did not act in an arbitrary or capricious manner by administering psychotropic medication against

There are a few other limitations on an incarcerated person's right to refuse treatment. An incarcerated person may receive medication despite objections or religious beliefs if the State can prove that its interests are legitimate.¹⁴⁰ Also, the State may give drugs to an incarcerated person over his objections if the court feels that enough procedural protections are in place to ensure that the decision to treat with drugs was reasonable.¹⁴¹ You should also note that, in some cases, if a doctor finds that medication is necessary and in the incarcerated person's medical interest, then the State does not have to grant an incarcerated person's request to stop taking the drugs so that he can prove he can do without them.¹⁴²

A determination of whether the right to refuse is limited in any given case "must be defined in the context of the inmate's confinement."¹⁴³ This means that the court will review your current prison conditions, the threat of danger that you pose to yourself or others, and the procedures that the State has in place to protect you from an unfair decision to treat you with drugs.¹⁴⁴

(e) How Do Courts Decide Whether State Interests Are Legitimate?

To determine whether or not the State may rightfully force an incarcerated person to take medication due to a situation of danger or emergency, courts apply what is called the *Turner v. Safley* rational basis test. With this test, the court tries to see if the State's decision to treat a non-consenting incarcerated person with psychotropic drugs is "reasonably related to legitimate penological interests."¹⁴⁵ Legitimate State interests include the health and safety of the public, the incarcerated person, and the general prison population.¹⁴⁶ The rational basis test presumes that State interests are legitimate. This means that a court will consider the State's choice to be reasonable unless it does not serve one or more of these legitimate State goals.

There are some common arguments that incarcerated people use to counter the presumption that the State's actions are the result of a legitimate interest. One challenge to medication over objection is that the decision to medicate is unfair or arbitrary (random or not supported by a reason).¹⁴⁷ In such cases, courts consider a competing risk that the determination of danger will be incorrect and may cause harm to the incarcerated person's reputation.¹⁴⁸ In order to avoid mistakes in determining if there is a danger, taking the drugs must be in the incarcerated person's medical interest and can only be for treatment purposes.¹⁴⁹

In addition, states must provide certain procedural safeguards to ensure that the decision to medicate is not arbitrary or erroneous. Common safeguards include (1) an administrative hearing before an independent decision maker (someone not involved in the incarcerated person's treatment

prisoner's will).

140. *Smith v. Baker*, 326 F. Supp. 787, 787–788 (W.D. Mo. 1970) (denying relief to an incarcerated person who objected to administration of drugs "against [his] will and religious belief"), *aff'd*, 442 F.2d 928 (8th Cir. 1971).

141. *See, e.g., Lappe v. Loeffelholz*, 815 F.2d 1173, 1176 (8th Cir. 1987) (finding that an incarcerated person's constitutional rights were not violated by a treatment transfer where he had written notice, an adversarial hearing with an independent decision maker, and legal counsel).

142. *See, e.g., Sullivan v. Flannigan*, 8 F.3d 591, 592 (7th Cir. 1993) (finding the Illinois Department of Corrections, which had forced incarcerated person to take mind-altering drugs against his will for five years after he was determined to be a danger to others, was not constitutionally required to give him a chance to stop taking the drugs to prove he didn't need them).

143. *Washington v. Harper*, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990).

144. *See Washington v. Harper*, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990) (holding that certain procedures, such as having different psychiatrists prescribe and review medication, ensure "that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement").

145. *Washington v. Harper*, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (1990) (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), *superseded by statute on other grounds*).

146. *Washington v. Harper*, 494 U.S. 210, 241, 110 S. Ct. 1028, 1047, 108 L. Ed. 2d 178, 228 (1990).

147. *See, e.g., Washington v. Harper*, 494 U.S. 210, 217, 110 S. Ct. 1028, 1034, 108 L. Ed. 2d 178, 195 (1990) (challenging as arbitrary a decision allowing treatment with antipsychotic drugs against the will of an incarcerated person with mental illness without a judicial hearing).

148. *Vitek v. Jones*, 445 U.S. 480, 494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565–566 (1980) (finding that characterization of mental illness, transfer, and treatment had "stigmatizing consequences").

149. *Washington v. Harper*, 494 U.S. 210, 227, 110 S. Ct. 1028, 1040, 108 L. Ed. 2d 178, 202 (1990).

but who may come from within the institution);¹⁵⁰ (2) written notice;¹⁵¹ (3) the right to be present at an adversary hearing;¹⁵² and (4) the right to present and cross-examine witnesses.¹⁵³ While the State may provide a lawyer to represent the incarcerated person in administrative hearings, providing a non-attorney adviser may satisfy due process.¹⁵⁴

3. Challenging Transfers for Treatment

(a) What Is a Treatment Transfer?

Many treatments are available for incarcerated people and sometimes these treatments must be administered at a site outside of the prison. This requires that the incarcerated person be transferred from his present location in order to be treated. An incarcerated person may submit to the transfer or voluntarily agree to various forms of treatment including medication, counseling, therapy, or commitment to a psychiatric center. Or, in some cases, the incarcerated person may be treated involuntarily. This Section explains when the prison can and cannot transfer you for treatment if you do not consent to the transfer.

Incarcerated people who suffer from a mental illness may be treated at one of several possible locations. For more details on these facilities, please see Part A(2) above. Please note that if you are transferred to a facility that has a significantly different quality than the normal and typical conditions of prison confinement, this might violate your constitutional rights.

(b) Procedural Safeguards Under the Due Process Clause

Lawful imprisonment may take away some of your rights, but you still have a right to basic protections.¹⁵⁵ In certain circumstances, basic procedures must be in place to protect you from an unfair action of the State. For more information on procedural due process, see Chapter 18 of the *JLM*, “Your Rights at Prison Disciplinary Hearings,” and Chapter 23, “Your Right to Adequate Medical Care.” A hearing and written notice are two common examples of procedures that might be required, often before an incarcerated person can be involuntarily committed to a psychiatric hospital.¹⁵⁶

Prison to hospital transfers might mean a significant change in living conditions and type of confinement. A determination of mental illness by a doctor and subsequent transfer does not automatically mean that an incarcerated person has a mental illness for the purposes of other laws in the state.¹⁵⁷ Still, there is a chance that the incarcerated person might suffer harm to his reputation. When the risk of physical and/or reputational harm is high, your constitutional right to due process might be triggered.

In addition, if the State tries to avoid the requirements imposed by its own laws, then a law giving you the right to procedures before transfer will also trigger due process protections. Where state regulations require a finding of mental illness before transfer, the State creates an “objective expectation” in the incarcerated person that there will be a procedure to determine whether or not a mental illness exists.¹⁵⁸ Without such procedures, the incarcerated person could suffer a due process

150. *Vitek v. Jones*, 445 U.S. 480, 494–496, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566–567 (1980).

151. *Vitek v. Jones*, 445 U.S. 480, 494–496, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566–567 (1980).

152. *Vitek v. Jones*, 445 U.S. 480, 494–496, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566–567 (1980).

153. *Vitek v. Jones*, 445 U.S. 480, 494–496, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566–567 (1980).

154. *Washington v. Harper*, 494 U.S. 210, 236, 110 S. Ct. 1028, 1044, 108 L. Ed. 2d 178, 207 (1990).

155. *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S. Ct. 2963, 2974, 41 L. Ed. 2d 935, 950 (1974) (“[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.”).

156. *Vitek v. Jones*, 445 U.S. 480, 495–496, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552, 566–567 (1980); *see, e.g., Washington v. Harper*, 494 U.S. 210, 235, 110 S. Ct. 1028, 1044, 108 L. Ed. 2d 178, 207 (1990) (upholding a Washington state policy which required a non-judicial hearing and notice of that hearing before the involuntary treatment of an incarcerated person).

157. *See In re Will of Stephani*, 250 A.D. 253, 254–257, 294 N.Y.S. 624, 624 (3d Dept. 1937) (finding that an incarcerated person who was determined to be insane by a physician and transferred to mental hospital was still mentally competent when he later wrote his will).

158. *Vitek v. Jones*, 445 U.S. 480, 489–490, 100 S. Ct. 1254, 1262, 63 L. Ed. 2d 552, 562–563 (1980) (holding that an incarcerated person had a state-created liberty interest because Nebraska law created an objective expectation that an incarcerated person would not be transferred unless he suffered from a mental disease or

violation. In short, you may have a right to due process protections (such as the right to a hearing and the right to receive notice of the hearing) when the State's action creates a high level of harm to you (physical or reputational), or when a state law gives you the expectation that some particular act or process must be followed, and then the State fails to follow this act or process.

The due process protection to which you are entitled is the same, no matter how your liberty interest is implicated.¹⁵⁹

In *Vitek v. Jones*, the Supreme Court found that a Nebraska statute requiring a finding of mental illness before transfer to an outside mental facility created an expectation among incarcerated people that transfer would occur *only* if they were found to have mental illness.¹⁶⁰

Under *Vitek*, the State must adequately protect your liberty interests (if it has created them through state law) in the transfer process by providing:

- (1) Written notice that the prison is considering your transfer;
- (2) A hearing;
- (3) An opportunity to present witness testimony and cross-examine state witnesses at the hearing;
- (4) An independent decision maker;
- (5) A written statement by the decision maker stating the reasons and evidence relied on for your transfer;
- (6) Legal assistance from the State if you cannot afford your own; and
- (7) Effective and timely notice of rights (1) through (6).¹⁶¹

All of these protections are triggered if your liberty interests are implicated *and* there is a chance that you will suffer a serious loss. Failure to provide them violates your rights.

(i) Are Your Liberty Interests Implicated?

Courts determine whether the State can deprive you of a liberty interest by balancing the interests of the State (for example, prison safety) with your liberty interest in freedom from random deprivations (for example, the right to agree or disagree to medication). If the interest of the incarcerated person is found to be stronger than the interest of the State, then the incarcerated person is entitled to due process protections.¹⁶² Whether or not an incarcerated person has a state-created liberty interest depends on whether the incarcerated person faces a serious loss.

Liberty interests are limited: incarcerated people are entitled to freedom from restraint only to the extent that restraint cannot exceed the conviction sentence in an unexpected manner.¹⁶³ This is true unless there is an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹⁶⁴ In other words, for due process to apply, you must have both a liberty interest *and* a

defect that could not be adequately treated in the prison).

159. See *Washington v. Harper*, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036–1037, 108 L. Ed. 2d 178, 198 (1990) (finding "that the Due Process Clause confers upon ... [the prisoner] no greater right than that recognized under state law" where a Washington law created a liberty interest in being free from unwanted medical treatment for mental illness).

160. *Vitek v. Jones*, 445 U.S. 480, 489–490, 100 S. Ct. 1254, 1262, 63 L. Ed. 2d 552, 562–563 (1980).

161. *Vitek v. Jones*, 445 U.S. 480, 494–495, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566 (1980). However, you may not be entitled to all of these procedures. In *Shakur v. Selsky*, 391 F.3d 106, 119 (2d Cir. 2004), the lower court held that "regardless of state procedural guarantees, the only process due an inmate is that minimal process guaranteed by the Constitution, as outlined in" *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (emphasis in original). As explained above in note 146, the minimal process may be limited to (1) advance written notice; (2) an opportunity for you to call witnesses and present documentary evidence in your defense; and (3) a written document from the fact-finder explaining the reasons for your transfer and the evidence relied on.

162. *Mathews v. Eldridge*, 424 U.S. 319, 334–335, 96 S. Ct. 893, 902–903, 47 L. Ed. 2d 18, 33 (1976) (developing a three-part balancing test to determine whether state-provided procedural protections are sufficient).

163. *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–430 (1995) (recognizing that while states may create liberty interests, these interests are generally limited to freedom from restraint that is significant and atypical rather than expected).

164. *Sandin v. Conner*, 515 U.S. 472, 484–485, 115 S. Ct. 2293, 2300–2301, 132 L. Ed. 2d 418, 430–431 (1995) (finding that holding an incarcerated person in a segregated housing unit for 30 days "though concededly punitive, does not present a dramatic departure from the basic conditions of [prisoner's] indeterminate sentence.").

deprivation of that liberty that imposes a significant and atypical (unusual) hardship. Only if both of these factors are present are you entitled to due process protections¹⁶⁵ like written notice and a hearing. Transfer from one prison to another within the State's system does not necessarily infringe upon any liberty interest.¹⁶⁶

The Equal Protection Clause of the Fourteenth Amendment of the Constitution prohibits states from denying any person equal protection of the laws.¹⁶⁷ In other words, state laws must treat each person in the same manner as others in similar conditions and circumstances. In the context of mental health, the equal protection rights of incarcerated people who are being committed entitle them to substantially the same procedures as those available to free persons subjected to an involuntary commitment proceeding.¹⁶⁸ In *United States ex rel. Schuster v. Herold*, the Second Circuit found that a incarcerated person in custody in New York who was transferred from prison to an institution for the criminally insane was deprived of equal protection because there was an unlawful difference between procedural protections given to civilians facing involuntary commitment and those given to incarcerated people.¹⁶⁹ Therefore, to determine the procedural protections that apply in your state, you should review civil commitment laws in addition to laws that govern corrections facilities. We discuss procedural protections and treatment transfers later in this Chapter.

(ii) What is a Serious Loss?

Courts might consider transfers to be a serious loss because of three factors: (1) there is a high risk of stigma associated with a declaration of mental illness; (2) there is an actual change in the type of confinement; and (3) there is actual behavior modification treatment.¹⁷⁰ As with challenges to medication over objection, these changes require that the State provide procedural protections.

165. *Frazier v. Coughlin*, 81 F.3d 313, 317 (2d Cir. 1996) (“To prevail, [the prisoner] must establish both that the confinement or restraint creates an ‘atypical and significant hardship’ under *Sandin*, and that the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint.”); *see also* *Palmer v. Richards*, 364 F.3d 60, 64 (2d Cir. 2004) (“Factors relevant to determining whether the plaintiff endured an ‘atypical and significant hardship’ include ‘the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions’ and ‘the duration of the disciplinary segregation imposed compared to discretionary confinement.’” (quoting *Wright v. Coughlin*, 132 F.3d 133, 136 (2d Cir. 1998))).

166. *See Montanye v. Haymes*, 427 U.S. 236, 242, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466, 471 (1976) (stating that “no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events.”) (citing *Meachum v. Fano*, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (finding mere transfer of prisoner from one prison to another within the state's system does not implicate an incarcerated person's liberty interests and does not violate due process)). *But see* *Wilkinson v. Austin*, 545 U.S. 209, 223–224, 125 S. Ct. 2384, 2394–2395, 162 L. Ed. 2d 174, 190–191 (2005) (noting that Ohio's Supermax facility “imposes an atypical and significant hardship under any plausible baseline” and thus prisoners have a liberty interest in not being confined in the facility).

167. U.S. CONST. amend. XIV, § 1.

168. *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071, 1073 (2d Cir. 1969) (“[W]e believe that before a prisoner may be transferred to a state institution for insane criminals, he must be afforded substantially the same procedural safeguards as are provided in civil commitment proceedings”); *see also* *Souder v. McGuire*, 516 F.2d 820, 821–822 (3d Cir. 1975) (finding that “serious equal protection and due process issues” were raised regarding the constitutionality of a Pennsylvania mental health statute that gave the warden a choice whether or not to adopt certain procedures for the commitment of people already in a correctional facility even though the same procedures were mandatory for the involuntary commitment of “non-confined” civilian adults); *Evans v. Paderick*, 443 F. Supp. 583, 585 (E.D. Va. 1977) (rejecting defendant's argument that a Virginia civil commitment procedure was not required when the person to be committed is a state incarcerated person); *People v. Arendes*, 86 Misc. 2d 468, 470, 382 N.Y.S.2d 684, 686 (Sup. Ct. Queens County 1976) (“[W]here the issue in the first instance is mental illness itself or dangerousness, there is no valid ground to distinguish between a civilian and a prisoner since the issues have no connection to the circumstance of incarceration and the same psychiatric criteria will apply to all people to determine mental illness.”); *cf.* *Baxstrom v. Herold*, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966) (holding that a New York state incarcerated person was denied equal protection of the laws by the statutory procedure that allowed him to be civilly committed at the expiration of his sentence without jury review available to all other civilly committed people in New York).

169. *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071, 1073 (2d Cir. 1969).

170. *Vitek v. Jones*, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

The test courts apply to determine if a loss is serious examines whether the loss is “atypical and significant.”¹⁷¹ Atypical and significant state actions are those actions *not* similar to prison conditions or those that substantially alter the environment, duration, or degree of the prison condition. For example, an incarcerated person who was placed in segregated confinement did not suffer a serious loss that implicated a liberty interest because the segregation was of the same duration and degree as that of his normal prison conditions.¹⁷²

More specifically, under the *Vitek* standard, “significant and atypical” means that the loss suffered by the prisoner is different than the loss already suffered as a result of prison confinement.¹⁷³ The loss to the prisoner in *Vitek* was “serious” enough to require due process protections because he had reasonably developed an “objective expectation” based on the state law¹⁷⁴ and the risk that mistaken mental illness could damage the incarcerated person’s reputation was great.¹⁷⁵ In another case, a loss of good-time credits was significant because such a loss of credits meant that there was a change in the length of the prison term.¹⁷⁶ Finally, confinement in a psychiatric prison unit might be far more restrictive than prison, and therefore might be considered a serious loss, implicating a liberty interest.¹⁷⁷

4. When Due Process Procedures Are Not Required for Transfer

The protections discussed in the previous Subsection might not be afforded to the incarcerated person if the transfer is voluntary or on an emergency basis. Additionally, the Due Process Clause does not protect against every change in the conditions of your imprisonment, even if that change has a negative impact on you.¹⁷⁸ This is true even if the incarcerated person has a reasonable expectation that state actions will produce a particular result. In some jurisdictions, the law says that the State may not need to have due process procedures in place before transferring you so you can participate in clinical evaluations¹⁷⁹ (you are not considered to be under the same great hardship in this case as

171. *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (holding that disciplinary segregation of an incarcerated person “did not present the type of atypical, significant deprivation” of a state-created liberty interest after comparing conditions inside and outside of disciplinary segregation in the prison and finding that the placement “did not work a major disruption in his environment.”). *See also* *Tellier v. Fields*, 280 F.3d 69, 80 (2d Cir. 2000) (concluding as a matter of law that “a confinement of 514 days under conditions that differ markedly from those in the general population” may be atypical and significant).

172. *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (finding segregated confinement that “mirrored” prison conditions was not significant and atypical); *see also* *Frazier v. Coughlin*, 81 F.3d 313, 317–18 (2d Cir. 1996) (finding no significant deprivation of a liberty interest to incarcerated person who failed to show that confinement conditions in a SHU were “dramatically different” from basic prison conditions). *But see* *Tellier v. Fields*, 280 F.3d 69, 80 (2d Cir. 2000) (holding that an extended confinement in the SHU may amount to a deprivation of a liberty interest).

173. *Vitek v. Jones*, 445 U.S. 480, 493, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565 (1980) (finding “transfer of a prisoner to a mental hospital is [not] within the range of confinement justified by imposition of a prison sentence”).

174. *Vitek v. Jones*, 445 U.S. 480, 489–490, 100 S. Ct. 1254, 1261–1262, 63 L. Ed. 2d 552, 562–563 (1980).

175. *Vitek v. Jones*, 445 U.S. 480, 495, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552, 566 (1980).

176. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974) (holding that a state law allowing a reduction in sentence for good time, and providing that such credit would only be forfeited for serious misbehavior, created a recognizable liberty interest); *see also* *Eichwedel v. Chandler*, 696 F.3d 660, 675 (7th Cir. 2012) (finding that Illinois incarcerated people have a liberty interest in their good-conduct credits that entitles them to due process procedures if revocation occurs).

177. *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071, 1078 (2d Cir. 1969) (“Not only did the transfer effectively eliminate the possibility of [the prisoner’s] parole, but it significantly increased the restraints upon him, exposed him to extraordinary hardships, and caused him to suffer indignities, frustrations and dangers, both physical and psychological, [that] he would not be required to endure in a typical prison setting.”).

178. *Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (“[W]e cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause.” (emphasis in original)).

179. *See* *Trapnell v. Ralston*, 819 F.2d 182, 184–185 (8th Cir. 1987) (finding there was no need for a pre-transfer hearing where the transfer was temporary and for evaluation purposes only); *United States v. Jones*, 811 F.2d 444, 448 (8th Cir. 1987) (finding “a temporary transfer for a psychological evaluation places no more of an imposition on a prisoner than does a transfer for administrative reasons,” and transfers for administrative reasons do not require pre-transfer hearings).

with commitment). In a few states, procedural protections do not have to occur before transfer, but may instead occur promptly after physical transfer.¹⁸⁰

As with challenges to medication over objection, there are limits to a transfer challenge. Transfer to a mental health facility without a hearing is generally not a due process violation when an incarcerated person poses an immediate threat to himself or the general population.¹⁸¹ These transfers are called emergency commitments. However, a hearing must be held as soon as possible after commitment.¹⁸² If it is determined you will be transferred to a psychiatric hospital or unit, you cannot challenge a transfer back to prison after treatment on due process grounds because no liberty interest existed.¹⁸³ For example, in Washington, D.C., prisoners may be moved, with the superintendent's certification, from psychiatric hospitals back to prisons after being restored to health.¹⁸⁴ You should check the laws in your state to determine the necessary steps the state must take to transfer you back to prison.

5. If You Are Transferred to a Hospital or Other Treatment Facility

If you are transferred or committed to a psychiatric facility, you maintain many of the same rights you had in prison, including the right to treatment and the right to adequate medical care. Similarly, if you are confined in a hospital or treatment facility prior to serving your criminal sentence in prison, you may be entitled to have your time spent there count toward your sentence.

(a) How Long Will I Be Held?

Generally, the time spent in commitment is left to the judgment of clinical mental health staff and prison officials, but it *cannot* be longer than your criminal sentence unless you are first granted significant due process protections.¹⁸⁵ Under New York State law, for example, the psychiatric hospital director may apply for a new commitment after your sentence expires.¹⁸⁶ If this happens in a state where there are requirements set up for a civil commitment proceeding, your criminal sentence is not relevant to any post-sentence confinement, and the State must provide the same procedural safeguards before committing or holding you for psychiatric care that it would if you were not incarcerated.¹⁸⁷ This means that if the State determines you need further commitment and treatment after your prison sentence has ended, you will be treated as a non-incarcerated person. If the psychiatric hospital director successfully extends commitment past your term sentence, you have the right to another hearing before a jury to determine whether commitment to a civilian mental health facility is appropriate.¹⁸⁸

180. See, e.g., *Baugh v. Woodward*, 808 F.2d 333, 336 (4th Cir. 1987) (finding that the North Carolina Department of Correction does not have to provide a hearing on an incarcerated person's involuntary mental health transfer prior to physical transfer and that a prompt hearing after transfer satisfies due process).

181. See, e.g., *Vermont Nat. Bank v. Taylor*, 445 A.2d 1122, 1124–1125, 122 N.H. 442, 446 (N.H. 1982) (noting that a hearing can be delayed after transfer to a hospital if the transfer is done to prevent harm to self or others); *Luna v. Van Zandt*, 554 F. Supp. 68, 72 (S.D. Tx. 1982) (holding that a hearing can take place after the deprivation of a right if there is a compelling interest, such as an immediate potential harm to others); *Mignone v. Vincent*, 411 F. Supp. 1386, 1389 (S.D.N.Y. 1976) (noting that a hearing can be delayed after transfer to a hospital if the transfer is made to prevent harm to self or others).

182. See, e.g., *Mignone v. Vincent*, 411 F. Supp. 1386, 1389 (S.D.N.Y. 1976).

183. *Jackson v. Fair*, 846 F.2d 811, 814–815 (1st Cir. 1988) (holding that as the incarcerated person did not have a liberty interest in remaining at a psychiatric hospital, no hearing was required before returning the prisoner to prison).

184. D.C. CODE ANN. § 24-503(b) (West 2017).

185. *Baxstrom v. Herold*, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966) (holding that a New York incarcerated person “was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like [the prisoner], nearing the expiration of a penal sentence.”).

186. N.Y. CORRECT. LAW §§ 402(10), 404(1) (McKinney 2014).

187. *Baxstrom v. Herold*, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966).

188. N.Y. CORRECT. LAW § 402(11) (McKinney 2014).

(b) What Happens to My Good-Time Credits?

In some jurisdictions, an incarcerated person may lose the opportunity to earn good-time credits after a mental illness determination and hospitalization.¹⁸⁹ The reasoning that many courts give for this policy is that the goals of hospitalization differ from the goals of imprisonment. Hospitalization is meant to treat incarcerated people with mental illness,¹⁹⁰ while incarceration is intended to punish and also rehabilitate.¹⁹¹ However, the Eighth Circuit found that there is a difference between meritorious credits (credits that are given at the State's discretion) and statutory good-time credits (credits that a state statute specifically grants for particular behavior). Unlike discretionary credits, statutory credits come from state laws. Therefore, a loss of statutory credits based on a mental health assessment could violate your constitutional right to equal protection under the Fourteenth Amendment, which prohibits states from applying the law differently to different citizens in the same condition and circumstances.¹⁹²

Even if the law in your jurisdiction does not permit you to continue to earn credits while you are hospitalized, your existing credits may be held in abeyance (paused) during treatment, meaning that all good-time credits that would have been credited will be restored when you are transferred back to prison.¹⁹³ However, if you have existing credits, in many jurisdictions they will not apply until you are restored to health; in other words, you are not entitled to early release if you are still hospitalized on your early release date.¹⁹⁴ Other states, in contrast, do permit you to receive good-time credits even while in the hospital. For example, the Connecticut Supreme Court has found that the language of Connecticut's statute orders the corrections commissioner to apply earned good-time credit to *any* incarcerated person's sentence,¹⁹⁵ in keeping with the idea that the law should treat equally prisoners with mental illness confined in hospitals and those incarcerated in prisons.¹⁹⁶ Since the law varies according to the statutes of each jurisdiction, you should check the law in your state, or the United States Code if you are in federal prison, to determine what happens to your credits during transfer to a hospital.

(c) Can I Receive Credit for Pre-Sentence Confinement in a Hospital or Treatment Program?

Though the law varies significantly by state regarding whether you can receive custody or conduct credits for time spent and good behavior in institutions other than prisons, there are a few general

189. See, e.g., *Urban v. Settle*, 298 F.2d 592, 593 (8th Cir. 1962) (*per curiam*) (finding that an incarcerated person who has "been removed to a hospital for defective delinquents" under federal law to determine mental competency is not entitled to receive further good time for conditional release purposes until, in the judgment of the superintendent of the hospital, he has become "restored to sanity or health"); *Bush v. Ciccone*, 325 F. Supp. 699, 701 (W.D. Mo. 1971) (holding under the express provisions of 18 U.S.C. § 4241, credit for good time is suspended as to an incarcerated person who has been found by a Board of Examiners to be insane or of unsound mind). But see *Sawyer v. Sigler*, 320 F. Supp. 690, 699 (D. Neb. 1970) (distinguishing between meritorious good time, which is permissive and may be withheld, and statutory good time, which cannot be denied without violating the Equal Protection Clause of the 14th Amendment if the withholding does not result from the incarcerated person's misconduct), *aff'd*, 445 F.2d 818–819 (8th Cir. 1971). The federal law that these cases mention has changed several times, so you should proceed with care, researching the current case and statutory law. If you are in state custody, you should check your state's statutes.

190. See, e.g., *People v. Callahan*, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (Cal. Ct. App. 2006) (finding that where an incarcerated person was confined pretrial to treat him to restore his competency to stand trial, he could not later recover credit for that time).

191. *People v. Smith*, 175 Cal. Rptr. 54, 56, 120 Cal. App. 3d 817, 822–823 (Cal. Ct. App. 1981) ("The purposes of the provision for 'good time' credits . . . are [to encourage prisoners] to conform to prison regulations . . . and to make an effort to participate in what may be termed 'rehabilitative activities'" (quoting *People v. Saffell*, 599 P.2d 92, 97, 25 Cal. 3d 223, 233, 157 Cal. Rptr. 897, 903 (1979)).

192. See *Cochran v. Kansas*, 316 U.S. 255, 257, 62 S. Ct. 1068, 1070, 86 L. Ed. 1453, 1455 (1942).

193. *Dobbs v. Neverson*, 393 A.2d 147, 150 n.9 (D.C. Cir. 1978).

194. See, e.g., *Dobbs v. Neverson*, 393 A.2d 147, 154 (D.C. Cir. 1978) (holding that an incarcerated person transferred from a prison to a hospital under the D.C. transfer statute is not entitled to statutory early release unless restored to mental health).

195. *Murray v. Lopes*, 529 A.2d 1302, 1305–1306, 205 Conn. 27, 33–35 (Conn. 1987).

196. *Murray v. Lopes*, 529 A.2d 1302, 1306–1308, 205 Conn. 27, 36–38 (Conn. 1987).

rules you can use to determine if you are entitled to custody credit.¹⁹⁷ First, if the facility you are in before you receive your sentence is the “functional equivalent of a jail,” you may be entitled to credit.¹⁹⁸ Second, some courts make distinctions based on whether the program you are in is voluntary or involuntary.¹⁹⁹ However, these are general rules, so you should make sure to find out how courts have interpreted the law in your state.

6. Credit for Time in a Mental Hospital

If you were housed in a hospital before being sentenced to prison, you might be entitled to custody credit for your time there. State statutes and courts’ interpretations of those laws determine whether you can receive custody credits. Several states have found that, because time in these institutions is similar to being in jail, you should receive credit.²⁰⁰ As one court stated:

“The physical place of confinement is not important as the [incarcerated person] technically continued to be in jail while held in custody at the hospitals. [The incarcerated person] was not free on bail, had no control over his place of custody and was never free to leave the hospitals. For all practical intents and purposes, he was still in jail.”²⁰¹

But other courts have found incarcerated people housed in psychiatric hospitals pre-sentence underwent treatment rather than incarceration and therefore could not receive custody credits for that time.²⁰² These courts reason the two types of confinement are different in kind: imprisonment punishes, while hospitalization or civil commitment provides treatment.²⁰³ So, some courts have

197. Custody credit is statutory credit that prisoners may be awarded for their time spent in confinement prior to trial and sentencing. The reason that many states allow prisoners to count these days as part of their sentence is that it would be unfair to treat defendants who can post bail differently than those who cannot and who therefore have to stay in jail. *See, e.g.,* *People v. Callahan*, 50 Cal. Rptr. 3d 677, 680–681, 144 Cal. App. 4th 678, 684 (2006) (stating that the purpose of actual custody credit statute is to eliminate unequal treatment of indigent and non-indigent defendants). However, courts have taken differing approaches as to whether to grant that time to prisoners detained for reasons other than inability to post bail or bond, like psychiatric evaluation or drug treatment. This section will discuss some of these approaches so that you can figure out whether you are entitled to credit for any time you spent pre-sentence in an institution other than a jail.

198. *Maniccia v. State*, 931 So. 2d 1027, 1030, 31 Fla. L. Weekly D1622 (Fla. Dist. Ct. App. 2006).

199. *Maniccia v. State*, 931 So. 2d 1027, 1030, 31 Fla. L. Weekly D1622 (Fla. Dist. Ct. App. 2006) (holding that where confinement is coercive, an incarcerated person is entitled to credit for pre-sentence time in a “lockdown facility”, even if the incarcerated person requested treatment there); *State v. Mackley*, 552 P.2d 628, 629, 220 Kan. 518, 519 (1976) (*per curiam*) (finding an incarcerated person in pretrial custody at a hospital where he was not free to leave was effectively in jail and therefore entitled to custody credit for his time there).

200. *See, e.g.,* *State v. Mackley*, 552 P.2d 628, 629, 220 Kan. 518, 519 (1976) (*per curiam*) (holding that the word “jail” meant a place of enforced confinement, and included a hospital that the incarcerated person was not free to leave); *Maniccia v. State*, 931 So. 2d 1027, 1028, 31 Fla. L. Weekly D1622 (Fla. Dist. Ct. App. 2006) (holding that pretrial confinement in a “lockdown psychiatric hospital” entitles the incarcerated person to credit for time served); *Murray v. Lopes*, 529 A.2d 1302, 1305, 205 Conn. 27, 33–34 (1987) (holding that statute entitles incarcerated people confined pre-sentence to credit for time served); *People v. Smith*, 175 Cal. Rptr. 54, 56, 120 Cal. App. 3d 817, 822 (1981) (finding incarcerated person entitled to credits for time spent in hospital when proceedings were suspended because he was incompetent to stand trial).

201. *State v. Mackley*, 552 P.2d 628, 629, 220 Kan. 518, 519 (1976) (*per curiam*).

202. *Harkins v. Wyrick*, 589 F.2d 387, 391–392 (8th Cir. 1979) (finding incarcerated person’s due process and equal protection rights were not violated when he was not credited for time undergoing evaluation and treatment at a hospital prior to serving his sentence); *Makal v. Arizona*, 544 F.2d 1030, 1035 (9th Cir. 1976) (holding it did not violate incarcerated person’s rights to deny him credit for time in a psychiatric hospital, where the purpose was treatment rather than punishment, unless state law provides otherwise, which it did not); *People v. Callahan*, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (2006) (finding that where an incarcerated person was confined pretrial for treatment to restore his competency to stand trial, he could not later recover credit for that time); *Closs v. S.D. Bd. of Pardons & Paroles*, 656 N.W.2d 314, 317–319, 2003 S.D. 1, (2003) (holding that because the time that incarcerated person spent in civil commitment was not related to his criminal punishment and because no South Dakota statute provided a right to credit for time served while awaiting trial, court refused to award credits); *State v. Sorenson*, 617 N.W.2d 146, 147, 150, 2000 S.D. 127, ¶1, ¶17 (2000) (*per curiam*) (holding that incarcerated person was not entitled to credit for pre-sentence confinement to undergo psychiatric evaluation unless he remained in state custody only because he could not afford to post bail).

203. *See* *Kansas v. Hendricks*, 521 U.S. 346, 361–362, 117 S. Ct. 2072, 2082, 138 L. Ed. 2d 501, 515 (1997); *see also* *Harkins v. Wyrick*, 589 F.2d 387, 392 (8th Cir. 1979) (holding that time in hospital was rehabilitative, not punitive); *Makal v. Arizona*, 544 F.2d 1030, 1035 (9th Cir. 1976) (“The state hospital was established for the confinement, treatment, and rehabilitation of the mentally ill . . . [not] for purposes of punishment . . .”); *People*

determined awarding credits for time in non-penal institutions toward prison sentences does not make sense.

7. Credit for Time in Drug Treatment

The law varies as to whether you may receive credit for time you spent in narcotics or alcohol treatment prior to serving your sentence. Some states permit credit,²⁰⁴ and some states do not.²⁰⁵ Additionally, like in the hospitalization context, whether you may count the days in treatment toward your sentence often depends on the nature of the institution and the terms of your confinement there, such as whether or not you will be returned to prison if you fail to complete the program.²⁰⁶ Typically, the court that sentences you is free to determine whether to award you credit.²⁰⁷

D. Conditions of Confinement for Prisoners with Mental Illness

This Part explains how your mental health may be a factor in determining conditions of confinement and in disciplinary proceedings. Section 1 details the rights of incarcerated people who are subjected to isolation and solitary confinement. This includes an explanation of the steps taken by many states to exclude prisoners with serious mental illness from isolated confinement and to increase mental health services for prisoners held in restrictive settings. Section 2 explains your right to have mental health considered in disciplinary proceedings. Some states require that prison administrators consider an incarcerated person's mental health when deciding whether and how to sanction incarcerated people for disciplinary misconduct.

1. Isolation and Solitary Confinement

Courts have recognized that isolating incarcerated people with mental illness in Special Housing Units (SHUs) or "keep-lock" for various reasons—among them protection or discipline—is a harmful

v. Callahan, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (2006) (finding that prisoner's confinement was "nonpenal and treatment oriented").

204. See, e.g., State v. Sevelin, 554 N.W.2d 521, 523, 204 Wis. 2d 127, 132–133 (Wis. Ct. App. 1996) (finding that state statute's definition of "custody" for the purpose of determining whether the incarcerated person should get pre-sentence credit includes those temporarily outside of a correctional institution in order to receive medical care, which included treatment for alcoholism); Lock v. State, 609 P.2d 539, 543–546 (Alaska 1980) (interpreting statute granting credit for time "in custody" to include time in non-penal rehabilitation centers, since these institutions also involve restraints on liberty); People v. Rodgers, 144 Cal. Rptr. 602, 606, 79 Cal. App. 3d 26, 33 (1978) (holding "custody" includes participation in live-in drug treatment programs, and so defendant was entitled to credit for time spent in such a program).

205. See, e.g., Pennington v. State, 398 So. 2d 815, 817 (Fla. 1981) (holding that because the purpose of "[h]alfway houses, rehabilitative centers, and state hospitals . . . is structured rehabilitation and treatment, not incarceration," incarcerated person who attended live-in drug treatment as a condition of probation was not entitled to statutory credit for time spent there prior to sentencing); Commonwealth v. Fowler, 930 A.2d 586, 597–598, 2007 Pa. Super. 219, ¶27–29 (2007) (holding that incarcerated person was not "in custody," within the meaning of the statute granting credit for time in custody prior to sentence, where he participated in drug treatment program that did not involve lock-down but did require reinstatement of court case if the defendant breached the terms of his program); State v. Vasquez, 736 P.2d 803, 804–805, 153 Ariz. 320, 321–322 (Ct. App. 1987) (holding that only time spent "in the actual or constructive control of jail or prison officials" qualifies as "in custody" for the purposes of the credit statutes, and so defendant's time in a residential treatment program under the supervision of his probation officer did not qualify for credit); People v. Scott, 548 N.W.2d 678, 680, 216 Mich. App. 196, 200–201 (1996) (holding that "the sentencing credit statute does not entitle that defendant to sentencing credit for his time in the [rehabilitative] treatment facility").

206. See, e.g., Lock v. State, 609 P.2d 539, 546 (Alaska 1980) (holding that because defendant would be returned to prison if he violated the terms of the drug treatment program, he is entitled to credit for time spent in that program).

207. See, e.g., Commonwealth v. Fowler, 930 A.2d 586, 596, 2007 Pa. Super. 219, 25 (2007) (noting that "it is within the trial court's discretion whether to credit time spent in an institutionalized rehabilitation and treatment program as time served 'in custody'").

practice.²⁰⁸ Although isolation of prisoners with mental illness is not unconstitutional as a rule,²⁰⁹ it is subject to Eighth Amendment limitations.²¹⁰ There are certain conditions under which isolating incarcerated people with mental illness is unconstitutional. When those conditions exist, courts will be more likely to intervene to help incarcerated people. For instance, courts will grow more suspicious if incarcerated people are segregated indefinitely without review²¹¹ or if there is a possibility that an incarcerated person will experience psychological harm.²¹² Several federal courts have found that, even though segregation does not by itself violate the Constitution, isolation can pose particular risks for those with mental illness or on the verge of developing mental illness.²¹³ For these groups, isolation can provide extreme stress and worsen their conditions,²¹⁴ and therefore violates their rights.²¹⁵

208. It has been known for many years that isolated confinement—the deprivation of human contact and other sensory and intellectual stimulation—can have disastrous consequences. *See In re Medley*, 134 U.S. 160, 168, 10 S. Ct. 384, 386, 33 L. Ed. 835, 839 (1890) (finding that “[a] considerable number of the prisoners fell, after even a short confinement, into a [state of foolishness], from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community”); *see also* *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988) (“[T]here is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant.”). Modern courts have reiterated these consequences in addressing present-day forms of isolated confinement. *See, e.g.,* *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (citing expert’s affidavit regarding effects of SHU placement on individuals with mental disorders); *Baraldini v. Meese*, 691 F. Supp. 432, 446–447 (D.D.C. 1988) (citing expert testimony on sensory disturbance, perceptual distortions, and other psychological effects of segregation), *rev’d on other grounds sub nom. Baraldini v. Thornburgh*, 884 F.2d 615, 280 U.S. App. D.C. 176 (D.C. Cir. 1989); *Bono v. Saxbe*, 450 F. Supp. 934, 946 (E.D. Ill. 1978) (“Plaintiffs’ uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit.”), *aff’d in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980); *Madrid v. Gomez*, 889 F. Supp. 1146, 1235 (N.D. Cal. 1995) (concluding, after hearing testimony from experts in corrections and mental health, that “many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU”), *rev’d in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

209. *See, e.g.,* *Jackson v. Meachum*, 699 F.2d 578, 583 (1st Cir. 1983) (finding that an incarcerated person with mental illness had no constitutional right to contact with other incarcerated people, even if it would have therapeutic value); *Madrid v. Gomez*, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995) (“[W]e are not persuaded that the SHU, as currently operated, violates [8th] Amendment standards vis-a-vis all inmates.”), *rev’d in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

210. *See, e.g.,* *Helling v. McKinney*, 509 U.S. 25, 34–35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993) (holding that prison conditions that “pose an unreasonable risk of serious damage to [a prisoner’s] future health” may violate the 8th Amendment); *Casey v. Lewis*, 834 F. Supp. 1477, 1548–1549 (D. Ariz. 1993) (condemning placement and retention of incarcerated people with mental illness on lockdown); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (holding that psychiatric evidence that prison officials fail to screen out from SHU “those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there” raises a triable 8th Amendment issue); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 868 (D.D.C. 1989) (holding that inmates with mental health problems must be placed in a separate area or a hospital and not in administrative/punitive segregation area), *rev’d in part sub nom. Brogdsdale v. Barry*, 926 F.2d 1184, 1191 (D.C. Cir. 1991).

211. *See* *Hutto v. Finney*, 437 U.S. 678, 685–687, 98 S. Ct. 2565, 2570–2571, 57 L. Ed. 2d 522, 531–532 (1978) (length of time in isolation should be considered when determining whether confinement there violates the 8th Amendment ban on cruel and unusual punishment); *see also* *Jackson v. Meachum*, 699 F.2d 578, 584–585 (1st Cir. 1983) (suggesting courts should be more willing to inquire where an incarcerated person has been held for a long period without a time limit).

212. *Jackson v. Meachum*, 699 F.2d 578, 584–585 (1st Cir. 1983) (urging that officials continue to monitor incarcerated people in segregation and that courts intervene in cases where there is evidence of psychological harm).

213. *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (finding the risk of isolating incarcerated people with mental illness or those likely to develop mental illness is unreasonable and violates the 8th Amendment), *rev’d in part on other grounds*, 190 F.3d 990 (9th Cir. 1999); *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from “supermax” prison, which isolates incarcerated people); *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (“[T]he isolation and idleness of Death Row combined with the squalor, poor hygiene, temperature, and noise of extremely psychotic prisoners create an environment ‘toxic’ to the prisoners’ mental health.”); *Inmates of Occoquan v. Barry*, 650 F. Supp. 619, 630 (D.D.C. 1986) (holding that housing incarcerated people with mental illness in segregation unit is inappropriate), *on remand to* *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 868 (D.D.C. 1989).

214. Fred Cohen, *The Mentally Disordered Inmate and the Law* 11–8 (1998) (“Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally.”).

215. *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (holding that confining those with marginal

However, to succeed on a claim that isolation violated your rights, you will need to show more than mild or generalized psychological pain.²¹⁶

A growing number of states have taken steps to exclude incarcerated people with serious mental illness from some isolated confinement housing areas and to increase mental health services for incarcerated people with serious mental illness who are held in restrictive settings. Courts have approved remedies, many in the form of settlement agreements, for incarcerated people with mental illness in isolation. In New Jersey, incarcerated people *must* be released from administrative segregation if they have a mental illness history and it appears that ongoing confinement there would harm them.²¹⁷ The Mississippi Department of Corrections was ordered to provide annual assessments and better mental health care for incarcerated people on death row who were subject to conditions of isolation.²¹⁸ In California, *Madrid v. Gomez* resulted in incarcerated people with serious mental illness being excluded from the Pelican Bay prison's SHU.²¹⁹ In Connecticut, the settlement of *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Choinski* called for exclusion of incarcerated people with serious mental illness from the Northern Correctional Institution.²²⁰ And, in Wisconsin, the settlement in *Jones'El v. Berge* excluded incarcerated people with serious mental illness from super-maximum security housing.²²¹

In New York, advocates with the goal of improving mental health treatment in state prisons brought the case *Disability Advocates, Inc. v. New York State Office of Mental Health*.²²² The suit was brought state-wide and alleged that because of inadequate mental health treatment, incarcerated people with mental illness were trapped in the disciplinary process and ended up in isolated confinement settings, which caused them to deteriorate psychiatrically. The case resulted in a private settlement agreement that included among its provisions: a minimum of two hours per day of out-of-cell treatment or programming for incarcerated people with serious mental illness confined in SHU, universal and improved mental health screening of all incarcerated people upon admission to prison, creation and expansion of residential mental health programs, required and improved suicide prevention assessments upon admission to SHU, and improved treatment and conditions for incarcerated people in psychiatric crisis in observation cells. A stated goal of this agreement was to treat rather than isolate and punish incarcerated people with serious mental health needs. This settlement applies *only* to incarcerated people in New York State. Also, note that because this is a private settlement agreement, it does not create an individual cause of action, and a court did not order its terms. If you intend to bring a lawsuit based on the failure of New York to provide necessary mental health treatment to you in isolation, you must exhaust your administrative remedies and file a separate lawsuit. If you are an incarcerated person in New York State and are concerned you are not

or full mental illness causes undue suffering for these groups), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

216. *Madrid v. Gomez*, 889 F. Supp. 1146, 1263–64 (N.D. Cal. 1995) (holding incarcerated people must show more than loneliness, boredom, or mild depression to state a claim of cruel and unusual punishment), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

217. *D.M. v. Terhune*, 67 F. Supp. 2d 401, 403 (D.N.J. 1999) (“The Special Administrative Segregation Review Committee shall release the prisoner from Administrative Segregation if the prisoner has a history of mental illness and the Committee decides that continued confinement in the unit would be harmful to the prisoner’s mental health.”).

218. *Gates v. Cook*, 376 F.3d 323, 342 (5th Cir. 2004) (ordering mental health examinations and care for death row incarcerated people).

219. *Madrid v. Gomez*, 889 F. Supp. 1146, 1265–1266 (N.D. Cal. 1995) (finding that placing incarcerated people with mental illness within SHU would result in an unreasonable risk of exacerbating their illnesses).

220. *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Choinski*, No. 3:03-cv-1352 (RNC) (D. Conn. 2004) (private settlement agreement), *available at* <http://www.aclu.org/FilesPDFs/f07s2zl.pdf> (last visited Feb. 1, 2020).

221. *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from “supermax” prison, which isolates incarcerated people).

222. *Disability Advocates, Inc. v. New York State Office of Mental Health*, No. 1:02-cv-04002 (S.D.N.Y. 2007) (private settlement agreement), *available at* <https://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf> (last visited Feb. 1, 2020).

receiving services required by the settlement, you may write to the lawyers who are enforcing this agreement. Appendix B contains a list of organizations to contact for help.

In 2008, the New York Legislature passed and the Governor signed bill S.333/A.4870 into law. This statute amends various sections of the New York Correction Law, expanding on some of the provisions of the settlement agreement and adopting others. Notably, it defines “mental illness,”²²³ provides for incarcerated people with serious mental illness to receive therapy and programming in environments that meet their clinical needs, and specifies that mentally ill incarcerated people will not be placed in segregated confinement except in exceptional circumstances.²²⁴

2. Your Right to Have Mental Health Considered in Disciplinary Proceedings

Mental health may be relevant in a prison disciplinary proceeding in three separate but related ways: whether the incarcerated person is mentally competent to proceed with the hearing; whether the incarcerated person was responsible for conduct at the time of the incident (or should not be held responsible because of his mental state at the time); and whether the incarcerated person’s mental status should be considered to lessen the penalty or in determining what the penalty should be. When there is a connection between mental illness and disciplinary misconduct, an incarcerated person with serious mental illness might commit a disciplinary infraction that jeopardizes chances for parole, results in lost good time credits,²²⁵ or results in isolated confinement.²²⁶ Some states recognize the relevance of mental health and require that prison administrators consider an incarcerated person’s mental health during disciplinary proceedings when deciding whether to sanction incarcerated people and, if so, how to sanction them. In New Jersey, the Department of Corrections implemented disciplinary regulations following a lawsuit stating that hearing officers must submit the names of any incarcerated people facing disciplinary hearings to mental health staff to find out whether mental illness might have played a role in the incarcerated person’s behavior.²²⁷ The hearing officer must take all information available to him into account in deciding whether to request a psychiatric evaluation and in deciding whether to impose punishment or refer the incarcerated people to a mental health unit instead of disciplining him.²²⁸

The New York State courts also recognize that evidence of an incarcerated person’s poor mental health at the time of the incident which led to disciplinary charges should be considered at prison disciplinary hearings.²²⁹ The seriousness of the offense or the number of incidents should not interfere

223. N.Y. CORRECT. LAW § 400 (McKinney 2014).

224. N.Y. CORRECT. LAW § 401(1) (McKinney 2014).

225. The effect of such discipline is a longer period of incarceration for these incarcerated people because of psychiatric disabilities. Suits challenging these practices have included claims based on the Americans with Disabilities Act and Rehabilitation Act. For more information on bringing suit under these acts, see *JLM*, Chapter 28, “Rights of Incarcerated People With Disabilities.”

226. Some courts clearly recognize the psychological effects of prolonged isolation as relevant to determining whether the discipline imposed constitutes an atypical and significant hardship under *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–430 (1995). See, e.g., *Colon v. Howard*, 215 F.3d 227, 232 (2d Cir. 2000) (advising district courts in the Second Circuit that, in cases challenging SHU confinement, evidence of psychological effects of prolonged confinement in isolation is relevant); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) (finding that 376 days in SHU was atypical and significant and also observing that “[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies”); *McClary v. Kelly*, 4 F. Supp. 2d 195, 205–208 (W.D.N.Y. 1998) (holding that evidence of psychological harm (both expert and the plaintiff’s own testimony) created a triable issue under the *Sandin* “atypical and significant” standard).

227. *D.M. v. Terhune*, 67 F. Supp. 2d 401, 403 (D.N.J. 1999) (stating that mental health staff will be given a list of all incarcerated people with pending disciplinary charges and then will inform the disciplinary hearing officer before the hearing that the incarcerated person is undergoing mental health treatment).

228. *D.M. v. Terhune*, 67 F. Supp. 2d 401, 403 (D.N.J. 1999).

229. *Huggins v. Coughlin*, 155 A.D.2d 844, 845, 548 N.Y.S.2d 105, 106–107 (3d Dept. 1989) (determining that the hearing officer is required to consider the incarcerated person’s mental condition in making the disciplinary disposition when the inmate’s mental state is at issue because “that principle is in conformity with the well-established proposition that evidence in mitigation of the penalty to be imposed or that which raises a possible excuse defense to the charged violation is relevant and material in a disciplinary proceeding”), *aff’d* 76 N.Y.2d 904, 905, 563 N.E.2d 281, 282, 561 N.Y.S.2d 910, 911 (1990); *People ex rel. Reed v. Scully*, 140 Misc. 2d 379, 382, 531 N.Y.S.2d 196, 199 (Sup. Ct. Oneida County 1988) (“[T]he mental competence and mental illness of a prisoner must be considered during the prison disciplinary process where a Penal Law § 40.15 adjudication has

with a determination that alleged misconduct was caused by deteriorating mental health.²³⁰ Litigation in New York²³¹ led to amendment of existing state-wide regulations that govern procedures at prison disciplinary hearings. The amendments contain criteria that establish when an incarcerated person's mental state must be considered at the hearing.²³² These amendments also establish that the hearing officer must ask the incarcerated person and other witnesses about his condition and interview an Office of Mental Health doctor concerning the incarcerated person's condition at the time of the incident and the time of the hearing.²³³ The amendments also created committees with full-time mental health staff at the maximum security prisons.²³⁴ The committees review people incarcerated in the SHU every two weeks and may recommend restoration of privileges, reduction of SHU term, housing reassignment, medication adjustment, or commitment to a psychiatric hospital.²³⁵ Mental illness is taken into consideration in determining whether to dismiss, make a finding of guilt, or lessen any penalty imposed.²³⁶ The settlement reached as a part of *Disability Advocates, Inc. v. New York State Office of Mental Health*²³⁷ provides for additional changes to the disciplinary process including expansion of case management committees to additional prisons, multiple reviews of SHU sentences for incarcerated people receiving mental health services, restrictions on charging incarcerated people with serious mental illness for acts of self-harm, and restrictions on punishing incarcerated people with serious mental illness with the "loaf" (a restricted diet). These changes are contained in a private settlement agreement. They apply *only* to incarcerated people in New York State. Also, note that the private settlement agreement does not create an individual cause of action and its terms were not ordered by the court. If you intend to bring a lawsuit based on the failure of New York to follow these procedures, you must exhaust your administrative remedies and file a separate lawsuit. If you are an incarcerated person in New York State prison and are concerned that you are not receiving considerations required by the settlement, you may write to the lawyers who are enforcing this agreement. Appendix B contains a list of organizations to contact for help.

For more information on your rights at disciplinary hearings, please see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings." In addition, because much of the information in this section is specific to New York and New Jersey, you should research the law in your own state if you live elsewhere.

been made or a well-documented history of serious psychiatric problems calls the prisoner's mental health into question."); see also *Powell v. Coughlin*, 953 F.2d 744, 749 (2d Cir. 1991) (upholding Office of Mental Health policy that testimony at prison disciplinary hearings provided by clinical staff concerning an incarcerated person's mental health status must be done outside the presence of the incarcerated person, as reasonably related to legitimate penological interests) (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), *superseded by statute on other grounds*). The requirement is now part of New York State regulations. See N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(c) (2020).

230. *Gittens v. Coughlin*, 143 Misc. 2d 748, 750–751, 541 N.Y.S.2d 718, 719–720 (Sup. Ct. Sullivan County 1989) (expunging incarcerated person's disciplinary record where at each hearing the incarcerated person was charged with aggressive behavior similar to behavior for which he was receiving psychiatric treatment; mental illness was not taken into account; there was no consideration of whether he was competent to participate in the hearing; his psychiatric history was well-documented; he had been committed to the forensic psychiatric hospital seventeen times; and the hearing officer did not inquire, based on his nonattendance at hearings, into whether or not he was competent); *Trujillo v. LeFevre*, 130 Misc. 2d 1016, 1017, 498 N.Y.S.2d 696, 698 (Sup. Ct. Clinton County 1986) ("[A]ny determination by the mental health unit that the petitioner's lack of mental health was a causal factor in his misbehavior should apply equally to all charges.").

231. See, e.g., *Anderson v. Goord*, 87-cv-141 (N.D.N.Y. 2003) (challenging the adequacy of mental health treatment for incarcerated people in disciplinary housing units at Attica and Auburn Correctional Facilities).

232. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(b)(1) (2020).

233. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(c)(3) (2020).

234. N.Y. COMP. CODES R. & REGS. tit. 7, § 310.1 (2020).

235. N.Y. COMP. CODES R. & REGS. tit. 7, § 310.3 (2020).

236. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(f) (2020).

237. *Disability Advocates, Inc. v. N.Y. Office of Mental Health*, No. 1:02-cv-04002 (S.D.N.Y. 2007) (providing changes under private settlement agreement to the disciplinary process for incarcerated people in New York). For a brief summary of settlement provisions, visit the case profile on The Civil Rights Litigation Clearinghouse, University of Michigan School of Law website, available at <http://www.clearinghouse.net/detail.php?id=5560> (last visited Feb. 1, 2020).

E. Special Considerations for Pretrial Detainees

Pretrial detainees are individuals in custody who have not yet been convicted. Because they are considered “innocent until proven guilty,”²³⁸ pretrial detainees enjoy many of the rights they would have were they not in jail. Put another way, pretrial detainees, unlike convicted incarcerated people, may not be punished, and can claim that jail practices subjecting them to punishment violate their due process rights to be found guilty before punishment is inflicted.²³⁹ In *Bell v. Wolfish*, the Supreme Court declared that the Due Process Clause of the Fourteenth Amendment governs whether conditions of confinement violate the rights of incarcerated people.²⁴⁰ The Court established in *Bell* that jail conditions should not be assessed under the Eighth Amendment, which bans cruel and unusual punishment,²⁴¹ because pretrial detainees cannot be punished *at all*.²⁴² Instead, claims are assessed under the Due Process Clause of the Fourteenth Amendment. For more information about filing a constitutional claim under the Due Process Clause of the Fourteenth Amendment, see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

Note that the Supreme Court has also made it clear that losing your liberty by confinement before trial does *not* violate the Constitution; it is only when your loss of liberty goes beyond what necessarily comes with detention that incarcerated people may raise claims that their rights have been violated.²⁴³ The *Bell* rule shapes most of the law surrounding your rights as a pretrial detainee to adequate mental health care and to avoid unwanted treatment.

1. Your Right as a Pretrial Detainee to Psychiatric Medical Care

In *City of Revere v. Massachusetts General Hospital*, the Supreme Court applied the *Bell v. Wolfish* rule, that pretrial detainees are entitled to be free of punishment under the Due Process Clause, to the medical care context. In that case, the Court found the Due Process Clause requires the government to provide medical care to pretrial detainees in its custody, and those detainees must receive protections “*at least as great as* the Eighth Amendment protections available to a convicted incarcerated person.”²⁴⁴ Pretrial detainees’ claims that they have been denied adequate medical care are assessed under the Due Process Clause of the Constitution, rather than under the Eighth Amendment.²⁴⁵ However, many circuit courts have imported *Estelle v. Gamble*’s²⁴⁶ “deliberate indifference” test, which is based on the Eighth Amendment, to evaluate pretrial detainees’ claims.²⁴⁷

238. See, e.g., *Campbell v. McGruder*, 580 F.2d 521, 527 (D.C. Cir. 1978) (pretrial detainees are presumed innocent and therefore may not be punished).

239. See *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) (holding that conditions of confinement should be evaluated for whether they inflict punishment on incarcerated people without due process).

240. *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt.”).

241. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.”) (emphasis added).

242. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16, 60 L. Ed. 2d 447, 466 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”).

243. *Bell v. Wolfish*, 441 U.S. 520, 538, 99 S. Ct. 1861, 1873, 60 L. Ed. 2d 447, 468 (1979) (“A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.”).

244. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983) (emphasis added).

245. See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16, 60 L. Ed. 2d 447, 466 n.16 (1979) (“[The] State does not acquire the power to punish with which the [8th] Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the [14th] Amendment.”) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671–672 n.40 (1977)).

246. *Estelle v. Gamble*, 429 U.S. 97, 107, 97 S. Ct. 285, 293, 50 L. Ed. 2d 251, 262 (1976) (finding that “[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice.”). For more information on the deliberate indifference standard, which requires showing more than negligence, please see Part B(2) of this Chapter.

247. See, e.g., *Elliott v. Cheshire County*, 940 F.2d 7, 10–12 (1st Cir. 1991) (holding that jail officials violated detainees’ rights when they exhibited deliberate indifference to medical needs); *Hill v. Nicodemus*, 979 F.2d 987, 990–992 (4th Cir. 1992) (finding deliberate indifference is the proper standard under which to assess

Some courts have found delaying treatment for pretrial detainees violates due process because delay punishes detainees and shows deliberate indifference to the serious medical needs of the detainees.²⁴⁸

The deliberate indifference test is subjective, not objective.²⁴⁹ This means for an official to be found “deliberately indifferent,” the official must have been aware there was a substantial risk of serious harm but failed to respond reasonably to the risk.²⁵⁰ The official’s conduct must go beyond mere negligence.²⁵¹

The bottom line is that as a pretrial detainee, you have at least the same rights that a convicted incarcerated person has to adequate and timely medical and psychiatric care. Your right comes from the Fourteenth Amendment, and may come from state statutes.²⁵² So, before filing your complaint, you should find out what the law is in your state.

(a) Your Right to Protection from Self-Harm and to Screening for Mental Illness

One application of the right to mental health care is the right to protection from self-harm and suicide. As a general rule, courts have found that jail staff and administrators have a duty to protect pretrial detainees²⁵³ and/or provide them with adequate psychiatric care.²⁵⁴ Jail officials are liable for

detainees’ rights to medical and mental health care); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1186–1187 (5th Cir. 1986) (finding pretrial detainees are entitled to at least the level of medical care required under the deliberate indifference test); *Heflin v. Stewart County*, 958 F.2d 709, 714–717 (6th Cir. 1992) (holding that pretrial detainees must show jail acted with deliberate indifference to serious medical needs), *overruled on other grounds by* *Monzon v. Parmer County*, 2007 U.S. Dist. LEXIS 43798 (N.D. Tex. June 15, 2007) (*unpublished*); *Hall v. Ryan*, 957 F.2d 402, 404–405 (7th Cir. 1992) (finding that pretrial detainees are at least entitled to protection from jailers’ deliberate indifference); *Bell v. Stigers*, 937 F.2d 1340, 1342–1343 (8th Cir. 1991) (holding that under either the 8th or 14th Amendments, deliberate indifference is the appropriate standard for assessing pretrial detainees’ claims); *Redman v. County of San Diego*, 942 F.2d 1435, 1441 (9th Cir. 1991) (en banc) (finding deliberate indifference is the appropriate test for pretrial detainees’ claims, but distinguishing other levels of culpability in the prison context); *Howard v. Dickerson*, 34 F.3d 978, 980 (10th Cir. 1994) (holding deliberate indifference test applies to pretrial detainees); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490–1491 (11th Cir. 1996) (rejecting a pretrial detainee’s mistreatment claim because of a failure to show subjective deliberate indifference).

248. *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc) (“We therefore hold that deliberate indifference is the level of culpability that pretrial detainees must establish for a violation of their personal security interests under the fourteenth amendment. We also hold that conduct that is so wanton or reckless with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur . . . will also suffice to establish liability.”) (internal quotation marks and citation omitted); *Terry v. Hill*, 232 F. Supp. 2d 934, 943–944 (E.D. Ark. 2002) (holding it violates due process and the 8th Amendment to subject pretrial detainees to an average wait of over eight months for admission to a hospital for mental health care); *Swan v. Daniels*, 923 F. Supp. 626, 631 (D. Del. 1995) (finding the court could apply either the 8th or 14th Amendment to assess incarcerated person’s claims, since both amendments provide equivalent protection).

249. *See, e.g., Elliott v. Cheshire County*, 940 F.2d 7, 10 (1st Cir. 1991) (“[A] finding of deliberate indifference requires . . . that defendant’s knowledge of a large risk can be inferred.”) (citation omitted); *Hare v. City of Corinth*, 74 F.3d 633, 636 (5th Cir. 1996) (en banc) (“We hold that the episodic act or omission of a state jail official does not violate a pretrial detainee’s due process right to medical care or protection from suicide unless the official acted or failed to act with subjective deliberate indifference to the detainee’s rights.”); *Sanderfer v. Nichols*, 62 F.3d 151, 154–155 (6th Cir. 1995).

250. *Sanderfer v. Nichols*, 62 F.3d 151, 154–155 (6th Cir. 1995) (adopting and applying the *Farmer v. Brennan* subjective deliberate indifference test to a pretrial detainee’s claim).

251. *Sanderfer v. Nichols*, 62 F.3d 151, 154–155 (6th Cir. 1995) (adopting and applying the *Farmer v. Brennan* subjective deliberate indifference test to a pretrial detainee’s claim).

252. *See, e.g., N.Y. CORR. LAW* § 505 (McKinney 2014) (establishing a provision of routine medical, dental and mental health services); 730 ILL. COMP. STAT. 125/17 (2019) ((requiring wardens to provide medical treatment necessary for all incarcerated people in their care).

253. *Hare v. City of Corinth*, 74 F.3d 633, 649 (5th Cir. 1996) (holding that the state has a duty to provide mental health care to suicidal pretrial detainees where to deny it would suggest deliberate indifference); *Elliott v. Cheshire County*, 940 F.2d 7, 10 (1st Cir. 1991) (“It is clearly established . . . that jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees that is tantamount to an intent to punish.”); *Hill v. Nicodemus*, 979 F.2d 987, 990–991 (4th Cir. 1992) (holding that a pretrial detainee who had committed suicide was entitled to medical care, and its denial could be assessed under the deliberate indifference standard); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986) (holding that jail officials had a duty not to be deliberately indifferent to an inmate’s psychiatric needs).

254. *Hare v. City of Corinth*, 74 F.3d 633, 649 (5th Cir. 1996) (en banc) (holding that the state has a duty to provide mental health care to suicidal pretrial detainees where to deny it would suggest deliberate indifference); *Elliott v. Cheshire County*, 940 F.2d 7, 10 (1st Cir. 1991) (“It is clearly established . . . that jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees that is tantamount to an intent to punish.”); *Hill v. Nicodemus*, 979 F.2d 987, 990–991 (4th Cir. 1992) (holding

failing to prevent a suicide or a suicide attempt only if they knew or should have known that an incarcerated person was suicidal.²⁵⁵ The standard that courts typically apply to determine if the State failed to protect incarcerated people from themselves or failed to provide mental health care is “deliberate indifference,”²⁵⁶ which is outlined in Parts E(1)(a) and B(2) of this Chapter. In a case of self-harm, “deliberate indifference” requires a strong likelihood that self-infliction of harm will occur.”²⁵⁷

Similarly, courts have not established a clear rule requiring screening for mental health problems or suicidal tendencies upon arrival at a jail. Some courts have held incoming incarcerated people must be screened so that they can be provided with mental health care.²⁵⁸ Other courts have found there is no duty to screen.²⁵⁹

(b) Your Right to Continuation of Drug Treatment

Although prisons are not usually required to offer specific types of treatment like methadone maintenance,²⁶⁰ you do have a protected liberty interest in treatments that you are already receiving at the time you begin your incarceration. Since pretrial detainees retain many of their rights, any unnecessary deprivation of liberty—like withdrawing methadone—violates their due process rights.²⁶¹ Additionally, withdrawal pain can be considered punishment, which is not allowed prior to trial or plea.²⁶² The only limit on this right is if the government can claim that *its* interest in ensuring, for example, jail security or your presence at trial²⁶³ overrides *your* interest in liberty. In addition to due process, if you are detained rather than released and are being denied methadone, you may be able to claim that you are not being treated the same as pretrial defendants who *are* out on pretrial release.²⁶⁴

that a pretrial detainee who had committed suicide was entitled to medical care, and its denial could be assessed under the deliberate indifference standard); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986) (holding that jail officials had a duty not to be deliberately indifferent to an inmate’s psychiatric needs).

255. *Elliott v. Cheshire County*, 940 F.2d 7, 10–11 (1st Cir. 1991).

256. *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) (adopting a test of deliberate indifference for episodic acts of inadequate medical care or failure to protect).

257. *Elliott v. Cheshire County*, 940 F.2d 7, 10 (1st Cir. 1991) (quoting *Torraco v. Maloney*, 923 F.2d 231, 236 (1st Cir. 1991)).

258. *Campbell v. McGruder*, 580 F.2d 521, 548–550 (D.C. Cir. 1978) (creating an affirmative duty to screen pretrial detainees displaying unusual behavior for mental illness, and requiring treatment for their medical needs); *Alberti v. Sheriff of Harris County*, 406 F. Supp. 649, 677 (S.D. Tex. 1975) (ordering that jail establish an intake screening process to detect alcohol and drug abuse, and mental illness).

259. *Belcher v. Oliver*, 898 F.2d 32, 34–35 (4th Cir. 1990) (holding detainee’s right to be free from punishment did not include right to be screened for mental illness or suicide risk); *Gagne v. City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986) (holding arresting officer had no duty to screen for suicidal tendencies); *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989) (“It is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help.”); *Estate of Cartwright v. City of Concord*, 856 F.2d 1437, 1439 (9th Cir. 1988) (upholding a finding that did not impose liability for failure to screen for mental illness).

260. *See Norris v. Frame*, 585 F.2d 1183, 1188 (3d Cir. 1978) (“There is no constitutional right to methadone.”); *Hines v. Anderson*, 439 F. Supp. 12, 17 (D. Minn. 1977) (finding no requirement that prison administer methadone as part of a drug maintenance program).

261. *Norris v. Frame*, 585 F.2d 1183, 1189 (3d Cir. 1978) (finding that under the circumstances, the pretrial detainee’s methadone treatment should have continued); *Cudnik v. Kreiger*, 392 F. Supp. 305, 311–312 (N.D. Ohio 1974) (holding that it violates due process to deny incarcerated person the right to continue methadone treatment); *see generally Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) (applying the Due Process Clause to assess pretrial detainees’ conditions of confinement claims).

262. *See Norris v. Frame*, 585 F.2d 1183, 1187 (3d Cir. 1978) (“A detainee . . . may not be ‘punished’ at all.”); *Cudnik v. Kreiger*, 392 F. Supp. 305, 311 (N.D. Ohio 1974) (“[A] pretrial detainee should not be subjected to . . . punishment or loss.”).

263. *Norris v. Frame*, 585 F.2d 1183, 1189 (3d Cir. 1978) (providing that the state can only override an incarcerated person’s liberty interest in limited circumstances: those inherent to confinement, necessary to guarantee jail security, or needed to ensure defendant’s presence at trial); *Cudnik v. Kreiger*, 392 F. Supp. 305, 311 (N.D. Ohio 1974) (finding pretrial detainees should lose only those liberties incident to confinement).

264. *Cudnik v. Kreiger*, 392 F. Supp. 305, 312 (N.D. Ohio 1974) (holding that those detained pretrial should not suffer greater deprivations—other than confinement—than those released pending trial).

2. Unwanted Treatment as a Pretrial Detainee

Just as you have the right to refuse medication while you are in prison,²⁶⁵ you have the right to refuse treatment if you are a detainee awaiting trial.²⁶⁶ However, your right to refuse medication is not absolute. Even though you have more rights as a detainee than as a convicted incarcerated person, the nature of the government interest in giving you medication is unique in this context. Specifically, the government may give you medication before trial in order to make you competent to stand trial.²⁶⁷ However, the government may do this *only* if several conditions are met.²⁶⁸ Similarly, there are several procedural checks in place to make sure that medicating you is absolutely necessary.²⁶⁹ If you are a detainee in federal custody, for example, you are entitled to an administrative hearing for which you had prior notice and are provided representation, and at which you may appear, present evidence, cross-examine witnesses, and hear the testimony of your treating mental health professional.²⁷⁰ You also may appeal a decision that you do not like.²⁷¹ The reason that there are so many checks is that you have a strong interest in defining your own treatment. You also have a strong interest in conducting your defense.²⁷² Thus, courts will be very careful to make sure that your interests are appropriately balanced against the government's interests.²⁷³

(a) The *Sell* Test: Conditions the Government Must Meet Before Medicating You

In *Sell v. United States*,²⁷⁴ the Supreme Court created the test that determines when it may be appropriate for the government to forcibly medicate you prior to trial. You may be medicated for serious but non-violent crimes. This test also determines when it violates your rights to be medicated prior to trial. There, the Court required the government to comply with *all* of the following conditions before medicating the pretrial detainee:

(i) Important Government Interests Are at Stake.²⁷⁵

The Court has held that determining a defendant's guilt or innocence for a "serious crime" is an important government interest.²⁷⁶ However, there is no clear rule defining what "serious" means. Courts may measure seriousness based on the sentence to which the charged crime exposes you.²⁷⁷

265. *Washington v. Harper*, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990) (finding incarcerated person had a protected liberty interest under the Due Process Clause in avoiding unwanted medication).

266. *Riggins v. Nevada*, 504 U.S. 127, 137, 112 S. Ct. 1810, 1816, 118 L. Ed. 2d 479, 490 (1992) (holding lower court erred by not acknowledging criminal defendant's liberty interest in avoiding unwanted antipsychotic drugs); *see generally* *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) (holding that pretrial detainees enjoy at least as much protection as convicted incarcerated people).

267. *Sell v. United States*, 539 U.S. 166, 169, 123 S. Ct. 2174, 2178, 156 L. Ed. 2d 197, 205 (2003) (concluding that the government may administer antipsychotic drugs to pretrial detainees in limited circumstances). In prison, in contrast, the government interest is often defined in terms of avoiding harm to self or others. *See* *Washington v. Harper*, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–1040, 108 L. Ed. 2d 178, 202 (1990).

268. *Sell v. United States*, 539 U.S. 166, 180–181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211–213 (2003) (establishing a multi-part test for when a detainee may be medicated to restore competence to stand trial).

269. *United States v. Brandon*, 158 F.3d 947, 955 (6th Cir. 1998) (ordering a hearing before a judge to decide whether to medicate defendant before trial).

270. 28 C.F.R. § 549.46(a) (2020).

271. 28 C.F.R. § 549.46(a)(8) (2020).

272. *See, e.g., Riggins v. Nevada*, 504 U.S. 127, 137, 112 S. Ct. 1810, 1816, 118 L. Ed. 2d 479, 490 (1992) (concluding that side effects from antipsychotic medication likely unfairly impaired prisoner's defense at trial); *United States v. Brandon*, 158 F.3d 947, 955 (6th Cir. 1998) (holding that courts should consider whether medication will affect the defendant's physical appearance at trial or as the defendant's ability to aid in the preparation of his own defense).

273. *See United States v. Rivera-Guerrero*, 377 F.3d 1064, 1069 (9th Cir. 2004) (finding that only federal district courts, not federal magistrates, may authorize the involuntary administration of medication because protection from unwanted medication is such an important right).

274. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

275. *Sell v. United States*, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211 (2003).

276. *Sell v. United States*, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211 (2003).

277. *See United States v. Evans*, 404 F.3d 227, 237 (4th Cir. 2005) (looking to the maximum statutory sentence to determine whether a crime is "serious"); *United States v. Dallas*, 461 F. Supp. 2d 1093, 1097 (D. Neb.

One court, for instance, declined to fix a clear line defining what crimes are serious. However, the court found that one exposing a defendant to a maximum of 10 years of imprisonment was serious.²⁷⁸ Therefore, the government had an interest in trying the detainee in that case.²⁷⁹

(ii) No Special Circumstances Exist that Lessen the Government's Interest in Prosecution.²⁸⁰

If special circumstances exist, the government's interest in trying you will be less important. But the *Sell* Court noted that, if the detainee is deemed dangerous to himself or others, the State may medicate him on those grounds instead. Under these circumstances, the court would not need to reach the question of whether medication is necessary to enable the detainee to stand trial.²⁸¹ In such a case, special circumstances might not lessen the government's interest, which would involve safety rather than ensuring a detainee could stand trial. You should note that the burden on the government is lower if it desires to medicate you for dangerousness reasons rather than to stand trial.²⁸²

(iii) Involuntary Medication "Significantly Further[s]" Government Interests, Making Defendant's Competence to Stand Trial Substantially Likely.²⁸³

Several courts have tried to define what "substantially likely" means. One court found that a 50% likelihood that the pretrial detainee would regain competency was not enough to justify giving him medication over his objection.²⁸⁴ Another court held that a 70% success rate among other detainees was enough.²⁸⁵ Yet another court has stated that an 80% chance was enough.²⁸⁶ Thus, it is not clear exactly what counts as "substantially likely." But the greater the percentage chance you will be restored to health, the smaller the chance you have of successfully claiming that the government should fail the *Sell* test. This percentage is a matter about which a psychiatrist will testify at your involuntary medication hearing. However, because the government must meet all of *Sell*'s conditions, you still might be able to claim that you should not be medicated for other reasons. Furthermore, some courts have been skeptical of the practice of using statistical evidence of how likely a defendant is to regain competence.²⁸⁷ Therefore, you might be able to argue that the statistics themselves are flawed.

2006) ("The seriousness of the crime is measured by its maximum statutory penalty.").

278. *United States v. Evans*, 404 F.3d 227, 232 (4th Cir. 2005) (finding that a defendant facing federal charges of assaulting a U.S. agricultural employee and threatening to murder a U.S. judge had committed a "serious" crime).

279. *United States v. Evans*, 404 F.3d 227, 238 (4th Cir. 2005).

280. *Sell v. United States*, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003) (finding that special circumstances, like the fact that the detainee is likely to be civilly confined for a length of time, might lessen the need to prosecute criminally and therefore also lessen the need to medicate a detainee for the sake of standing trial).

281. *Sell v. United States*, 539 U.S. 166, 181–183, 123 S. Ct. 2174, 2185–2186, 156 L. Ed. 2d 197, 213–214 (2003) (finding that if the government can instead seek civil commitment, where the detainee may be medicated because of risk to self or others, it should do that prior to seeking to medicate to stand trial); *United States v. Cruz-Martinez*, 436 F. Supp. 2d 1157, 1159 n.2 (S.D. Cal. 2006) (noting that courts often conduct a *Washington v. Harper* dangerousness assessment prior to a trial competence one because of the difficulty of the *Sell* inquiry to determine whether a person can be forcibly medicated); *United States v. White*, 431 F.3d 431, 434–435 (5th Cir. 2005) (holding that government should have sought a dangerousness assessment before assessing whether to forcibly medicate to restore competency).

282. *See United States v. Rodman*, 446 F. Supp. 2d 487, 496 (D.S.C. 2006) ("[T]he standard for determining whether to forcibly medicate a detainee for the sole purpose of rendering him competent for trial is greater than the standard for medicating a detainee who poses a significant danger to himself or others.").

283. *Sell v. United States*, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003) (noting that the use of drugs must be "in the patient's best medical interest in light of his medical condition" and must take into account the chance of side effects).

284. *United States v. Rivera-Morales*, 365 F. Supp. 2d 1139, 1141 (S.D. Cal. 2005).

285. *United States v. Gomes*, 387 F.3d 157, 161–162 (2d Cir. 2004).

286. *United States v. Bradley*, 417 F.3d 1107, 1115 (10th Cir. 2005).

287. *United States v. Cruz-Martinez*, 436 F. Supp. 2d 1157, 1162 (S.D. Cal. 2006) (doubting the "predictive value and applicability of the government's statistic regarding the likelihood of success").

Courts are also concerned that side effects may affect the detainee. Even side effects that are not medically harmful may affect the ways that the detainee is able to assist in his defense.²⁸⁸ Whether this will happen is another factor that courts should consider when deciding whether to allow you to be medicated before trial.

- (iv) Involuntary Medication is Necessary to Further Government Interests, and Less Intrusive Means Are Unlikely to Achieve the Same Result.²⁸⁹

The Supreme Court requires the government to explore alternatives before deciding to use the very invasive practice of giving you medication over your objection.²⁹⁰ These alternatives might include non-drug therapies. It may also include a court order to the detainee backed by the court's power to punish him for contempt if he does not comply.²⁹¹

- (v) Medication is Medically Appropriate (in the Detainee's Best Interest).²⁹²

If the State is trying to medicate you, the drugs must be in your best interest. If the side effects are too dangerous, for example, a court may deny the government's request to medicate you.²⁹³ Courts have even held that the government must provide evidence that shows how the drugs are likely to affect *you* specifically. This differs from evidence that shows how the drug affects people generally.²⁹⁴

(b) Other Procedural Requirements

The *Sell* case involves what is called your "substantive due process" right to avoid unwanted intrusions into your personal liberty. The *Sell* test weighs your interests against the government's interests. You also have the right to certain *procedures* before your rights are taken away. For example, you are entitled to a hearing before you are forcibly medicated. If the government seeks to medicate you for dangerousness, it must at least give you an administrative hearing.²⁹⁵ If, however, the government is trying to restore your competence to stand trial, you are entitled to a full judicial hearing in a court.²⁹⁶ In both instances, you have the right to protections. These include notice (you must be told when and where your hearing will occur), representation by a lawyer, and the ability to present evidence. The precise procedural requirements vary by state.

Another protection that courts have established is the burden of proof that the government must meet when trying to forcibly administer medication to pretrial detainees. Not all federal circuits have decided this question. However, the general rule is that the government must show medication is necessary by "clear and convincing evidence."²⁹⁷ This differs from the standard used in criminal cases,

288. *Sell v. United States*, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

289. *Sell v. United States*, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

290. *Sell v. United States*, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

291. *Sell v. United States*, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

292. *Sell v. United States*, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

293. *See United States v. Evans*, 404 F.3d 227, 242 (4th Cir. 2005) (requiring government to state what the likely side effects will be, and whether the benefits of treatment will outweigh them); *United States v. Cruz-Martinez*, 436 F. Supp. 2d 1157, 1162–1163 (S.D. Cal. 2006) (finding antipsychotic drugs can have severe side effects, and the government had not met its burden of showing that the benefits of giving them to the detainee outweighed the risks).

294. *See United States v. Evans*, 404 F.3d 227, 241–242 (4th Cir. 2005) (finding fault with government's failure to provide evidence about this particular detainee).

295. *See United States v. White*, 431 F.3d 431, 435 (5th Cir. 2005) (finding the federal government regulatory scheme entitled pretrial detainee to an administrative hearing on the issue of forcible medication).

296. *United State v. Brandon*, 158 F.3d 947, 956 (6th Cir. 1998) (finding that judicial, rather than administrative, hearing is necessary because there is "great risk" in allowing the decision to be made by individuals without legal training).

297. *United States v. Gomes*, 387 F.3d 157, 160 (2d Cir. 2004) (requiring the government to make its case for involuntary medication with clear and convincing proof); *United States v. Bradley*, 417 F.3d 1107, 1114 (10th Cir. 2005) (finding that because important interests are involved, the government must prove its case by clear and convincing evidence); *United States v. Cruz-Martinez*, 436 F. Supp. 2d 1157, 1160 n.3 (S.D. Cal. 2006) (adopting the "clear and convincing" burden of proof standard).

“beyond a reasonable doubt”. Although clear and convincing is not as difficult a standard to meet as “beyond a reasonable doubt,” it is still very hard to meet. Furthermore, the government may not use conclusory evidence to prove its case.²⁹⁸ Conclusory evidence is evidence that presumes the point it is trying to make. Though these protections do not offer you an absolute right to avoid treatment, they make it more difficult for the State to take away your rights.

F. Planning for Your Release

If you are an incarcerated person in New York and are receiving mental health care while in custody, your institution should provide you with some assistance in planning for treatment upon your release. A staff member familiar with your case should complete a written service plan. The plan should at least include a statement of your need for supervision, medication, aftercare services, or assistance in finding employment. The service plan should include a list of organizations and facilities that are available to provide treatment.

G. Planning for Parole

Although there is no constitutional right to parole,²⁹⁹ the State may not use a mental illness as a reason to deny a parole hearing to an incarcerated person.³⁰⁰ Even if you have been determined to have a mental illness, you have the right to a parole hearing. At the hearing, you also have the right to the same procedures that incarcerated people without mental illness have.³⁰¹ You cannot be denied parole because of your mental illness if you are eligible for psychological or psychiatric treatment³⁰² and the prison has failed or refused provide you those services.³⁰³ If state regulations provide for parole and specific conditions of parole, then you may have a constitutionally protected liberty interest in the procedures provided by the state statute.³⁰⁴ For more information, please see Chapter 35: “Getting Out Early: Conditional & Early Release,” and Chapter 32: “Parole” of the *JLM*. You should also check the laws of your state to determine whether procedural protections apply to parole denial.

H. Where to Go for Help

In most states, there are organizations called Protection and Advocacy (“P&A”) agencies that protect and advocate for the rights of people with mental illnesses. P&A agencies also investigate reports of abuse and neglect in facilities that care for or treat individuals with mental illnesses. These facilities include hospitals, nursing homes, homeless shelters, jails, and prisons. These facilities can be either public or private. P&As may advocate for incarcerated people and investigate issues that

298. See *United States v. Evans*, 404 F.3d 227, 240 (4th Cir. 2005) (criticizing the government for its failure to explain how it reached its conclusions about alleged necessity to medicate pretrial detainee).

299. See *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7–8, 99 S. Ct. 2100, 2103–2104, 60 L. Ed. 2d 668, 675–676 (1979) (finding that while a state may establish a parole system, it has no duty to do so because there is no constitutional right of an incarcerated person to be conditionally released before the expiration of his sentence).

300. *Sites v. McKenzie*, 423 F. Supp. 1190, 1195 (N.D. W. Va. 1976) (finding a prisoner cannot be denied a parole hearing afforded to other prisoners solely because he is in a mental hospital). But see *Lopez v. Evans*, 25 N.Y.3d 199, 206–207 (2015) (holding that conducting a parole revocation hearing after a court has deemed the parolee to be mentally incompetent violates due process and, therefore, made be precluded from going forward).).

301. See, e.g., *Sites v. McKenzie*, 423 F. Supp. 1190, 1195 (N.D. W. Va. 1976) (holding that liberty interest for the prisoner with mental illness included the right to a parole hearing and also the right to several procedural protections).

302. *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (finding there is a right to psychological treatment when an incarcerated person is eligible for it. An incarcerated person is eligible if a physician or other health care provider concludes that “(1) that the prisoner’s symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial”).

303. *Bowring v. Godwin*, 551 F.2d 44, 46 (4th Cir. 1977) (reversing dismissal of incarcerated person’s complaint that he had been denied parole in part because of his mental illness, for which he had not received treatment).

304. See *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7–8, 99 S. Ct. 2100, 2103–2104, 60 L. Ed. 2d 668, 675–676 (1979) (finding Nebraska parole statute created a protected liberty interest a prisoner may enforce).

come up during transportation or admission to such treatment facilities. P&As also investigate issues that come up during residency in these facilities, or within ninety days after discharge from them.³⁰⁵

I. Conclusion

This Chapter explains your rights as an incarcerated person with a mental illness. It covers the basic information you will need to understand how the law applies to incarcerated people with mental illnesses. It also covers your right to receive treatment, and your limited right to refuse unwanted treatment and transfers. For a list of organizations that might be able to help you with legal issues related to your mental illness, see Appendix A or write to the JLM for further assistance.

305. This general definition of Protection and Advocacy Agencies was taken from various publications by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services, such as *Transforming Housing for People with Psychiatric Disabilities Report* 17 (2006), available at <https://www.yumpu.com/en/document/read/34895762/transforming-housing-for-people-with-psychiatric-disabilities-report> (last visited Feb. 2, 2020).

APPENDIX A

RESOURCES FOR PRISONERS WITH MENTAL ILLNESS

The following is a list of organizations, including Protection and Advocacy organizations (P&As) that you might wish to contact for help with legal issues related to your mental illness. This list is not complete, and every state should have at least one P&A that assists people with mental illness. To find out the name and contact information for the P&A in your area, contact the National Disability Rights Network, 900 Second Street NE, Suite 211, Washington, D.C. 20002; Phone: (202) 408-9514, TTY: (202) 408-9521, Fax: (202) 408-9520.

National Organization

The Bazelon Center for Mental Health Law

1101 15th Street NW, Suite 1212

Washington, DC 20005

Phone: (202) 467-5730

Fax: (202) 223-0409

TDD: (202) 467-4232

<http://www.bazelon.org>

California

Disability Rights California

1831 K Street

Sacramento, CA 95811

Phone: (916) 504-5800

Fax: (916) 504-5802

<http://www.disabilityrightscalifornia.org/>

Florida

Advocacy Center for

Persons with Disabilities, Inc.

2728 Centerview Drive, Suite 102

Tallahassee, FL 32301

Phone: (850) 488-9071

Toll Free: (800) 342-0823 (in-state)

Fax: (850) 488-8640

TDD: (800) 346-4127

<http://www.disabilityrightsflorida.org/>

Massachusetts

Disability Law Center, Inc.

11 Beacon Street, Suite 925

Boston, MA 02108

Phone: (617) 723-8455

Toll Free: (800) 872-9992

TTY: (800) 381-0577

Fax: (617) 723-9125

<http://www.dlc-ma.org/index.htm>

New York

The Urban Justice Center

123 William Street, 16th Floor

New York, NY, 10038

Phone: (646) 602-5600

Fax: (212) 533-4598

<http://www.urbanjustice.org/>

Counties served: Bronx, Brooklyn, Manhattan, Queens

Disability Advocates, Inc.

5 Clinton Square, 3rd Floor

Albany, NY 12207

Phone: (518) 432-7861 (voice and TTY)

Toll Free: (800) 993-8982

Fax: (518) 427-6561 (voice and TTY)

<http://www.disabilityadvocates.info/>

Counties served: Albany, Columbia, Dutchess, Fulton, Greene, Montgomery, Orange, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Westchester

New York State Commission on Quality of Care and Advocacy for Persons with Disabilities ("CQCAPD")

401 State Street

Schenectady, NY 12305

Toll Free: (800) 624-4143 (Voice/TTY/Spanish)

<http://www.cqcaped.state.ny.us>

Legal Aid Society of Northeastern New York, Inc.

100 Court Street, P.O. Box 989

Plattsburgh, NY 12901

Phone: (518) 563-4022

Toll Free: (800) 722-7380

Fax: (518) 563-4058

<http://www.lasnny.org/>

Counties served: Franklin, Clinton, Essex, Hamilton

Legal Aid Society of Northeastern New York, Inc.

17 Hodskin Street

Canton, NY 13617

Phone: (315) 386-4586

Toll Free: (800) 822-8283

Fax: (315) 386-2868

<http://www.lasnny.org/>

Counties served: St. Lawrence, St. Regis Indian Reservation

Legal Aid Society of Northeastern New York, Inc.

112 Spring Street

Saratoga Springs, NY 12866

Phone: (518) 587-5188

Toll free: (800) 870-8343

Fax: (518) 587-0959

<http://www.lasnny.org/>

Counties served: Saratoga, Warren, Washington

Legal Aid Society of Northeastern New York, Inc.

1 Kimball Street

Amsterdam, NY 12010

Phone: (518) 842-9466

Toll free: (800) 821-8347

Fax: (518) 843-1792

<http://www.lasnny.org/>

Counties served: Fulton, Montgomery, Schoharie

Legal Aid Society of Northeastern New York, Inc.

55 Colvin Avenue

Albany, NY 12206

Phone: (518) 462-6765

Toll free: (800) 462-2922

Fax: (518) 427-8352

http://www.lasnny.org

Counties Served: Albany, Columbia, Greene, Rensselaer, Schenectady

New York Lawyers for the Public Interest

151 West 30th Street, 11th Floor

New York, NY 10001-4017

Phone: (212) 244-4664

Fax: (212) 244-4570

<http://nylpi.org>

Counties served: Bronx, Brooklyn, Manhattan, Queens, Richmond

Neighborhood Legal Services, Inc.

237 Main Street, 4th Floor

Buffalo, NY 14203

Phone: (716) 847-0650

TTY: (716) 847-1322

Fax: (716) 847-0227

<http://www.nls.org/>

Counties served: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Seneca, Steuben, Wayne, Wyoming, Yates

Legal Services of Central New York, Inc.

472 South Salina Street, Suite 300

Syracuse, NY 13202

Phone: (315) 703-6500

Toll Free: (866) 475-9967 (in-state)

TTY: (866) 475-3120

Fax: (315) 475-2706

<http://www.lscny.org/>

Counties served: Broome, Cayuga, Chemung, Chenango, Cortland, Delaware, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Otsego, Oswego, Schuyler, Tompkins, Tioga

Touro College Clinic Program

Jacob D. Fuchsberg Law Center

225 Eastview Drive

Central Islip, NY 11722

Phone: (631) 761-7080

Fax: (631) 421-2675

*Counties served: Nassau, Suffolk***Texas**Advocacy, Inc.

7800 Shoal Creek Blvd., Suite 171-E

Austin, TX 78757-1024

Phone: (512) 454-4816

Toll Free: (866) 362-2851 (Voice/TDD)

Fax: (512) 323-0902

(only in county and city jails)

<http://www.disabilityrightstx.org>

APPENDIX B

CONTACT INFORMATION FOR DISABILITY ADVOCATES, INC. v. NEW YORK STATE OFFICE OF MENTAL HEALTH

Disability Advocates, Inc.

5 Clinton Square, 3rd Floor
Albany, NY 12207
Phone: (518) 432-7861
Toll Free: (800) 993-8982
Fax: (518) 427-6561
www.disability-advocates.org

Prisoners' Legal Services of New York

102 Prospect Street
Ithaca, NY 14850
<http://www.plsny.org>

Prisons Served: Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard

Prisoners' Legal Services of New York

41 State Street, Suite M112
Albany, NY 12207
<http://www.plsny.org>

Prisons Served: Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Cossackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne

Prisoners' Legal Services of New York

237 Maine Street, Suite 1535
Buffalo, NY 14203
<http://www.plsny.org>

Prisons Served: Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming

CHAPTER 30

SPECIAL INFORMATION FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND/OR QUEER INCARCERATED PEOPLE*

A. Introduction

Lesbian, gay, bisexual, transgender, and/or queer (“LGBTQ”) incarcerated people face the same challenges as other incarcerated people, but due to prejudice and a lack of knowledge about issues surrounding sexual orientation and gender identity, LGBTQ incarcerated people often encounter additional difficulties.

Many of the issues unique to LGBTQ incarcerated people have not been litigated extensively.¹ And many of the issues that have been litigated may change significantly in light of relatively recent Supreme Court decisions.² The outcomes of these claims are now less predictable. This unpredictability, combined with the fact that prejudice against LGBTQ individuals may play a role in many judges’ and juries’ decision-making processes, means that LGBTQ incarcerated people face uphill battles when they bring claims in court. For this reason, you should consider contacting an LGBTQ impact litigation organization to see if its lawyers would be willing to take your case.³ This is especially important if you are seeking to apply new theories about sexual orientation or gender identity to your case. Even if such an organization cannot take your case, someone may be able to refer you to an attorney who has experience working with LGBTQ plaintiffs.

Throughout this Chapter, the term “transgender” is used to describe people whose gender identity is different from their assigned sex at birth. Gender identity is used to describe the gender a person identifies as, regardless of whether that gender is the same as the one they were assigned at birth. Male pronouns (he, him, his) are used throughout this chapter and manual. The use of male pronouns is not intended to suggest that only people who identify as men can use the manual. The information contained in this chapter can be helpful to anyone, regardless of their gender identity.

This Chapter attempts to address the most pressing concerns of LGBTQ incarcerated people. Part B explains what to do if you are being treated unfairly because of your sexual orientation or gender identity. Part C through Part H address day-to-day issues that may arise as a lesbian, gay, bisexual, transgender or queer person in prison. Part C addresses your right to control your gender identity while in prison and includes a discussion of your right to gender-related medical care such as hormone treatment. Part D explains your right to confidentiality regarding your sexual orientation or gender identity. Part E addresses assault and harassment by prison officials and other incarcerated people. Part F discusses protective custody and housing placements for transgender incarcerated people. Part G discusses visitation rights. Part H discusses your right to receive LGBTQ literature. Part I of this Chapter discusses important Supreme Court cases and how they may affect past and future prison

* This Chapter was revised by Lillian Morgenstern, based on previous versions by Meredith Duffy, Jen Higgins and Kari Hong. Special thanks to Amy Whelan of the National Center for Lesbian Rights (NCLR) and Professor Brett Dignam of Columbia Law School.

1. Unfortunately, some legal decisions of significance to LGBTQ incarcerated people are unreported—that is, they do not appear in the Federal Reporter or Federal Supplement volumes available in prison law libraries. In the *JLM*, these cases have citations like “U.S. App. LEXIS 12345 (*unpublished*).” Make sure you read Chapter 2 of the *JLM*, “Introduction to Legal Research,” for important information about unpublished cases. At the very least, even if you cannot cite an unpublished case in your claim, the case may help you predict the outcome of a similar lawsuit.

2. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); *Hollingsworth v. Perry*, 570 U.S. 693, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013); *United States v. Windsor*, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

3. Impact litigation organizations fight cases where the law is unresolved with the hope of creating favorable law for future cases. A list of such organizations appears in Appendix A at the end of this Chapter.

regulations more generally. Finally, Part J discusses your remedies if you feel that homophobic or transphobic beliefs (prejudice against LGBTQ individuals) led to jury bias in your conviction.

As you read this Chapter, you should always keep in mind that Title 42 of the United States Code, Section 1983 (known as “Section 1983”), is a federal statute that permits you to sue a person who, while acting on behalf of the state, violates either your federal statutory rights or your constitutional rights, such as your right to be free from cruel and unusual punishment under the Eighth Amendment or your right to equal protection under the Fourteenth Amendment.⁴ If you are a federal incarcerated person, you will file a *Bivens* action or a Federal Tort Claim if you are looking for monetary damages. If you are held in state or municipal custody, Section 1983 may also apply to you. Also, if you are a state or municipal incarcerated person and prison officials have violated your rights, you should also check state and local laws. Depending on where you are located, bringing a lawsuit under Section 1983 may be your best option. For a more detailed explanation of Section 1983, see Chapter 16 of the *JLM*, “Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law.”

It is also very important to be aware of the restrictions placed on prisoner litigation by the Prisoner Litigation Reform Act (“PLRA”). Please read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” for a more detailed explanation of the PLRA before filing any lawsuit.

B. Unequal Treatment Because of Sexual Orientation or Gender Identity

1. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits the government from treating different classes of people differently unless there is a sufficiently legitimate purpose for doing so.⁵ If you believe that benefits are being withheld from you and that they are not being withheld from heterosexual incarcerated people, you may bring a Section 1983 claim against the prison or prison officials for violation of your equal protection rights. To do this successfully, you must convince the court that (1) “similarly situated” incarcerated people are treated differently by the prison; and (2) the difference between their treatment and your treatment is not rationally related to a legitimate penological (prison-related) interest.⁶ In other words, the prison rule or policy that results in your being treated differently must have a commonsense connection to a valid goal or concern of the prison. For a more thorough discussion of equal protection claims, see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law.”

When LGBTQ incarcerated people claim that they are being treated differently than heterosexual incarcerated people, prisons have often tried to justify their actions by claiming that different treatment is necessary to protect LGBTQ incarcerated people because they are often more vulnerable to attack than other incarcerated people. For instance, two cases in the Sixth Circuit involved LGBTQ incarcerated people who, having been denied the opportunity to participate in religious services while in prison, brought suit under Section 1983 for a violation of their First Amendment rights. In both cases, the prison argued that because the LGBTQ incarcerated person was vulnerable to attack, his

4. To challenge the conduct of an official or employee of the federal government, you must bring a *Bivens* action. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). You can find an explanation of how to do this in Chapter 16 of the *JLM*, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief From Violations of Federal Law.”

5. U.S. Const. amend. XIV, § 1; see also *Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620, 1629, 134 L. Ed. 2d 855, 868 (1996) (holding that an amendment to the Colorado Constitution prohibiting the Colorado government from protecting gay men or lesbians from discrimination failed to serve any legitimate government purpose).

6. 42 U.S.C. § 1983; see also *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987); *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 171 (2003) (“In *Turner* we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a valid, rational connection to a legitimate governmental interest; whether alternative means are open to incarcerated people to exercise the asserted right; what impact an accommodation of the right would have on guards and incarcerated people and prison resources; and whether there are ready alternatives to the regulation.”) (internal citations omitted).

participation in the services posed a security risk. The prison argued that the restriction on the incarcerated person's First Amendment rights served the valid penological interest of prison security and so was justified.⁷

Several LGBTQ incarcerated people have, with some success, sued prison officials, claiming they were terminated from their prison jobs because they are LGBTQ. For instance, in *Holmes v. Artuz*, a federal court in New York said that a gay incarcerated person who claimed he was removed from his food service prison job may have stated a claim under Section 1983 for violation of his equal protection rights.⁸ The court did not decide whether the equal protection guarantee of the Constitution had been violated because the plaintiff, appearing without counsel, did not present enough information for the court to reach that decision.⁹ However, the court was clearly sympathetic to the incarcerated person's claim, and the opinion contains strong language saying that the prison would have to show, rather than just say, that its decision was rationally related to the state's interest in maintaining security.¹⁰

2. Sex Discrimination

Although your chances of prevailing on an equal protection claim may have increased after *United States v. Windsor*, you might also have a chance of winning a case if you state your grievance in terms

7. *Brown v. Johnson*, 743 F.2d 408, 412—413 (6th Cir. 1984) (holding a prison's total ban on group worship services by a church for gay people was reasonably related to the state interest in maintaining internal security in the prison). *But see Phelps v. Dunn*, 965 F.2d 93, 100 (6th Cir. 1992) (holding that a genuine issue of material fact existed as to whether a gay incarcerated person alleging he was denied permission to attend religious services was in fact so denied, and whether he posed a security risk because he was gay); *see also Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir. 1989) (affirming summary judgment for defendant prison because allowing plaintiff incarcerated person to receive mailings from North American Man/Boy Love Association would make him a likely victim of incarcerated person violence); *Star v. Gramley*, 815 F. Supp. 276, 278—279 (C.D. Ill. 1993) (granting summary judgment to prison that refused to allow an incarcerated person in a men's facility to wear dresses and skirts because it could pose a security threat by promoting or provoking sexual activity or assault).

8. *Holmes v. Artuz*, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *3 (S.D.N.Y. Oct. 27, 1995) (*unpublished*). *But see Counce v. Kemna*, No. 02-6065-CV-SJ-HFS-P, 2005 U.S. Dist. LEXIS 4021, at *9—10 (W.D. Mo. Mar. 8, 2005) (*unpublished*) (granting defendant prison officials qualified immunity in case where plaintiff alleged job discrimination based on his sexual orientation).

9. The plaintiff was granted leave to replead (rewrite his complaint and bring it again). *Holmes v. Artuz*, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *6 (S.D.N.Y. Oct. 26, 1995) (*unpublished*).

10. The *Holmes* court reasoned as follows:

Defendants argue that "the decision to reassign plaintiff from his job in food service is rationally related to a legitimate state interest in preserving order in the correction facility mess hall (sic)." However, defendants proffer no explanation of what this "rational relationship" might be. A person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security concerns. It is not sufficient to assert, as defendants do in their motion papers, that the prison's exclusionary policy is designed to prevent "potential disciplinary and security problems which could arise from heterosexual inmates' reaction to and interaction with homosexual and/or transsexual inmates who serve and prepare food" in the mess hall. Defendants as yet have offered no evidence that these alleged disciplinary and security problems are real threats to prison life, or that the exclusionary policy is a rational response to such threats if they do exist.

Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *4 (S.D.N.Y. Oct. 26, 1995) (*unpublished*) (citations omitted); *see also Johnson v. Knable*, No. 88-7729, 1988 U.S. App. LEXIS 20071, at *2 (4th Cir. Oct. 31, 1988) (*unpublished*) (vacating lower court's summary judgment dismissal of an equal protection claim brought by a gay incarcerated person after he was allegedly denied a job in the prison's education department because he was gay, and remanding for further proceedings, noting that "[i]f [the plaintiff] was denied a prison work assignment simply because of his sexual orientation, his equal protection rights may have been violated"); *Kelley v. Vaughn*, 760 F. Supp. 161, 163—164 (W.D. Mo. 1991) (denying defendant's motion to dismiss on the ground that a gay incarcerated person, bringing an action against the correctional center's food service manager to challenge his removal from his job as bakery worker, might have a valid equal protection claim); *Howard v. Cherish*, 575 F. Supp. 34, 36 (S.D.N.Y. 1983) (stating, that a gay incarcerated person who claimed he was punished because he was gay would have a claim under § 1983 if he had shown evidence in his claim that he was discriminated against solely because of his sexual preferences). *But see Fuller v. Rich*, 925 F. Supp. 459, 463 (N.D. Tex. 1995) (finding that mistaken rumors that a gay incarcerated person was HIV-positive were enough to raise a legitimate safety concern that justified firing him from food handling job).

of sex discrimination.¹¹ Title VII of the Civil Rights Act of 1964 creates a federal cause of action where “sex ... was a motivating factor”¹² for discrimination, and this law has been held to prohibit sex discrimination against both men and women.¹³ Sex discrimination is discrimination that occurs based on whether you are a man or a woman. It is also sex discrimination when you suffer discrimination based on stereotypes about how men or women should behave or look. LGBTQ people have used this “sex-stereotyping” theory to argue they have suffered from sex discrimination. This is useful because courts look at laws and policies that treat people differently according to their sex with “intermediate scrutiny.”¹⁴ Intermediate scrutiny is a higher level of scrutiny than “rational basis scrutiny.” Intermediate scrutiny requires the prison to show a *substantial* relationship between a prison rule and a legitimate goal of the prison to justify a sex-based classification.¹⁵ For an explanation on the different levels of scrutiny that the court uses, see Part I(2) of this Chapter “*Romer v. Evans* and the Equal Protection Clause.”

Sex-stereotyping claims include claims of discrimination against people for not conforming to the expected behavior of their sex (not acting like people think their sex is “supposed to” act). The Supreme Court recognized this cause of action in *Price Waterhouse v. Hopkins*, finding sex discrimination existed when an accounting firm told an employee she had to “walk, talk, and dress more femininely, style her hair, and wear make-up and jewelry” to get a promotion.¹⁶ This case is particularly useful for transgender incarcerated people who suffer from discrimination in prison. For many years, courts were unsympathetic to transgender plaintiffs, particularly in prisons. But, several cases have held that *Price Waterhouse* protects transgender people and overrules previous decisions like *Ulane v. Eastern Airlines, Inc.*,¹⁷ which denied transgender people protection under Title VII and similar sex discrimination laws.¹⁸

11. See *Schwenk v. Hartford*, 204 F.3d 1187, 1200–1202 (9th Cir. 2000) (finding that the evidence showed the attack by a prison guard was at least in part motivated by sex discrimination, as the guard was not interested in the incarcerated person sexually until his discovery of her “true” sex). But see *Neal v. Dept. of Corr.*, 583 N.W.2d 249, 254, 230 Mich. App. 202, 214–215, (Mich. Ct. App. 1998) (“Prisoners simply are not protected against [sex] discrimination by the [Civil Rights Act] (which is by no means to say that they are entirely unprotected; whatever restraints exist, however, are found outside the four corners of the act).”). It is difficult to predict, then, how courts would respond, and you should be mindful of the consequences under the Prison Litigation Reform Act of filing claims deemed frivolous by the court. See Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

12. 42 U.S.C. § 2000e-2(m). Numerous state statutes also prohibit sex discrimination. The Equal Employment Opportunity Commission (“EEOC”) has also held that discrimination against an individual because that person is transgender is discrimination because of sex and is therefore prohibited under Title VII. See *Macy v. Dept. of Justice*, EEOC Appeal No. 0120120821 at *11 (April 20, 2012). Furthermore, the EEOC held that discrimination against an individual because of that person’s sexual orientation is discrimination because of sex and prohibited under Title VII. See *David Baldwin v. Dept. of Transportation*, EEOC Appeal No. 0120133080 at *10 (July 15, 2015). While the EEOC cases described did not occur in the prison context, looking at them may help you to develop an argument for your claim.

13. See, e.g., *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201, 206 (1998); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 103 S. Ct. 2622, 2630, 77 L. Ed. 2d 89, 101 (1983).

14. Different constitutional challenges receive different levels of scrutiny (review). There are three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis. For a more detailed explanation of levels of scrutiny, you can look at Part I(2) of this Chapter.

15. See *JLM*, Chapter 16.

16. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 109 S. Ct. 1175, 1782, 104 L. Ed. 2d 268, 278 (1989).

17. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084–1085 (7th Cir. 1984) (construing “sex” in Title VII narrowly to mean only anatomical sex rather than gender); see also *Holloway v. Arthur Andersen*, 566 F.2d 659, 661 (9th Cir. 1977) (affirming trial court decision “that Title VII does not embrace transsexual discrimination”).

18. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (holding *Price Waterhouse*’s logic overruled “the initial judicial approach” in cases like *Holloway*); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (“It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on ‘sex’ (referring to an individual’s anatomical and biological characteristics), but not on ‘gender’ (referring to socially-constructed norms associated with a person’s sex) ... However, [this] approach ... has been eviscerated

Sex-stereotyping can also be used by lesbian, gay, and bisexual people in making discrimination claims. For example, if you are a gay man and you believe you were fired from your prison job because you are gay, you could argue that you were discriminated against based on sex or sex stereotypes. For instance, you are a *man* who desires male sexual partners and therefore you were fired, but male incarcerated people who desired female sexual partners would not have been fired.¹⁹ By framing the argument in this way, you can perhaps get the court to be more careful in its review of the prison officials' actions by applying the "intermediate scrutiny" standard.

3. State Laws

Many state laws (and state constitutions) provide greater protection to LGBTQ people than the federal Constitution does. Examples are the Minnesota State Constitution²⁰ and California's Unruh Civil Rights Act.²¹ You should research your state's laws to find out if you could have a stronger statutory claim under those laws than the federal constitutional claims (discussed in the above two sections). If you are in a state with LGBTQ-friendly statutes, you can bring a claim under a state statute as a "pendent claim" (an additional claim to your Section 1983 claim) in federal court, or you can bring the state claim alone in state court. Also, sometimes federal courts have analyzed whether a state law violates the federal Equal Protection Clause of the Fourteenth Amendment.²²

C. Your Right to Control Your Gender Presentation While in Prison

Transgender incarcerated people often have difficulty expressing their gender while in prison. These difficulties range from denial of access to gender-related medical care to denial of access to personal items like clothes and cosmetics.

1. Access to Gender-Related Medical Care

Many transgender incarcerated people seek access to gender-related medical care while in prison. The most common requests are for hormone treatments and gender reassignment surgery. For general

by *Price Waterhouse*."); *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) ("Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer."); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 U.S. Dist. LEXIS 6521, at *3 (W.D. Pa. Feb. 17, 2006) (*unpublished*) ("Plaintiff claims that he was fired because he began to present as a female. He claims that he was the victim of discrimination and a hostile work environment created by defendant due to plaintiff's appearance and gender-related behavior. These allegations, if true, state a claim under Title VII."); *Kastl v. Maricopa County Cmty. College Dist.*, No. 02-1531-PHX-SRB, 2004 U.S. Dist. LEXIS 29825, at *7 (D. Ariz. June 3, 2004) (*unpublished*) (finding plaintiff's allegation that she was required to use the men's restroom stated a claim under Title VII where plaintiff was a biological female born with male genitalia); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(Sc), 2003 U.S. Dist. LEXIS 23757, at *12 (W.D.N.Y. Sept. 26, 2003) (*unpublished*) ("This Court is not bound by the *Ulane* decisions. More importantly, the *Ulane* decisions predate the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), which undermined the reasoning of the *Ulane* decisions."); *but see Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 U.S. Dist. LEXIS 12634, at *10-12 (D. Utah June 24, 2005) (*unpublished*) ("The *Price Waterhouse* prohibition against sex stereotyping should not be applied to transsexuals ... [because] there is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.").

19. *See Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214-216 (1st Cir. 2000) (holding that it was possible that a bank that refused a loan application made by a man wearing a dress until he went home and changed into "male attire" had engaged in sex discrimination because it likely would not have refused a loan application to a woman wearing a dress); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.").

20. Minn. Const. art. I, § 2.

21. Unruh Civil Rights Act, Cal. Civ. Code § 51 (West 2007).

22. *See Doe v. Sparks*, 733 F. Supp. 227, 232 (W.D. Pa. 1990) (finding that even though federal law allowed discrimination based on sexual activity, Pennsylvania state law did not, and Pennsylvania law could be used to evaluate the decision to bar a lesbian partner from visitation).

information about your right to adequate medical care while in prison, see Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.”

(a) Serious Medical Need and Deliberate Indifference

The Supreme Court established in *Estelle v. Gamble* that “deliberate indifference” to an incarcerated person’s “serious medical needs” violates that incarcerated person’s Eighth Amendment right to be free from cruel and unusual punishment.²³

Circuit courts (appellate courts) have regularly found that “gender dysphoria”²⁴ is a “serious medical need” that meets the *Estelle* standard.²⁵ Many federal courts have held that transgender incarcerated people are therefore constitutionally entitled to *some* type of medical treatment for their condition.²⁶ Nevertheless, most of these courts have held that transgender incarcerated people do not have a constitutional right to any *particular* type of treatment, so long as they receive some kind of treatment, such as psychological counseling.²⁷ Under these rulings, prison officials do not violate the Eighth Amendment when, based on their professional judgment, they refuse to provide an incarcerated person with the particular treatment or he requests.²⁸ As a result, most courts that have considered

23. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976). For general information about your right to adequate medical care while in prison, see Chapter 23 of the *JLM*.

24. Gender dysphoria (“GD”) is distress because your gender identity does not match your biological sex. Gender Dysphoria, American Psychiatric Association, *available at* <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited November 6, 2020); *see also* *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997). Many older cases will not use the term “gender dysphoria,” but will state that “transsexualism” or “gender identity disorder” are “serious medical needs.” *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (treating “transsexualism” as a “serious medical need”). Even though these cases do not use up to date language, they can help you argue for trans-affirming medical care.

25. *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (treating “transsexualism” as a “serious medical need”); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (finding that “transsexualism is a very complex medical and psychological problem” that constitutes a serious medical need”); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (finding that “transsexualism” may present a “serious medical need,” which constitutionally entitles incarcerated person to at least some type of medical care); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (holding plaintiff’s transgender healthcare was a “serious medical need” and prison officials were required to provide treatment, including psychotherapy with a professional experienced in treating gender identity disorder and potentially also including hormone therapy or gender reassignment surgery). *But see* *Long v. Nix*, 86 F.3d 761, 765 n.3 (8th Cir. 1996) (noting that the court’s holding in *White* that “transsexualism” is a “serious medical need” may be in doubt in light of *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)).

26. Injunctive relief is where you ask the court to make a prison do something or stop doing something. For instance, if you are trying to get a medical treatment which the prison has previously refused, you are seeking injunctive relief. If you are trying to get “damages” (usually money) from a prison official, you will have to show that the prison official is not entitled to “qualified immunity.” If you are trying to get damages, see Chapter 16 of the *JLM* for an explanation of qualified immunity and other defenses to § 1983 suits.

27. *See, e.g., Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (holding that a transgender incarcerated person is entitled to medical treatment but has no constitutional right to any one particular type of treatment).

28. *See* *Long v. Nix*, 86 F.3d 761, 765–766 (8th Cir. 1996) (holding a prison official was not deliberately indifferent for choosing a different course of treatment than the tranquilizers recommended by the incarcerated person’s expert, where the prison medical staff tried to evaluate the incarcerated person’s psychological condition and the incarcerated person failed to cooperate); *White v. Farrier*, 849 F.2d 322, 327–328 (8th Cir. 1988) (holding a different diagnosis by prison medical staff than by incarcerated person’s experts does not establish deliberate indifference on its own, since doctors are entitled to exercise their medical judgment and an incarcerated person is not entitled to hormone treatment if the prison instead decides to provide her with psychotherapy); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (holding a transgender incarcerated person is entitled to some type of medical treatment but has no constitutional right to any one particular type of treatment); *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (holding that prison officials are not required to administer estrogen to treat transgender people, because it is one of a variety of treatment options and there is no medical consensus that it is the best option; therefore a transgender person denied estrogen treatment may have a claim for medical malpractice but not for deliberate indifference); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 162 (D. Mass. 2002)

the question have denied transgender incarcerated people' requests for hormonal treatment while still upholding their right to medical care.²⁹

Several more recent federal court decisions, however, suggest that courts are beginning to recognize circumstances in which prisons are required to provide hormone therapy. In *Phillips v. Michigan Department of Corrections*, for example, a Michigan federal court granted a preliminary injunction directing prison officials to provide estrogen therapy. The incarcerated person had been taking estrogen since she was a teenager but was prevented from doing so in prison. As a result, she started experiencing a physical transformation and severe depression.³⁰ The *Phillips* court held that denying hormonal treatment in this case caused "irreparable harm" and violated the Eighth Amendment:

It is one thing to fail to provide an inmate with care that would improve his or her medical state, such as refusing to provide sex reassignment surgery or to operate on a long-endured cyst. Taking measures which actually reverse the effects of years of healing medical treatment ... is

(holding that a prison could deny transgender incarcerated person hormones or sex reassignment surgery if security concerns made such treatment impossible but was required to provide some kind of treatment, including, at a minimum, psychotherapy); *Madera v. Corr. Med. Sys.*, No. 90-1657, 1990 U.S. Dist. LEXIS 11878, at *10 (E.D. Pa. Sept. 5, 1990) (*unpublished*) ("[T]here is no absolute constitutional right to hormonal treatments for a transsexual, any more than there is for any other specific therapy requested by a prisoner."); *Farmer v. Carlson*, 685 F. Supp. 1335, 1340 (M.D. Pa. 1988) (finding denial of plaintiff's estrogen medication resulted from an informed medical opinion, and therefore plaintiff did not have a legal claim of deliberate indifference); *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986) ("[T]he key question in this case is whether defendants have provided plaintiff with some type of treatment, regardless of whether it is what plaintiff desires."). These are all cases where the incarcerated person sought injunctive relief, trying to get the prison to give some kind of medical treatment. The courts' refusal to recognize a specific right to hormone therapy, and the recognition instead of a broader right to medical care, has at least once prevented prison officials from avoiding liability by claiming qualified immunity (which would allow an incarcerated person to possibly get damages). In a Ninth Circuit case, prison officials sued by an incarcerated person whose hormonal therapy they had terminated argued that they were entitled to qualified immunity because incarcerated people suffering from gender dysphoria have no clearly established right to female hormone therapy. The Ninth Circuit rejected the officials' claim, holding that "with respect to prisoner medical claims, the right at issue should be defined as an incarcerated person's [8th] Amendment right 'to officials who are not "deliberately indifferent to serious medical needs,"' and not as a right to something more specific. *South v. Gomez*, 211 F.3d 1275 (9th Cir. 2000), *opinion reported in full at* No. 99-15976, 2000 U.S. App. LEXIS 3200, at *4 (9th Cir. Feb. 25, 2000) (*unpublished*) (quoting *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)). See Chapter 16 of the *JLM* for an explanation of qualified immunity and other defenses to § 1983 suits.

29. In *Maggert v. Hanks*, 131 F.3d 670, 671–672 (7th Cir. 1997), a court recognized what many other courts have not: hormone therapy is necessary to "cure" gender dysphoria. Nevertheless, the *Maggert* court held that prisons should not be required to provide hormonal therapy—not because other treatments would work, but because such therapy goes beyond the minimal treatment that prisons are required to provide. Though a prison is required by the 8th Amendment to provide an incarcerated person with medical care, it need not provide care as good as the person would receive if he were a free person; incarcerated people are entitled only to minimum care. *Maggert v. Hanks*, 131 F.3d 670, 671–672 (7th Cir. 1997) (citing *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992)). The *Maggert* court reasoned that because neither public nor private health insurance programs typically pay for sex reassignment, it would be inaccessible to most transgender incarcerated people even if they were not in prison. "[M]aking the treatment a constitutional duty of prisons would give incarcerated people a degree of medical care that they could not obtain if they obeyed the law," which may lead to "transsexuals committing crimes because it is the only route to obtaining a cure." *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997); see also *Praylor v. Tex. Dept. of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (assuming that, because "transsexualism" presents a "serious medical need," den of hormone therapy was not deliberate indifference based on the plaintiff's term length, the prison's inability to perform gender confirmation surgeries, the lack of medical necessity for the hormone, and the disruption to all-male prison).

30. *Phillips v. Mich. Dept. of Corr.*, 731 F. Supp. 792, 794 (W.D. Mich. 1990).

measurably worse, making the cruel and unusual determination much easier.³¹

Despite these encouraging developments in a few federal courts, courts in many other jurisdictions have continued to deny claims by transgender incarcerated people for hormonal treatment.³² Prisoners who are unable to demonstrate that they previously received hormone treatment before incarceration may still face an uphill battle, despite recent changes to the federal Bureau of Prisons policy.³³ Courts will give more weight to the original decision made by prison medical personnel rather than prior treatment history.³⁴

(b) Access to Gender Reassignment Surgery

Courts generally do not require a prison to pay for or conduct any surgery related to an incarcerated person's gender identity or transition.³⁵ If you are diagnosed with gender dysphoria (GD) by prison medical staff, then the prison may be required to give you treatment to comply with due process under the Eighth Amendment "deliberate indifference" test.³⁶ However, it may be difficult to get staff to diagnose you with gender dysphoria. If you are successfully diagnosed with GD, you will not have a choice in what treatment you receive because treatment decisions are left to prison health care staff.³⁷ If the "choice" of treatment is unacceptable to you, you can always refuse. If you feel that your medical need for gender reassignment surgery is not being addressed, you can try to show an Eighth Amendment violation. To do this, you must show (1) proof of a "serious medical need," and (2) a prison's deliberate indifference to that need.³⁸ Unless a doctor is willing to

31. *Phillips v. Mich. Dept. of Corr.*, 731 F. Supp. 792, 800 (W.D. Mich. 1990); *see also De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003) (holding that termination of a transgender incarcerated person's hormone treatment could constitute deliberate indifference where such treatment was terminated because of prison policy rather than because of medical judgment); *South v. Gomez*, 211 F.3d 1275 (9th Cir. 2000), *opinion reported in full at* No. 99-15976, 2000 U.S. App. LEXIS 3200, at *5-6 (9th Cir. Feb. 25, 2000) (*unpublished*) (holding when an incarcerated person was already receiving hormones at the time of her transfer to a prison, it was a violation of her 8th Amendment rights for that prison to halt all hormone treatment at once rather than end it gradually); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001) (ruling that where a prison doctor discontinued a patient's hormone treatment that she had been receiving for almost a year, there was "at least a fact question as to whether each of the defendants was deliberately indifferent to treating [the plaintiff's] gender identity disorder").

32. *See, e.g., Praylor v. Tex. Dept. of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (holding that denial of hormone therapy and gender confirmation surgery does not constitute deliberate indifference when the prison's medical director found no medical necessity for such treatment and the prison was unable to perform a gender confirmation surgery); *Farmer v. Moritsugu*, 163 F.3d 610, 615 (D.C. Cir. 1998) (denying incarcerated person's claim against the medical director of the Bureau of Prisons because the director was not in a position to diagnose and treat individual patients); *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997) (holding that prisons are not required to provide hormone therapy because it is unnecessary and expensive, and because gender dysphoria is not a serious enough condition to justify the cost).

33. *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT 6031.04, PATIENT CARE 41-42 (June 3, 2014), *available at* https://www.bop.gov/policy/progstat/6031_004.pdf (last visited Sept. 29, 2019) (stating that if an incarcerated person is diagnosed with gender dysphoria, a treatment plan may include hormone therapy).

34. *See, e.g., Praylor v. Tex. Dept. of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (deferring to treating physician's recommendations).

35. *Darren Rosenblum, "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 543 (2000); *see also Lewis v. Berg*, No. 9:00-CV-1433, 2005 U.S. Dist. LEXIS 39571, at *22, *30 (N.D.N.Y. Mar. 10, 2005) (*unpublished*) (finding it reasonable for prison grievance committee to deny incarcerated person's request for gender reassignment and cosmetic surgery and refer her back to medical personnel for other appropriate treatment).

36. *See Cuoco v. Moritsugu*, 222 F.3d 99, 106-107 (2d Cir. 2000) (assuming transgender individuals have a "serious medical need" within the meaning of the 8th Amendment deliberate indifference test).

37. *See Sires v. Berman*, 834 F.2d 9, 13 (1st Cir. 1987) ("Where the dispute concerns not the absence of help, but the choice of a certain course of treatment, or evidences mere disagreement with considered medical judgment, we will not second guess the doctors.").

38. *See Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014) (*en banc*) ("Therefore, to prove an Eighth

say that the chosen option would not address the “serious medical need,” prison health care providers have freedom to choose your treatment. Therefore, there is a chance that even if gender reassignment surgery is an option, it may not be chosen by the prison.³⁹

Finally, if you experience health complications as a result of a prior gender-related surgery, the government is obligated to provide you the medical care necessary to treat those complications.⁴⁰

(c) Access to Hormonal Treatment

The federal Bureau of Prisons’ medical policy has recently changed to allow incarcerated people to be provided with hormone therapy even if they did not have hormone therapy prior to incarceration.⁴¹ Nevertheless, many federal and state prisons have refused to provide hormone treatment to transgender incarcerated people, even though the cost of hormone treatment does not necessarily exceed the costs of other routine medical treatments administered to the general prison population.⁴²

If you were undergoing hormone therapy before you went to jail, or if you need hormones now but prison officials deny you access to the treatment, you can sue those officials for violations of your constitutional right to medical care. As you will see in the following subsections, the issue of whether a transgender person is entitled to hormone therapy while in prison has been looked at a lot by the courts. In recent years in particular, several courts have required prisons to provide transgender incarcerated people with hormonal treatment.⁴³

2. Access to Personal Items Associated with Gender Identity

Clothing, cosmetics, jewelry, and personal care products are often significant components of a person’s gender presentation. Prisons vary as to whether they permit incarcerated people to access the clothing of their choice and other personal items.⁴⁴ Prisoners have used Section 1983 to challenge

Amendment violation, a prisoner must satisfy both of two prongs: (1) an objective prong that requires proof of a serious medical need, and (2) a subjective prong that mandates a showing of prison administrators’ deliberate indifference to that need.”). *But see* *Norsworthy v. Beard*, 802 F.3d 1090, 1092 (9th Cir. 2014) (*per curiam*) (holding *Norsworthy*’s case moot, meaning the court did not need to decide the issue anymore, because even though the district court required the California prison system to perform sex reassignment surgery, she was released from prison on parole).

39. *See* *Kosilek v. Spencer*, 774 F.3d 63, 89–90 (1st Cir. 2014) (*en banc*) (finding that when the Department of Corrections chose to provide hormonal treatment, facial hair removal, feminine clothing, antidepressants, and psychotherapy instead of gender reassignment surgery, it was not the court’s place to second-guess prison medical professionals’ judgment and so no 8th Amendment violation was found).

40. *See* *Estelle v. Gamble*, 429 U.S. 97, 103–104, 97 S. Ct. 285, 290–291, 50 L. Ed. 2d 251, 259–260 (1976) (“These elementary principles [per the Eighth Amendment] establish the government’s obligation to provide medical care to those whom it is punishing by incarceration.”)

41. *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT 6031.04, PATIENT CARE 41 (June 3, 2014), *available at* https://www.bop.gov/policy/progstat/6031_004.pdf (last visited Sept. 29, 2019) (“If a diagnosis of GID [GD] is reached, a proposed treatment plan will be developed ... The treatment plan may include elements or services that were, or were not, provided prior to incarceration, including, but not limited to: those elements of the real-life experience consistent with the prison environment, hormone therapy, and counseling.”).

42. *See* Darren Rosenblum, “Trapped” in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 MICH. J. GENDER & L. 499, 545–546 (2000).

43. *See* *Phillips v. Mich. Dept. of Corr.*, 731 F. Supp. 792, 800–801 (W.D. Mich. 1990) (granting transgender incarcerated person’s request for a preliminary injunction requiring prison officials to provide her with estrogen therapy where she had taken estrogen for the 16 years prior to incarceration); *Gammett v. Idaho State Bd. of Corr.*, No. CV05-257-S-MHW, 2007 U.S. Dist. LEXIS 55564, at *43–44 (D. Idaho July 27, 2007) (*unpublished*) (granting incarcerated person’s request for a preliminary injunction to provide estrogen therapy but only after self-castration required the provision of some type of hormone). Because many prisons refuse to prescribe hormones to incarcerated people who do not have a previous doctor’s prescription, incarcerated people who had been getting hormones through informal means may have an additional challenge in bringing suit.

44. *See, e.g.*, *Tates v. Blanas*, No. CIV S-00-2539 OMP P, 2003 U.S. Dist. LEXIS 26029, at *31 (E.D. Cal. Mar. 11, 2003) (*unpublished*) (rejecting a categorical rule that denies an incarcerated person a bra simply because he is transgender or is housed in a men’s ward; the possibility that the bra could be misused as a weapon or noose must be balanced against any medical or psychological harm resulting from denial of a bra); *Lucrecia v. Samples*,

prison policies that deny them access to certain kinds of clothing and products, as well as specific refusals of prison staff to provide them with such property. In both situations, incarcerated people claim that the prison policies and refusals violate their constitutional rights. These challenges have been mostly unsuccessful, however, because courts show significant respect to prison officials' decisions about how to oversee daily life in prison.⁴⁵

Claims under the First Amendment generally fail when they come up against arguments by prisons that restrictions on dress, jewelry, and makeup are justified by legitimate penological interests.⁴⁶ Several courts have noted that such deprivations are simply not of a constitutional nature.⁴⁷

As one court stated:

“Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measures of life’s necessities are sufficiently grave to form the basis of an Eighth Amendment violation.” Cosmetic products are not among the minimal civilized measure of life’s necessities.⁴⁸

Additionally, courts have held that different grooming regulations for male and female incarcerated people do not trigger an incarcerated person’s equal protection rights.⁴⁹

No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *1–2, *15–16 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (noting that transgender incarcerated person was permitted access to “female clothing and amenities” in one prison, but denying relief for second facility’s refusal of permission to wear female undergarments because of significant penological interests and lack of demonstration that wearing the female undergarments was a medical necessity).

45. *See* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (holding a prison regulation intruding on an incarcerated person’s constitutional right will be upheld if the regulation is reasonably related to a legitimate prison interest).

46. *See, e.g.,* Star v. Gramley, 815 F. Supp. 276, 278–279 (C.D. Ill. 1993) (holding that restrictions on clothing incarcerated people can wear are reasonably related to a legitimate penological interest and hence do not violate the 1st Amendment and allowing prison to prevent an incarcerated person from wearing women’s makeup and apparel on the ground that the individual would be more vulnerable to attack if he dressed that way); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) (denying request by transgender incarcerated person for cosmetics and female clothing and holding that “prison authorities must have the discretion to decide what clothing will be tolerated in a male prison”); Ahkeen v. Parker, No. 02A01-9812-CV-00349, 2000 Tenn. App. LEXIS 14, at *25–26 (Tenn. Ct. App. Jan. 10, 2000) (*unpublished*) (upholding prison policy denying men the right to wear earrings, which was challenged on equal protection grounds, because by discouraging cross-dressing the policy discouraged sexual assaults).

47. Remember that in order to bring a successful § 1983 claim, you must allege a violation of a federal constitutional or statutory right. *See* Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *7–8 (6th Cir. Jan. 28, 1997) (*unpublished*) (*per curiam*) (holding that denial of access to hair and skin products that transgender incarcerated person claimed were necessary for her to maintain a feminine appearance did not state a constitutional claim); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) (failing to be “convinced that a denial of female clothing and cosmetics is a constitutional violation”); Ahkeen v. Parker, No. 02A01-9812-CV-00349, 2000 Tenn. App. LEXIS 14, at *22 (Tenn. Ct. App. Jan. 10, 2000) (*unpublished*) (holding that confiscation of the incarcerated person’s earrings by prison officials did not violate the individual’s privacy rights, as “loss of freedom of choice and privacy are inherent incidents of confinement” (quoting Hudson v. Palmer, 468 U.S. 517, 528, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393, 404 (1984))).

48. Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *7–8 (6th Cir. Jan. 28, 1997) (*unpublished*) (*per curiam*) (citation omitted) (quoting Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992)).

49. *See, e.g.,* Hill v. Estelle, 537 F.2d 214, 215–216 (5th Cir. 1976) (holding that difference in application of state prison regulations, in failing to enforce hair length regulations against female incarcerated people, impinged on no fundamental right, created no suspect classification, and did not constitute violation of equal protection); Poe v. Werner, 386 F. Supp. 1014, 1019 (M.D. Pa. 1974) (holding that state prison hair length regulation does not violate the Equal Protection Clause, even though it does restrict female hair length or style).

D. Your Right to Confidentiality Regarding Your Sexual Orientation or Gender Identity

If you are an LGBTQ incarcerated person, you may not have disclosed your sexual orientation or transgender status to fellow incarcerated people. The disclosure by a prison official of your sexual orientation or gender identity could subject you to harassment or abuse by other officials or fellow incarcerated people. If a prison official has told others that you are gay, lesbian, transgender, or bisexual, you might have a claim under Section 1983 that the official violated your Eighth Amendment right to be free from cruel and unusual punishment and/or your right to privacy under the Fourteenth Amendment.

1. Disclosure of Sexual Orientation or Gender Identity as an Eighth Amendment Violation

(a) Sexual Orientation

One case specifically addresses an incarcerated person's Eighth Amendment right to be free from disclosure of his sexual orientation. *Thomas v. District of Columbia* involved a corrections officer at the Maximum Security Facility in Lorton, Virginia, who allegedly sexually harassed an incarcerated person and spread rumors that the incarcerated person was gay and a "snitch."⁵⁰ As a result of these rumors, the incarcerated person claimed he suffered emotional distress and feared for his safety when confronted and threatened with bodily harm by other incarcerated people. The incarcerated person sued the corrections officer under Section 1983, claiming the officer had violated his Eighth Amendment rights, and the officer filed a motion to dismiss the complaint.⁵¹

The U.S. District Court for the District of Columbia found that the incarcerated person had stated a valid Eighth Amendment claim against the officer.⁵² The court held that the officer's "alleged conduct, the physical harm with which [the incarcerated person] was threatened, and the psychic injuries that are alleged to have resulted from such unnecessary, cruel and outrageous conduct, are sufficiently harmful to make out an Eighth Amendment excessive force claim."⁵³

The rumors about the incarcerated person's sexuality were just one part of the abuse the officer allegedly inflicted on the incarcerated person, and it is impossible to know whether the case would have been decided the same way if the case was only about the incarcerated person's sexuality. However, there is language in *Thomas* that could be useful to incarcerated people bringing suits against prison officials who have revealed their sexual orientation or gender identity to other incarcerated people.

(b) Gender Identity

In 2003, Congress passed the Prison Rape Elimination Act ("PREA") to deal with the high levels of sexual assault and harassment in prisons, jails, police lock-ups, community corrections, and immigration detention.⁵⁴ In 2012, the U.S. Department of Justice created guidelines to implement PREA, known as the PREA Standards.⁵⁵ While the PREA Standards do not allow an incarcerated

50. *Thomas v. District of Columbia*, 887 F. Supp. 1, 3 (D.D.C. 1995); *see also* *Montero v. Crusie*, 153 F. Supp. 2d 368, 376–377 (S.D.N.Y. 2001) (denying summary judgment for correctional officers who spread rumor that incarcerated person was gay and tried to incite fight between him and other incarcerated people).

51. *Thomas v. District of Columbia*, 887 F. Supp. 1, 3 (D.D.C. 1995).

52. *Thomas v. District of Columbia*, 887 F. Supp. 1, 5 (D.D.C. 1995) (denying the defendant's motion to dismiss and allowing the case to go to trial).

53. *Thomas v. District of Columbia*, 887 F. Supp. 1, 4 (D.D.C. 1995). *But see* *Davis-Hussung v. Lewis*, No. 14-14964, 2015 U.S. Dist. LEXIS 126964, at *1–2 (E.D. Mich. Aug. 31, 2015) (*unpublished*) (finding no constitutional right violated when prison officials spread inflammatory rumors about incarcerated person's sexuality, despite fact that remarks led to one incarcerated person being harmed by other others).

54. Prison Rape Elimination Act of 2003, Pub. L. No. 108–79, 117 Stat. 972 (codified at 34 U.S.C. §§ 30301–30309 (2012)).

55. 28 C.F.R. pt. 115 (2018).

person to sue if the standards are violated,⁵⁶ they do create a baseline to help show that your constitutional rights have been violated otherwise. The PREA Standards provide specific protections to transgender individuals. For example, the Standards require prisons to screen incarcerated people within seventy-two hours of intake to figure out the incarcerated person's risk for sexual victimization or abuse.⁵⁷ This screening must consider whether the incarcerated person is (or may be thought to be) LGBTQ or gender nonconforming and prison facilities must consider this screening information in making housing and program assignments.⁵⁸

Furthermore, if you do not plan to disclose your gender identity while in prison, the PREA Standards help to maintain privacy for incarcerated people. The PREA Standards require that transgender incarcerated people get access to a private shower if requested. If this is not available, you can ask to either shower at a different time or in a more private area.⁵⁹ Many courts have also held that prison staff must do strip searches in a respectful, professional way—meaning that strip searches performed in full view of other incarcerated people may violate privacy rights.⁶⁰

2. Disclosure of Sexual Orientation or Gender Identity as a Fourteenth Amendment Violation

The Supreme Court has held that the Fourteenth Amendment to the U.S. Constitution guarantees the right to privacy regarding disclosure of certain personal information.⁶¹ These holdings come out of a Supreme Court tradition of finding a general right to privacy in the Constitution that protects certain intimate matters.⁶² Further, many other courts have also found that a constitutional right of privacy protects against disclosure of some kinds of personal information.⁶³ If a prison official discloses private

56. States that have adopted PREA use the Standards as a guideline for how to treat incarcerated people humanely. The Standards are purely advisory, meaning it is not mandatory for a prison who adopts PREA to follow the Standards. Courts have found that incarcerated people cannot sue prisons or prison officials for violating the PREA Standards. *See, e.g.,* De'Lonta v. Clarke, No. 7:11-cv-00483, 2013 U.S. Dist. LEXIS 5354, at *7 (W.D. Va. Jan. 14, 2013) (*unpublished*) (“[T]here is no basis in law for a private cause of action under § 1983 to enforce a PREA violation.”); Chinnici v. Edwards, No. 1:07-CV-229, 2008 U.S. Dist. LEXIS 119933, at *7 (D. Vt. July 23, 2008) (*unpublished*) (“PREA confers no private right of action ... The statute does not grant incarcerated people any specific rights.”).

57. 28 C.F.R. § 115.41(b) (2018); 28 C.F.R. § 115.241(b) (2018); 28 C.F.R. § 115.341(a) (2018).

58. 28 C.F.R. § 115.41(b) (2018); 28 C.F.R. § 115.42(a) (2018).

59. 28 C.F.R. § 115.42(f) (2018) (“Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.”).

60. *See* Farmer v. Perril, 288 F.3d 1254, 1260 (10th Cir. 2002) (finding transgender incarcerated person has right not to be humiliated and strip searched in full view of other incarcerated people unless reasonably related to legitimate penological interest); Meriwether v. Faulkner, 821 F.2d 408, 418 (7th Cir. 1987) (finding there may be violation of 8th Amendment's prohibition against cruel and unusual punishment where public bodily searches are wholly unrelated to a penological justification).

61. *See, e.g.,* Whalen v. Roe, 429 U.S. 589, 599–600, 97 S. Ct. 869, 876–877, 51 L. Ed. 2d 64, 73–74 (1977) (holding that the “individual interest in avoiding disclosure of personal matters” is one of the interests protected by a constitutional zone of privacy, but ultimately finding that a New York statute requiring that the state be provided with a copy of prescriptions for certain drugs did not violate the Constitution because it included appropriate confidentiality protections and furthered a legitimate state interest).

62. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177 (1973) (holding that the constitutional right to privacy includes a woman's decision whether or not to have an abortion); Griswold v. Connecticut, 381 U.S. 479, 485–486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–516 (1965) (holding that prohibiting the use of contraceptives violates the Constitution because the marital relationship is one that lies within the zone of privacy created by several constitutional guarantees).

63. *See, e.g.,* Powell v. Schriver, 175 F.3d 107, 110–113 (2d Cir. 1999) (finding the disclosure of an incarcerated person's confidential medical information regarding transgender status as humor or gossip is not reasonably related to a legitimate penological interest and therefore violates individual's constitutional right to privacy); Nolley v. County of Erie, 776 F. Supp. 715, 728–736 (W.D.N.Y. 1991) (finding that red stickers disclosing plaintiff's HIV status to non-medical staff and automatic segregation of HIV-positive incarcerated people violated constitutional and statutory rights to privacy); Doe v. Coughlin, 697 F. Supp. 1234, 1238–1241 (N.D.N.Y. 1988) (holding that the identification of incarcerated people with HIV and/or AIDS violated their right to privacy and

information about you, you could be subject to harassment or abuse by other officials or fellow incarcerated people. If this has happened to you, you might be able to bring a claim under Section 1983 against the official who made the disclosure for violating your constitutional right to privacy. While many cases have focused on the disclosure of medical information, you might be able to bring a similar claim for unwarranted disclosure of other personal information.

(a) Privacy Regarding Gender Identity

The Second Circuit has found that a person's transgender status is among those constitutionally protected personal matters and that a prison official may not violate an incarcerated person's right to privacy through disclosure of gender identity when that disclosure is not "reasonably related to legitimate penological interests."⁶⁴ In other words, the prison official must have a legitimate reason, related to the prison system's goals, for giving away such private information.

Because it is hard to imagine a situation in which a prison could claim a legitimate interest in "outing" a transgender incarcerated person, you might succeed if you bring a Section 1983 claim arguing that a prison official who told others that you were transgender violated your right to privacy. In *Powell v. Schriver*, a transgender incarcerated person argued that a corrections officer had violated her constitutional right to privacy when the officer told another corrections officer, in the presence of other prison staff and incarcerated people, that she had undergone gender reassignment surgery. The Second Circuit held that the corrections officer's "gratuitous disclosure" of the incarcerated person's "confidential medical information as humor or gossip ... [was] *not* reasonably related to a legitimate penological interest" and therefore violated her right to privacy.⁶⁵ Because there was no legitimate reason for the sharing of personal information, it was a violation of the incarcerated person's constitutional right to privacy. Keep in mind, however, that *Powell* focused on the incarcerated person's transgender status as a medical condition, and not on the sexual orientation of the incarcerated person.⁶⁶

(b) Privacy Regarding Sexual Orientation

Importantly, at least one court has also held that sexual orientation is one of those "personal matters" protected by the Fourteenth Amendment.⁶⁷ There is also at least one case containing a

that "the incarcerated people subject to this program must be afforded at least some protection against the non-consensual disclosure of their diagnosis").

64. *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999); *see also* *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79, 55 U.S.L.W. 4719 (1987) (holding that a regulation that violates incarcerated peoples' constitutional rights is only valid if it is "reasonably related to legitimate penological interests").

65. *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999). Despite this finding, the *Powell* court ultimately found for the corrections officer because that officer was protected by qualified immunity. Qualified immunity shields government officials from liability for money damages on account of their performance of discretionary official functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Powell v. Schriver*, 175 F.3d 107, 113 (2d Cir. 1999) (quoting *Rodriguez v. Phillips*, 66 F.3d 470, 475 (2d Cir. 1995)). The *Powell* court found that the right of an incarcerated person to maintain the privacy of her "transsexualism" was not clearly established at the time the defendant in *Powell* made the disclosure, so he could not be held liable. Since the *Powell* case was decided, however, a court in the Second Circuit would likely find that the right to privacy about one's gender identity is "clearly established." *See also* *Hunnicut v. Armstrong*, 152 Fed. Appx. 34, 35 (2d Cir. 2005) (holding that the plaintiff adequately alleged a right to privacy claim based on the public discussion of his mental health issues). Also note injunctive relief (where you can make an actor carry out a court's orders) may still be available, even if the prison official has qualified immunity. For more information on qualified immunity and injunctive relief, see Chapter 16 of the *JLM*, "Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Law."

66. *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999). The unnecessary disclosure of an incarcerated person's medical information is generally recognized as a constitutional violation of privacy. *See Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001) ("[T]he constitutional right to privacy in one's medical information exists in prison.").

67. *See Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (holding that the disclosure—or even threat of disclosure—of an arrestee's sexual orientation by a police officer constituted a violation of the

privacy claim brought by an incarcerated person specifically related to sexual orientation.⁶⁸ However, it is important to recognize that the novelty (or “newness”) of your claim makes it somewhat unlikely to succeed. While cases like *Lawrence v. Texas* (where the Supreme Court held that sexual activity between people of the same sex was within the zone of privacy protected by the Constitution)⁶⁹ have found a valid privacy claim for the disclosure of sexual orientation, most of these cases are decided outside of the prison context. Again, there are many limits to constitutional rights for incarcerated people (including limitations on privacy rights).⁷⁰

3. Potential Obstacles to Suit

The Prison Litigation Reform Act (“PLRA”) prohibits requests for emotional distress without related physical injury (that rises above a “de minimis”, or minimal, level).⁷¹ Therefore, a prison official’s violation of your right to confidentiality would have to create a risk of serious harm to be actionable under the Constitution. Yet, the evidence standard is lower if you are alleging sexual abuse and/or sexual harassment because you do not need to show a physical injury.⁷² For more information, review *JLM*, Chapter 14, “The Prison Litigation Reform Act,” on the PLRA.

If this rule prevents you from bringing suit under the Constitution, you may still have a state law remedy available to you. Many states recognize the *tort* of invasion of privacy. A tort is an action, usually for money damages that you can bring against a government or individual defendants if they violate your privacy. If the state in which you are incarcerated recognizes this tort, and has *waived* Eleventh Amendment sovereign immunity (which is a legal concept that prevents you from bring a lawsuit against a state), you can sue for disclosure of your sexual orientation or gender identity under state law.⁷³ Be aware, though, that you may have to file a tort claim or other kind of administrative

arrestee’s constitutional right to privacy because sexual orientation is an “intimate aspect of [one’s] personality entitled to privacy protection” and “[i]t is difficult to imagine a more private matter than one’s sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity”).

68. See *Johnson v. Riggs*, No. 03-C-219, 2005 U.S. Dist. LEXIS 44428, at *36–39 (E.D. Wis. Sept. 15, 2005) (*unpublished*) (recognizing *Sterling’s* right to privacy in one’s sexual orientation in the prison context and denying any sort of legitimate penological purpose in disclosing this information without incarcerated person’s consent but finding for the defendant on grounds of qualified immunity).

69. *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508, 525–526, 71 U.S.L.W. 4574, 2003 Cal. Daily Op. Service 5559, 2003 Daily Journal DAR 7036, 16 Fla. L. Weekly Fed. S 427 (2003) (holding that the “petitioners are entitled to respect for their private lives” and the state “cannot demean their existence or control their destiny by making their private sexual conduct a crime,” relying on the right to liberty under the Due Process Clause and noting that there is an area of personal liberty that the government may not enter).

70. See *Overton v. Bazzetta*, 539 U.S. 126, 135–137, 123 S. Ct. 2162, 2169–2170, 156 L. Ed. 2d 162, 172–173, 71 U.S.L.W. 4445, 6 A.L.R.6th 731, 16 Fla. L. Weekly Fed. S 354 (2003) (finding no substantive due process violation where various prison regulations restricted incarcerated peoples’ rights to receive visits from family members, noting limited privacy rights in prison).

71. 42 U.S.C. § 1997e(e).

72. 28 C.F.R. § 115.72 (2018) (explaining that to bring a substantiated allegation, prisons only require “preponderance of the evidence,” meaning it is more likely than not that you were sexually abused or harassed). Several courts have also allowed emotional distress claims under state laws for incarcerated peoples’ allegations of sexual abuse/harassment. See, e.g., *Chao v. Ballista*, 806 F. Supp. 2d 358, 381 (D. Mass. 2011) (affirming jury verdict that found intentional infliction of emotional distress when incarcerated person was sexually abused by prison guards); *Heckenlaible v. Va. Peninsula Reg’l Jail Auth.*, 491 F. Supp. 2d 544, 553 (E.D. Va. 2007) (“[T]estimony that she was the victim of a sexual assault is sufficient to avoid summary judgment on her intentional infliction of emotional distress claim. She need not come forward with objectively verifiable evidence of severe distress, if the jury believes her testimony about the effects of an intentional sexual assault on her by [prison guard].”).

73. For more information on state tort actions, see Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions.” Note such 11th Amendment waivers are almost always triggered by a state statute that requires filing a notice of claim within a short period of time. If you are thinking about filing such a tort claim under state law, you should be aware of the short filing period and look at Chapter 17 as soon as possible.

claim with the state before you can sue state officials for money damages. This is another reason you should consult with an attorney as soon as possible to make sure you do not miss important deadlines that might apply to any potential case.

E. Assault and Harassment

1. Assault⁷⁴

LGBTQ incarcerated people are often more vulnerable than other incarcerated people to assault (including sexual assault), and to illegal searches by prison guards. Assault can happen at the hands of both fellow incarcerated people, guards or prison staff. If you have experienced such assault, you may be able to bring a Section 1983 claim against prison officials for violation of your Eighth Amendment rights either for assaulting you or for failing to protect you from assault.

You should read Chapter 14, “The Prison Litigation Reform Act,” Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law,” and Chapter 24, “Your Right to Be Free From Assault” of the *JLM* if you are considering bringing a suit against prison officials for assault.

(a) Assault by Prison Employees

The Eighth Amendment protects you from punishment that is cruel or unusual.⁷⁵ Courts have been reluctant to find constitutional violations when prison officials use force to maintain or restore security within the prison.⁷⁶ However, if the force has no identifiable purpose and is simply meant to harm the incarcerated person, a prison official may be found to have used excessive force.

To show that an assault by a prison official violates the Eighth Amendment, you must prove that: (1) the prison official acted “maliciously and sadistically”; and (2) you suffered some physical injury.⁷⁷ This standard was explained by the Supreme Court in *Hudson v. McMillian*, and is known as “the *Hudson* standard.”⁷⁸

To determine whether an official acted maliciously and sadistically, courts will consider factors such as:

- (1) The extent of the injury suffered;⁷⁹
- (2) The need for the official to have used force under the circumstances;

74. See Chapter 24 of the *JLM*, “Your Right to Be Free from Assault by Prison Guards and Other Incarcerated People,” for information on assault in prisons generally.

75. U.S. Const. amend. VIII.

76. U.S. Const. amend. VIII. *Hudson v. McMillian*, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992) (stating that “application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance.”).

77. *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992). See also *Wilkins v. Gaddy*, 559 U.S. 34, 36, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010) (“When prison officials maliciously and sadistically use force to cause harm ... contemporary standards of decency always are violated ... whether or not significant injury is evident.”).

78. The *Hudson* standard applies to excessive force used against convicted incarcerated people. The standard to determine whether excessive force was used against a pretrial detainee is different. For a pretrial detainee to bring a claim against a prison official, he must show a violation of the 14th Amendment Due Process Clause. To do this, he must show that the force was purposeful (not accidental or negligent) and that the deliberate use of force was objectively unreasonable. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–73, 192 L. Ed. 2d 416 (2015). As this is a new case, it is unclear whether the *Kingsley* objective standard for looking at excessive force claims by pretrial detainees under the 14th Amendment goes against the *Hudson* prior finding that a subjective standard is required to assess excessive force claims brought by convicted incarcerated people under the 8th Amendment.

79. While the injury does not have to be “significant” to prevail on an 8th Amendment claim, the extent of the injury “may suggest ‘whether the use of force could plausibly have been thought necessary’ in a particular situation ‘or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.’” *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261–262 (1986)).

- (3) The relationship between the need to use force and the amount of force that was actually used;
- (4) The seriousness of the threat from the point of view of a reasonable person; and
- (5) Efforts made by prison guards to lessen the severity of a serious use of force.⁸⁰

Under the *Hudson* standard, you do not need to show you suffered serious injury, but you must show that you did suffer *some* physical injury. The extent of your injury is one of the factors a court will consider in determining whether the use of force violated the Eighth Amendment's ban on cruel and unusual punishment. Also, the Prison Litigation Reform Act (PLRA)⁸¹ prohibits actions for emotional distress without some physical injury.⁸²

(b) Assault by Other Prisoners

If you have been attacked or feel at risk of attack by fellow incarcerated people, you may bring suit under Section 1983 to claim that prison officials who failed to protect you violated your Eighth Amendment right to be free from cruel and unusual punishment.⁸³

To show that a prison official violated the Eighth Amendment by failing to protect you from assault by other incarcerated people, you must prove that: (1) the prison official exhibited "deliberate indifference" to your health or safety by ignoring an excessive risk to you; and (2) the injury you suffered was severe.⁸⁴

Deliberate indifference is a standard that is harder to meet than *negligence*, but not as difficult as the standard of "malicious and sadistic intent."⁸⁵ Generally, if prison officials were negligent, it means that they should have known of a danger or failed to take the precautions a reasonable person would have taken. If prison officials were acting with malicious and sadistic intent, it would mean that they acted with the intention of causing you harm. "Deliberate indifference" is somewhere in between those two standards; generally, it means that the prison officials were aware of a substantial risk to your safety but ignored it.

The leading case for Section 1983 claims involving assault and deliberate indifference is *Farmer v. Brennan*, in which a transgender incarcerated person brought a Section 1983 suit based on prison officials' failure to protect her from other incarcerated people because of her feminine appearance.⁸⁶ The Supreme Court defined "deliberate indifference" as the failure of prison officials to act when they know of a "substantial risk of serious harm."⁸⁷ The Court went on to say that an "inference from

80. *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992).

81. The physical injury requirement of The Prison Litigation Reform Act (PLRA) may also be important if you are thinking of bringing a sexual abuse claim, which is explained further in subsection 3(b) of Part E. The PLRA also requires that you exhaust administrative options before bringing an action under § 1983. See Chapter 14 of the *JLM* for more information on the PLRA and its requirements.

82. The PREA Standards have a have a lower standard of evidence ("preponderance of the evidence" meaning more than a 50% chance) if you are alleging sexual abuse or sexual harassment. 28 C.F.R. § 115.72 (2016). Although PREA and the PREA Standards do not create a private right of action for incarcerated people (meaning you cannot sue on the basis of a PREA Standard violation), showing that a prison official violated a standard can help to show the seriousness of another claim you are bringing, but again, you cannot sue on this violation alone. See *De'lonta v. Clarke*, 7:11-CV-00483, 2013 U.S. Dist. LEXIS 5354, at *7–8 (W.D. Va. Jan. 14, 2013) (collecting cases stating that PREA does not "create a private right of action for inmates to sue prison officials for noncompliance with [PREA]").

83. See *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding unanimously that prison officials can be liable for damages if they are deliberately indifferent in failing to protect incarcerated people from harm caused by other incarcerated people).

84. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that a prison official cannot be liable under the 8th Amendment for denying an incarcerated person humane confinement conditions unless the official knows of and disregards an excessive risk to individual's health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and must draw that inference).

85. *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824 (1994).

86. *Farmer v. Brennan*, 511 U.S. 825, 831, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994).

87. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

circumstantial evidence” could be used to demonstrate that prison officials had knowledge of a risk.⁸⁸ “Circumstantial evidence” is evidence that tends to support that something is true. This means that an incarcerated person can present evidence showing that it is likely that the prison officials knew of the risk, even if there is no “direct evidence” (such as statements from the officials or documented complaints from the incarcerated person) that shows this risk.

One important thing to keep in mind is that the “inference from circumstantial evidence” does not mean that an official can be held responsible for something he *should have known* but did not know. Rather, it means the circumstantial evidence should demonstrate that the official *actually knew* of something that he denies knowing.⁸⁹

Under *Farmer v. Brennan*, you do not have to wait until you have actually been attacked to bring a viable Section 1983 claim of deliberate indifference. If prison officials did not protect you from a mere *risk* of harm, they may still have deprived you of your rights under the Eighth Amendment. Your status as gay, lesbian, bisexual, or transgender may make it easier for you to prove that you are at risk of harm. If prison officials know your status, then they know you are at a higher risk for harm. For example, in *Greene v. Bowles*, the Sixth Circuit recognized an Eighth Amendment deliberate indifference claim where the warden admitted knowing that the plaintiff was placed in protective custody because she was “transsexual” and that a “predatory inmate” was being housed in the same unit.⁹⁰ The court held that a vulnerable (e.g. gay or transgender) incarcerated person could prove prison officials knew of a substantial risk to his safety by showing the officials knew of the incarcerated person’s vulnerable status, and of the general risk to his safety from other incarcerated people, even if they did not know of any specific danger.⁹¹ Although it may be easier to prove you are at risk if you are a vulnerable incarcerated person, you should still report any threats against you so that officials know about any specific problems, because there must be a *substantial* risk to actually prove deliberate indifference.⁹²

In your complaint, you should ask for a temporary injunction while your case is pending. An injunction is an order from a court making the prison officials take or not take a certain action. In your case, you may seek an injunction to be immediately transferred into protective custody while your claim is pending. Note, however, that for the court to grant you a temporary injunction, you will have to show that you are likely to win your case. You should also be aware that, under the PLRA, any temporary injunction that a court grants you is likely to expire before your case is resolved. You may

88. *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994).

89. To be clear, under *Farmer*, to survive a motion to dismiss the complaint must allege that defendants knew or must have known of a substantial risk of serious harm. You are more likely to bring a successful claim if you can point to concrete facts that show that the defendants knew or must have known of your risk. *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994). The exhaustion requirements under the PLRA can actually be helpful here because if the procedures require multiple levels of review and you have used up all administrative remedies, there will often be signatures by the supervisors that can be used to argue they “knew” of the risk. For more information on the PLRA, see *JLM*, Chapter 14, “The Prison Litigation Reform Act.”

90. *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004). Note that the plaintiff in *Greene* was actually attacked and severely beaten by the other incarcerated person.

91. *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (“[A] prison official cannot ‘escape liability ... by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific incarcerated person who eventually committed the assault.’” (quoting *Farmer v. Brennan*, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994))). The court also noted that deliberate indifference can be shown alternatively by proving that prison officials knew that a predatory incarcerated person presented a substantial risk to a large class of incarcerated people without segregation or other protective measures.

92. See *Purvis v. Ponte*, 929 F.2d 822, 825–826 (1st Cir. 1991) (*per curiam*) (stating the 8th Amendment was not violated when the incarcerated person had a general fear of “gay bashing” and suspected that homophobic cellmates threatened his physical safety, since he did not show a likelihood that violence would occur and officials had tried six different cellmates).

also file a temporary restraining order asking for safe housing, including in a woman's facility if you are a transgender woman.⁹³

Because the PLRA also bars incarcerated people from suing for emotional or mental distress without an accompanying physical injury, and punishes incarcerated people who file multiple lawsuits that courts deem "frivolous" or that fail to state a claim, you should be certain that your claim is one a court will recognize as valid. Be sure to review Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," and Chapter 16 of the *JLM*, "Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law."

2. Sexual Abuse

Sexual abuse includes rape and unwanted physical contact of a sexual nature, such as fondling someone else's breasts and/or genitals.⁹⁴ Generally, bringing a Section 1983 suit for sexual abuse in prison requires analyzing whether an Eighth Amendment violation occurred.⁹⁵ For example, if a prison official sexually abuses you, you must show that the prison official acted maliciously, and that you suffered harm.⁹⁶ Under PREA, the "harm" element is broadly interpreted.⁹⁷ Further, you can show sexual abuse by proving that the degree of assault violates "contemporary standards of decency."⁹⁸ Physical assault is easier to prove because you can show that the prison official acted maliciously and sadistically, you have automatically proven that it violates contemporary standards of decency.⁹⁹ With sexual assault cases, the contemporary standards of decency are often evaluated based on what the state law might say about sexual contact between incarcerated people and prison employees, and whether psychological harm was intentionally inflicted, or whether the assault was "offensive to

93. The PREA Standards require prisons to make individualized housing and program placement. 28 C.F.R. § 115.42(c) (2016) (evaluating transgender or intersex incarcerated person assignments by considering "whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems"). The Standards also require prison staff to look at housing and program assignments at least twice a year to review for threats and must consider an incarcerated person's own view of his or her own safety. *See* 28 C.F.R. § 115.42(d)-(e) (2016).

94. 28 C.F.R. § 115.6 (2016).

95. *See* *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) (holding that there are 8th Amendment limitations to imprisonment, and that sexual abuse is unconstitutional); *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (stating that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards" (citing *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986))). However, some jurisdictions, including New York State, have a zero-tolerance approach to sexual abuse. That means, if you are incarcerated, you are presumed incapable of consent. N.Y. PENAL L. § 130.05. This means that in New York, you can bring a claim against a prison official if you can prove that you were the victim of sexual abuse. N.Y. PENAL L. § 130.52.

96. *See* *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156 (1992); *but see* *Freitas v. Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997) (showing high bar to meet 8th Amendment violation in a "consensual" situation because "welcome and voluntary sexual encounters, no matter how inappropriate, cannot as a matter of law constitute 'pain' as contemplated by the Eighth Amendment").

97. *See* 28 C.F.R. § 115.6 (2016) ("Sexual abuse [includes] ... any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire."); *Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015) (finding sexual abuse of incarcerated people is broadly understood in light of PREA). While under PREA "harm" is broadly interpreted, neither PREA nor the PREA Standards allow an incarcerated person to sue for such a violation under those regulations. *See* *Peterson v. Burris*, No. 14-CV-13000, 2016 U.S. Dist. LEXIS 853, at *4 (E.D. Mich. Jan. 6, 2016) (compiling a list of courts which have found that "PREA does not provide incarcerated people with a private right of action"). While violations of the PREA Standards are not directly enforceable, showing a PREA "harm" occurred may support another claim that you bring.

98. *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156 (1992). *See* *Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015) (applying spirit of PREA to explain that "contemporary standards of decency" changed so that "sexual abuse of incarcerated people, once overlooked as distasteful ... [now] offends our most basic principles of just punishment").

99. *Wilkins v. Gaddy*, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995 (2010).

human dignity.”¹⁰⁰ Courts have different ways of thinking about the subjective prong (which is a test that focuses on a specific prison guard’s state of mind) and analyzing whether a prison guard acted maliciously. Generally, courts assume that if you can show that the sexual contact did not serve a legitimate penological interest, the contact had malicious intent.¹⁰¹ If another incarcerated person assaulted you, you need to show that prison officials acted with deliberate indifference and that you suffered harm.¹⁰²

In addition, Title 18 of the United States Code, Section 2243, criminalizes sexual intercourse or any type of sexual contact between people with “custodial, supervisory or disciplinary” authority (meaning, prison employees) and incarcerated people in federal correctional facilities.¹⁰³ Moreover, Section 2241 of U.S. Code Title 18 makes it a felony for a prison official to use or threaten force to engage in sexual intercourse in a federal prison.¹⁰⁴ Many states also have laws criminalizing sexual contact between prison officials and incarcerated people.¹⁰⁵ See Chapter 24 of the *JLM*, “Your Right To Be Free from Assault by Prison Guards and Other Prisoners,” for more information about assaults.

3. Harassment

(a) Sexual Harassment

Sexual harassment is common in prisons, and LGBTQ incarcerated people are often even more vulnerable to such harassment than other incarcerated people.¹⁰⁶ Federal courts have recognized that sexual harassment of incarcerated people by prison staff can be a constitutional “tort” (an action, usually for money damages that you can bring against a government or individual defendants if they violate your constitutional rights), violating incarcerated people’s Eighth Amendment right to be free from cruel and unusual punishment.¹⁰⁷ A incarcerated person can state an Eighth Amendment claim

100. See, e.g., *Rodriguez v. McClenning*, 399 F. Supp. 2d 228, 237–238 (S.D.N.Y. 2005); *Turner v. Huibregtse*, 421 F. Supp. 2d 1149, 1151 (D. Wis. 2006); *Schwenk v. Hartford*, 204 F.3d 1187, 1196–1197 (9th Cir. 2000) (“A sexual assault on an inmate by a guard—regardless of the gender of the guard or of the prisoner—is deeply offensive to human dignity.”).

101. See *Wood v. Beauclair*, 692 F.3d 1041, 1050 (9th Cir. 2012) (“Where there is no legitimate penological purpose for a prison official’s conduct, courts have ‘presum[ed] malicious and sadistic intent.’”) (citing *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1290 (10th Cir. 1999)); *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997); *Graham v. Sheriff of Logan County*, 741 F.3d 1118, 1123 (10th Cir. 2013) (“Thus, when a prisoner alleges rape by a prison guard, the prisoner need prove only that the guard forced sex in order to show an Eighth Amendment violation.”).

102. See, e.g., *Johnson v. Johnson*, 385 F.3d 503, 527 (5th Cir. 2004) (finding a deliberate indifference claim where prison officials continued to house a gay incarcerated person in the general population where he was gang raped and sold as a sexual slave for over 18 months); *Taylor v. Mich. Dept. of Corr.*, 69 F.3d 76, 84 (6th Cir. 1995) (holding that a warden who knows of a risk of physical and sexual assault posed to a vulnerable incarcerated person and fails to take reasonable steps to protect against such abuse may be found to have acted with deliberate indifference).

103. 18 U.S.C. § 2243. Also, under PREA, whether or not you give your consent, any kind of sexual contact between an incarcerated person and a prison official qualifies as sexual abuse. 28 C.F.R. § 115.6 (2016). Any sexual contact between incarcerated people, without consent, is sexual abuse. 28 C.F.R. § 115.6 (2016).

104. 18 U.S.C. § 2241.

105. While PREA and the standards make some distinctions about “consent” within prison, many states have statutes that criminalize sex between incarcerated people and guards regardless of consent, assuming that consent is not possible given the control dynamics of prisons.

106. National Prison Rape Elimination Commission Report (June 2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf> (last visited Mar. 19, 2017) (compiling key findings on the prevalence of rape and sexual harassment in prisons, findings which helped to create the PREA Standards to counteract some of these issues in a more standardized way).

107. See *Daskalea v. District of Columbia*, 227 F.3d 433, 450 (D.C. Cir. 2000) (finding the District of Columbia deliberately indifferent to a pattern of particularly heinous and widespread sexual harassment and abuse of female incarcerated people, including forced stripteases); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (holding that a pre-operative male-to-female transgender incarcerated person’s 8th Amendment rights were violated by a guard’s attempted rape, which constituted sexual assault offensive to human dignity); *Boddie*

for sexual harassment only if the alleged harassment is so harmful that it could be considered a departure from “the evolving standards of decency that mark the progress of a maturing society,” and only if the defendant acted with intent to harm the incarcerated person.¹⁰⁸ As explained below, incarcerated people generally do not succeed in claims against prison staff for sexual harassment involving words alone. However, incarcerated people have succeeded in claims against prison staff for sexual harassment that *did* involve repeated physical touching or assault, or that threatened the incarcerated person’s safety.¹⁰⁹

The 1996 passage of the PLRA made it much harder for an incarcerated person to succeed in a sexual harassment claim against prison staff. Again, while the PLRA does not explicitly state that incarcerated people cannot sue for sexual harassment, it does say they cannot receive money damages “for mental or emotional injury ... without a prior showing of physical injury.”¹¹⁰ Many courts have interpreted this to mean that you cannot receive money damages for sexual harassment unless the harasser physically hurt you.¹¹¹ But other sorts of relief, like “injunctions” (where the court orders someone to stop or start some action other than the payment of money damages), may be available to

v. Schnieder, 105 F.3d 857, 861–862 (2d Cir. 1997) (noting that sexual abuse by corrections officers could be an 8th Amendment violation, but ultimately holding that the particular allegations of verbal harassment and bodily contact made by incarcerated person were not sufficiently serious to be a violation); Freitas v. Ault, 109 F.3d 1335, 1338 (8th Cir. 1997) (recognizing sexual harassment as a constitutional claim where plaintiff alleges that the harassment objectively caused physical or psychological pain and that the officer acted with a sufficiently culpable state of mind); Johnson v. Phelan, 69 F.3d 144, 147 (7th Cir. 1995) (noting that “a prisoner has a remedy for deliberate harassment, on account of sex, by guards of either sex”). *But see* Minifield v. Butikofer, 298 F. Supp. 2d 900, 904 (N.D. Cal. 2004) (dismissing plaintiff’s sexual harassment claim because, although the Ninth Circuit has recognized that sexual harassment may constitute a claim for an 8th Amendment violation, “the Court has specifically differentiated between sexual harassment that involves verbal abuse and that which involves allegations of physical assault, finding the latter to be in violation of the constitution.”); *see also* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 Am. Crim. L. Rev. 1, 19–23 (1999) (looking at cases both involving physical contact and no physical contact).

108. Thomas v. District of Columbia, 887 F. Supp. 1, 4 (D.D.C. 1995) (citing Hudson v. McMillian, 503 U.S. 1, 8 (1992)).

109. Wood v. Beauclair, 692 F.3d 1041, 1049 (9th Cir. 2012) (holding that if an incarcerated person brings a claim of sexual harassment against a prison official, the individual enjoys the presumption that the sexual contact was nonconsensual); Calhoun v. DeTella, 319 F.3d 936, 939–940 (7th Cir. 2003) (finding that the strip search was conducted “in a manner designed to demean and humiliate” the incarcerated person and was therefore a sufficient 8th Amendment claim); Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (holding that a pre-operative male-to-female transgender incarcerated person’s 8th Amendment rights were violated by a guard’s attempted rape, which constituted sexual assault offensive to human dignity); Watson v. Jones, 980 F.2d 1165, 1165–1166 (8th Cir. 1992) (finding a valid 8th amendment claim where correctional officer sexually harassed two incarcerated people on an almost daily basis for two months by conducting deliberate examination of their genitalia and anuses); Berry v. Oswalt, 143 F.3d 1127, 1131 (8th Cir. 1998) (upholding a jury’s finding that the incarcerated person’s 8th Amendment rights had been violated when a guard “had attempted to perform non-routine pat-downs on her, had propositioned her for sex, had intruded upon her while she was not fully dressed, and had subjected her to sexual comments”); Webb v. Foreman, No. 93 Civ. 8579 (JGK), 1996 U.S. Dist. LEXIS 15227, at *9–10 (S.D.N.Y. Oct. 16, 1996) (*unpublished*) (holding that when a guard conducts a strip search that includes grabbing the incarcerated person’s genitals, the conduct may be a valid 8th Amendment claim); Thomas v. District of Columbia, 887 F. Supp. 1, 4–5 (D.D.C. 1995) (finding a valid 8th Amendment claim where correctional officer harassed incarcerated person and spread rumors that he was gay, thereby endangering him).

110. 42 U.S.C. § 1997e(e).

111. Cobb v. Kelly, No. 4:07CV108-P-A, 2007 WL 2159315, at *1 (N.D. Miss. July 26, 2007) (*unpublished*) (finding PLRA’s physical injury requirement not met when plaintiff’s case manager fondled his genitals); Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, at *5–6 (M.D. Pa. Feb. 8, 2006) (*unpublished*) (finding PLRA’s physical injury requirement not met when correctional officer held and fondled incarcerated person’s penis); Ashann-Ra v. Virginia, 112 F. Supp. 2d 563, 565–566 (W.D. Va. 2000) (finding PLRA’s physical injury requirement not met when correctional officers viewed incarcerated person naked and encouraged him to masturbate). *But see* Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1270 (N.D. Fla. 2002) (finding that incarcerated person who was forced to perform oral sex on fellow incarcerated person suffered physical injury sufficient to satisfy PLRA’s physical injury requirement).

you.¹¹² For this reason it is important to learn about the PLRA, particularly its physical injury requirement, before you file a suit.¹¹³

Nevertheless, for administrative investigations (investigations done by prison officials) evidence of physical injury is not required to show sexual harassment.¹¹⁴

(b) Verbal Harassment

Prisoners who try to sue based on verbal harassment face two obstacles: (1) an interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment that prohibits verbal harassment lawsuits and (2) the PLRA's physical injury requirement. Courts often find that words alone, no matter how abusive, do not violate the Eighth Amendment.¹¹⁵ So, claims by incarcerated people against prison staff for harassment consisting only of words generally do not succeed.¹¹⁶

Additionally, even where incarcerated people have alleged valid Eighth Amendment violations, courts have often determined that the PLRA blocks the suits if there is not a physical injury.¹¹⁷ For instance, harassment by prison staff has been found to violate the Eighth Amendment when it includes threats of attack with a lethal weapon.¹¹⁸ But where there is no physical injury, some courts have

112. Multiple circuits have found that the PLRA does not bar an incarcerated person from injunctive relief. *See* *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001); *Harris v. Garner*, 190 F.3d 1279, 1288 (11th Cir. 1999); *Perkins v. Kansas Dept. of Corr.*, 165 F.3d 803, 808 (10th Cir. 1999); *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Zehner v. Trigg*, 133 F.3d 459, 462–463 (7th Cir. 1997).

113. *See JLM*, Chapter 14.

114. *See* 28 C.F.R. §§ 115.71, 115.72 (2020) (governing federal investigations). State administrative investigations may vary and some may require evidence of a physical injury.

115. *See, e.g., Adkins v. incarcerated person Rodriguez*, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that a jail deputy who had made comments to a female incarcerated person about her body and his own sexual prowess, and entered her cell, stood over her bed, and told her she had nice breasts, engaged in “outrageous and unacceptable” conduct, but that the conduct did not violate the 8th Amendment, because it did not include “physical intimidation”); *Minifield v. Butikofer*, 298 F. Supp. 2d 900, 903 (N.D. Cal. 2004) (“Allegations of verbal harassment and abuse fail to state [an 8th Amendment] claim cognizable under 42 U.S.C. § 1983.”); *Ellis v. Meade*, 887 F. Supp. 324, 328–329 (D. Me. 1995) (holding that a correctional officer allegedly tapping or spanking an incarcerated person’s buttocks and asking “How’s the little boy doing?” did not violate the 8th Amendment because the comment was isolated and carried no threat of violence); *Maclean v. Secor*, 876 F. Supp. 695, 699 (E.D. Pa. 1995) (holding that threats alone do not make a constitutional claim even if the threatened incarcerated person has a particular vulnerability to assault).

116. *See, e.g., Austin v. Terhune*, 367 F.3d 1167, 1171–1172 (9th Cir. 2004) (holding that a guard who exposed genitalia to an incarcerated person from a glass-walled control booth for a 30–40 second “isolated incident” was not serious enough to constitute an 8th Amendment violation, and noting generally that “[a]lthough incarcerated people have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards, the 8th Amendment’s protections do not necessarily extend to mere verbal sexual harassment” (citation omitted)); *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) (finding that a guard’s use of sexually explicit and racially derogatory language was not a constitutional violation, stating that “[s]tanding alone, simple verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a protected liberty interest, or deny a prisoner equal protection of the laws”); *Barney v. Pulsipher*, 143 F.3d 1299, 1310 n.11 (10th Cir. 1998) (holding that verbal harassment and intimidation alone, without allegations of sexual assault, were insufficient to state an 8th Amendment cause of action); *Blueford v. Prunty*, 108 F.3d 251, 254–255 (9th Cir. 1997) (holding that prison guard engaging in “vulgar same-sex trash talk” with incarcerated people incarcerated people was entitled to qualified immunity because an incarcerated person’s right to be free from such behavior was not clearly established at the time the behavior took place); *compare* *Beal v. Foster*, 803 F.3d 356, 359 (7th Cir. 2015) (finding verbal harassment actionable because, when prison guard called plaintiff “punk, faggot, sissy and queer” in front of other inmates, the likelihood of subsequent sexual assault and psychological damage increased). *But see* Chapter 24 of the *JLM* which cites cases holding that incarcerated people may get money damages for psychological injury inflicted by prison staff.

117. *See JLM*, Chapter 14.

118. *See, e.g., Northington v. Jackson*, 973 F.2d 1518, 1524–1525 (10th Cir. 1992) (finding some forms of verbal harassment can inflict cruel and unusual punishment when they involve threatened use of lethal weapons); *Burton v. Livingstone*, 791 F.2d 97, 100–101 (8th Cir. 1986); *Douglas v. Marino*, 684 F. Supp. 395, 397–398 (D.N.J. 1988).

determined that these cases are blocked by the PLRA's physical injury requirement.¹¹⁹ Also, some courts have held the PLRA blocks the recovery of money damages in cases where harassing language or threats are accompanied by groping or abusive touching.¹²⁰

F. Housing and Protective Custody

1. Housing Issues for Transgender Incarcerated People¹²¹

Like most other institutions, prisons are structured around the assumptions that all people are easily classified as either male or female, gender is assigned at birth, and a person's gender remains constant throughout life. These assumptions present challenges for transgender, intersex, and gender-nonconforming incarcerated people, as the overwhelming majority of prisons recognize only two genders and segregate male from female incarcerated people.

Transgender incarcerated people are generally housed either according to the gender they were assigned at birth or by their genitalia.¹²² However, the PREA Standards require housing decisions to be made on an individual basis, taking into consideration the health and safety of the inmate.¹²³ Furthermore, prison staff cannot make housing decisions based only on an incarcerated person's LGBTQ status.¹²⁴

119. *See, e.g.*, Cobb v. Kelly, No. 4:07CV108-P-A, 2007 WL 2159315, at *1 (N.D. Miss. July 26, 2007) (*unpublished*) (finding PLRA's physical injury requirement not met when plaintiff's case manager fondled his genitals); Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, at *5–6 (M.D. Pa. Feb. 8, 2006) (*unpublished*) (finding PLRA's physical injury requirement not met when correctional officer held and fondled incarcerated person's penis); Ashann-Ra v. Virginia, 112 F. Supp. 2d 563, 565–566 (W.D. Va. 2000) (finding PLRA's physical injury requirement was not met when female corrections officers viewed male incarcerated person naked and encouraged him to masturbate); Boxer X v. Harris, 437 F.3d 1107, 1111 (11th Cir. 2006) (finding no 8th Amendment violation when a female prison guard made a male incarcerated person masturbate in front of her under a threat of retaliation, because the case did not present more than a *de minimus* (minimal) injury); Moton v. Walker, 545 F. App'x 856, 860 (11th Cir. 2013) (finding no 8th Amendment violation when officer, with sadistic smile, conducted a visual body cavity search because the incarcerated person only suffered a *de minimus* injury).

120. *See, e.g.*, Walker v. Akers, No. 98-C-3199, 1999 U.S. Dist. LEXIS 14995, at *15–17 (N.D. Ill. Sept. 22, 1999) (*unpublished*) (holding that the PLRA's physical injury requirement bars the recovery of monetary damages where corrections officer threatened incarcerated person and held electric stun gun to his head).

121. All known transgender incarcerated people who have filed lawsuits contesting their conditions of imprisonment that have resulted in reported opinions have been male-to-female (MTF) transgender people. This, of course, does not mean that female-to-male (FTM) transgender incarcerated people do not face challenges while incarcerated. If you are an FTM incarcerated person who wishes to sue officials of the prison in which you are housed, the lack of precedent for such cases should not stop you from doing so. But, it might be advisable to contact an impact litigation organization specializing in transgender rights for help in preparing your claim. See Appendix A of this Chapter, "LGBTQ Resources," for information on these organizations.

122. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 829–830, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 820 (1994) (noting that a pre-operative male-to-female transgender incarcerated person was housed in male housing despite receiving hormone treatments and dressing femininely); Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) (noting plaintiff's incarceration with the male population despite undergoing estrogen therapy and receiving silicone breast implants). *But see* Crosby v. Reynolds, 763 F. Supp. 666, 669–670 (D. Me. 1991) (upholding placement of pre-operative transgender person undergoing hormone treatment, at her request and on the recommendation of the jail's contract physician, within the female population, even in the face of a challenge by the incarcerated person's female cellmate, who alleged it was a violation of her right to privacy); Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) ("the practice of the federal prison authorities . . . is to incarcerate people who have completed sexual reassignment with incarcerated people of the transsexual's new gender.").

123. 28 C.F.R. § 115.42(c) (2020).

124. *See* 28 C.F.R. § 115.42(g) (2020) ("The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates."). Should you experience a violation of these policies, the agency is required to allow you to report the incident to the agency involved and to a public or private third-party agency. *See* 28 C.F.R. § 115.51 (2020).

To date, no one has successfully challenged the gendered housing policies of prisons that places transgender incarcerated people in housing for genders with which they do not identify.¹²⁵ The Supreme Court has explicitly held that incarcerated people do not have a constitutional right to choose their place of confinement.¹²⁶ Moreover, courts generally respect prison officials' choices about how to manage their institutions, and classification within prisons has not been found to violate a liberty interest.¹²⁷ Thus, it is unlikely that you will be able to successfully challenge your housing classification in court.

2. Segregation and Protective Custody

State prisons may not segregate LGBTQ incarcerated people from the general prison population unless either an incarcerated people asks for this or a court order requires such separation.¹²⁸ If being housed with the general population is difficult or harmful for you, you can request to be placed in segregation or protective custody. While LGBTQ incarcerated people deserve protection, the conditions of protective custody often are horrible.¹²⁹

Segregation means different things in different prisons. Some prisons have so many LGBTQ incarcerated people that they have a wing for people identifying themselves as LGBTQ; other prisons can offer only single rooms, or certain cells within a larger segregation unit, for the occasional LGBTQ incarcerated person.¹³⁰

125. See, e.g., *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir. 1982) (denying transgender incarcerated person's equal protection claim for not being classified as a woman and housed with female incarcerated people on ground that a prison administrative decision may give rise to an equal protection claim only if the plaintiff can "demonstrate intentional or purposeful discrimination to show an equal protection violation."); *Lucrecia v. Samples*, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *14–15 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (holding a transgender incarcerated person's legal challenge alleging that her incarceration in a male cell violated due process must fail because no liberty interest was infringed and "housing decisions are within the discretion of prison officials"); *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986) ("Prison authorities must be given great deference to formulate rules and regulations that satisfy a rational purpose and segregation of the sexes is a rational purpose."). See Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more information on challenging administrative decisions.

126. *Meachum v. Fano*, 427 U.S. 215, 216, 96 S. Ct. 2532, 2534, 49 L. Ed. 2d 451, 454 (1976) (reversing lower court decision ruling in favor of plaintiff incarcerated people who sought injunctive and declaratory relief for being transferred to prisons with less desirable conditions following a fire at their previous facility).

127. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418, 429 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."); *Grayson v. Rison*, 945 F.2d 1064, 1067 (9th Cir. 1991) ("When prison officials have legitimate administrative authority, such as the discretion to move inmates from prison to prison or from cell to cell, the due process clause imposes few restrictions on the use of that authority."); *McCray v. Sullivan*, 509 F.2d 1332, 1334 (5th Cir. 1975) ("The federal courts are extremely reluctant to limit the freedom of prison officials to classify incarcerated people as they in their broad discretion determine appropriate."); *Young v. Wainwright*, 449 F.2d 338, 339 (5th Cir. 1971) ("Classification of inmates is a matter of prison administration and management with which federal courts are reluctant to interfere except in extreme circumstances"). For example, incarcerated people who have challenged their classification on other bases, such as security or gang classifications, have also been unsuccessful. See Chapter 31 of the *JLM*, "Security Classification and Gang Validation," for a detailed discussion of legal challenges to security classification decisions and the definition of liberty interests in the prison context.

128. Before the PREA Standards, the separation of LGBTQ-identified incarcerated people was used to punish LGBTQ people or was sometimes based on the false assumption that LGBTQ incarcerated people are sexual predators. 28 C.F.R. § 115.42(g) (2020).

129. Before the PREA Standards, the separation of LGBTQ-identified incarcerated people was used to punish LGBTQ people or was sometimes based on the false assumption that LGBTQ incarcerated people are sexual predators. 28 C.F.R. § 115.42(g) (2020).

130. The New York City prison system, for example, provides separate housing for gay inmates. Darren Rosenblum, "Trapped" in *Sing Sing: Transgender Prisoners Caught in the Gender Binaries*, 6 Mich. J. Gender & L. 499, 524 (2000). The Los Angeles County Jail includes a "homosexual ward" separate from the general prison population where (as of 1990) 350 gay incarcerated people were housed. Patricia Klein Lerner, *Jailer Learns Gay Culture to Foil Straight Inmates*, L.A. Times, Dec. 27, 1990, at B1. See also *Falls v. Nesbitt*, 966 F.2d 375, 376

(a) Getting Into Protective Custody

If you have been placed in general population and have experienced ill treatment there (attack or threat of attack), you may request to be transferred into protective custody through administrative channels.¹³¹ Be aware, though, that the conditions in protective custody could be the same as or very similar to solitary confinement (also called the “hole,” “SHU,” or “AdSeg”). However, according to the PREA Standards, incarcerated people in protective custody should receive access to programs, privileges, education and work opportunities to the greatest extent possible.¹³²

If your protective custody request is not granted when brought through administrative channels, including all administrative appeals processes, you may bring a Section 1983 claim against prison officials for violating your Eighth Amendment right to be free from cruel and unusual punishment. As explained in Part E of this Chapter, a prison official may be held liable under Section 1983 for violating the Eighth Amendment if he acted with “deliberate indifference” to your health or safety—that is, if he knew you faced a substantial risk of serious harm but disregarded that risk by not taking reasonable action to stop it.¹³³ In general, the more serious the threats or attacks against you and the more evidence you can produce that the prison officials knew about the risk but did nothing, the better your chances are of winning in court.

Few Section 1983 suits about the failure to house a incarcerated person in protective custody have been brought by LGBTQ incarcerated people, but several courts have recognized the vulnerability of incarcerated people who do not fit within traditional gender norms.¹³⁴ Before *Farmer v. Brennan*, the few claims that were filed had very limited success.¹³⁵ The *Farmer* Court’s extensive discussion of the

(8th Cir. 1992) (describing a “special section of the prison reserved for those incarcerated people who are slight of build, physically weaker than the typical inmate, preyed upon, or, in many cases, homosexuals”); *McCray v. Bennett*, 467 F. Supp. 187, 190 (M.D. Ala. 1978) (describing segregation unit housing for, among others, “[k]nown homosexuals,” inmates who have histories of institutional violence, and those who are being punished for violating prison rules); *Inmates of Milwaukee Cnty. Jail v. Petersen*, 353 F. Supp. 1157, 1160–1161 (E.D. Wis. 1973) (describing cell block housing for, among others, gay men and narcotic addicts undergoing treatment or detoxification).

131. See Chapter 31 of the *JLM*, “Security Classification and Gang Validation,” for more information on requesting protective custody.

132. 28 C.F.R. § 115.43(b) (2020).

133. See *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that “a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”). See Chapter 16 of the *JLM*, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief From Violations of Federal Law,” for more information about Section 1983 and the deliberate indifference standard.

134. But see *Farmer v. Brennan*, 511 U.S. 825, 850, 114 S. Ct. 1970, 1985, 128 L. Ed. 2d 811, 833 (1994) (allowing an 8th Amendment claim by a transgender incarcerated person to go forward where she was placed in the general population and subsequently sexually assaulted, even though the incarcerated person did not express safety concerns beforehand). See, e.g., *Taylor v. Mich. Dept. of Corr.*, 69 F.3d 76, 82–84 (6th Cir. 1995) (noting that “small, youthful incarcerated people are especially vulnerable to sexual pressure”); *Young v. Quinlan*, 960 F.2d 351, 362 (3d Cir. 1992) (noting that “fellow inmates subjected [plaintiff] to sexual assault on several documented occasions, most likely because of [plaintiff]’s youthful appearance and slight stature”); *United States v. Gonzalez*, 945 F.2d 525, 526–527 (2d Cir. 1991) (noting that “even if [plaintiff] is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him . . . susceptible to homophobic attacks. . .”). See also Chapter 24 of the *JLM*, “Your Right To Be Free from Assault by Prison Guards and Other Incarcerated Persons,” and Part E(1) of this Chapter.

135. See, e.g., *Purvis v. Ponte*, 929 F.2d 822, 825–827 (1st Cir. 1991) (holding that the 8th Amendment rights of a incarcerated person were not violated even after he stated a general fear of “gay bashing” and a suspicion that homophobic cellmates threatened his physical safety, since incarcerated person presented no evidence of strong likelihood that violence would occur and officials had tried six different cellmates); *Falls v. Nesbitt*, 966 F.2d 375, 380 (8th Cir. 1992) (holding that guard who failed to protect gay incarcerated person from a cellmate who ultimately stabbed him was not deliberately indifferent). But see *Young v. Quinlan*, 960 F.2d 351, 362–363 (3d Cir. 1992) (holding that the rights of an incarcerated person described as small, young, and

meaning of “deliberate indifference,” however, may make it easier to win.¹³⁶ Also, the fact that courts have acknowledged the heightened vulnerability of incarcerated people known to be LGBTQ, or who might be thought to be LGBTQ, by giving lighter sentences strengthens the deliberate indifference argument of LGBTQ incarcerated people.¹³⁷ These cases may make it more difficult for a prison official to prove he did not have the required knowledge that LGBTQ incarcerated people are at risk. If you plan to bring a Section 1983 claim for violation of your Eighth Amendment rights, be sure to also read Chapter 16 of the *JLM*, “Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law.”

(b) Getting Out of Protective Custody

Although segregation from the general prison population may afford LGBTQ incarcerated people protection from harassment and assault, the conditions of segregated cells are often worse than those in general population.¹³⁸ If segregation makes you ineligible for certain work detail or denies you access to libraries and other facilities, visitation, or proper medical treatment, prison officials must document those limitations, how long the limitation will last and the reason for such limitation.¹³⁹

If you have been placed in segregation and wish to be housed among the general population, you may request a transfer through administrative channels.¹⁴⁰ The PREA Standards state that you cannot be segregated for more than 30 days, and prison officials may involuntarily segregate only until an alternative arrangement, away from your abuser, can be found.¹⁴¹ If you are unsuccessful, you may file a complaint under Section 1983 and claim that the physical conditions of your segregation violate your Eighth Amendment rights or that the decision to place you in segregation is a violation of your equal protection rights. A Section 1983 claim seeking transfer out of protective custody is far less likely to succeed than an administrative claim requesting transfer *into* protective custody (and is also likely to take a lot longer, and trigger a \$350 filing fee).

Courts have held involuntary segregation—even for non-punitive (non-punishment) reasons—does not infringe on a liberty interest except in narrow circumstances.¹⁴² For example, in a Seventh Circuit

effeminate may have been violated when he was subjected to sexual assaults by other incarcerated people after officials in the federal prison where he was housed ignored his requests for protection), *superseded by statute on other grounds*.

136. *But see* Poole v. Yeazel, No. 94-3199, 1995 U.S. App. LEXIS 16195, at *3-4 (7th Cir. June 29, 1995) (*unpublished*) (holding that a guard who knew incarcerated person had been “labeled a homosexual” did not exhibit deliberate indifference when he failed to protect him from attack, rather “at best the defendants negligently failed to recognize a potential for assault,” a failure that does not rise to the level of a constitutional deprivation).

137. The U.S. Sentencing Guidelines are advisory guidelines that assist judges’ decisions in sentencing for federal crimes. Before 2005, federal courts had to follow the U.S. Sentencing Guidelines, but federal courts permitted what were called “downward departures” or reduced sentences when sentencing defendants known to be gay or who might be perceived to be gay, in order to protect these defendants from prison abuse. *See* 18 U.S.C. app. §5H1.4 *see* United States v. Gonzalez, 945 F.2d 525, 525-526 (2d Cir. 1991) (finding downward departure of gay man’s sentence was authorized, under the U.S. Sentencing Guidelines as interpreted in United States v. Lara, 905 F.2d 599 (2d Cir. 1990), to ensure his safety in prison due to his feminine features which would make him vulnerable to attack by other incarcerated people); *see also* United States v. Wilke, 156 F.3d 749, 754-755 (7th Cir. 1998) (departing from sentencing guidelines because of incarcerated person’s sexual orientation and demeanor). Note that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance alone in determining an incarcerated person’s potential for victimization and thus reduction in sentence. *See* Koon v. United States, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050-2051, 135 L. Ed. 2d 392, 418 (1996) (recognizing that use of physical appearance was discouraged by the Commission, but Commission does not prohibit doing so in all cases).

138. *Davis v. Ayala*, 135 S. Ct. 2187, 2208-2210; 192 L. Ed. 2d 323, 344-347 (2015) (Kennedy, J., concurring) (emphasizing the terrible conditions of solitary confinement).

139. If you are in protective custody and believe you are being denied proper medical treatment, read Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.” 28 C.F.R. § 115.43(b)(1)-(3) (2020).

140. *See* Chapter 31 of the *JLM*, “Security Classification and Gang Validation.”

141. 28 C.F.R. § 115.43© (2020).

142. *See, e.g.,* Martin v. Scott, 156 F.3d 578, 580 (5th Cir. 1998) (holding that, “absent extraordinary

case, the court noted that, while it sympathized with the incarcerated person's desire not to be segregated, it had to take into account that there might not be possible alternatives to keep the incarcerated person's safe outside of the prolonged segregation.¹⁴³ Nevertheless, given the media attention around the Supreme Court case *Davis v. Ayala*, solitary confinement conditions may eventually be re-examined.¹⁴⁴

(c) Challenging the Conditions of Protective Custody

If you cannot or do not want to secure a transfer out of protective custody, but the conditions under which you are living in such custody are bad, you may bring a claim under Section 1983 for:

- (1) Violation of your Eighth Amendment right against cruel and unusual punishment (if, for example, the cell is unclean, or you are not being provided with food and water often enough); or
- (2) Violation of your equal protection rights (if conditions in protective custody are much worse than those in the cells where the general population is housed and the difference is not justified by a legitimate interest, such as security).¹⁴⁵

G. Visitation Rights: Special Issues for LGBTQ Incarcerated People

Most state prisons and all federal prisons have policies that, subject to restrictions, allow incarcerated people to visit with their family members. Unfortunately, because many of these policies define "family" narrowly, LGBTQ incarcerated people whose partners wish to visit them in prison may face special difficulties. Incarcerated people do not have an absolute right to visitation.¹⁴⁶ While prisons may place limitations on visitation, or exclude visitation altogether, those limitations are only allowed if the prison has a legitimate goal rationally related to the functioning of the prison. Courts have accepted justifications such as the rehabilitation of incarcerated people and most importantly, prison security.¹⁴⁷ A prison official cannot simply assert that limitations on your visitation privileges serve

circumstances, administrative segregation as such, being an incident to the ordinary life of a incarcerated person, will never be a ground for a constitutional claim' because it 'simply does not constitute a deprivation of a constitutionally cognizable liberty interest,'" (quoting *Pichardo v. Kinker*, 73 F.3d 612, 612–613 (5th Cir. 1996)); *Sandin v. Conner*, 515 U.S. 472, 482, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418, 429 (1995) (finding that federal courts should defer to prison officials because prisons are "trying to manage a volatile environment."); *see also* Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings."

143. *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987) ("Given her transsexual identity. . . it is unlikely that prison officials would be able to protect her from the violence, sexual assault and harassment about which she complains.").

144. *Davis v. Ayala*, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015).

145. *See Wilson v. Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 282 (1991) (holding that challenges to physical living conditions of prisons are governed by the deliberate indifference standard). For an explanation of the deliberate indifference standard, see Part C(1)(a) of this Chapter. *See, e.g., Williams v. Lane*, 851 F.2d 867, 881–882 (7th Cir. 1988) (holding state provisions for programming and living conditions for protective custody incarcerated people violated the Equal Protection Clause because they were unequal in comparison with general population incarcerated people, and not justified by security concerns). *But see Griffin v. Coughlin*, 743 F. Supp. 1006, 1009–1016 (N.D.N.Y. 1990) (holding that differences in treatment of protective custody incarcerated people at Clinton Correctional Facility with those in other protective custody units in New York State and with those in special programs did not violate equal protection rights of protective custody incarcerated people). For more information about what you need to prove to prevail on a Section 1983 equal protection claim in prison, see Chapter 16 of the *JLM* and Part B(1) of this Chapter.

146. *See Overton v. Bazzetta*, 539 U.S. 126, 133, 123 S. Ct. 2162, 2186, 156 L. Ed. 2d 162, 170 (2003) (upholding prison regulations which prevented family member visits with incarcerated people because regulations had rational relation to a "legitimate penological interest"); *Block v. Rutherford*, 468 U.S. 576, 585–589, 104 S. Ct. 3227, 3232–3234, 82 L. Ed. 2d 438, 446–449 (1984) (finding that the denial of visitation is appropriate when the denial furthered a legitimate government purposes and was not for the purpose of punishment). *See* Part B(1) of this Chapter for an explanation of the way *Turner* has courts evaluate whether a constitutional right should be upheld in prison.

147. Prison administrators decide the "legitimate goals of a corrections system and [so] determin[e] the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 2167, 156

security or rehabilitation interests; the officials must instead show that the visitation policies actually help accomplish the goals they claim and that incarcerated people are given adequate procedural safeguards.¹⁴⁸ This means that if a prison forbids you to visit with your partner because the relationship somehow poses a security risk to the institution, you can challenge the policy by arguing that denying your visitation does not actually help prison security.¹⁴⁹ Although the visitation policies vary from state to state, and state policies are different from the policies in federal prison, the justifications for those policies are similar everywhere. The rest of this Part will help explain why prisons have denied LGBTQ incarcerated people the right to visitation and whether or not those policies can be challenged.

1. Federal Prison Visiting Guidelines

If you are in a federal prison and you want to have regular visitors, you must submit a list of proposed visitors to prison staff members.¹⁵⁰ When prison officials are deciding whether to allow the people on your list to visit you, they will divide your visitors into three categories: (1) members of your immediate family; (2) other relatives; and (3) friends and associates.

Members of your immediate family include your parents, your spouse, and your children. In order for the prison to exclude a member of your immediate family from visitation, prison officials would have to show “strong circumstances” which justify excluding them.¹⁵¹ To exclude a relative who is not a member of your immediate family (including aunts, uncles, and cousins), the prison must have a specific reason.¹⁵² To exclude friends and associates, a prison official only needs to show that they “could reasonably create a threat to the security and good order of the institution.”¹⁵³

Until recently, federal law prohibited treating a same-sex partner as either a member of the immediate family or as another relative. However, the Supreme Court’s recent decisions in *Windsor* and *Obergefell* make clear that government policies that refuse to recognize the marriages of same-sex couples are unconstitutional.¹⁵⁴

If you are not married, the federal regulations do not explicitly forbid prisons from counting same-sex partners as immediate family members. However, same-sex partners do not appear on the list of who counts as immediate family members, meaning the prison officials can refuse to place them on the immediate family list.¹⁵⁵

Classification in the third category (friends and associates) means that prison officials only need to reasonably fear that your visitor will harm security or your rehabilitation in order to exclude them.

L. Ed. 2d 162 (2003) (finding that prison regulations which excluded family members, required children to be accompanied by a family member, and that generally banned visits for incarcerated people with two substance-abuse violations furthered the legitimate prison purposes of deterring alcohol and drug use, maintaining security, and protecting child visitors, and so were valid regulations).

148. See *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904, 1910, 104 L. Ed. 2d 506, 516 (1989) (finding that prison regulations, including prison visitation regulations, must include “specific directives to the decision-maker that if the regulations’ [conditions] are present, a particular outcome must follow, in order to create a liberty interest” for the incarcerated person whose right is being affected). For example, *Thompson* shows that a prison visitation regulation must be written in such a way that make clear the conditions that would trigger the denial of a visit, so that an incarcerated person could reasonably expect to enforce a regulation if a condition was not met. *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 465, 109 S. Ct. 1904, 1911, 104 L. Ed. 2d 506, 518 (1989).

149. If an incarcerated person wants to claim that a visitation regulation is improper because it does not further a legitimate prison purpose, the incarcerated person carries the burden of disproving that a regulation is a valid one. See *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170 (2003).

150. 28 C.F.R. § 540.44 (2020); Fed. Bureau of Prisons, Program Statement 540.44, Visiting Regulations (Dec. 10, 2015) (stating that if an incarcerated person wants to receive regular visitors, he must submit a list of proposed visitors to the staff).

151. 28 C.F.R. § 540.44(a) (2020).

152. 28 C.F.R. § 540.44(b) (2020).

153. 28 C.F.R. § 540.44(c) (2020).

154. *United States v. Windsor*, 570 U.S. 744, 808, 133 S. Ct. 2675, 2715, 186 L. Ed. 2d 808, 851 (2013); see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608, 192 L. Ed. 2d. 609, 635 (2015).

155. 28 C.F.R. § 540.44 (202016).

In the past, prison officials have generally given two reasons for strict visitation policies for LGBTQ incarcerated people. The first reason was rehabilitation. Since sex between men or women was illegal in several states and could be outlawed by the federal government, it was possible for prison officials to claim that allowing incarcerated people visitation with same-sex partners harmed their rehabilitation. After *Lawrence v. Texas*, this reason is inadequate.¹⁵⁶ *Lawrence* said that a state cannot outlaw sex between two men or two women. So, it is difficult to imagine how a state could have a rehabilitative interest in preventing constitutionally-protected sexual activity in today's society. The more recent decisions in *Windsor* and *Obergefell* also make clear that same-sex couples have a right to marry and to have their marriages recognized.

The other more common justification given for restricting a LGBTQ incarcerated people's visitation was security. Prison officials have sometimes claimed that allowing a same-sex partner to visit or allowing the couple to show affection during visitation would open the gay incarcerated person up to possible violence and retribution.¹⁵⁷ While this justification has worked in other contexts (with the right to receive LGBTQ literature—see Part H of this Chapter), courts have often been harsh on prison officials who try to restrict visitation policies. In *Doe v. Sparks*, prison officials had a policy that allowed opposite-sex partners to visit incarcerated people, but did not allow same-sex partners to visit.¹⁵⁸ The prison officials claimed that the policy furthered the purpose of promoting the internal security of the prison. Although this case challenged a state prison policy, the case was decided under federal constitutional equal protection standards found in the Fourteenth Amendment. The court looked closely at the "security" reasons given by the prison. In *Doe*, visitors were not allowed any physical contact, nor were the relationships between the incarcerated people and the visitors announced in any way. The court said that there was no way for other incarcerated people to know of the same-sex relationship between the incarcerated person and the visitor, and therefore any threat to the security of the prison was "so remote as to be arbitrary."¹⁵⁹ The court found that the prison policy was not reasonably related to security concerns, and therefore it violated the federal equal protection standards in the Fourteenth Amendment.

A similar outcome was reached in a case where prison officials denied a gay incarcerated person the ability to kiss and hug his visiting partner. In *Whitmire v. Arizona*, prison policy allowed incarcerated people to kiss and hug family members and opposite-sex partners briefly at the beginning and end of visits.¹⁶⁰ The prison claimed that allowing a male incarcerated person to hug and kiss his male partner would cause other incarcerated people to label him as gay and therefore open him up to attack from other incarcerated people. In *Whitmire*, the incarcerated person was openly gay—he told other incarcerated people about his sexuality and the court also felt that it was implied since he had no problem showing affection for his partner. The court held the prison policy lacked "a common-sense connection" to security since the incarcerated person was already labeled as gay—or was at least willing to be so labeled.¹⁶¹ The court thus determined that the prison was potentially in violation of the incarcerated person's First, Third, Fifth, and Fourteenth Amendment rights.

These cases show that if a federal prison denies you the same visitation privileges as heterosexual incarcerated people merely because of your sexual orientation, you may have a strong claim against the prison for the denial of visitation.

156. *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 2483, 156 L. Ed. 2d 508 (2003).

157. *See Whitmire v. Arizona*, 298 F.3d 1134, 1136 (9th Cir. 2002) (holding that there is no common sense basis for prisons to prevent, for safety reasons, displays of affection between same sex couples when an incarcerated person is openly gay).

158. *Doe v. Sparks*, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

159. *Doe v. Sparks*, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

160. *Whitmire v. Arizona*, 298 F.3d 1134, 1135 (9th Cir. 2002).

161. *Whitmire v. Arizona*, 298 F.3d 1134, 1135 (9th Cir. 2002).

2. New York Visitation Policies

New York State's visitation policies are very similar to those of the federal government, with some notable differences. New York prison regulations hold that the staff of a prison may deny, limit, or suspend the visitation privileges of any incarcerated person if there is reason to believe that "such action is necessary to maintain the safety, security, and good order of the facility."¹⁶²

Also, like federal prisons, New York prisons require that the inmate agree to the visit of a first-time visitor.¹⁶³ These visitors will be admitted unless prison officials can show some legitimate security reason for excluding them.¹⁶⁴ While prison officials generally have a lot of discretion in deciding what constitutes a safety concern, keep in mind that your prison will probably have to follow the same general rules as federal prisons. So, only stating that your same-sex partner would cause a security concern is likely not enough.¹⁶⁵

New York prisons generally allow physical contact between incarcerated people and visitors.¹⁶⁶ This contact can involve a small amount of kissing, hugging, and hand-holding (as long as hands remain in plain view of the staff). All of this can occur at the beginning and end of a visit, and brief kisses and embraces should also be allowed during the course of the visit as long as it does not offend other incarcerated people or visitors.¹⁶⁷ If prison officials try to prevent you from engaging in the same physical contact with your partner that heterosexual incarcerated people are allowed to engage in, you may have a valid claim under both federal and state law.¹⁶⁸

(a) New York's Family Reunion Program

Currently, New York has a Family Reunion Program that allows close family members a chance for more private visits with incarcerated people.¹⁶⁹ The program applies to close relatives and spouses who are in legal marriages.¹⁷⁰ Since New York allows same-sex couples to marry, you should qualify to participate in this program if you are married to a same-sex partner.

(b) New York City's Domestic Partnership Laws

Unlike the rest of New York State and the federal government, New York City's Domestic Partnership Law requires city correctional facilities to give registered domestic partners of incarcerated people the same visitation rights as those granted to married couples.¹⁷¹ This not only means that your domestic partner can visit you under the same rules as married couples but also that domestic partners may visit other family members (which includes your parents, spouse, and children) in the same way that heterosexual spouses may.

Very little case law involving the Domestic Partnership Law exists. This may be because that prisons are treating domestic partners in the same manner as heterosexual spouses. At the very least, the law has been upheld under challenges from various opposition groups.¹⁷²

162. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.4(a) (2016).

163. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.2(a)(1) (2016).

164. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.4(a) (2016).

165. *See Doe v. Sparks*, 733 F. Supp. 227, 234 (W.D. Pa. 1990) (striking down prison policy against visits by incarcerated people' same-sex partners on grounds that the connection between the policy and the supposed security concerns the policy is supposed to address is too remote).

166. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2016).

167. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2016).

168. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2016). *See generally* *Whitmire v. Arizona*, 298 F.3d 1134, 1135–1136 (9th Cir. 2002) (holding that there is no common-sense basis for prisons to prevent, for safety reasons, displays of affection between same sex couples when an incarcerated person is openly gay and similar displays of affection are permitted for heterosexual couples).

169. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.1 (2016).

170. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.3(a) (2016).

171. Admin. Code of the City of N.Y. 3-240 (2015).

172. *See, e.g., Slattery v. City of New York*, 179 Misc. 2d 740, 743, 686 N.Y.S.2d 683, 686 (Sup. Ct. N.Y. County 1999) (holding that New York City had the statutory power to enact the Domestic Partnership Law).

H. Right to Receive LGBTQ Literature¹⁷³

Under *Thornburgh v. Abbott*, prisons may restrict your right to receive publications that may cause a threat to the daily operation of the prison.¹⁷⁴ In other words, you may not be able to receive publications if the prison administration decides that the publication could cause problems with security, order, or discipline. This rule has created special problems for LGBTQ incarcerated people.

1. Sexually Explicit Material with LGBTQ Content

(a) Federal Prisons

In *Thornburgh*, the Supreme Court found constitutional a federal prison regulation that gave prison officials the power to withhold sexually explicit publications—among other types of mail—from incarcerated people, if the officials reasonably believed that those publications posed a threat to prison order or security.¹⁷⁵ The *Thornburgh* Court also upheld as constitutional a 1985 Bureau of Prisons program statement that specifically listed “homosexual (of the same sex as the institution population) material” as “sexually explicit,” and a warden could decide not to allow incarcerated people to receive. The Court justified its decision on two grounds: (1) the material would, once in the prison, circulate and lead to “disruptive conduct”; and (2) if incarcerated people observed a fellow incarcerated person reading such material, they might draw inferences about the incarcerated person’s sexual orientation and “cause disorder by acting accordingly.”¹⁷⁶ After *Thornburgh*, then, all sexually explicit material can potentially be withheld, but it may be easier and more defensible for a warden to censor sexually explicit material depicting two men or two women.

Note that the holding in *Thornburgh* does not necessarily mean that you may never receive sexually explicit publications while in prison. The *Thornburgh* Court only held that a warden may choose to restrict your access to such material. The decisions of different wardens will result in different regulations in different prisons.

173. For general information about your right to communicate with the outside world, including your right to engage in non-legal correspondence, your right to communicate with your lawyer, your right to receive non-LGBTQ publications, your right to have access to news media, and your access to visitation while in prison, see *JLM*, Chapter 19, “Your Right to Communicate with the Outside World.”

174. *Thornburgh v. Abbott*, 490 U.S. 401, 413 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989). Note that the *Thornburgh* standard has replaced the previous and more relaxed standard articulated in *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974). Therefore, cases decided before 1989 are unlikely to be helpful to you because courts will probably only take into account cases decided under the currently prevailing *Thornburgh* test.

175. *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989). Also note that since *Thornburgh*, the U.S. Supreme Court held that a state prison may deny newspapers, magazines, and photos to incarcerated people who are “the worst of the worst” in terms of security threat and behavior. *Beard v. Banks*, 548 U.S. 521, 530, 126 S. Ct. 2572, 2579, 165 L. Ed. 2d 697 (2006) (finding prison regulation banning all newspapers, magazines, and photographs allowable because the regulation was reasonably related to the legitimate prison goals to motivate better behavior, to make it easier for guards to detect contraband, and to the lessen the amount of property to be used as potential weapons). Again, *Beard* demonstrates the wide level of discretion provided to prisons as they regulate incarcerated person’s and the materials received in prison.

176. *Thornburgh v. Abbott*, 490 U.S. 401, 412–413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–473 (1989). Other courts have upheld similar state prison policies on the grounds that pornographic material leads to security risks. See, e.g., *Frost v. Symington*, 197 F.3d 348, 357–358 (9th Cir. 1999) (upholding prison regulation that banned sexually explicit materials depicting sexual penetration because such material could lead to sexual harassment of female guards); *Mauro v. Arpaio*, 188 F.3d 1054, 1057 (9th Cir. 1999) (upholding regulations prohibiting incarcerated people from possessing sexually explicit materials on grounds that regulation was “reasonably related to legitimate penological interests”); *Allen v. Wood*, 970 F. Supp. 824, 831 (E.D. Wash. 1997) (granting defendant prison’s motion for summary judgment because prison regulations prohibiting certain sexually explicit materials satisfied the reasonable relation standard); *Willson v. Buss*, 370 F. Supp. 2d 782, 788–791 (N.D. Ind. 2005) (upholding regulations prohibiting incarcerated person from possessing “general interest magazines directed towards issues relevant to homosexual individuals” on grounds that regulation was “reasonably related to legitimate penological interests”).

Further, though federal regulations allow the censorship of sexually explicit material and several courts have, since *Thornburgh*, upheld restrictions on such material, if wardens in your prison are exercising their discretion selectively (for example, allowing incarcerated people to receive explicit material about opposite, but not same-sex conduct), you may be able to bring a claim under Section 1983 to challenge this conduct on equal protection grounds.¹⁷⁷ If a warden in a federal prison is censoring only same-sex materials, some of the cases from this Chapter might help you make an equal protection challenge. First, it is not clear whether courts will allow prisons to make life more difficult for you simply because other incarcerated people dislike your sexual orientation.¹⁷⁸ Second, if you are already openly gay, lesbian, or bisexual, the warden will have a difficult time justifying a decision based on the idea that other incarcerated people who observe you reading the magazines would make life more difficult for you.¹⁷⁹

Finally, since the *Thornburgh* decision, the Bureau of Prison Program Statement has been updated.¹⁸⁰ It does not single out same-sex materials in the list of types of sexually explicit material the warden may reject. However, a court could still allow censorship of sexually explicit material if the prison could demonstrate legitimate prison-related justifications for restricting the material.

(b) State Prisons

Regulations governing many state prisons also contain provisions that permit censorship of sexually explicit materials depicting gay men or lesbians. State courts have found state prisons' regulations prohibiting this literature to be constitutional.¹⁸¹ For example, a court found that the New Hampshire Department of Corrections Policy and Procedure Directive banning "[o]bscene material, including publications containing explicit descriptions, advertisements, or pictorial representations of homosexual acts, bestiality, bondage, sadomasochism, or sex involving children" was constitutional.¹⁸² The New Hampshire Department of Corrections Policy and Procedure Directive has since updated its policy, removing the prohibition against "representations of homosexual acts."¹⁸³

2. Non-Sexually Explicit LGBTQ Publications

(a) Federal Prisons

The 2011 Program Statement on incoming publications, elaborating on the Federal Bureau of Prisons regulations, provides that:

177. See, e.g., *Frost v. Symington*, 197 F.3d 348, 358 (9th Cir. 1999) (holding that a prison's restrictions on an incarcerated person's possession of images depicting heterosexual penetration did not violate the incarcerated person's 1st Amendment rights); *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) (upholding regulation prohibiting incarcerated people from possessing sexually explicit materials on grounds that regulation was "reasonably related to legitimate penological interests"); *Amatel v. Reno*, 156 F.3d 192, 202 (D.C. Cir. 1998) (holding that regulation banning use of Bureau of Prisons funds to distribute sexually explicit material to incarcerated people was reasonable means of advancing penological interests); *Snelling v. Riveland*, 983 F. Supp. 930, 936 (E.D. Wash. 1997) (rejecting incarcerated person's claim that prison policy banning receipt of written or graphic sexually explicit material violated his 1st Amendment rights), *aff'd*, 165 F.3d 917 (9th Cir. 1998).

178. See *Watkins v. U.S. Army*, 875 F.2d 699, 711 (9th Cir. 1989) (showing that, under *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984), the court is unwilling to allow the Army to prevent an individual from reenlisting on the basis of his sexual orientation.).

179. See *Whitmire v. Arizona*, 298 F.3d 1134, 1136–1137 (9th Cir. 2002) (finding prison officials could not justify a discriminatory policy based on protecting incarcerated person from rumors about his sexuality when the incarcerated person was already "out" in prison).

180. See Federal Bureau of Prisons, U.S. Department of Justice, Program Statement 5266.11, Incoming Publications (2011), available at https://www.bop.gov/policy/progstat/5266_011.pdf (last visited Sept. 30, 2019).

181. See *Willson v. Buss*, 370 F. Supp. 2d 782, 789–791 (N.D. Ind. 2005) (upholding prison supervisor's denial of plaintiff's "blatantly homosexual" literature, claiming a legitimate penological interest in prison security).

182. *Lepine v. Brodeur*, No. 97-72-M, 1999 U.S. Dist. LEXIS 23743, at *15 (D.N.H. Sept. 30, 1999) (*unpublished*) (finding prison regulations forbidding incarcerated people from receiving pornographic publications depicting sex between two men constitutional).

183. N.H. Code Admin. R. Ann. Cor 301.05(j) (Lexis 2016).

“[s]exually explicit material does not include material of a news or information type. Publications concerning research or opinions on sexual, health, or reproductive issues, or covering the activities of gay rights organizations or gay religious groups, for example, should be admitted unless they are otherwise a threat to legitimate institution interests.”¹⁸⁴

This language seems to indicate that you should be allowed to receive a wide variety of LGBTQ publications with political, religious, social, and fictional content while you are in prison. Because prejudice against LGBTQ people often creates the view that everything about sexual orientation is sexual, and anything related to LGBTQ people is about sex, even if it explicitly is not, prison wardens may attempt to keep you from receiving issues of magazines such as *The Advocate* or *Out* on the grounds that they are sexually explicit. Under the 2011 Program Statement quoted above, such conduct in federal prisons is not allowed and can be challenged.¹⁸⁵

(b) State Prisons

Your right to receive non-sexually explicit LGBTQ publications in state prisons is less clear and possibly less strong than in the federal context.¹⁸⁶ Most states do not have program statements like the Federal Bureau of Prisons, and the options given to prison officials in *Thornburgh v. Abbott* may result in many different decisions and regulations even within the same state.¹⁸⁷

I. Changes in the Law

This Part of the chapter is designed to give you a sense of the recent cases that courts look to when deciding cases about LGBTQ incarcerated person rights. This Part begins by briefly explaining a very important Supreme Court case, *Lawrence v. Texas*, in which the Court ruled that states cannot criminalize same-sex conduct.¹⁸⁸ This case will be discussed alongside *Bowers v. Hardwick*, which was overruled by *Lawrence v. Texas*, *Romer v. Evans*, and *Obergefell v. Hodges*, all of which may affect claims brought by LGBTQ incarcerated people.¹⁸⁹ Finally, this Part discusses the general changes to the law that *Lawrence* and *Romer* might bring about.

Because many of the cases discussed in this Chapter are based explicitly on the court's reasoning in *Bowers*, keep in mind that the issues may be open to new interpretation because *Lawrence* and *Romer* came after. Please note that while both *Bowers* and *Lawrence* deal specifically with sexual

184. Federal Bureau of Prisons, U.S. Department of Justice, Program Statement 5266.11, Incoming Publications 2 (2011), available at https://www.bop.gov/policy/progstat/5266_011.pdf (last visited Sept. 26, 2020).

185. It is worth mentioning that publishers also have First Amendment rights regarding subscribers' ability to receive publications in prison. Unlike incarcerated person, publishers are not subject to the Prison Litigation Reform Act and its exhaustion procedures and fee caps, and so are able to sue the prison more freely. Publishers like Prison Legal News and others have repeatedly sued prisons when they have refused to distribute their materials to incarcerated person.

186. See, e.g., *Harper v. Wallingford*, 877 F.2d 728, 730–731 (9th Cir. 1989) (holding that incarcerated person's 1st Amendment rights were not violated when a non-sexually explicit membership application and organization bulletin for the North American Man/Boy Love Association were withheld from him, primarily because they posed a threat to prison security); *Espinoza v. Wilson*, 814 F.2d 1093, 1099 (6th Cir. 1987) (finding that censorship was justified because sexual activity between men had presented security problems at prison in the past and publications that advocate that activity posed a danger to institutional security); *Willson v. Buss*, 370 F. Supp. 2d 782, 787–91 (N.D. Ind. 2005) (finding incarcerated person did not have the right to receive two gay advocacy magazines, although lacking in sexually explicit material, and that the prison regulation banning “blatant homosexual materials” was constitutional).

187. *Thornburgh v. Abbott*, 490 U.S. 401, 417 n.15, 190 S. Ct. 1874, 1883 n.15, 104 L. Ed. 2d 459, 475 n.15 (1989) (noting that “[t]he exercise of discretion called for by these regulations may produce seeming ‘inconsistencies’. . . [but that given the] likely variability within and between institutions over time. . . greater consistency might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications”).

188. *Lawrence v. Texas*, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–519 (2003).

189. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d. 609 (2015).

orientation, they may also affect claims brought by transgender incarcerated people because prison officials may perceive a transgender incarcerated person to be gay, regardless of the incarcerated person's actual sexual orientation.

1. *Lawrence v. Texas* and Due Process Claims

In the June 2003 case *Lawrence v. Texas*, the U.S. Supreme Court found a Texas law that criminalized sex between consenting adults who are the same sex to be unconstitutional.¹⁹⁰ While the decision may not have immediate practical impact on you or your conditions of confinement, the *Lawrence* decision may ultimately have major consequences. In the ruling, the Court held that the right to privacy, as guaranteed by the Fourteenth Amendment, includes the right to engage in consensual intimate or sexual activity, including same-sex activity.¹⁹¹

Many of the cases in this Chapter were decided before *Lawrence*. Because of this, many cases in this Chapter rely on the reasoning in an earlier Supreme Court case, *Bowers v. Hardwick*.¹⁹² *Bowers*, decided in 1986, was in many ways the exact legal opposite of *Lawrence*, and cases that would have relied upon the ruling in *Bowers* may now be decided differently, since *Lawrence* is now the law. For an example of how this can change can play out, see section I3 for a practical example.

(a) *Bowers v. Hardwick*

Bowers v. Hardwick was a Supreme Court case that found the constitutional right to privacy did not extend to sexual acts between consenting adults who are the same sex.¹⁹³ Generally, the Fourteenth Amendment of the Constitution prohibits the government from infringing upon fundamental rights unless there is a sufficient justification for the government's interference.¹⁹⁴ The question of which rights are "fundamental" has been the subject of many court battles. The Supreme Court has held in the past that very private decisions, such as the decision to use birth control or have an abortion, are protected under the Fourteenth Amendment because they involve a fundamental right to privacy.¹⁹⁵ In *Bowers*, the Court held that the right to privacy does not protect a man's right to have consensual sex with another man, and that states could prohibit those sexual acts on the basis of views that gay people are immoral.¹⁹⁶

(b) The End of *Bowers*

When the Supreme Court decided *Lawrence v. Texas*, it explicitly overruled *Bowers*, which means that *Bowers* is longer an acceptable case to use in court.¹⁹⁷ As a result, many cases that relied on *Bowers* in upholding the unequal treatment of LGBTQ incarcerated people might now be questionable. Several important issues arise after *Lawrence*. Keep these issues in mind if you are thinking about filing a lawsuit about your treatment in prison.

190. *Lawrence v. Texas*, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–519 (2003).

191. *Lawrence v. Texas*, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–519 (2003).

192. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

193. *Bowers v. Hardwick*, 478 U.S. 186, 191–192, 106 S. Ct. 2841, 2844, 92 L. Ed. 2d 140, 146 (1986).

194. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1.

195. *Griswold v. Connecticut*, 381 U.S. 479, 485–486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–516 (1965) (holding that the right of married couples to access contraception falls within the right of personal privacy); *Roe v. Wade*, 410 U.S. 113, 154, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177–178 (1973) (holding that the abortion decision falls within the right of personal privacy, but qualifying that it must be considered against some important state interests).

196. *Bowers v. Hardwick*, 478 U.S. 186, 196, 106 S. Ct. 2841, 2846–2847, 92 L. Ed. 2d 140, 149 (1986).

197. *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508, 525 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

First, *Lawrence* says that under the Constitution, all adults, including LGBTQ individuals, have the right to engage in intimate conduct with another adult in private.¹⁹⁸ This means that private, consensual sex between two men or two women is no longer a crime. This does not mean that you have the right to have sex in prison, but it probably does mean that prison officials cannot treat you differently because you identify as LGBTQ or because others see you as LGBTQ.¹⁹⁹

Second, one Supreme Court Justice wrote in *Lawrence* that previous Supreme Court cases show that moral disapproval is not a good enough reason to treat people differently.²⁰⁰ While this statement is not a part of the main decision of the *Lawrence* case, the statement may be useful in court when arguing that your rights have been infringed because of your sexual orientation or gender identity.

Third, *Lawrence* makes all cases that have relied on *Bowers* open to challenge. When you are considering whether or not to bring a legal claim, pay close attention to whether *Bowers* was used in any cases in your jurisdiction. If you think a case relied heavily on *Bowers* and negatively affects your case, contact one of the impact litigation organizations listed in Appendix A at the end of this Chapter. It may be possible to argue that the negative case no longer applies since *Bowers* was overruled.

(c) The Unknown Effect of *Lawrence*

It is hard to predict the effects of *Lawrence*. The case decided that same-sex conduct gets at least some legal protection, so it could influence many other cases involving LGBTQ rights. But courts have hesitated to interpret *Lawrence* as establishing a basis for LGBTQ rights in cases where the facts are different from the facts in *Lawrence*. For instance, sometimes courts will use other previous cases—such as *Romer v. Evans*, which is discussed below—to avoid the question of whether *Lawrence* protects certain conduct.²⁰¹

At least one case that was decided after *Lawrence* has ruled that *Lawrence* does not give incarcerated people a right to receive publications covering LGBTQ issues. In *Willson v. Buss*, an incarcerated person sued the superintendent of his prison for the right to receive LGBTQ-related magazines.²⁰² The court noted that *Lawrence* overruled *Bowers* and recognized a constitutional right to engage in same-sex relationships. However, the court emphasized that this right may not extend fully to the prison context, because prison officials can limit the constitutional rights of incarcerated people for legitimate prison-related reasons.²⁰³

198. *Lawrence v. Texas*, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–519 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual people the right to make this choice.”).

199. Remember that privacy rights can be limited in prison, because courts often decide that the prison rules that affect incarcerated person privacy are “reasonably related” to a “legitimate prison purpose.” *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

200. *Lawrence v. Texas*, 539 U.S. 558, 582, 123 S. Ct. 2472, 2486, 156 L. Ed. 2d 508, 528 (2003) (O’Connor, J., concurring) (“Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”); see also *Romer v. Evans*, 517 U.S. 620, 634, 116 S. Ct. 1620, 1629, 134 L. Ed. 2d 855, 867 (1996) (alteration and emphasis in original) (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 2826, 37 L. Ed. 2d 782 (1973)) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare. . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”).

201. *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); see, e.g., *Johnson v. Johnson*, 385 F.3d 503, 532–533 (5th Cir. 2004) (relying on *Romer* to conclude that the law clearly establishes that disadvantaging an incarcerated person because of his sexuality without any legitimate government purpose violates the Equal Protection Clause).

202. *Willson v. Buss*, 370 F. Supp. 2d 782 (N.D. Ind. 2005).

203. *Willson v. Buss*, 370 F. Supp. 2d 782, 786 (N.D. Ind. 2005). See Part H of this Chapter for more discussion of your right to receive LGBTQ literature while in prison.

2. *Romer v. Evans* and the Equal Protection Clause

The ruling in *Lawrence v. Texas* was based on the right to privacy protected by the Due Process Clause of the Fourteenth Amendment, but the Equal Protection Clause of the Fourteenth Amendment can be another basis for protecting LGBTQ incarcerated people's rights.

The Equal Protection Clause prevents the government from treating different "classes" or groups of people differently unless it has a good enough government-related reason.²⁰⁴ When courts consider equal protection claims, they use different legal standards depending on how the government is classifying people. For example, if the government treats people differently based on their race, it must convince the court that the different treatment is "necessary" to achieve a "compelling government interest." This is the highest standard, called "strict scrutiny," and it is the most difficult standard for the government to satisfy. If the government classifies people based on gender, the classification must be "substantially related" to an "important government objective." This is the "intermediate scrutiny" standard. Other classifications, such as ones based on age, only need to be "rationally related" to a "legitimate government purpose." This is the lowest standard, called "rational basis review," and it is the easiest for the government to satisfy. In general, the higher the standard of review, the more likely it is that the law will be found unconstitutional under the Equal Protection Clause.

Romer v. Evans is the most important case for LGBTQ people bringing equal protection claims.²⁰⁵ *Romer* involved an amendment to Colorado's constitution that prevented local governments from protecting gay, lesbian, and bisexual people as a class. For example, this amendment prevented cities from passing local laws to prohibit discrimination based on sexual orientation. In hearing the case, the Supreme Court could have decided which of the legal standards described above should be applied to classifications based on sexual orientation. However, the Court avoided deciding that question by deciding that the Colorado amendment could not satisfy *any* of the standards, even the lowest one, rational basis review. The Court explained that there was no legitimate government purpose for the amendment. Instead, the amendment seemed to be based on "animus toward the class [gay men and lesbians] it affects."²⁰⁶

Romer v. Evans is important because it says that laws passed to harm a particular group, such as LGBTQ people, cannot survive even the lowest level of constitutional review. That ruling has led to other important victories. In *Johnson v. Johnson*, for example, the Fifth Circuit relied on *Romer* in discussing claims against prison officials.²⁰⁷ In *Johnson*, a gay incarcerated person said that officials failed to protect him from violence and rape by other incarcerated people, even after he told officials about the assaults. The Fifth Circuit said: "It is clearly established that all prison inmates are entitled to reasonable protection from sexual assault. . . . Neither the Supreme Court nor this court has recognized sexual orientation as a suspect classification [or legally protected group]; nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims."²⁰⁸ In other words, a prison cannot create policies that unfairly harm LGBTQ incarcerated people because it would violate the Equal Protection Clause.

3. A Practical Example

To help you figure out how *Lawrence v. Texas* and *Romer v. Evans* can work together to protect LGBTQ rights in prison, consider whether an earlier case about a lesbian incarcerated person, *Doe v. Sparks*, would have been decided differently if it had been decided after *Lawrence* and *Romer*.²⁰⁹

204. For more discussion of the federal Equal Protection Clause, see Part B(2)(g) of Chapter 16.

205. *Romer v. Evans*, 517 U.S. 620, 626–627, 116 S. Ct. 1620, 1624–1625, 134 L. Ed. 2d 855, 862 (1996).

206. *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855, 865–866 (1996). Animus can be defined as "hostility or ill feeling." *Animus*, OXFORD DICTIONARIES, Available at: <https://en.oxforddictionaries.com/definition/animus> (last visited Sep. 26, 2020).

207. *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004).

208. *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004).

209. *Doe v. Sparks*, 733 F. Supp. 227 (W.D. Pa. 1990).

In *Doe v. Sparks*, a lesbian incarcerated person was denied a visit from her girlfriend.²¹⁰ The prison claimed that allowing the visit could cause anti-gay violence in the prison. The incarcerated person tried to bring an equal protection claim. She argued that she was being unfairly targeted for being gay, and that the prison's reasons for denying her girlfriend's visit were not rationally related to a legitimate government purpose. The court, in considering the incarcerated person's claim, acknowledged that "the equal protection clause dictates equal administration of rights and privileges, such as visitation, between similarly situated people."²¹¹

However, the court decided that denying gay and lesbian incarcerated people visitation rights was not a violation of the Equal Protection Clause. Because of *Bowers v. Hardwick*, the court said that LGBTQ people should not be treated as a "class" for equal protection purposes. The court also found that any group that is defined by sexual preference could not bring an equal protection claim.²¹²

This case might have been decided differently after the *Lawrence* and *Romer* decisions. The *Doe* court argued that the Equal Protection Clause can't protect individuals based on their sexual orientation, because *Bowers* already decided that the Constitution allows states to make it a crime for gay men and lesbians to have sex.²¹³ Since *Lawrence* overruled *Bowers*, the *Doe* court's argument for denying federal equal protection falls apart. In addition, *Romer* provides a concrete example of the Supreme Court extending federal equal protection to individuals based on sexual orientation. Thus, after those two cases, a court hearing a case identical to *Doe* would analyze the visitation policy under the federal Equal Protection Clause and would likely find that it does not satisfy even rational basis review.²¹⁴ Nevertheless, as we saw in *Willson v. Buss*, courts might not give these protections in the prison context, even after *Lawrence*.²¹⁵

Therefore, after *Lawrence* and *Romer*, the incarcerated person in *Doe* might now have a stronger claim that the policy discriminated against her due to her sexual orientation and interfered with her right to privacy.²¹⁶

J. Jury Bias

The Sixth Amendment of the United States Constitution guarantees defendants the right to trial by a *fair and impartial* jury in all criminal prosecutions.²¹⁷ If you suspect that the jury that delivered the guilty verdict against you could not make an impartial decision because some of them had

210. *Doe v. Sparks*, 733 F. Supp. 227, 228 (W.D. Pa. 1990).

211. *Doe v. Sparks*, 733 F. Supp. 227, 231 (W.D. Pa. 1990).

212. *Doe v. Sparks*, 733 F. Supp. 227, 232 (W.D. Pa. 1990) ("We hold that conduct which is not in itself protected by substantive due process, natural right, or some source of substantive protection cannot be the basis of an equal protection challenge by the class which engages in the conduct."). However, the court did decide that the policy violated Pennsylvania state law, and thus struck down the visitation policy. *Doe v. Sparks*, 733 F. Supp. 227, 232–234 (W.D. Pa. 1990).

213. Technically, the court concluded that the federal Equal Protection Clause does not protect sexual orientation *on its own*. However, the court concluded that, because Pennsylvania law protects homosexual conduct, federal equal protection applied and required that the visitation policy satisfy rational basis review.

214. Ultimately, the *Doe* court actually *did* conclude that the visitation policy failed to satisfy rational basis review, and therefore violated the federal Equal Protection Clause. But after *Lawrence* and *Romer*, a court would apply federal equal protection directly, rather than go through state law like the *Doe* court did.

215. *Willson v. Buss*, 370 F. Supp. 2d 782, 786–791 (N.D. Ind. 2005) (concluding that the prison regulation on LGBTQ publications satisfied the *Turner v. Safley* test and was therefore constitutional).

216. For further discussion on how *Doe* might be decided today, see Derrick Farrell, *Crime and Punishment Law Chapter: Correctional Facilities: Prisoners' Visitation Rights, The Effect of Overton v. Bazetta and Lawrence v. Texas*, 5 Geo. J. Gender & L. 167, 173–174 (2004); Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 384–404 (2009).

217. See *Irvin v. Dowd*, 366 U.S. 717, 721–722, 81 S. Ct. 1639, 1641–1642, 6 L. Ed. 2d 751, 755–756 (1961). *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (1968) (holding that the Sixth Amendment's guarantee of a jury trial applies to any criminal case in state court that would have gotten Sixth Amendment protection if it were in federal court).

homophobic or transphobic attitudes—prejudice toward LGBTQ people—you may have grounds to challenge your conviction.²¹⁸

Your right to a fair and impartial jury is supposed to be protected by a process called “voir dire.” Voir dire happens before the trial begins. During voir dire, potential jurors are asked questions so the judge and the lawyers can learn more about them. Usually the judge asks the questions, but in some jurisdictions the lawyers also ask questions, or are allowed to submit questions to the judge. Generally, the lawyers from each side are permitted to “strike,” or exclude, jurors based on their answers to the questions. If a lawyer believes a potential juror is biased against his client, the lawyer can ask the judge to exclude that person from the jury “for cause” (for a good reason). If the judge decides that there is evidence of bias based on the person’s answers, the judge can exclude them. Lawyers can request as many “for cause” removals of potential jurors as they want. The judge also has a separate obligation to exclude any potential juror he believes may be biased.²¹⁹

You might have a claim that your right to trial by an impartial jury was violated if:

- (1) The court failed or refused to question jurors during voir dire about their attitudes toward gay or transgender people, *and* your sexual orientation or gender identity was discussed at trial;²²⁰
- (2) The court selected a juror even though that juror had indicated that, due to his homophobia or transphobia, he would have trouble being impartial; or
- (3) The prosecutor conducting the voir dire excluded all the gay or transgender people from the pool of prospective jurors because they were gay or transgender.²²¹

A handful of incarcerated people have challenged their convictions by claiming anti-gay jury bias, but with little success. For example, in *Owens v. Hanks*, a gay incarcerated person whose sexual orientation was discussed during his murder trial argued that he was denied an impartial jury because

218. There is evidence that some prosecutors attempt to use jurors’ homophobia to influence their decision process. *See, e.g.,* Joey L. Mogul, *The Dykier, the Butcher, the Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. City L. Rev. 473, 474 (2005). Lesbians also serve longer sentences than heterosexual women. *See* Robert Leger, *Lesbianism Among Women Prisoners: Participants and Nonparticipants*, 14 Criminal Justice and Behavior 448, 463 (1987). *See* Batson created the standard to show when the prosecutor on a case has shown purposeful discrimination in selecting a jury. *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69, 87 (1986) (“To establish such a case, the [incarcerated person] first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the [jury] members of the defendant’s race.”).

219. *See* *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S. Ct. 1629, 1634, 68 L. Ed. 2d 22, 29 (1981) (“Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire.”).

220. In conducting voir dire, the trial court judge is required to permit at least some questioning about any material issue that will or could arise at trial. *See, e.g.,* *Aldridge v. United States*, 283 U.S. 308, 311–313, 51 S. Ct. 470, 472, 75 L. Ed. 1054, 1056–1057 (1931) (finding voir dire unfair where trial judge “failed to ask any question which could be deemed to cover the subject [of racial prejudice],” in order to uncover a “disqualifying state of mind”). In deciding what questions to ask potential jurors during voir dire, the trial court must exercise its discretion consistently with “the essential demands of fairness.” *See* *Aldridge v. United States*, 283 U.S. 308, 310, 51 S. Ct. 470, 471, 75 L. Ed. 1054, 1056 (1931). Nevertheless, the trial court is given great freedom to determine how best to conduct the voir dire, and failure to ask specific questions will be reversed on appeal only if the judge abuses that discretion. *See* *Rosales-Lopez v. United States*, 451 U.S. 182, 190–91, 101 S. Ct. 1629, 1635–1636, 68 L. Ed. 2d 22, 29–30 (1981).

221. *See* *State v. Johnson*, 706 So. 2d 468, 477–478 (La. Ct. App. 1998) (finding that it was proper for the trial judge to dismiss one juror for anti-gay bias but not a second juror, because the second juror was not sincere when he said he would “almost automatically” convict a defendant he knew was gay, but was instead attempting to avoid jury duty). Some courts have ruled that jurors cannot be removed “for cause” from a jury just for being gay. *See, e.g.,* *People v. Viggiani*, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. N.Y. County 1980) (“To say that [citizens] who may be otherwise qualified, would be unable to sit as impartial jurors in this case, merely because of their homosexuality is tantamount to a denial of equal protection under the United States Constitution.”); *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 479 (9th Cir. 2014) (finding lower court erred by not concluding that a juror was impermissibly dismissed on the basis of his sexual orientation because “it is clear that [defendant] ha[d] no further credible reasons” to dismiss juror).

the court chose several jurors who had expressed bias against gay people during jury selection.²²² The court decided that these expressions of bias did not make his trial unfair because *witnesses* for both the prosecution and the defense were gay, so any anti-gay prejudice in the jury would have affected both parties.²²³ A claim of juror bias might be more likely to succeed if the bias affects only one party.

On the other hand, a New Jersey court reversed the conviction of a defendant on appeal, finding that the trial court had deprived him of his fundamental right to be present when potential jurors were questioned individually. At the voir dire, questions were asked about potential jurors' attitudes toward LGBTQ people, and the defendant had directly requested to be present. The trial court, however, did not allow him into the voir dire.²²⁴ The appeals court held that "[s]ince. . .the evidence suggested that defendant was bisexual because he was a frequent patron [customer] of gay bars, it was important that defendant be present so that he could have formed his own impressions of the jurors' demeanor and visceral reactions when they responded to the questions about homosexuality."²²⁵ Because the defendant was not present when he specifically requested to be, his conviction was reversed. It is important to note that this ruling only guaranteed that the defendant had a right to be present at his case, it did not guarantee a right to trial by a fair jury.

Though there is very little case law, some cases indicate that you might be granted a retrial if LGBTQ people were purposefully excluded from the jury. In *People v. Viggiani*, a New York state case, the court decided that jurors could not be excluded from a jury "for cause" just because both they and the defendant are gay or lesbian.²²⁶ The California Court of Appeals ruled in *People v. Garcia* that the prosecution could not use its peremptory challenges (strikes) to exclude all lesbians from a jury. It found that gay men and lesbians constitute a "cognizable class" (meaning that these jurors share a common trait that makes them distinct) and that completely eliminating them from a jury violated the California constitution.²²⁷

If you believe homophobic or transphobic bias played a role in the selection of your jury, you can try to convince a court to vacate or reverse the judgment against you, or to set aside your sentence.

K. Conclusion

Being lesbian, gay, bisexual, or transgender can make the experience of incarceration especially hard, and the lack of consistent case law involving incarcerated people who are LGBTQ may make you

222. *Owens v. Hanks*, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *3 (7th Cir. June 25, 1996) (*unpublished*). For example, one juror stated during voir dire that "she would unwittingly be influenced by a witness' homosexuality because she believe[d] it [was] morally wrong." Another stated that she did not approve of homosexuality and "would be less likely to believe a homosexual." *Owens v. Hanks*, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *3 (7th Cir. June 25, 1996) (*unpublished*). Please note, however, that *Owens v. Hanks* is an unpublished opinion and therefore may not be an acceptable case to cite in some jurisdictions.

223. *Owens v. Hanks*, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *5-6 (7th Cir. June 25, 1996) (*unpublished*); *see also* *Lingar v. Bowersox*, 176 F.3d 453, 457-558 (8th Cir. 1999) (finding the admission of testimony that defendant was gay during the penalty phase of his murder trial was harmless and did not contribute to the jury's decision, because it was brief and the State did not refer to it during closing argument); *United States v. Click*, 807 F.2d 847, 850 (9th Cir. 1987) (finding that the trial judge did not abuse his discretion by refusing the defendant's request to ask potential jurors a question about "effeminate mannerisms" during the jury selection process, because it would draw attention to the defendant's mannerisms and was not necessary to assess whether the jurors could be impartial); *State v. Lambert*, 528 A.2d 890, 892 (Me. 1987) (finding that the trial judge did not abuse his discretion by questioning potential jurors as a group or by limiting the questioning related to anti-gay bias, because potential jurors completed a confidential questionnaire where they could privately admit any bias, and because the judge asked the group of jurors directly whether the defendant being gay would prevent them from being impartial").

224. *State v. Dishon*, 687 A.2d 1074, 1082, 297 N.J. Super. 254, 269 (N.J. Super. Ct. App. Div. 1997).

225. *State v. Dishon*, 687 A.2d 1074, 1082, 297 N.J. Super. 254, 269-270 (N.J. Super. Ct. App. Div. 1997).

226. *See People v. Viggiani*, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. N.Y. County 1980) ("To say that this entire group of citizens who may be otherwise qualified, would be unable to sit as impartial jurors in this case merely because of their homosexuality is tantamount to a denial of equal protection under the United States Constitution.")

227. *People v. Garcia*, 92 Cal. Rptr. 2d 339, 343-344, 77 Cal. App. 4th 1269, 1275-1277 (Cal. Ct. App. 2000).

hesitant to bring a claim due to uncertainty about how a court will rule on it. Contact the legal organizations in the Appendix for help with your case and send information about the challenges you face in prison to the non-legal advocacy groups listed there. You are in a better position than anyone else to educate LGBTQ activists about the challenges LGBTQ incarcerated people face so that they can better advocate for laws and policies that will improve your situation.

Appendix A

LGBTQ RESOURCES

American Civil Liberties Union Lesbian, Gay, Bisexual, Transgender Project

125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Gay & Lesbian Advocates & Defenders (GLAD)

18 Tremont, Suite 950
Boston, MA 02108
(617) 426-1350

Hotline: 1-800-455-GLAD (1-800-455-4523)

GLAD is a public interest legal organization working to defend and expand the rights of gay men, lesbians, bisexuals, transgender individuals and people with HIV. GLAD responds to over 3,000 requests for information and assistance each year and litigates impact cases.

Gay Men's Health Crisis

307 West 38th Street
New York, NY 10018
(212) 367-1000
Hotline: 1-800-AIDS-NYC (1-800-243-7692)
Legal Services and Advocacy: (212) 367-1326

Immigration Equality

40 Exchange Place, Suite 1300
New York, NY 10005
(212) 714-2904

Immigration Equality is a coalition of immigrants, lawyers, and other activists providing education, outreach, legal services, information, and referrals to combat discrimination in immigration law.

Lambda Legal Defense & Education FundNational Headquarters

120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585

Western Regional Office

4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
(213) 382-7600

Midwest Regional Office

65 E. Wacker Place, Suite 2000
Chicago, IL 60601
(312) 663-4413

Southern Regional Office

730 Peachtree Street, NE, Suite 640
Atlanta, GA 30308
(404) 897-1880

South Central Regional Office

3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
(214) 219-8585

Washington DC Office

1776 K Street, N.W., 8th Floor
Washington, DC 20006
(202) 804-6245

Lambda is a national organization committed to achieving full civil rights of lesbians, gay men, and people with HIV/AIDS through impact litigation, education, and public policy work.

National Center for Lesbian Rights

870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257

NCLR is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, legislation, policy, and public education.

National LGBTQ Task Force

National Headquarters

1325 Massachusetts Ave., NW, Suite 600
Washington, DC 20005
(202) 393-5177

New York Office

25 Broadway 12 Floor
New York, NY 10004
(212) 604-9830

National LGBTQ Task Force is a national progressive organization working for the civil rights of gay, lesbian, bisexual and transgender people.

Sylvia Rivera Law Project

147 W. 24th St., 5th Floor
New York, NY 10011
(212) 337-8550

Sylvia Rivera Law Project fights discrimination against gender non-conforming people, particularly intersex and transgender people, and focuses on people of color and poor people.

Chapter 31

SECURITY CLASSIFICATION AND GANG VALIDATION*

A. Introduction

Upon entering the prison system, all incarcerated people are assigned a security classification. This classification is reevaluated regularly. Your security classification largely determines where you are incarcerated and what sort of treatment you receive while in prison. A lower security classification is better because it means that you have more freedoms and fewer restrictions. You can think of “gang validation” as a subset of security classification. Gang validation is the process that prison officials use to identify incarcerated people that they suspect of being members of gangs or “Security Threat Groups” (“STGs”). If prison officials validate you as a member of a gang, it means that they have classified you as someone who poses a particular security risk. As a result, you may be isolated from other incarcerated people.

Part B of this Chapter discusses general security classifications. It starts with a description of the guidelines for classification of incarcerated people in the Federal Bureau of Prisons (“BOP”) and in New York State, California, and Florida. It then explains some of the legal challenges that incarcerated people have raised to classification decisions in the past. Keep in mind that these challenges have been largely unsuccessful. Part B ends with a description of administrative options for challenging a particular security classification. Part C outlines gang validation and begins with a general discussion of the process. It follows with a summary of the ways that incarcerated people have used the Fourteenth Amendment, the Eighth Amendment, the Fifth Amendment, and Equal Protection claims to challenge their validation as gang members. Because these legal challenges have been largely unsuccessful, the Chapter concludes with some suggestions for challenging gang validation using administrative options.

B. General Security Classification

1. Introduction

In all states, you will be assigned a security classification shortly after entering the prison system. This Chapter focuses on the classification guidelines used in the Federal Bureau of Prisons (“BOP”), in New York’s Department of Corrections and Community Supervision (“DOCCS”), in California’s Department of Corrections and Rehabilitation (“CDCR”), and in Florida’s Department of Corrections (“FDOC”). It also focuses on court challenges that incarcerated people have made to their classification under these guidelines. Most other state prisons use similar classification systems to evaluate incarcerated people. Courts in most jurisdictions are reluctant to interfere in what they view as a prison’s internal administrative matters. However, you should investigate the details of your own state’s procedures.

You should be able to obtain a copy of the classification manual for the system in which you are incarcerated. The classification manual should allow you to verify that the standards used to evaluate you are accurate. However, in some states, such as New York, the classification manual is primarily a set of guidelines for entering data into a computer program. Without access to that computer program, the classification manual will not be very useful, although you may still find it helpful to examine the classification standards in greater detail.

* This Chapter was revised by Romie Barriere, based in part on previous versions by Ben Van Houten and Daniel Green. Thanks to John Boston for his valuable feedback.

2. Federal Bureau of Prisons Classification Guidelines¹

(a) Security Level Score

In the federal prison system, new incarcerated people are assigned a security level score by a Community Corrections Manager in the BOP. Regional and Central Office Designators use this score to assign new incarcerated people to an institution with a corresponding level of security. An institution's security level is determined by the security measures in place at the institution.²

An incarcerated person will have an initial program review about seven months after arriving at the institution, following initial classification. At this time, the incarcerated person will be given a custody classification score. This score refers to how much the staff must supervise the incarcerated person within and beyond the institution. It determines, among other things, the types of work assignments and activities that an incarcerated person may participate in, and the level of staff supervision required.³ Note that the *custody* classification score is different from the *security* classification score. The security classification score is used to match an incarcerated person with a specific type of institution based on the institution's security features.

An incarcerated person's custody classification must be reviewed at least every twelve months and is usually reviewed at the same time as program reviews.⁴ Additionally, an incarcerated person's security level and custody level will usually be reviewed when a new sentence is imposed, when a sentence is reduced, when a disciplinary action occurs, or when there is a change in external factors that might affect the security or custody level.⁵

The calculation of a new incarcerated person's security level score is based on the person's Pre-Sentence Investigation Report ("PSI"), a copy of the judgment from the person's case, and the Individual Custody and Detention Report provided by the U.S. Marshals Service. When there is no PSI, a Post-Sentence Investigation Report will be prepared. In some cases, a Magistrate Information Sheet may be used. The BOP considers several factors when determining the security level score:

- (1) The "level of security and supervision the inmate requires";
- (2) The "level of security and staff supervision the institution is able to provide";
- (3) The incarcerated person's program needs (including substance abuse, medical/mental health treatment, educational training, group counseling and other programs); and
- (4) Various administrative factors, including the level of overcrowding in an institution, its distance from the incarcerated person's release residence, and any recommendations that the judge may have offered.⁶

When considering these factors, the BOP uses a detailed scoring system that includes elements based on the severity of the current offense, any past offenses, and other relevant details. Scores in

1. The Federal Bureau of Prisons classification guidelines are documented in U.S. Department of Justice, Federal Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification (2006), *available at* http://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

2. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 3, at 3 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

3. U.S. Dep. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

4. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006) *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

5. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006) *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

6. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 1, at 1–2 (2006) *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

various elements are entered into a database known as SENTRY. This database then calculates an incarcerated person's security level score. For a detailed breakdown of this calculation, you should refer to the BOP Program Statement.

(b) Other Safety Factors

In addition to the scoring system, the BOP may also check if any of 11 “public safety factors” are present in the incarcerated person's case. These public safety factors are:

- (1) validated membership in a “disruptive group” identified in the Central Inmate Monitoring System (males only),
- (2) current term of confinement in the “Greatest Severity” range according to the Offense Severity Scale (males only),
- (3) sex offender status,
- (4) Central Inmate Monitoring assignment of threat to government official,
- (5) deportable alien status,
- (6) remaining sentence length (males only),
- (7) violent behavior (females only),
- (8) involvement in a serious escape,
- (9) prison disturbance,
- (10) juvenile violence, and
- (11) serious telephone abuse.⁷

If any of these factors are present, they will raise an incarcerated person's security classification despite a score that would, on its own, produce a lower classification.⁸ At maximum, three of these factors will be applied to an incarcerated person. If more than three of the factors apply, those that would provide the greatest public safety and security threat are considered.⁹ These factors may be waived at the discretion of the Regional Director.

In addition, the Regional Director may find that any of 11 “management variables” apply, which would result in an incarcerated person's placement at an institution that is not at the same security level as the incarcerated person's security level score.¹⁰ Examples of Management Variables include population management, medical or psychiatric history, and greater security concerns.¹¹ Thus, management variables generally relate to administrative considerations that might result in an incarcerated person's placement in a specific institution, while the public safety actors relate to the BOP's concern with the threat an incarcerated person poses to society.

Custody classification evaluations are calculated in a similar way. They use a scoring system based primarily upon an incarcerated person's criminal history and behavior within the institution. The warden has discretion to assign an incarcerated person a custody level different from the one indicated by the scoring system. If the warden does this, an explanation must be noted on the incarcerated person's custody classification form. The warden may use public safety factors and management variables in this determination.

7. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 7–10 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

8. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 2, at 4 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

9. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 7 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

10. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 1 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

11. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 3–5 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

There are different scoring systems for calculating the security levels of male and female incarcerated people. Persons under the age of 18 are not subject to this classification system. In addition, certain special cases have special designation procedures, including military incarcerated people and some medical or mental health cases. Please consult the Program Statement for a full list of descriptions of these special cases.

3. New York's Classification Guidelines

In New York, incarcerated people are assigned an initial classification score at a reception facility. Reclassification hearings occur periodically. In New York State, the initial reclassification screening occurs six months after an incarcerated person is taken into custody. Subsequent reclassifications take place every three months after that.¹² The counselor assigning the classification enters numerical factors into a computer program, which then calculates a score. The information used to determine the factor values comes from evidence in the Commitment Paper, the Presentence Report ("PSR"), warrants, the Division of Criminal Justice Services ("DCJS") Summary Case History ("Rap Sheet"), sentencing minutes (when available), your interview, and, if you have served a prior DOCCS term, any available Department records of that term.¹³ Counselors may rely on both official and unofficial documents, although evidence from unofficial documents "should be evaluated in relation to official documents and used where appropriate."¹⁴ If a counselor cannot resolve inconsistencies between documents, the counselor is supposed to use the "most cautious alternative."¹⁵

New York's Security Classification Guidelines identify two types of security risks: (1) public risk, which is the likelihood that an incarcerated person will escape and be a danger to the public; and (2) institutional risk, which is the likelihood that an incarcerated person will be dangerous to staff, other incarcerated people, or himself while incarcerated. The Guidelines use three main factors to determine public risk: (1) history of criminal violence; (2) history of escape and abscondence (hiding to avoid legal proceedings); and (3) time until earliest possible release.¹⁶ The Guidelines identify one main factor that determines institutional risk: institutional disciplinary history.¹⁷

These characteristics are all evaluated by point scores. The point scores are then combined to produce your security classification. More specific descriptions of each of the characteristics can be found in the State of New York DOCCS Classification Manual. The Classification Manual also describes the procedures used for assigning point values and the way in which a score is calculated from these values.¹⁸

12. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-85 (1996) (formerly Department of Correctional Services). To acquire a copy of this manual, you may need to file a request under the New York State Freedom of Information Law. You can also email or write to the *JLM* to receive a copy received under this law. Please refer to Chapter 7 of the *JLM*, "Freedom of Information," for more information on Freedom of Information requests. Please note that, since the publication of the Classification Manual, the New York Department of Correctional Services has been reorganized as the New York Department of Corrections and Community Supervision. However, the Office of Classification and Movement still stands and may be contacted at: The Office of Classification and Movement, New York State Department of Corrections and Community Supervision, The Harriman State Campus – Building #2, 1220 Washington Avenue, Albany, NY 12226-2050. Additionally, please note that some sections of the Classification Manual itself are outdated (for instance, the section on LGBTQ+ incarcerated people).

13. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-43 (1996) (formerly Department of Correctional Services).

14. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-43 (1996) (formerly Department of Correctional Services).

15. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-43 (1996) (formerly Department of Correctional Services).

16. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1 (1996) (formerly Department of Correctional Services).

17. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1 (1996) (formerly Department of Correctional Services); *see also* N.Y. COMP. CODES R. & REGS. tit. 7, app. 1-E (2020).

18. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1–2 (1996) (formerly Department of Correctional Services).

In addition to these main characteristics, you should know that there are thirty-four additional characteristics that are difficult to assign point values to, or that are not used very often. These additional characteristics can affect the classification you receive and may qualify you for a higher classification level, even if you receive a point total that might alone produce a lower classification.¹⁹ For instance, a security characteristic that falls in the “other characteristics” category is an incarcerated person who has been involved in sexual violence against someone of the same gender.²⁰ This is labeled as a “high institutional risk”, but is normally not counted within the same point system.²¹ If there is discrepancy between the point number and the perceived security classification, the counselor responsible for determining the security classification must “us[e] his knowledge of the case material and of the [incarcerated person] to adjust the security classification and explain the adjustment.”²²

Some of these additional characteristics included in the Manual have been updated in other materials that the DOCCS uses to guide its actions. Characteristics of LGBTQ+ incarcerated people are one such subject area. Updating the information from the Classification Manual, a 2014 Respectful Classification Practices with LGBTI Inmates Trainer’s Manual outlines that “lesbian or gay,” “bisexual,” “transgender male,” and “transgender female” characteristics can be incorporated if an incarcerated person self-reports the information, but the characteristic of “gender-nonconforming” may be applied “based on [the] Offender Rehabilitation Coordinator’s observation.” Additionally, there is a new Gender Identity Interview Form, updated in 2020, that the New York DOCCS uses for LGBTQ+ incarcerated people regarding their classifications.²³

You should also be aware that the characteristics for male and female incarcerated people may have different elements.²⁴ Male and female incarcerated people’s scores are evaluated against different classification schemes. The elements for minor and adult incarcerated people may also differ. Finally, there are some cases in which the counselor will feel that the point score does not accurately represent your security risk. He is allowed to adjust the security classification in those cases, although he must provide an explanation for doing so.²⁵ Most other state prison systems have similar provisions that let a counselor or other official assign you a security classification that differs from the one produced from the scoring system.²⁶

19. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1 (1996) (formerly Department of Correctional Services).

20. *Erica King and Maureen Baker*, State of New York, Department of Corrections and Community Supervision, Respectful Classification Practices with LGBTI Inmates Trainer’s Manual, Handout 3:1, *available at* <https://www.prearesourcecenter.org/sites/default/files/library/nysdoccslgbtirespectfulclassificationtrainermanualfinal102914.pdf> (last visited Nov. 21, 2020).

21. *Erica King and Maureen Baker*, State of New York, Department of Corrections and Community Supervision, Respectful Classification Practices with LGBTI Inmates Trainer’s Manual, Handout 3:1, *available at* <https://www.prearesourcecenter.org/sites/default/files/library/nysdoccslgbtirespectfulclassificationtrainermanualfinal102914.pdf> (last visited Nov. 21, 2020).

22. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1 (1996) (formerly Department of Correctional Services).

23. State of New York, Department of Corrections and Community Supervision, Form No. 115.41GI, Gender Identity Interview Form (last updated June 2020), *available at* <https://doccs.ny.gov/system/files/documents/2020/06/115.41gi-06-20.pdf> (last visited Nov. 21, 2020).

24. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-3 (1996) (formerly Department of Correctional Services).

25. State of New York, Dept. of Correctional Services, Office of Classification and Movement, Classification Manual, II-3-4 (1996) (formerly Department of Correctional Services).

26. *See, e.g.*, State of California, Dept. of Corr. & Rehabilitation, Operations Manual §§ 61010.8, 61020.13 (2020), *available at* <http://www.cdcr.ca.gov/regulations/adult-operations/dom-toc> (last visited Feb. 22, 2020) (authorizing department officials to depart from the classification scoring system in individual cases); 103 MASS. CODE REGS. 420.07(3)(f) (1995) (authorizing override of scored classification level); N.J. ADMIN. CODE § 10A: 9-2.14(a) (West 2019) (providing for override of the initial classification or reclassification determination); OR. ADMIN R. 291-078-0020(5) (2011) (providing for either decreases or increases in the level of supervision from that

4. California's Classification Guidelines

In California, new incarcerated people are assigned a classification score when they are committed to state prison.²⁷ This classification determines the type of institution in which the incarcerated person is placed. In California, there are four levels of prisons. Level 1 houses the least dangerous incarcerated people, and Level 4 houses the most dangerous. In order to fill out an incarcerated person classification score sheet, a counselor will first review documents, such as probation reports, and then interview the incarcerated person.²⁸ A committee will then conduct a hearing to determine your classification.²⁹ The committee will review the counselor's score sheet and consider various factors during the hearing, including: 1) background information such as your age at first arrest, current prison term, street gang affiliation, mental illness, prior sentences, and prior incarcerations; and 2) your prior behavior while incarcerated.³⁰ These factors are assigned point scores. Your total score will determine your classification. Sometimes, the law requires a mandatory minimum score for certain sentences or crimes, which will replace your score if it is below the mandatory minimum.³¹ In other cases, prison officials can adjust your score if necessary for safety or other institutional needs, such as prison overcrowding.³² A score of 0–18 means placement in a Level 1 institution; a score of 19–27 means placement in a Level 2 institution; a score 28–51 means placement in a Level 3 institution; and a score higher than 51 means placement in a Level 4 institution.³³

The committee will reclassify you and recalculate your score at least once a year.³⁴ When possible, the committee should give you notice before any hearing so that you have time to prepare.³⁵ At the hearing, the committee will consider two things: 1) your favorable behavior since the last review, such as six month periods without any serious disciplinary actions and six month periods with average or above average performance in certain programs; and 2) any unfavorable behavior since the last review, such as serious misbehavior, assault, possession of a deadly weapon, drug distribution, or starting a riot.³⁶ Favorable behavior will reduce your score, and unfavorable behavior will increase your score. Remember, a lower score means a lower classification and placement in a less secure institution.

5. Florida's Classification Guidelines

In Florida, two groups make security classification decisions: the Institutional Classification Team ("ICT") and the State Classification Office ("SCO").³⁷ The ICT includes the warden or assistant warden, the classification supervisor, and the chief of security. It is responsible for making work, program, housing, and incarcerated person status decisions at a facility and for making other recommendations

determined through the risk assessment score).

27. CAL. PENAL CODE § 5068 (2012).

28. State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61010.9 (2020), *available at* <https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/> (last visited Feb. 22, 2020). To acquire a print copy, you may need to file a request under the Freedom of Information Act. Please refer to Chapter 7 of the *JLM*, "Freedom of Information," for more information on FOIA requests.

29. CAL. CODE REGS. tit. 15, §§ 3375–79 (2019).

30. CAL. CODE REGS. tit. 15, § 3375.3 (2019).

31. CAL. CODE REGS. tit. 15, § 3375.3(d) (2019); *see also* State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61010.11.5 (2020), *available at* <https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/> (last visited Feb. 22, 2020).

32. State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61010.8 (2020), *available at* <https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/> (last visited Feb. 22, 2020).

33. State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61010.11.7 (2020), *available at* <https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/> (last visited Feb. 22, 2020).

34. CAL. CODE REGS. tit. 15, § 3376(d)(2); *see also* State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61020.14 (2020), *available at* <https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/> (last visited Feb. 22, 2020).

35. CAL. CODE REGS. tit. 15, § 3375(e) (2019).

36. CAL. CODE REGS. tit. 15, § 3375.4 (2019).

37. FLA. ADMIN. CODE ANN. r. 33-601.209 (2014).

to the SCO.³⁸ The SCO is responsible for reviewing recommendations made by the ICT.³⁹ When a new incarcerated person arrives, the ICT uses the Custody Assessment and Reclassification computer program (“CARS”) to prepare an automated custody classification questionnaire using all available sources to determine the appropriate degree of supervision. This includes information such as your criminal history and sentence.⁴⁰ When the questionnaire is completed, a computer generated numerical score is used to place you in one of five security classification levels: maximum, close, medium, minimum, and community. These are called “custody grades” by the Florida Department of Corrections.⁴¹ The most restrictive custody grade is maximum custody status, which usually refers to incarcerated people who are sentenced to death.⁴² The least restrictive custody grade is a community custody status, which makes an incarcerated person eligible for placement in a community residential facility.⁴³ Changes can be made to an incarcerated person’s custody grade for various reasons, including changes in charges due to plea bargaining, public interest concerns, family environment, military record, age, and health.⁴⁴ Other factors that may affect your custody status include sex offenses, alien status, escape, and gain time credits.⁴⁵ The SCO can also start a new custody assessment when they decide it is “necessary for the safety of the public or the needs of the department.”⁴⁶

The ICT will meet to review your custody status, assess your adjustment, and determine whether any changes may be necessary. You must appear at any review or assessment unless a documented permanent medical condition makes you unable to participate. You should receive notice at least forty-eight (48) hours in advance unless you have waived your right to notice in writing. Assessments will occur at least every twelve months.⁴⁷ Custody grades can be increased or decreased throughout your sentence. If your behavior is favorable, your custody grade should decrease as the time remaining on your sentence decreases.

6. Classification of Female Incarcerated People

While many state correctional agencies use the same classification guidelines for male and female prisons, some states, including Idaho, Massachusetts, New York, and Ohio, as well as the BOP, apply different guidelines or weigh factors differently. For example, as stated in Part B(2)(b) of this Chapter, the BOP only considers “violent behavior” as a public safety factor for female incarcerated people. Factors specific to male incarcerated people include the severity of the offense, membership in a disruptive group and the remaining length of the sentence. Because there are more men in prison than women, there are also more prisons built for male incarcerated people. Thus, in many states female incarcerated people with different classification levels are housed together. Female incarcerated people may also be over-classified or placed in a higher security level than necessary. The majority of

38. FLA. ADMIN. CODE ANN. r. 33-601.209(3) (2014). In private prisons (prisons that are not operated by the government), a Department of Corrections representative must also be on the ICT when the ICT is reviewing custody decisions.

39. FLA. ADMIN. CODE ANN. r. 33-601.209(2) (2014).

40. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(b)–(c) (2014).

41. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(a) (2014).

42. See Florida Dept. of Corr., *Inmate Orientation Handbook: Reception Center Processing* 8 (2016), available at <http://www.dc.state.fl.us/pub/files/InmateOrientationHandbook.pdf> (last visited Feb. 21, 2020).

43. See Florida Dept. of Corr., *Inmate Orientation Handbook: Reception Center Processing* 8 (2016), available at <http://www.dc.state.fl.us/pub/files/InmateOrientationHandbook.pdf> (last visited Feb. 21, 2020).

44. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(d)(1)–(9) (2014).

45. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(h) (2014) (listing the exceptions to the rule that incarcerated people convicted of crimes involving sex acts are not ordinarily eligible for community or minimum custody status); FLA. ADMIN. CODE ANN. r. 33-601.210(2)(k) (2014) (specifying certain conditions under which alien incarcerated people shall not be assigned to a custody status any lower than close custody); FLA. ADMIN. CODE ANN. r. 33-601.210(4)(e) (2014) (stating that a prison may alter the regular schedule for assessments and reviews in cases of escape or other unusual occurrences); FLA. ADMIN. CODE ANN. r. 33-601.210(4)(k) (2014) (“Additional gain time is to be considered at the time of any scheduled or unscheduled review.”).

46. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(g) (2014).

47. FLA. ADMIN. CODE ANN. r. 33-601.210(4)(c) (2014).

classification systems were designed for male incarcerated people and fail to predict the needs of female incarcerated people.⁴⁸ In 2000, a group of female incarcerated people sued the Michigan Department of Corrections (“MDOC”) and reached a settlement concerning the classification of female incarcerated people. The MDOC agreed to make changes to the classification system as it was applied to female incarcerated people and to conduct research regarding the changes.⁴⁹ If you are considering bringing a similar lawsuit to challenge the use for females of a classification system designed for males, you should read this case closely. You should also consider contacting an advocacy organization such as the Women’s Prison Association or the California Coalition for Women Prisoners.⁵⁰

7. Legal Challenges to Classification Decisions

Generally, legal claims made to improve the conditions of imprisonment are filed under 42 U.S.C. § 1983 (“Section 1983”). Because your security classification determines the conditions of your imprisonment, most incarcerated people who challenge their security classification file their claims under Section 1983. The U.S. Constitution and other federal statutes provide a broad range of individual rights. Section 1983 is a federal statute that protects you from violations of these rights by allowing you to sue the individuals responsible in federal court.⁵¹ It is important to note, however, that there is little federal law on the issue of classification. Instead, state law generally governs these matters. You should look to the law of your own state and individual prison regulations, and when it is possible you should always try to have the regulations enforced in state court. You can look to federal court if a state remedy does not exist, or if the federal remedy would override the state remedy.⁵²

For detailed instructions on how to file a claim under Section 1983, see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.” It is also important that you read Chapter 14 of the *JLM* on the Prison Litigation Reform Act (“PLRA”). The PLRA requires you to exhaust administrative remedies before filing suit and imposes substantial penalties if you fail to do so.⁵³

One possible legal challenge to classification decisions is a due process challenge. The Due Process Clause of the Fourteenth Amendment protects individuals, including incarcerated people, from the loss of “life, liberty, or property” at the hands of the government without due process of law.⁵⁴ But the

48. See PATRICIA L. HARDYMAN & PATRICIA VAN VOORHIS, U.S. DEPT. OF JUSTICE, THE NAT’L INST. OF CORR., DEVELOPING GENDER-SPECIFIC CLASSIFICATION SYSTEMS FOR WOMEN OFFENDERS viii (2004) *available at* <https://s3.amazonaws.com/static.nicic.gov/Library/018931.pdf> (last visited Feb. 21, 2020).

49. See State Bar of Michigan’s Prisons and Corrections Section, *Litigation Update: Female Prisoners’ Portion of Cain Case Settled*, PRISONS & CORR. FORUM, (State Bar of Michigan’s Prisons and Corr. Section), Spring/Summer 2000, at 6–7, *available at* <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/61a5ea9f-95b2-431b-9931-cd1d84a2cff9/UploadedImages/pdfs/spring00.pdf> (last visited Feb. 21, 2020) (the *Cain* settlement agreement included provisions agreeing to: hire an expert to evaluate the type, quantity, or quality of misconducts issued to male and female incarcerated people; ensure that female incarcerated people have access to legal assistance; provide an unmonitored telephone to allow incarcerated people to participate in court ordered hearings; and settle outstanding claims).

50. Women’s Prison Association, *available at* <http://www.wpaonline.org/> (last visited Feb. 22, 2020); California Coalition for Women Prisoners, *available at* <http://www.womenprisoners.org/> (last visited Feb. 22, 2020). For more information about the settlement, see the earlier class action suit, *Cain v. Dept of Corr.*, 548 N.W.2d 210, 451 Mich. 470 (Mich. 1996).

51. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492, 497 (1961) (applying § 1983 to illegal search of civilian home and detention of citizen by police), *overruled in unrelated part by* *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 695, 98 S. Ct. 2018, 2038, 56 L. Ed. 2d 611, 638 (1978).

52. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 174, 81 S. Ct. 473, 477, 5 L. Ed. 2d 492, 498 (1961) (explaining that one aim of § 1983 is “to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice”), *overruled in unrelated part by* *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 695, 98 S. Ct. 2018, 2038, 56 L. Ed. 2d 611, 638 (1978).

53. Most importantly, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). For more information on the exhaustion requirement, see Part E of Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

54. U.S. Const. amend. XIV, § 1. For a more detailed discussion of liberty interests and the degree of due process rights owed to incarcerated people, see Chapter 18 of the *JLM*, “Your Rights at Prison Disciplinary

Constitution itself does not provide incarcerated people the right to be housed at any particular classification level. Therefore, an incarcerated person must rely on state law to create a liberty interest that receives protection under the Due Process Clause of the Fourteenth Amendment.⁵⁵ In 1995, in *Sandin v. Conner*, the Supreme Court created a new standard for determining whether conditions of imprisonment violate due process.⁵⁶ The new standard emphasizes the nature of the deprivation suffered by the incarcerated person. You should be careful researching this issue, however, as much of the case law on incarcerated person classification was decided under an old standard. You must make sure that the cases you research use the current *Sandin* standard.

In *Sandin*, the Court held that state-created liberty interests “will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,”⁵⁷ and that the hardship imposed upon the incarcerated person must be of “real substance.”⁵⁸ Following *Sandin*, courts have been extremely reluctant to find that a particular security classification constitutes a deprivation of a constitutional liberty interest. Two key considerations are the conditions of segregation and the duration of segregation.⁵⁹ Incarcerated people have not been successful in convincing courts that the officials’ decision to classify them in a particular way constituted an “atypical and significant” deprivation of liberty. Incarcerated people have had more success, however, challenging long-term placement in administrative segregation.⁶⁰

Proceedings.”

55. *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429 (1995) (“States may under certain circumstances create liberty interests which are protected by the Due Process Clause.”).

56. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (finding no liberty interest in incarcerated person’s administrative segregation absent “atypical and significant hardship in relation to the ordinary incidents of prison life.”).

57. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

58. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974). Generally, hardships of “real substance” involve some physical injury or other deprivation related to an incarcerated person’s person. Otherwise, the unfair treatment may not be recognized as a constitutional liberty interest. *See, e.g., Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) (finding due process claim meritless because incarcerated person had no protectable interest in custodial classification and did not allege physical injury in claim for damages); *Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998) (holding that under ordinary circumstances administrative segregation will never be grounds for a constitutional claim because it does not constitute deprivation of a constitutional liberty interest) (citing *Pichardo v. Kinker*, 73 F. 3d 612, 612–613)(5th Cir. 1996).

59. In recent years, a number of circuit courts have addressed the question of classification rights under *Sandin* and have found a violation of a protected liberty interest in only limited cases. *See, e.g., Iqbal v. Hasty*, 490 F.3d 143, 161 (2d Cir. 2007), (holding that an incarcerated person has a protected liberty interest “only if the deprivation . . . is atypical and significant and the state has created the liberty interest by statute or regulation”) (quoting *Sealey v. Giltner*, 116 F.3d 47, 52 (2d Cir. 1997)); *rev’d on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1954 (2009); *Morales v. Chertoff*, No. 06-12752, 2006 U.S. App. LEXIS 31846, at *3–4 (11th Cir. Dec. 27, 2006) (*unpublished*) (finding that the issue of custodial classification does not implicate an atypical or significant deprivation); *Portley-El v. Brill*, 288 F.3d 1063, 1065 (8th Cir. 2002) (holding that “administrative and disciplinary segregation are not atypical and significant hardships under *Sandin*”); *Leamer v. Fauver*, 288 F.3d 532, 546 (3d Cir. 2002) (holding that, “[u]nder *Sandin*, the mere fact of placement in administrative segregation is not in itself enough to implicate a liberty interest”); *Hatch v. District of Columbia*, 184 F.3d 846, 856 (D.C. Cir. 1999) (finding that, following *Sandin*, “a deprivation in prison implicates a liberty interest protected by the Due Process Clause only when it imposes an ‘atypical and significant hardship’ on an incarcerated person in relation to the most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences”); *Freitas v. Ault*, 109 F.3d 1335, 1337–1338 (8th Cir. 1997) (holding that administrative detention and prison transfer without a hearing do not meet the “atypical and significant hardship” required to implicate a liberty interest).

60. *See Giano v. Selsky*, 238 F.3d 223, 226 (2d Cir. 2001) (quoting *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000)) (finding that an aggregated period of confinement in administrative segregation of 762 days is a “sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*”). In New York, at least, when looking at whether placement in administrative segregation constitutes an “atypical and significant” hardship, federal courts will combine separate special housing unit (“SHU”) and disciplinary segregation sentences where they constitute a sustained period of confinement. *Sims v. Artuz*, 230 F.3d 14, 23–24 (2d Cir. 2000) (finding that two 365-day placements in administrative segregation, combined with

One reason it is so difficult to succeed on a Fourteenth Amendment claim is that even where the court finds a liberty interest, an incarcerated person will still lose his case if the prison's policies satisfy due process (remember that the Fourteenth Amendment does not protect you from any deprivation of liberty, but only those undertaken without due process of law). In *Wilkinson v. Austin*, the Supreme Court found that incarcerated people had a protected liberty interest in avoiding placement in a Supermax facility which imposed "atypical and significant hardships" on the incarcerated people such as twenty three hours in their cells, non-contact visits, and indefinite placement.⁶¹ While the Court recognized the liberty interest for incarcerated people, it still held that the prison's procedural policies satisfied due process.⁶² The Court also clarified that the liberty interest protected—an interest in avoiding transfer to a higher level of confinement—is not created by the Constitution, but instead produced by state policies and regulations.⁶³

Classification that affects parole eligibility may also establish a liberty interest. For example, you may have an argument that you would be eligible for parole, were it not for your incorrect classification. In *Wilkinson*, the Court considered the fact that incarcerated people lost their eligibility for parole while incarcerated at the Supermax facility in addition to the factors listed above (duration of confinement and conditions of confinement). The Court found that together they resulted in atypical and significant hardships.⁶⁴

You may also be able to challenge your classification in state court on the grounds that prison officials gave you an unfair classification based on their evaluation of the information contained in the Commitment Paper, the Pre-Sentence Report ("PSR"), warrants, the DCJS Summary Case History ("Rap Sheet"), sentencing minutes, the interview, or any available Department records of a prior DOCS term. It may be possible to convince the court that some of the information contained in these documents was incorrect, or that a clerical error was made in transferring the information from these documents onto a classification worksheet or into a computer program. If an error like this was made, any security classification based on them was not only unfair, but also invalid, because it would be based on false information.⁶⁵ Be aware that you may face difficulties in obtaining these documents for review, and that you may be unsuccessful in doing so even if you bring the matter to court.⁶⁶

several other shorter sentences, could constitute "atypical and significant" hardship). This means they will consider time spent in administrative segregation, regardless of whether it was in a different facility, if the confinement is continuous. In *Giano*, for instance, the court combined the incarcerated person's 92-day confinement at one institution with his 670-day confinement at another. *Giano v. Selsky*, 238 F.3d 223, 226 (2d Cir. 2001). *But see* *Smart v. Goord*, No. 04 Civ. 8850 (RWS), 2008 U.S. Dist. LEXIS 16053, at *7–8 (S.D.N.Y. Mar. 3, 2008) (*unpublished*) (finding no due process violation and refusing to aggregate (combine) sentences because the two periods were not identical and not due to the same rationale, as one was for the plaintiff's own protection while the other for possession of contraband).

61. *Wilkinson v. Austin*, 545 U.S. 209, 220, 125 S. Ct. 2384, 2393, 162 L. Ed. 2d 174, 188 (2005).

62. *Wilkinson v. Austin*, 545 U.S. 209, 230, 125 S. Ct. 2384, 2398, 162 L. Ed. 2d 174, 193 (2005).

63. *Wilkinson v. Austin*, 545 U.S. 209, 221–222, 125 S. Ct. 2384, 2393, 162 L. Ed. 2d 174, 189 (2005).

64. *Wilkinson v. Austin*, 545 U.S. 209, 224, 125 S. Ct. 2384, 2395, 162 L. Ed. 2d 174, 190 (2005) (finding that each factor on its own may not be enough to constitute "atypical and significant hardship" but taken together they do); *see also* *Neal v. Shimoda*, 131 F.3d 818, 828–830 (9th Cir. 1997) (holding that classification as a sex offender deprived incarcerated person of a liberty interest where refusing sex offender treatment made one ineligible for parole).

65. *Udzinski v. Coughlin*, 188 A.D.2d 716, 717, 592 N.Y.S.2d 801, 802 (3d Dept. 1992) (ordering that petitioner's crime and sentence report, upon which his security classification was based, be corrected because Department of Correctional Services employees inaccurately transcribed information from pre-sentence report into their own documents).

66. New York State's pre-sentence reports must be confidential (meaning that reports "may not be made available to any person or public or private agency"), except where disclosure is permitted or required by statute or "specific authorization of the court." N.Y. CRIM. PROC. LAW § 390.50 (McKinney 2018). Where there is no relevant statutory provision, an incarcerated person may obtain a copy of the report "upon a proper factual showing for the need thereof." *Shader v. People*, 233 A.D.2d 717, 717, 650 N.Y.S.2d 350, 351 (3d Dept. 1996). *See, e.g., Kilgore v. People*, 274 A.D.2d 636, 636, 710 N.Y.S.2d 690, 691 (3d Dept. 2000) (finding petitioner's "bare assertion" that he required the

Again, there is little federal law in this area, but state law may allow suits based on violations of state law and state-created liberty interests or prison regulations. Even in state courts, however, it may still be difficult to succeed on your claim. In California, courts have deferred to the classification decisions of prison officials, limiting judicial intervention to instances when “actions by prison officials are arbitrary, capricious, irrational, or an abuse of the discretion granted those given the responsibility for operating prisons.”⁶⁷

8. Administrative Options

Courts generally do not like to interfere with security classification. Therefore, the most realistic approach to lowering your classification may be through your prison’s internal appeals process. Keep in mind that an unsuccessful federal lawsuit could have consequences for you under the Prison Litigation Reform Act (“PLRA”).⁶⁸ Additionally, the PLRA requires that you exhaust administrative options before bringing a legal action under Section 1983.⁶⁹ Be sure to read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”

No matter where you are incarcerated, your security classification should be periodically reviewed. You should notify your assigned counselor of any information that you think could impact your security classification, such as a change in your rap sheet. You should also give copies of any relevant documents to your counselor. You will need to research the administrative rules in your prison regarding appeals of security classification. For example, in California you are able to contest classification decisions resulting in adverse effects (such as an increased custody level) during your reclassification hearing, and are then able to appeal your score and hearing results to your prison’s Classification Committee.⁷⁰

Finally, if you are incarcerated in New York and you have exhausted all of the internal administrative options, you can begin an Article 78 court proceeding. Article 78 provides a way to challenge administrative decisions in court. Article 78 only applies to the state of New York, but if you are imprisoned elsewhere, you should research whether or not your state has a similar law.⁷¹ For detailed instructions on bringing an Article 78 proceeding, see Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules.” *There are very strict rules and time limits* to remember when bringing an Article 78 proceeding, so it is important that you read Chapter 22 carefully.

pre-sentence report in order to properly prepare for an appearance before the Board of Parole insufficient to constitute a showing of need for the report); *cf.* Gutkaiss v. People, 49 A.D.3d 979, 979–980, 853 N.Y.S.2d 677, 678 (3d Dept. 2008) (finding that the petitioner had made a proper factual showing entitling him to a copy of the report where “petitioner had notice of an impending hearing before the Board and his presentence report was one of the factors to be considered by the Board in determining his application for release”). *See also* CAL. CODE REGS. tit. 15, § 3375(j)(1)–(4) (requiring that incarcerated people in California, intending to challenge any information collected in their intake forms, provide necessary documentation to support their challenge).

67. *In re Wilson*, 202 Cal. App. 3d 661, 667, 249 Cal. Rptr. 36, 40 (1988) (finding basis for the incarcerated person’s classification as a sex offender, even when the related charges were dismissed and, therefore, that prison officials did not act arbitrarily or capriciously when they classified the incarcerated person as a sex offender).

68. For example, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). See Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” for more information on PLRA.

69. The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).

70. State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 62010.4.2.1 (2020), *available at* <https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/>. (last visited Feb. 23, 2020).

71. *See, e.g.*, FLA. STAT. ANN. §120.68 (2019); CAL. GOV’T CODE § 53069.4(b)(1) (Deering 2019). Similar to Article 78 of the New York Civil Practice Law and Rules, most state statutes contain strict time limitations on when you can challenge administrative proceedings in court, so be sure to read your own state’s rules carefully.

C. Gang Validation

1. Definition and Discussion

Gang validation is the process by which prison officials determine that an incarcerated person is an associate or a member of a gang or Security Threat Group (“STG”). Once prison officials make that decision, the incarcerated person is often “administratively segregated,” meaning that he is housed separately from, and receives different treatment than incarcerated people who have not been validated as gang members or associates. Although the specific procedures vary from state to state, Arizona, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Michigan, Nebraska, Oregon, Tennessee, Texas, and Wisconsin all segregate suspected gang members from the rest of the prison population.⁷² Please note that this is not an exclusive list of state procedures related to gangs and other associations. Some states’ administrative codes may be difficult to find, and some might follow practices that are not explicitly mentioned in the code but may be found in a policy directive. While a state prison system may use a standard written definition of what constitutes a gang member, the process for actually proving that someone is a gang member, and the amount of proof required, may vary by state.⁷³ Generally, the only way to be declassified as a gang member is to “debrief.” “Debriefing” is a process that may involve informing prison officials of the identities and activities of fellow gang members. Debriefing can place the suspected gang member’s well-being at risk and expose him to retaliation. This Section discusses the problems that individuals who have tried to challenge their gang validation in court have experienced, and it offers some suggestions for challenging gang validation through administrative proceedings rather than in court.

California’s system of gang validation is one of the most developed and punitive in the country. California has been segregating suspected gang members since at least 1984, and other states have studied California in developing gang validation procedures of their own.⁷⁴ In California, and states with similar procedures, you are validated as a gang member if you are found to meet three or more factors.⁷⁵ These factors include, among others, gang tattoos, correspondence to or from known gang members or correspondence that contains references to gang activity, wearing gang colors, association with known gang members, possession of gang-related literature, possession of a photograph of known gang members, and identification by a fellow incarcerated person as a gang member. Misconduct is not necessarily required to be labeled a gang member.

72. See State of Arizona, Department of Corrections, Department Order No. 806, Security Threat Groups (STGs) (2009), *available at* <https://corrections.az.gov/sites/default/files/0806.pdf> (last visited Feb. 19, 2020); CAL. CODE REGS. tit. 15, § 3335 (2020); State of Colorado, Department of Corrections, Policies Nos. 600-01 & 600-09 (2019), *available at* <https://www.colorado.gov/pacific/cdoc/policies-1> (last visited Feb. 19, 2020); State of Connecticut, Department of Correction, Administrative Directive No. 6.14, Security Risk Groups (2013), *available at* <https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0614pdf.pdf?la=en> (last visited Feb. 19, 2020); FLA. ADMIN. CODE, 33-601.800 (2)(a) (2016); ILL. ADMIN. CODE tit. 20, § 505.40 (2020); 103 MASS. CODE REGS. 421.09 (2020); State of Michigan, Department of Corrections, Policy Directive No. 04.04.113, Security Threat Groups (2015), *available at* http://www.michigan.gov/documents/corrections/04_04_113_482417_7.pdf (last visited Feb. 19, 2020); 72 NEB. ADMIN. CODE § 1-003.02(D) (2019); OR. ADMIN. R. 291-069-0270 (2019); State of Tennessee, Department of Correction, Administrative Policy No. 404.10, Administrative Segregation, Placement, Review, and Release (2017), *available at* <https://www.tn.gov/content/dam/tn/correction/documents/404-10.pdf> (last visited Feb. 19, 2020); State of Texas, Department of Criminal Justice, Offender Orientation Handbook 31 (2017), *available at* http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf (last visited Feb. 19, 2020); WIS. ADMIN. CODE DOC § 308.04(2)(d) (2019).

73. Claire Johnson et al., Nat’l Crim. Just. Reference Serv., *Prosecuting Gangs: A National Assessment*, in NIJ RESEARCH IN BRIEF 1, 2–3 (NCJ Publication No. 151785, 1995), *available at* <https://www.ncjrs.gov/pdffiles1/Digitization/151785NCJRS.pdf> (last visited Feb. 19, 2020).

74. Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1129 (1995).

75. Madrid v. Gomez, 889 F. Supp. 1146, 1242 (N.D. Cal. 1995) (quoting the California Department of Corrections Operations Manual § 55070.19.2, which requires at least three “original, independent source items of documentation indicative of actual membership” in a gang).

Florida uses the term Security Threat Group (“STG”) which includes “formal or informal ongoing groups, gangs, organization[sic] or associations consisting of three or more members who have a common name or common identifying signs, colors, or symbols; a group whose members/associates engage in a pattern of gang activity or department rule violation; or whose potential work together could pose a threat to the prison.”⁷⁶ Similar to California, Florida defines a “criminal gang member” as a person who meets two or more factors. These factors include, among others, self-identification as a criminal gang member, identification as a criminal gang member by a parent or guardian, identification by a documented reliable informant, adopting the style of dress of a criminal gang, adopting the use of a hand sign identified as used by a criminal gang, having a tattoo identified as used by a criminal gang, and associating with one or more known criminal gang members.⁷⁷

New York State uses the label “Security Risk Group” and defines a gang as “a group of individuals, having a common identifying name, sign, symbol or colors who have engaged in a pattern of lawlessness” such as violence, destruction of property, threats, intimidation, harm, or drug smuggling. Incarcerated people are prohibited from wearing, possessing, or distributing gang materials or insignia (identifying marks or symbols of the gang) or participating in gang-related activities or meetings.⁷⁸ In a recent New York case, an incarcerated person unsuccessfully challenged his classification as a member of a Security Risk Group (“SRG”) based on the observation of him greeting another incarcerated person with gang signs. In that case, the court found gang validation and classification as a member of a SRG to be “merely an observation tool” that does not result in a loss of liberty.⁷⁹

Most of the case law on gang validation comes from California, where incarcerated people have been most active in using the courts to challenge their classification as gang members. For that reason, the following discussion addresses claims regarding gang validation that have been filed in California, both in state and federal court. Federal courts have generally not been receptive to incarcerated person claims. They have not decided whether incarcerated people have a constitutionally protected “liberty interest” in being classified a particular way. Instead, federal courts have found that the due process afforded to incarcerated people by the California system would be sufficient even if such an interest was found to exist.⁸⁰ For this reason, courts have rejected Fourteenth Amendment claims that a gang member classification violates an incarcerated person’s right to due process.⁸¹ The courts have also rejected Eighth Amendment claims that the “debriefing” requirement subjects an incarcerated person to cruel or unusual punishment,⁸² and claims that classification as a gang member violates an incarcerated person’s Fifth Amendment protection from self-incrimination.⁸³ Courts have generally

76. FLA. ADMIN. CODE, 33-601.800 (1)(s) (2016).

77. FLA. STAT. § 874.03(2)-(3) (2019).

78. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2(B)(6)(iv) (2020).

79. *Arriaga v. City of New York*, No. 06 Civ. 2362 (PKC) (HBP), 2008 U.S. Dist. LEXIS 41433, at *20–21 (S.D.N.Y. May 20, 2008) (*unpublished*), *aff’d*, No. 08-3410-pr, 2010 U.S. App. LEXIS 6168 (2d Cir. Mar. 25, 2010) (*unpublished*).

80. *Castañeda v. Marshall*, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*) (finding no due process violation because the incarcerated person received notice of his classification and continuing placement in the security housing unit, and his placement there was based on reliable information), *aff’d*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 24, 1998) (*unpublished*); *Galvaldon v. Marshall*, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished*) (finding no due process violation because the incarcerated person had an opportunity to present his views to the Criminal Activities Coordinator, the incarcerated person’s status was based on sufficient and reliable evidence, and his status was given periodic review).

81. *Castañeda v. Marshall*, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*); *Galvaldon v. Marshall*, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished*).

82. *Castañeda v. Marshall*, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *25–26 (N.D. Cal. Mar. 10, 1997) (*unpublished*).

83. *Griffin v. Gomez*, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *17–18 (N.D. Cal. June 29, 1995) (*unpublished*), *aff’d in part and remanded on other grounds*, No. 95-16684, 1998 U.S. App. LEXIS 3152 (9th Cir. Feb. 24, 1998) (*unpublished*); *Castañeda v. Marshall*, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *23–24 (N.D. Cal. Mar. 10, 1997) (*unpublished*); *Medina v. Gomez*, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208,

found that prison officials should be granted broad discretion in such administrative matters, and courts in California have dismissed most gang validation complaints at the summary judgment stage (meaning that the incarcerated person was not able to reach the full trial stage).

Before you bring any action, you should consider the possibility that the court where you argue your case will follow the lead of the California courts. You should also consider the implications that dismissal of your case could have for you under the Prison Litigation Reform Act.⁸⁴ Finally, before taking any action, it is important that you also read Part B of this Chapter, which is devoted to general security classification and contains additional information that you may find relevant.

2. Fourteenth Amendment Claims

The Due Process Clause of the Fourteenth Amendment protects individuals, including incarcerated people, from loss of “life, liberty, or property” at the hands of government without due process of law.⁸⁵ However, courts in California have found that administrative segregation does not violate the Due Process Clause. They have generally determined that it is not necessary to decide whether an incarcerated person has a valid state-created liberty interest in being free from administrative confinement because the due process provided to incarcerated people by the California system would be sufficient even if this liberty interest were found to exist.⁸⁶

In California, courts consider adequate the due process provided in classification and administrative segregation proceedings. The courts have found that California procedures provide the incarcerated person with some notice of the charges against him. The procedures also provide him with an opportunity to present his views to the official charged with deciding whether or not to transfer him to administrative segregation. Due process requires that, following an incarcerated person’s administrative segregation, officials must engage in some sort of periodic review of his confinement.⁸⁷ Although prison officials are not required by due process to provide the names of their sources of information in validating a suspected gang member, if they fail to do so, the record must contain a prison official’s statement that safety considerations prevented the disclosure of the informant’s name.⁸⁸

The Ninth Circuit has found that the Due Process Clause does *not* require:

- (1) Detailed written notice of charges,
- (2) Representation by counsel or counsel-substitute,
- (3) An opportunity to present witnesses,
- (4) A written description of the reasons for placing the incarcerated person in administrative segregation, or

at *15-16 (N.D. Cal. Aug. 14, 1997) (*unpublished*).

84. For example, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). See Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” for more information on the PLRA.

85. U.S. Const. amend. XIV, § 1. For a more detailed discussion of liberty interests and the degree of due process rights owed to incarcerated people, see Chapter 18 of the *JLM*, “Your Rights at Prison Disciplinary Hearings.”

86. *Castañeda v. Marshall*, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*); *Galvaldon v. Marshall*, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished*).

87. *Rojas v. Cambra*, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *11 (N.D. Cal. May 20, 1997) (*unpublished*); *Castañeda v. Marshall*, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *13 (N.D. Cal. Mar. 10, 1997) (*unpublished*); see also *Hewitt v. Helms*, 459 U.S. 460, 477 n.9, 103 S. Ct. 864, 874 n.9, 74 L. Ed. 2d 675, 692 n.9 (1983) (noting that prison administrators must engage in some sort of periodic review of whether the incarcerated person remains a security threat), *as modified by Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

88. See *Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1987) (holding that due process requires the affirmative statement of a prison official where safety considerations prevent the disclosure of the informant’s name and additional facts to show that the information was reliable); *Castañeda v. Marshall*, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *16 n.6 (N.D. Cal. Mar. 10, 1997) (*unpublished*) (finding that prison officials must include a statement that the informant’s name was not included for safety purposes).

- (5) The disclosure of the identity of any person providing information leading to the placement of the incarcerated person in administrative segregation.⁸⁹

Placement in segregation for an indeterminate period based upon gang membership does not require any procedures beyond those required in regular administrative segregation cases.⁹⁰ However, an incarcerated person may not be confined separately for gang affiliation unless the record contains at least some factual information from which prison officials can reasonably conclude that the information supporting segregation is reliable.⁹¹ In California, under statute, information is considered reliable if one or more of the following elements are met:

- (1) The confidential source has previously given information that has proven to be true,
- (2) Other confidential sources have independently provided the same information,
- (3) The information provided by the confidential informant is self-incriminating,
- (4) Part of the information provided is corroborated (confirmed) through investigation or information provided by non-confidential sources,
- (5) The confidential informant is the victim, or
- (6) This source successfully completed a polygraph examination.⁹²

Finally, a further due process claim that you might make is that your validation as a gang member has been made in retaliation for some other unrelated legal activity that you have engaged in, such as filing an appeal. To state the “*prima facie* case,”⁹³ you must show that retaliation for the exercise of protected conduct was the “substantial” or “motivating” factor behind the prison officials’ actions.⁹⁴ Additionally, you must show that the retaliatory action did not advance legitimate prison management or incarcerated person treatment goals (referred to as “penological goals”),⁹⁵ or was not “narrowly tailored” enough to achieve such goals. Targeting of incarcerated people for gang validation without a good reason is not an action that is narrowly tailored to achieve legitimate penological goals. For example, you might try to argue that gang validations without good cause actually misdirect prison resources away from other proceedings and compromise prison security.⁹⁶ Once you have established a *prima facie* case of retaliation and demonstrated that the retaliatory action does not advance a legitimate penological goal, the burden shifts to the prison officials. They must establish that they

89. Toussaint v. McCarthy, 801 F.2d 1080, 1100–1101 (9th Cir. 1986); Medina v. Gomez, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208, at *9 (N.D. Cal. Aug. 14, 1997) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *13 (N.D. Cal. Mar. 10, 1997) (*unpublished*).

90. Madrid v. Gomez, 889 F. Supp. 1146, 1274–1275 (N.D. Cal. 1995) (holding that, in order to satisfy due process, an incarcerated person cannot be segregated for gang affiliation unless the record contains “some factual information” sufficient to satisfy the reliability standard used in other administrative segregation proceedings); see Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *8–10 (N.D. Cal. May 20, 1997) (*unpublished*).

91. Madrid v. Gomez, 889 F. Supp. 1146, 1274 (N.D. Cal. 1995); see Koch v. Lewis, 96 F. Supp. 2d 949, 965 (D. Ariz. 2000) (noting that there must be some reliable evidence of current gang/STG membership before the state may impose indefinite administrative segregation), *vacated as moot*, Koch v. Schriro, 399 F.3d 1099 (9th Cir. 2005); accord, Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001) (holding that there must be specific facts to support administrative segregation based on gang membership).

92. CAL. CODE REGS. tit. 15, § 3321(c) (2020).

93. To state a *prima facie* case is to state sufficient facts to allow the judge or jury to find in your favor if everything you said is true and undisputed.

94. Koch v. Lewis, 96 F. Supp. 2d 949, 956 (D. Ariz. 2000). See Chapter 24 of the *JLM*, “Your Right To Be Free from Assault by Prison Guards and Other Prisoners,” for more information on your rights against retaliation.

95. See Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” and Chapter 27 of the *JLM*, “Religious Freedom in Prison,” for more information on the “legitimate penological goals” language and the *Turner* standard.

96. See Koch v. Lewis, 96 F. Supp. 2d 949, 956 (D. Ariz. 2000) (“[I]nstituting STG proceedings without good cause would misdirect prison resources away from proceedings involving a legitimate compromise to prison security.”). While an argument of wasting prison resources was effective in *Koch*, many other courts have held that gang validation supports the goal of prison security. See, e.g., Stewart v. Alameida, 418 F. Supp.2d 1154, 1163 (N.D. Cal. 2006) (finding the prison’s regulations on gang validation did not violate the incarcerated person’s rights because the regulations were reasonably related to the valid penological interest of security).

would have validated you as a gang member even if you had not engaged in the legally protected conduct.

3. Eighth Amendment Claims

The Eighth Amendment of the Constitution prohibits “the unnecessary and wanton infliction of pain”⁹⁷ and punishment that is grossly disproportionate (out of proportion) to the severity of the crime.⁹⁸ California courts have rejected that the debriefing process⁹⁹ constitutes an Eighth Amendment violation because it could subject an incarcerated person to retaliation from other gang members, thereby placing his life and well-being at risk. They have generally found this allegation to be speculative. Courts will not allow this argument to go forward without evidence of a particular threat to the incarcerated person bringing the case, or without evidence that prison officials are not concerned about the incarcerated person’s well-being.¹⁰⁰

4. Fifth Amendment Claims

The Fifth Amendment of the Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.”¹⁰¹ Debriefing generally requires an incarcerated person to disclose information regarding himself and other gang members and their gang-related activities. Prison administrators have argued, and courts have agreed, that debriefing is necessary to determine whether an incarcerated person is telling the truth about no longer being a part of the gang. Prison officials have also argued that debriefing helps to determine if a gang member’s information is reliable and helps to gather further information about the gang.¹⁰²

California courts have held that the debriefing requirement does not violate Fifth Amendment protection against self-incrimination because the information acquired in debriefing is not (under California’s policy) used in later criminal proceedings.¹⁰³ Courts have held that the right against self-incrimination “does not arise in the debriefing processing,” and therefore that prison officials are not required to provide incarcerated people with immunity.¹⁰⁴ Remember that the right against self-incrimination is a personal protection and may not be invoked to prevent the implication of others, such as other people involved in the gang.

Keep in mind, however, that if you are incarcerated in California, the policies surrounding debriefing provide you with only thin protection. Although the regulations state that debriefing is “not for the purpose of acquiring incriminating evidence against the subject,”¹⁰⁵ they do not explicitly forbid the evidence from being used in later legal proceedings. Partly as a result of incarcerated people

97. *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)).

98. *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981) (citing *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 2866, 53 L. Ed. 2d 982, 989 (1977) (plurality opinion)).

99. For more on debriefing, see Part C(4) of this Chapter.

100. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986) (stating that an incarcerated person may bring a §1983 claim under the Eighth Amendment if it is shown that prison officials acted with “deliberate indifference” to a serious threat of harm to an incarcerated person by another incarcerated person); *followed by* *Pollard v. GEO Group, Inc.*, 629 F.3d 843, 863 (9th Cir. 2010), *rev’d on other grounds sub nom.* *Minnecci v. Pollard*, 565 U.S. 118, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012).

101. U.S. Const. amend. V.

102. *Madrid v. Gomez*, 889 F. Supp. 1146, 1241 (N.D. Cal. 1995) (“Because prison gang members ‘join for life,’ the CDC considers debriefings necessary to prove the renunciations of gang memberships are genuine.”).

103. *Griffin v. Gomez*, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *8–11 (N.D. Cal. June 29, 1995) (*unpublished*), *aff’d in part and remanded in part on other grounds*, No. 95-16684, 1998 U.S. App. LEXIS 3152 (9th Cir. Feb. 24, 1998) (*unpublished*); *Castañeda v. Marshall*, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *23–24 (N.D. Cal. Mar. 10, 1997) (*unpublished*), *aff’d*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 24, 1998) (*unpublished*); *Medina v. Gomez*, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208, at *16 (N.D. Cal. Aug. 14, 1997) (*unpublished*).

104. *Griffin v. Gomez*, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *19 (N.D. Cal. June 29, 1995) (*unpublished*).

105. CAL. CODE REGS. tit. 15, § 3378.5(b) (2019).

challenging the debriefing process, the regulations also provide that if an incarcerated person “makes a statement that tends to incriminate [himself] in a crime,” he must waive his right against self-incrimination “prior to questioning . . . about the incriminating matter.”¹⁰⁶ However, the prison official or gang investigator conducting the debriefing determines when a statement “tends to incriminate,” and the debriefing incarcerated person has no attorney or representative present at the debriefing. If you are currently appealing your conviction or sentence and considering debriefing, you should talk to your appellate attorney about the possible implications debriefing may have on your appeal.

If you are not in California, it may be worth investigating whether or not the system in which you are incarcerated has a policy regarding the use of information gathered through gang debriefings in future criminal proceedings. If it does not have such a policy, then the debriefing requirement may present a valid Fifth Amendment issue.

5. Equal Protection and Free Exercise of Religion Claims

To win on an equal protection claim, an incarcerated person usually must prove: (1) that the government has intentionally treated similarly situated incarcerated people differently and (2) that there is no rational relationship between this dissimilar treatment and any legitimate penal interest.¹⁰⁷ This standard is frequently called “rational basis review.” Rational basis review is the lowest level of scrutiny, or review, applied by courts. Challenges that incarcerated people make to classifications usually fail because officials only need to show that the action is “rationally related” to a “legitimate government interest.” If, however, you are alleging that you were treated differently than other similarly situated incarcerated people because of your *race*, some courts, including California, will apply “strict scrutiny” to the government’s policy. “Strict scrutiny” is a significantly higher standard than “rational basis review,” and therefore more difficult for the government to meet (and more favorable to incarcerated people). To survive “strict scrutiny,” the government must prove that the treatment you are challenging both: (1) promotes a compelling state interest; and (2) is narrowly or suitably tailored to that interest.¹⁰⁸

An example of a policy that treated people differently based on race was found in *Johnson v. California*.¹⁰⁹ In *Johnson*, the court applied a strict scrutiny standard of review to the prison’s policy of placing new or transferred incarcerated people with cellmates of the same race during the initial sixty-day evaluation period. In *Harbin-Bey v. Rutter*, however, the Sixth Circuit Court of Appeals held that a prison’s decision to designate an incarcerated person as a member of a Security Threat Group without a hearing did not involve different treatment based on race.¹¹⁰ Instead, the court in *Harbin-Bey* held that because incarcerated people are not a suspect class, the “rational basis” test applied, and the prison’s classification decision was constitutional.¹¹¹ For more information on Equal Protection claims you should see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S. § 1331 to Obtain Relief from Violations of Federal Law.”

You may be able to argue that the debriefing policy makes it hard to practice your religion. However, these types of claims have failed because the policy does not “substantially burden” free

106. CAL. CODE REGS. tit. 15, § 3378.5(e) (2019).

107. *Harbin-Bey v. Rutter*, 420 F.3d 571, 576 (6th Cir. 2005); see *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (establishing the “legitimate penological interests” test to validate prison regulations that may otherwise impinge an incarcerated person’s constitutional rights); see also *Ashelman v. Wawrzaszek*, 111 F.3d 674, 676 (9th Cir. 1997) (noting that the *Turner* “legitimate penological interests” test may not apply to certain religious discrimination cases under the “compelling government interest” test required by the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1).

108. *Johnson v. California*, 543 U.S. 499, 505, 125 S. Ct. 1141, 1146, 160 L. Ed. 2d 949, 958 (2005); see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 127 S. Ct. 2746, 2752, 168 L. Ed. 2d 517, 523 (2007) (using the strict scrutiny standard in the context of race-conscious student assignment policies designed to eliminate racial imbalances in school enrollment); *Jana-Rock Const., Inc. v. New York State Dept. of Econ. Dev.*, 438 F.3d 195, 205 (2d Cir. 2006) (clarifying that “extrinsic showing of discriminatory animus or effect is not necessary to trigger strict scrutiny”).

109. *Johnson v. California*, 543 U.S. 499, 509, 125 S. Ct. 1141, 1148, 160 L. Ed. 2d 949, 960 (2005).

110. *Harbin-Bey v. Rutter*, 420 F.3d 571, 576 (6th Cir. 2005).

111. See *Harbin-Bey v. Rutter*, 420 F.3d 571, 576 (6th Cir. 2005).

exercise of religion.¹¹² Using the substantial burden test, a district court in California rejected a challenge where a religious Catholic incarcerated person argued that the debriefing policy was unconstitutional because it forced him to confess to a person other than a priest. The court held that the policy did not substantially burden the incarcerated person's religion because the incarcerated person was not forced to commit any act forbidden by his religion, but instead could refrain from debriefing.¹¹³ For more information on your right to practice your religion see Chapter 27 of the *JLM*, "Religious Freedom in Prison."

6. Administrative Options

Given courts' general hostility toward gang validation claims, the most effective way to challenge classification is probably through administrative procedures within the prison. You should be granted periodic review of your status as an alleged gang member. When this happens, you should have the opportunity to express your views on your classification. This is your opportunity to ensure that officials are following the proper administrative procedures that the California courts have relied upon in dismissing incarcerated people's due process claims. For example, as discussed above, all anonymous testimony must be accompanied by an official statement that the identity of your accuser has been withheld for security reasons and that testimony should be as complete as it can possibly be without identifying the source. You should become familiar with the classification procedures so that you can monitor whether they are being followed. Deviations from the classification may provide grounds for challenging your classification.

Chapter 15 of the *JLM*, "Inmate Grievance Procedures," contains detailed instructions on how to pursue administrative remedies. The focus of Chapter 15 is on the state of New York's Internal Grievance Program ("IGP"), but you will also find information on locating the guidelines and procedures for filing grievances in other states. You may also find Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings," helpful in challenging your classification. Many states separate their disciplinary and classification systems and there may be separate provisions for appealing your classification. It is important that you read the grievance rules carefully so that you can use the correct administrative remedy. Finally, if you have exhausted all of the administrative options and you are imprisoned in the state of New York, you can file an Article 78 proceeding. Article 78 provides a procedure for challenging administrative decisions in court. For instructions on how to bring an Article 78 proceeding, see Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

D. Conclusion

Your security classification is important because it influences where you are incarcerated and what sort of freedoms you will receive. If you have undergone gang validation and been designated a member of a Security Threat Group it may be possible to challenge this designation, although such challenges are difficult to win. While you may have some room to raise a challenge on equal protection grounds if the prison used a race-based policy to classify you in a certain group, you are probably more likely to be successful challenging your security classification through your prison's administrative procedures.

112. *Rojas v. Cambra*, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *23 (N.D. Cal. May 20, 1997) (*unpublished*).

113. *Rojas v. Cambra*, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *22-23 (N.D. Cal. May 20, 1997) (*unpublished*).

Chapter 32

PAROLE*

A. Introduction

Parole is a system of discretionary release for prisoners who have not yet completed their maximum sentences. Parole also refers to the process of your supervised re-joining the community while you serve the remainder of your sentence outside of prison.¹ In this Chapter, Part B provides an overview of the parole system of New York State. Parts C through I examine New York's parole system in detail. Part C explains the calculation of the minimum imprisonment period; Part D discusses the Shock Incarceration Program; Part E discusses the sentence of parole supervision; Part F explains parole release hearings; Part G reviews release on parole; Part H covers parole revocation; Part I discusses release from parole supervision; Part J looks at the parole system of California; Part K examines the Florida state system; Part L examines the Illinois state system; Part M examines the Texas state system; and Part N examines the Michigan parole system. Prisoners in other states must research their own states' laws on parole, as parole laws tend to be very different from state to state and parole has been completely eliminated in many states. See Chapters 35 of the *JLM*, "Getting Out Early: Conditional and Early Release," for information on conditional and early release, and see Chapter 39 of the *JLM*, "Temporary Release Programs," for information on temporary release programs.

B. New York

In New York, the Division of Parole and the Department of Correctional Services recently merged and became the Department of Corrections and Community Supervision (DOCCS).² The parole law is found in the N.Y. Executive Law § 259 and in Title 9 of New York State Compilation of Codes, Rules and Regulations, Part 8000.³ The parole law requires the DOCCS to adopt written guidelines for use in making parole decisions.⁴ The DOCCS also publishes pamphlets, handbooks, and other materials that explain the parole process.⁵

For further information, check with your institution's parole officer, pre-release center, or law library. They should have the New York State Parole Handbook, "Questions and Answers Concerning Parole Release and Supervision."⁶ This pamphlet gives the DOCCS' answers to questions on issues

* This Chapter was revised by JoAnn Kintz, based in part on a previous version written by Mary Beth Myles. Special thanks to Professor Philip Genty of Columbia Law School for his valuable comments.

1. This supervised release can be as a result of a discretionary parole release or a mandatory supervised release ordered by the sentencing judge.

2. In New York, Parole, Conditional Release, Work Release and Temporary Release programs are run by the Department of Corrections and Community Supervision. N.Y. CORRECT. LAW §§ 150, 151, 851, 852 (McKinney 2014); N.Y. CORRECT. LAW § 10 (McKinney 2014); N.Y. PENAL LAW § 70.40 (McKinney 2009). Probation is handled by the Division of Probation and Correctional Alternatives. N.Y. EXEC. LAW § 240 (McKinney 2018). Because the combining of the departments is so recent, the state laws may still describe the Division of Parole and the Department of Correctional Services as separate departments.

3. N.Y. COMP. CODES R. & REGS. tit. 9, § 8000 (2020). The New York Official Compilation of Codes, Rules, and Regulations is in a green three-ring binder, and it should be in your prison library.

4. N.Y. EXEC. LAW § 259-c(4) (McKinney 2018). Though the Guidelines are written and codified, the Parole Board is not absolutely bound to follow them.

5. These materials can be located online at <https://doccs.ny.gov/community-supervision-0> or by contacting the N.Y. State Department of Corrections and Community Supervision at (518) 473-9400.

6. COMMUNITY SUPERVISION HANDBOOK, QUESTIONS AND ANSWERS CONCERNING RELEASE AND COMMUNITY SUPERVISION, N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION (2019), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Mar. 10, 2020).

regarding time served, institutional parole and parole board activities in state correctional facilities, parole supervision, the revocation process, the Sentencing Reform Act of 1995, interstate parole, juvenile offenders, restoration of rights, executive clemency, appeals, and access to parole files. If available, you should also review other DOCCS publications, especially the *Guidelines Applications Manual*, and look at the laws and regulations themselves.⁷

This Chapter describes the practices and procedures of the Parole Board. Parole has five basic phases:

- (1) Determination of your minimum sentence;
- (2) Parole release considerations, preparing for your parole hearing, and the hearing itself;
- (3) Release on parole and supervision by parole officers;
- (4) Constitutional due process protections required in the parole revocation process; and
- (5) Release from parole and the restoration of full rights.

You can appeal a Parole Board decision in two ways. The first appeal is an administrative procedure conducted through the Appeals Unit of the Parole Board.⁸ You *must* first try the administrative process within the DOCCS. If that fails and you wish to continue, you may then appeal through an Article 78 proceeding in the New York courts.⁹ The courts have adopted an extremely tough test for review of any Parole Board decision. In order for courts to intervene in Parole Board decisions, you must show “irrationality bordering on impropriety on the part of the parole board.”¹⁰ In other words, you must show that the Parole Board’s decision did not make sense and was close to being improper in order for a court to step in. It is very unusual for a court to find that a Parole Board’s decision was wrong.

C. Minimum Term of Incarceration Under an Indeterminate Sentence & Conditional Release Under a Determinate Sentence

There are two types of sentences the sentencing court can give: indeterminate and determinate. An “indeterminate” sentence is when the court assigns a range of minimum and maximum time a prisoner must serve, rather than a specific number of days or years. A determinate (“flat”) sentence is a fixed period of time you must spend in prison. If you are serving a determinate sentence, you are not eligible for parole but may qualify for conditional release.

If you were given an indeterminate sentence, the sentencing court should have set the minimum amount of time you must serve in a state correctional facility before you become eligible for release.¹¹ Since 1995, New York has been moving away from indeterminate sentencing and discretionary parole release to the system of determinate sentences. Determinate sentences are required for persons

7. A copy of the Division of Parole’s Release Decision-Making Guidelines Application Manual should be available at the law library for each state prison or by contacting your Facility Parole Officer.

8. The appeals procedure is the same for Parole Board decisions regarding a minimum period of imprisonment (MPI), parole release, parole rescission, and final revocation. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(a).

9. For a discussion of Article 78 proceedings, see Chapter 22 and Part C(6) of Chapter 5 of the *JLM*.

10. *In re Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69, 77, 405 N.E.2d 225, 229, 427 N.Y.S.2d 982, 986 (1980) (holding that the Parole Board may impose an MPI for a longer period of time than the sentencing judge could have fixed). The *Russo* standard has been held to be a review of “whether the Board’s decision to deny parole was arbitrary or capricious.” *Silmon v. Travis*, 95 N.Y.2d 470, 477, 741 N.E.2d 501, 505, 718 N.Y.S.2d 704, 708 (2000) (holding it was not arbitrary or capricious for the Board to consider a lack of remorse and insight in denying parole). See *Jorge v. Hammock*, 84 A.D.2d 362, 364, 446 N.Y.S.2d 585, 587 (3d Dept. 1982) (holding complete disregard of a sentencing judge’s recommendation in setting a minimum incarceration period was inappropriate and entitled prisoner to a new hearing).

11. N.Y. PENAL LAW § 70.00(3) (McKinney 2009). If you were sentenced before September 1, 1980, the Parole Board—instead of the sentencing court—will fix your minimum term. See *Schwimmer v. Hammock*, 59 N.Y.2d 636, 637, 449 N.E.2d 1266, 1267, 463 N.Y.S.2d 188, 189 (1983) (holding the Parole Board had the authority to set prisoner’s minimum period of incarceration (MPI) because the law in existence at the time of sentencing did not give the sentencing court the power to set an MPI).

sentenced as second violent felony offenders after 1995, or first violent felony offenders after 1998.¹² Determinate sentences are also required for felony drug offenders sentenced after 2004.¹³ Persons sentenced to a determinate sentence as violent or second violent felony offenders are eligible for conditional release when they have served six-sevenths of their sentence.¹⁴ Persons serving determinate sentences for felony drug offenses are eligible for merit time/conditional release after serving five-sevenths of their sentence.¹⁵

But there are three exceptions. First, you may get early parole if you successfully complete a shock incarceration program¹⁶ (described in Part D of this Chapter). Second, you may appear before the Parole Board prior to the expiration of your minimum sentence if you are eligible for “merit time.”¹⁷ Most categories of non-violent felonies qualify for merit time.¹⁸ If you are serving a sentence that qualifies and you have earned merit time, you will appear before the Parole Board for release consideration after you have served five-sixths of your minimum sentence for a determinate sentence.¹⁹ If you are serving an indeterminate sentence for a felony drug offense, you may earn additional merit time and appear before the Parole Board for release consideration after serving two-thirds of your minimum sentence, and for all other indeterminate sentences, you may earn additional merit time and appear before the Parole Board for release consideration after serving five-sixths of your minimum sentence.²⁰ Third, certain categories of felony drug offenses are eligible for a sentence of parole supervision²¹ (described in Part E of this Chapter).

D. Shock Incarceration Program

Shock Incarceration is a Department of Correctional Services program in which selected eligible prisoners participate in a structured six-month program at a Shock Incarceration facility.²² Shock Incarceration is a highly structured program that requires daily exercise, a full work day, daily meetings, and substance abuse counseling. Participants are also required to participate in high school equivalency classes through the educational programs offered.²³ Generally, participants who successfully complete the program are issued a Certificate of Earned Eligibility and become eligible for parole release consideration before completing the court-imposed minimum sentence.²⁴ See Part F(5) of this Chapter for additional information on Certificates of Earned Eligibility.

A prisoner may submit an application to the Shock Incarceration screening committee for permission to participate in the shock incarceration program.²⁵ Eligible prisoners are also screened to insure that their participation in the program is “consistent with the safety of the community, the

12. N.Y. PENAL LAW §§ 70.02, 70.04 (McKinney 2009).

13. N.Y. PENAL LAW §§ 70.70, 70.71 (McKinney 2009).

14. N.Y. CORRECT. LAW § 803(1)(c) (McKinney 2014).

15. N.Y. CORRECT. LAW § 803(1)(d) (McKinney 2014).

16. N.Y. CORRECT. LAW §§ 865-867 (McKinney 2014); N.Y. EXEC. LAW 259-i(2)(e) (McKinney 2018).

17. Merit time is time credit given for such actions as good behavior, efficient performance of duties, and success in a treatment program. N.Y. CORRECT. LAW. § 803(1)(d)(iv) (McKinney 2014).

18. N.Y. CORRECT. LAW § 803(1)(d)(ii) (McKinney 2014).

19. N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014).

20. N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014).

21. N.Y. PENAL LAW § 70.70(3)(d) (McKinney 2014).

22. If you complete a shock incarceration program, you are eligible to receive a Certificate of Earned Eligibility under Section 805 of N.Y. Corrections Law. N.Y. CORRECT. LAW §§ 805, 867(4) (McKinney 2014). See Part F(5) of this Chapter for additional information on Certificates of Earned Eligibility.

23. N.Y. COMP. CODES R. & REGS. tit. 7, §1800.6(b) (2020).

24. N.Y. CORRECT. LAW § 805 (McKinney 2014).

25. N.Y. CORRECT. LAW § 867(1) (McKinney 2014). To be eligible, you must be under the age of 40 and have been at least 16 years old when you committed the crime for which you are incarcerated. You must be eligible for parole within three years and not have been convicted of a felony with an indeterminate sentence. The commission of certain crimes will also make you ineligible, including but not limited to a violent felony offense, an A-1 felony offense, manslaughter in the second degree, or rape in the second or third degree. N.Y. COMP. CODES R. & REGS. tit. 7, §1800.4 (2020).

welfare of the applicant, and the selection criteria for the program.”²⁶ Therefore, even if you meet the eligibility criteria for the program, you still may not ultimately be chosen to participate.

E. Sentence of Parole Supervision

If you have a history of drug or alcohol addiction, and abuse of that substance has led you to commit illegal acts, you may be given a sentence of parole supervision (also known as a “Willard Sentence” after the Willard Drug Treatment Center). You are eligible for a sentence of parole supervision only if you satisfy the following three requirements:

- (1) You have a history of drug or alcohol addiction that has significantly contributed to your illegal acts,
- (2) A sentence of parole supervision would likely help you become or stay drug-free, and
- (3) A sentence of parole supervision would not risk “public safety or public confidence in the integrity of the criminal justice system.”²⁷

Furthermore, you can only be given a sentence of parole supervision for conviction of certain specified crimes.²⁸ When the court considers whether to give you a sentence of parole supervision, the prosecutor may either agree with or oppose the sentence, and the court is permitted, but not required, to consider the prosecutor’s view.

If you receive a sentence of parole supervision, you will be placed under the supervision of the state DOCCS and will be sent immediately to a reception center for no more than ten days.²⁹ Once you arrive at the reception center, the law requires that you be given a copy of the conditions of your parole. You will need to acknowledge in writing that you have received a copy of these conditions.³⁰ Sometime after you leave the reception center, you will be placed in a drug treatment campus for ninety days.³¹ While you are at the campus, the DOCCS will assess your needs and develop a personal drug treatment

26. N.Y. COMP. CODES R. & REGS. tit. 7, §1800.3(c) (2020).

27. N.Y. CRIM. PROC. LAW § 410.91(3) (McKinney 2005); *People v. Denue*, 275 A.D.2d 863, 864, 713 N.Y.S.2d 783, 784 (3d Dept. 2000) (denying petitioner a sentence of parole supervision because he did not show that he had a history of substance dependence that significantly contributed to his criminal conduct or that he was not subject to an undischarged term of imprisonment).

28. The specified crimes are listed in N.Y. CRIM. PROC. LAW § 410.91(5) (McKinney 2020) and include the following: burglary in the third degree as defined in N.Y. PENAL LAW § 140.20 (McKinney 2010); criminal mischief in the third degree as defined in N.Y. PENAL LAW § 145.05 (McKinney 2010); criminal mischief in the second degree as defined in N.Y. PENAL LAW § 145.10 (McKinney 2010); grand larceny in the fourth degree as defined in N.Y. PENAL LAW §§ 155.30(1)–(6), (8)–(10) (McKinney 2010); grand larceny in the third degree as defined in N.Y. PENAL LAW § 155.35 (McKinney 2010) (except where the property consists of one or more firearms, rifles, or shotguns); unauthorized use of a vehicle in the second degree as defined in N.Y. PENAL LAW § 165.06 (McKinney 2010); criminal possession of stolen property in the fourth degree as defined in N.Y. PENAL LAW §§ 165.45(1)–(3), (5)–(6) (McKinney 2010); criminal possession of stolen property in the third degree as defined in N.Y. PENAL LAW § 165.50 (McKinney 2010) (except where the property consists of one or more firearms, rifles, or shotguns); forgery in the second degree as defined in N.Y. PENAL LAW § 170.10 (McKinney 2010); criminal possession of a forged instrument in the second degree as defined in N.Y. PENAL LAW § 170.25 (McKinney 2010); unlawfully using slugs in the first degree as defined in N.Y. PENAL LAW § 170.60 (McKinney 2010); criminal diversion of medical cannabis in the first degree as defined in N.Y. PENAL LAW § 179.10 (McKinney 2010); an attempt to commit any of the aforementioned offenses if such attempt constitutes a felony offense; or a class B felony offense defined in N.Y. PENAL LAW § 220 (McKinney 2008) where a determinate sentence is imposed pursuant to N.Y. PENAL LAW § 70.70(2)(a) (McKinney 2009); or any class C, class D or class E controlled substance or cannabis felony offense as defined in N.Y. PENAL LAW § 220 or § 221 (McKinney 2008). You are only eligible if (i) you are a second felony offender as defined in N.Y. CRIM. PROC. LAW § 410.91(5) (McKinney 2020) who stands convicted of no other felony offense; (ii) you have not previously been convicted of either a violent felony offense as defined in N.Y. PENAL LAW § 70.02 or a class A or class B felony offense (other than a class B felony offense defined in article 220 of the penal law, which contains a variety of drug offenses); and (iii) you are not subject to an undischarged term of imprisonment. N.Y. CRIM. PROC. LAW § 410.91(2) (McKinney 2005).

29. N.Y. CRIM. PROC. LAW § 410.91(1) (McKinney 2005).

30. N.Y. CRIM. PROC. LAW § 410.91(6) (McKinney 2005).

31. N.Y. CRIM. PROC. LAW § 410.91(1) (McKinney 2005).

program. In most cases, this program will include help from local community organizations that work with the DOCCS.³² After you have completed the drug treatment program at the campus, you will be given money, clothes, and transportation from the drug treatment campus to the county where your parole supervision and drug treatment plan will continue.³³

F. Parole Release Hearing and Appeals

1. Your Right to a Parole Release Hearing

The parole release hearing is an interview where the Parole Board determines whether you should be released from prison before you serve your maximum sentence. You are entitled to a parole release hearing at least one month before the end of your minimum period of incarceration.³⁴ There are some situations in which you may become eligible for parole before you complete your minimum sentence. You may get early parole if you complete a Shock Incarceration program, if you are eligible for and earn merit time, or if you serve and successfully complete a sentence of parole supervision.³⁵ (See Parts D and E of this Chapter for a description of the Shock Incarceration Program and the Sentence of Parole Supervision.) You do not have to file for a parole release hearing; one will be scheduled for you automatically. If you believe your scheduled parole release hearing is past due, you can contact the pre-release center or parole officer at your institution.

2. Steps to Take Before the Hearing

Only the Parole Board can decide to release you on parole; there is no statutory or constitutional right to parole release.³⁶ Nevertheless, there are ways you can improve your chances of being released on parole. While you are in prison, the more that you do to get ready for your re-entry into the community, the better your chances become of convincing the Board to release you on parole. However, in recent years, the Parole Board has placed a great deal of importance on the seriousness of the crime when making decisions about prisoners who are put in prison for violent felonies. In addition to the facts and circumstances of the underlying crime, the Parole Board is likely to consider five basic areas:

- (1) *Education*—Did you take any classes while in prison? Those classes might include a GED course, vocational training, or college;
- (2) *Employment*—Did you try to develop any job skills? These could range from making furniture to kitchen work, as long as it is a skill that relates to life and might help with employment outside of prison;
- (3) *Issues That Led to Incarceration*—Can you address the problems that led to your conviction? For example, if you are in on a drug use charge, did you participate in any treatment programs?;
- (4) *Likelihood of Community Reintegration*—Have you had any contact with your family or community? Even if you cannot show family ties like letters or visits, developing a contact with a halfway house or an ex-offender service group will help; and
- (5) *Future Plans and Goals*—You should be prepared to discuss your immediate plans and future goals for your life after release on parole.

In short, your activities while you are in prison affect your chances for parole.

32. N.Y. CRIM. PROC. LAW § 410.91(6) (McKinney 2005).

33. N.Y. CRIM. PROC. LAW § 410.91(7) (McKinney 2005).

34. N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 2018).

35. N.Y. CORRECT. LAW § 805 (McKinney 2014).

36. See, e.g., *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001) (holding that a prisoner does not have a justifiable expectation of release on parole, and that it is up to the Parole Board to determine prisoner eligibility for parole); *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979) (holding that New York state's statutory scheme of parole did not create a due process entitlement to parole). However, as discussed in Part F(5) of this Chapter, in 1987 New York adopted the Certificate of Earned Eligibility program, which created a presumption in favor of release on parole in certain situations.

As an eligible parole candidate, you must complete what is known as a parole or release plan before your parole release hearing. This plan will be part of your Parole Board Report.³⁷ The Guidelines describe “release plans” as including the “community resources, employment, education and training and support services” that are available to you in prison.³⁸ One of the most important parts of your parole plan is your plan for employment or education after release. If you are granted parole but have not created a satisfactory plan, your release date will be pushed back until you have made one.³⁹ Therefore, if you are finding it difficult to develop a parole plan, you must get some help as soon as possible. Otherwise, you risk delaying or losing your parole release.

For help in preparing your parole plan, contact the pre-release center or parole officer at your institution. The parole regulations state that the DOCCS should “assist inmates eligible for . . . parole . . . to secure employment, educational or vocational training.”⁴⁰ In addition to contacting the pre-release center and/or institutional parole officers, you should use any other contacts you have (like former employers, family, or friends) to get a job while still in prison. For information on employment in New York City, you can contact the New York State Department of Corrections and Community Supervision at (518) 473-9400. The Fortune Society is another good source of support that may lead to possible employment. It offers one-on-one counseling and tutoring. You can write to the Fortune Society at 29-76 Northern Boulevard, Long Island City, NY 11101 or call (212) 691-7554.

Your institutional record is also an important part of your Inmate Status Report. It will list your program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy, and relationships with staff and other prisoners.⁴¹ It is important that this information present a favorable image to the Parole Board. However, while it may be helpful to maintain a good-standing prison record to make a good impression on the Parole Board, it is important to note that good conduct alone does not guarantee parole.⁴²

To obtain parole, your record and conduct must show the Parole Board that:

- (1) You “will live and remain at liberty without violating the law,”
- (2) Your release will not harm society, and
- (3) You will not “deprecate” the seriousness of the crime you committed (make the crime seem less serious) and undermine respect for the law.⁴³

If you have been issued a Certificate of Earned Eligibility, which is explained in Part F(5) of this Chapter, the Parole Board will apply a lesser standard of review in determining your parole.⁴⁴

37. N.Y. EXEC. LAW § 259-i(2)(c)(A)(iii) (McKinney 2010); N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.3 (2020). New York defines the Parole Board Report as follows: The Parole Board Report is prepared by an Institutional Parole Officer and will include information such as: (1) court information on the present offense, the judge’s sentence, etc.; (2) your age, place of birth, occupation, marital status, and other personal characteristics; (3) your legal history (prior offenses); (4) your institutional record, including any disciplinary record, your medical history and involvement in educational and recreational programs; (5) your inmate statement, which includes comments regarding the offense that resulted in your conviction, as well as your comments about your prior record; and (6) your Parole Plan. N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision* (2020), at 15, available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 29, 2020).

38. N.Y. EXEC. LAW § 259-i(2)(c)(A)(iii) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.3.

39. N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision* (2020), at 13–15, available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 29, 2020).

40. N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.1(a)(5).

41. N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.2(d)(1) (2020).

42. N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2018).

43. N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2018).

44. N.Y. COMP. CODES R. & REGS. tit. 9, § 8010.2(a) (2020) (“[R]eceipt of a certificate of earned

Nevertheless, it is a good idea to build the strongest record of education, program participation, and work that you can since your activities while in prison directly affect this part of the Inmate Status Report.

If the Parole Board grants parole, some prisoners may be required to find acceptable housing before being released. The Parole Board's requirements for approved housing may be very challenging (for example, prisoners may be banned from living near a school or a school bus stop, may not be allowed to live alone, or may not be allowed to live in a shelter).⁴⁵

If you are serving a sentence for a non-violent felony, other than those involving manslaughter, homicide, or sexual misconduct, you may be eligible for presumptive release.⁴⁶ Presumptive release allows you to be released to parole supervision without appearing before the Parole Board as long as you have no serious disciplinary violations and have not brought a frivolous court proceeding while in prison.⁴⁷ You must submit an application in order to be considered for presumptive release and should talk with your Correction Counselor for more information on the program application.⁴⁸ Individuals who successfully complete the Shock Incarceration program are eligible for presumptive release.⁴⁹

3. The Parole Release Hearing

A two- or three-member panel of the Parole Board conducts the parole release hearing during visits to each facility.⁵⁰ Only one member of the panel will review your parole plan in detail. The other panel members will be present at the interview, but will generally defer to the judgment of the member who read the file. Instead of reading the full report, the other panel members will receive a summary of your parole report. The Parole Board members, the facility parole officer and staff, and a hearing reporter will be present at the release interview. You are not permitted to have an attorney with you at this interview.⁵¹

During the parole release interview, panel members will ask you questions about:

- (1) Your plans if you are released on parole;
- (2) Your conduct and activities while in prison;
- (3) Your criminal record, including past crimes and time served; and
- (4) The events surrounding the crime for which you are presently incarcerated.

It is important to note that the panel members will consider whether you understand why the crime happened, whether you feel any remorse for the crime, and what you would do differently in the future. You must answer all questions honestly, but be sure to present your side of the story in answering any difficult questions. Remember, if your parole is denied and you want to appeal, the basis for any appeal *must* appear in the hearing record. So, you must present all your information and reasons for parole at the interview.

eligibility...shall create a presumption in favor of parole release.”); *see also* N.Y. CORRECT. LAW § 805 (McKinney 2014).

45. *See People ex rel. Travis v. Coombe*, 219 A.D.2d 881, 881–882, 632 N.Y.S.2d 340, 341–342 (4th Dept. 1995) (holding that parole grantee was not entitled to immediate release, since “[n]o residence was located for relator that was acceptable to the Division of Parole”).

46. N.Y. CORRECT. LAW § 806 (McKinney 2014).

47. N.Y. CORRECT. LAW §§ 806(1)(i)–(iii) (McKinney 2014).

48. N.Y. CORRECT. LAW § 806(3) (McKinney 2014); *see also* State of New York, Department of Corrections and Community Supervision, Directive No. 4791, Presumptive Release (2017).

49. N.Y. CORRECT. LAW § 806(1) (McKinney 2014).

50. COMMUNITY SUPERVISION HANDBOOK, QUESTIONS AND ANSWERS CONCERNING RELEASE AND COMMUNITY SUPERVISION, N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION 13 (2019), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Mar. 10, 2020); New York State law also says that the Board of Parole “shall consist of not more than nineteen members appointed by the governor with the advice and consent of the senate.” N.Y. EXEC. LAW § 259-b(1) (McKinney 2018).

51. N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, COMMUNITY SUPERVISION HANDBOOK, QUESTIONS AND ANSWERS CONCERNING RELEASE AND COMMUNITY SUPERVISION 13 (2019), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Mar. 10, 2020).

Be sure to bring to your release hearing any documents that would make a good impression on the panel members, such as program certificates, diplomas, or letters of recommendation. These should already be in your parole file, but sometimes institutional authorities file them incorrectly.

The Parole Law *requires* the Parole Board to take into consideration *all* of the following factors in determining early release on parole:

- (1) Your institutional record;
- (2) Your academic achievements;
- (3) Your training or work assignments;
- (4) Any therapy you have had;
- (5) Interpersonal relationships with staff and other prisoners;
- (6) Your performance, if any, in a release program;
- (7) Any release plans involving community resources, education, and training support services;
- (8) Any deportation orders;
- (9) Any written or oral statement of the crime victim;⁵²
- (10) The seriousness of the offense for which you are presently incarcerated;⁵³
- (11) Recommendations of the sentencing court and district attorney;
- (12) The recommendation of your attorney at trial;
- (13) The pre-sentence probation report;
- (14) Any mitigating and aggravating factors;⁵⁴
- (15) Activities following arrest and prior to conviction;⁵⁵ and
- (16) Any prior criminal record.⁵⁶

If the Board fails to consider relevant statutory factors in determining your parole, you may have grounds for appealing the parole decision.⁵⁷ However, the Board does not have to give each factor equal weight.⁵⁸

The Board decides whether or not to grant parole either on the day of the hearing or a few days later. Typically, the panel will make a decision immediately after you leave the room. The Parole Board has a large amount of decision-making power in deciding whether or not you are eligible for parole. Beyond the factors listed above, the Parole Board establishes its own guidelines to determine when a prisoner is eligible for parole,⁵⁹ and it currently sets a high standard. As the Second Circuit stated in *Barna v. Travis*, “the New York parole scheme is not one that creates in any prisoner a legitimate

52. The Parole Board will also consider any statements made on the victim’s behalf by a representative.

53. The Parole Board will consider both the type of sentence and the length of the sentence.

54. Mitigating factors are circumstances in your crime that do not excuse the criminal conduct but might make the Board view your crime less harshly—for example, if you had no prior criminal record. Aggravating circumstances are those that might make the Board view your crime more harshly—for example, if your crime affected a large number of people.

55. It is important to effectively use your pre-conviction time (that is, the time following your arrest but before conviction and sentencing), especially if you are out on bail. Seeking employment—or, if you already have a job, keeping a good record at that job—can sometimes help justify a lower sentence and early release on parole.

56. N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2018).

57. *See, e.g.,* King v. N.Y. State Div. of Parole, 190 A.D.2d 423, 431, 598 N.Y.S.2d 245, 250 (1st Dept. 1993), *aff’d*, 83 N.Y.2d 788, 791, 632 N.E.2d 1277, 1278, 610 N.Y.S.2d 954, 955 (1994) (holding that the Parole Board has a duty “to give fair consideration” to each person who comes before it, and where the record “convincingly demonstrates” that the Board did not fairly consider the proper standards in reaching its decision, courts must intervene); *but see, e.g.,* Valderrama v. Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758, 759 (3rd Dept. 2005) (holding that a parole decision made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety).

58. *See* Geames v. Travis, 284 A.D.2d 843, 843, 726 N.Y.S.2d 506, 506 (3d Dept. 2001) (holding the Parole Board does not have to weigh each factor equally; the heavy weight put on crime severity and criminal history was acceptable in this situation); King v. N.Y. State Div. of Parole, 190 A.D.2d 423, 431, 598 N.Y.S.2d 245, 250 (1st Dept. 1993), *aff’d*, 83 N.Y.2d 788, 791, 632 N.E.2d 1277, 1278, 610 N.Y.S.2d 954, 955 (1994) (holding that although it is not necessary for the Parole Board to refer to every factor or for the board to give each factor equal weight, the Board must consider each factor laid out in the law).

59. N.Y. EXEC. LAW § 259-c(4) (McKinney 2018).

expectancy of release.”⁶⁰ Even though the Parole Board must consider the above factors, the list is only intended as a guide. In recent years the Board has given particular weight to the factors of the seriousness of the crime and past criminal history for individuals in prison for violent felonies.

4. Victim Impact Statement

A victim impact statement is a written statement to the Parole Board by the crime victim or the victim's family, describing the effect of the crime on the victim's life or on his or her family.⁶¹ The victim or the victim's family must submit the statement at least ten business days before your parole hearing.⁶² You usually cannot see the victim's (or the victim's family's) statement unless the victim or court authorizes you to do so.⁶³

Whether or not there is a victim impact statement in your file, you can ask as many people as possible from your family, your community, and your legal team to write letters to the Parole Board in support of your release. If the letters come to you directly, photocopy them (or ask someone to photocopy them for you) and ask the parole officer at your facility to add them to your file. You should also bring these letters to your pre-parole interview and to the parole hearing itself.

5. Certificate of Earned Eligibility

The “Earned Eligibility Program”⁶⁴ was enacted to address the problem of overcrowding in state prisons. Under the program, once you are in custody, you should be assigned a work and treatment program “as soon as practicable.”⁶⁵ Two months before your minimum term expires, the DOCCS will review your institutional record to determine whether you have complied with your program. If you have successfully participated in this program, DOCCS *may* issue you a “Certificate of Earned Eligibility.”⁶⁶ Prisoners serving an indeterminate sentence with a minimum term of eight years are not able to receive a Certificate of Earned Eligibility. It is also important to note that even if you successfully complete the program, you may still be denied a Certificate of Earned Eligibility since the decision to issue a Certificate of Earned Eligibility is discretionary.⁶⁷ This means that it is entirely up to DOCCS to determine whether to grant you a Certificate of Earned Eligibility and DOCCS is not required to give you one even if you complete the program. A court of law cannot force DOCCS to issue you a Certificate of Earned Eligibility, even if you have completed your treatment program; however, DOCCS cannot arbitrarily (randomly or unreasonably) deny a Certificate of Earned Eligibility. In such instances, a court may review the denial, although it is important to remember that courts often defer to the opinion of DOCCS, except in unusual or extreme circumstances.

If you have a Certificate of Earned Eligibility and have served your minimum period of incarceration, the standard for parole release is easier to meet.⁶⁸ The Parole Board will not consider

60. *Barna v. Travis*, 239 F.3d 169, 170–171 (2d Cir. 2001) (holding that denial of parole did not violate the Due Process or *Ex Post Facto* clauses, since petitioners did not have “a legitimate expectancy of release that is grounded in the state's statutory scheme”); *see also* *Graziano v. Pataki*, 689 F.3d 110, 114–15 (2d Cir. 2012) (applying *Barna*).

61. N.Y. EXEC. LAW § 259-i(2)(c)(A)(v) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.4 (2020).

62. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.4(b) (2020).

63. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.4(e) (2020).

64. N.Y. CORRECT. LAW § 805 (McKinney 2014).

65. N.Y. CORRECT. LAW § 805 (McKinney 2014).

66. N.Y. CORRECT. LAW § 805 (McKinney 2014). *See* *Klos v. Haskell*, 835 F. Supp. 710, 723 (W.D.N.Y. 1993), *aff'd*, 48 F.3d 81, 89 (2d Cir. 1995) (stating the Commissioner and Deputy Commissioner of the Department of Corrections and Community Supervision may exercise “their discretion, without restraint, to remove an inmate from participation in the [Certificate of Earned Eligibility] program”).

67. *See* *Frett v. Coughlin*, 156 A.D.2d 779, 781, 550 N.Y.S.2d 61, 63 (3d Dept. 1989) (“Successful participation in the program is merely a threshold requirement which activates the Commissioner’s discretionary power to issue a Certificate of Earned Eligibility. [S]tatute . . . does not create a liberty interest in receiving a Certificate of Earned Eligibility . . . even upon successful participation in the program, the Commissioner may deny the certificate.”).

68. N.Y. CORRECT. LAW § 805 (McKinney 2014).

your release if there is a reasonable probability that it will not “deprecate the seriousness of [the] crime.”⁶⁹ However, when you possess a Certificate of Earned Eligibility, the Board presumes you will probably live and remain at liberty without violating the law—which means unless the Board affirmatively finds otherwise, you should get parole.

One month prior to the expiration of your minimum period of incarceration (MPI), you will be interviewed by members of the Board for release consideration.⁷⁰ The Parole Board will review:

- (1) The institutional record, including program goals and accomplishments, academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates;
- (2) Performance, if any, as a participant in a temporary release program;
- (3) Release plans, including community resources, employment, education and training, and support services available to the inmate;
- (4) Any deportation order issued by the federal government against the inmate while in the custody of the Department of Corrections and Community Supervision and any recommendation regarding deportation made by the Commissioner of the Department of Corrections and Community Supervision pursuant to section 147 of the Correction Law;⁷¹
- (5) Any statement made or submitted to the Board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
- (6) The length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the Penal Law for a felony defined in article 220 or article 221 of the Penal Law;
- (7) The seriousness of the offense with due consideration to the type of sentence and length of sentence;
- (8) Recommendations of the sentencing court, the district attorney, and the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated;
- (9) The pre-sentence probation report, as well as consideration of any mitigating and aggravating factors and activities following arrest prior to the inmate's current confinement;
- (10) Prior criminal record, including the nature and pattern of the inmate's offenses, adjustment to any previous periods of probation, community supervision, and institutional confinement;
- (11) The most current risk and needs assessment that may have been prepared by the Department of Corrections and Community Supervision; and,
- (12) The most current case plan that may have been prepared by the Department of Corrections and Community Supervision pursuant to section 71-a of the Correction Law.⁷²

It is important to note that having a Certificate of Earned Eligibility does not automatically allow you to receive parole.⁷³ Rather, it “merely create[s] an expectation of parole ... that deserves due process protection.”⁷⁴ As in all cases, you have a right to be heard by the Parole Board, and if you are

69. N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2018); *see also* N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.2(a) (2020) (explaining that the Board may consider “other risk and need assessments or evaluations [that] are prepared to assist in determining the inmate's treatment, release plan, or risk of reoffending”).

70. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.1(a) (2020).

71. N.Y. CORRECT. LAW § 147 (McKinney 2014).

72. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.2(b) (2020). *See, e.g.*, Pike v. N.Y. State Div. of Parole, 188 A.D.2d 602, 603, 591 N.Y.S.2d 495, 496 (2d Dept. 1992) (holding that despite the Department of Correctional Services issuing petitioner a Certificate of Earned Eligibility, “petitioner's release was incompatible with the welfare of society, and that the petitioner would not remain at liberty without violating the law”); Confoy v. N.Y. State Div. of Parole, 173 A.D.2d 1014, 1015, 569 N.Y.S.2d 846, 847 (3d Dept. 1991) (holding that Parole Board's denial of parole based on the findings that the “[prisoner] would not remain at liberty without violating the law and that his release would be incompatible with the welfare of society” was supported by the law and evidence).

73. *See* Howard v. N.Y. State Bd. of Parole, 270 A.D.2d 539, 539–540, 704 N.Y.S.2d 326, 327 (3d Dept. 2000) (holding that the fact that the prisoner received a Certificate of Earned Eligibility did not stop parole board from being able to deny him parole release).

74. *People ex rel. Hunter v. Bara*, 144 Misc. 2d 750, 752, 545 N.Y.S.2d 65, 66 (Sup. Ct. Richmond County

denied parole, you have a right to be told why you were denied.⁷⁵ If a court determines that the Parole Board did not comply with these requirements, you may be entitled to a new hearing.⁷⁶

6. Denial of Parole Release

If you are denied parole, within two weeks of your first hearing, the Parole Board must provide you with a detailed written explanation stating the reasons you were denied parole.⁷⁷ Within two weeks of your first hearing, the Board will also set a date for reconsideration of your parole release, which must be scheduled within twenty-four months of your first hearing.⁷⁸ The twenty-four month notice period begins from the date of your last parole hearing.⁷⁹ Before the new hearing, you should (1) prepare a new parole plan; and (2) try to strengthen the parts of your record that the Board identified as reasons for denying parole. If you are denied parole more than once, you must continue to follow this procedure. If your parole is *revoked* (taken away), there is no time limit for rescheduling a parole release hearing. So, if your parole is revoked and you are returned to prison, the Parole Board may order that you be held for a period longer than twenty-four months before being given another parole hearing.⁸⁰ See Part H of this Chapter for more information on parole revocation.

7. Appealing Denial of Parole Release to Appeals Unit

You can appeal a denial of parole. This appeal is an administrative procedure conducted through the Appeals Unit of the Parole Board.⁸¹ You have the right to an attorney when you appeal to the Parole Board. If you cannot afford an attorney, one will be assigned to you.⁸² You can appeal a release proceeding on one or more of the following grounds:

- (1) The proceeding and/or determination violated lawful procedure, was influenced by an error of law, or was “arbitrary, capricious or otherwise unlawful;”⁸³
- (2) A Board member or members relied on mistaken or irrelevant information in making a decision, and this can be *shown in the record* of the hearing; or
- (3) The determination was excessive.⁸⁴

If you believe you have grounds for an appeal, immediately file a “notice of appeal,” which should be included in the notification of denial. Then request an attorney if you do not already have one. You

1989) (holding that the prisoner only has a liberty interest in the possibility of release on parole which required due process).

75. N.Y. EXEC. LAW § 259-i(2)(a)(i) (McKinney 2018) (effective until Sept. 1, 2020).

76. *See People ex rel. Hunter v. Bara*, 144 Misc. 2d 750, 752, 545 N.Y.S.2d 65, 67 (Sup. Ct. Richmond County 1989) (“If the Parole Board fails to comply with the statutory due process protection, the parole candidate is entitled to a new hearing rather than a habeas corpus relief . . . It does not give the petitioner a vested right to release.”).

77. N.Y. EXEC. LAW § 259-i(2)(a)(i) (McKinney 2018).

78. N.Y. EXEC. LAW § 259-i(2)(a)(i) (McKinney 2018) (effective until Sept. 1, 2020); N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.3(b) (2020). *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1 (2020).

79. N.Y. EXEC. LAW § 259-i(2)(a)(i) (McKinney 2018).

80. *See People ex rel. Matthews v. New York State Div. of Parole*, 58 N.Y.2d 196, 205, 447 N.E.2d 689, 693, 460 N.Y.S.2d 746, 750 (1983) (holding that denial of adjournment (delay) of parole revocation hearing did not violate due process).

81. The appeals procedure is the same for Parole Board decisions regarding a minimum period of imprisonment (MPI), parole release, parole rescission, and final revocation. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(a) (2020).

82. N.Y. EXEC. LAW § 259-i(4)(b) (McKinney 2018). You should write to the County Clerk for the county in which your prison is located and ask the Clerk to assign you a lawyer for the administrative appeal.

83. “Arbitrary, capricious or otherwise unlawful” means the Parole Board’s decision to deny parole was not reasonable and shows a clear error in judgment by the Board. *West v. N.Y. State Bd. of Parole*, 41 Misc. 3d 1214(A), 980 N.Y.S.2d 279 (Sup. Ct. 2013) (explaining that while the Board need not discuss all the factors outright, they must give reasonable consideration to all the statutory factors when making a determination regarding parole).

84. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.3(a) (2020) (emphasis added).

must file a notice of appeal within thirty days of receiving the notification of denial; otherwise, you will have waived your right to an appeal.⁸⁵

You should begin to prepare for your appeal by obtaining the parole release hearing minutes from: New York State Division of Parole, 97 Central Avenue, Albany, NY 12206.⁸⁶

You will have to pay for the parole release hearing minutes (the record of the proceeding). If you have an attorney and cannot afford to pay for the minutes, your attorney can get them for you. You may also make a written request for “[a]ll other nonconfidential, discoverable documents relating to the appeal.”⁸⁷ So, if you believe there is important information in your parole records to support your appeal, you may request permission to access it. However, you will not be given unrestricted access. Access to your parole records will be limited in the following ways:

- (1) You can only gain access to your case record at certain times—just before a scheduled appearance before the Board or a hearing officer, or prior to making an administrative appeal;⁸⁸
- (2) You can only access parts of the case record that the Board or the hearing officer will consider;
- (3) You will not be given access to diagnostic opinions that could seriously disrupt your institutional program,⁸⁹ information obtained from a confidential source, or information that might harm another person;⁹⁰ and
- (4) The DOCCS will not grant access to reports or materials from other agencies.⁹¹ You will only be allowed to review the record at the prison or at the area parole office that serves the prison.⁹²

8. If Your Administrative Appeal is Denied

If you make an administrative appeal and are denied relief and want to seek a court to review the decision, you can begin an Article 78 proceeding.⁹³ Remember, as discussed in Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” you must serve (properly deliver) your Article 78 petition to each respondent and the New York Attorney General within four months of the date when the Appeals Unit decision becomes final.⁹⁴ This four-month limit is called the “statute of limitations.”

If you pursue an Article 78 review, it is important to note that it is difficult to get a court to reverse the Parole Board’s decision. The Parole Board’s decisions are discretionary (left to the Parole Board’s choice) and are not subject to review by courts if the decision is made in accordance with what the law requires.⁹⁵ There are two ways for a prisoner to get a reversal of the Board’s decision. A prisoner must

85. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(b) (2020).

86. N.Y. EXEC. LAW § 259-i(6)(a)(i) (McKinney 2018) states that “[t]he board shall provide for the making of a verbatim record of each parole release interview, except where a decision is made to release the inmate to parole supervision, and . . . except when the decision of the presiding officer after such hearings result in a dismissal of all charged violations of parole, conditional release or post release supervision.”

87. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 8000.5(c)(3), 8006.1(e) (2020). Nonconfidential, discoverable documents are materials that you are not restricted from seeing.

88. N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.5(c)(1) (2020).

89. N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.5(c)(2)(i)(a)(1) (2020).

90. N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.5(c)(2)(i)(a)(3) (2020).

91. N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.5(c)(2)(i)(b) (2020).

92. N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.5(c)(6)(ii) (2020).

93. See Part C(6) of Chapter 5 of the *JLM* and Chapter 22 of the *JLM* for discussions of Article 78 proceedings.

94. N.Y. C.P.L.R. 217(1) (McKinney 2019).

95. N.Y. EXEC. LAW § 259-i(5) (McKinney 2018). See *Davis v. N.Y. State Div. of Parole*, 114 A.D.2d 412, 412, 494 N.Y.S.2d 136, 137 (2d Dept. 1985) (“[T]he division of parole’s release decisions are discretionary, and if made in accordance with the statutory requirements, such determinations are not subject to judicial review.”); *Ristau v. Hammock*, 103 A.D.2d 944, 945, 479 N.Y.S.2d 760, 761 (3d Dept. 1984) (requiring a showing of “irrationality bordering on impropriety to warrant intervention by the courts” in a Parole Board’s release decision, which is discretionary).

make a “convincing showing” that either (1) the Board did not consider the required factors or considered erroneous information,⁹⁶ or (2) acted “irrationally bordering on impropriety” in reaching its decision such that it was arbitrary and capricious.⁹⁷ The Parole Board may not consider the following factors in deciding whether to grant parole: “penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place.”⁹⁸ Thus, if you are denied parole on the basis of one of those factors, you may have a right to a new hearing.⁹⁹ In addition, the Parole Board may not consider “illegally seized evidence which has already been suppressed in a criminal action,” or “public pressure” in determining whether or not to grant a prisoner parole.¹⁰⁰ The Parole Board may not deny parole on the grounds that the “best kind of treatment” for your emotional and physical problems would be to remain in prison.¹⁰¹ Finally, the Parole Board is required to consider any recommendations made by the sentencing court, and a reviewing court may order reversal and reconsideration if the Board fails to do so.¹⁰²

Again, despite these limited examples of court reversals, it is important to remember that courts generally defer to Parole Board decisions. Even in cases where the Parole Board based its decision to deny parole on factors other than those specified by the legislature, courts have upheld the decision,

96. *E.g.*, *Plevy v. Travis*, 17 A.D.3d 879, 880, 793 N.Y.S.2d 262, 263 (3d Dept. 2005) (reversing denial of parole and ordering a new parole hearing because the Parole Board improperly considered the petitioner's prior violation of parole, which had been dismissed at the time, when determining denial of parole); *Lewis v. Travis*, 9 A.D.3d 800, 801, 780 N.Y.S.2d 243, 245 (3d Dept. 2004) (reversing denial of parole and granting a new parole hearing due to the Parole Board's reliance on incorrect information about the petitioner's conviction when making its determination); *Edge v. Hammock*, 80 A.D.2d 953, 954, 438 N.Y.S.2d 38, 39 (3d Dept. 1981) (reversing Parole Board's determination of minimum period of imprisonment and ordering a new hearing because the Parole Board based its determination on crimes the petitioner had not been convicted of).

97. *Silmon v. Travis*, 95 N.Y.2d 470, 476, 741 N.E.2d 501, 504 (2000) (explaining when judges may intervene in decisions made by parole commissions); *see also* *Monroe v. Thigpen*, 932 F.2d 1437, 1442 (11th Cir. 1991) (noting that “[a] parole board may not engage in ‘flagrant or unauthorized action’ by knowingly relying on false information”); *Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69, 77, 405 N.E.2d 225, 229, 427 N.Y.S.2d 982, 986 (1980) (rejecting assertion that parole board acted arbitrarily in setting minimum period of imprisonment at maximum sentence).

98. *King v. N.Y. State Div. of Parole*, 83 N.Y.2d 788, 791, 632 N.E.2d 1277, 1278, 610 N.Y.S.2d 954, 955 (1994) (requiring a new hearing before a different panel after finding prisoner was not given a proper parole hearing because “one of the Commissioners considered factors outside the scope of the applicable statute”).

99. *See* *King v. N.Y. State Div. of Parole*, 83 N.Y.2d 788, 791, 632 N.E.2d 1277, 1278, 610 N.Y.S.2d 954, 955 (1994).

100. *Quartararo v. Russi*, No. 45734/92, 1994 WL 16858139 at *20 (N.Y. Sup. Ct. Jan. 31, 1994). In *Quartararo v. N.Y. State Div. of Parole*, 224 A.D.2d 266, 637 N.Y.S.2d 721 (1st Dept. 1996), the court held that the Parole Board “improperly considered factors outside the scope of Executive Law § 259-i and in violation of a prior court order” and ordered a new hearing in front of a different panel. The court held that it was improper for the Parole Board to consider press accounts of the petitioner's crime, unchallenged *ex parte* allegations for removal from a work release program, and photographs of the victim in reviewing the petitioner's application for parole. *Quartararo v. Russi*, No. 45734/92, 1994 WL 16858139 at *25 (N.Y. Sup. Ct. Jan. 31, 1994) (*unpublished*).

101. *People ex rel. Smith v. N.Y. State Bd. of Parole*, 91 Misc. 2d 486, 487, 398 N.Y.S.2d 12, 12 (Sup. Ct. Dutchess County 1976) (holding that petitioner's parole status be reinstated because the Parole Board does not have “the duty of determining what would be the best kind of treatment for petitioner's emotional and physical problems”).

102. *E.g.*, *Standley v. N.Y. State Div. of Parole*, 34 A.D.3d 1169, 1170, 825 N.Y.S.2d 568, 569 (3d Dept. 2006) (reversing denial of parole because the Parole Board “repeatedly failed to consider sentencing minutes and recommendations of the sentencing court” and remanding for a reconsideration that includes these factors); *McLaurin v. N.Y. State Bd. of Parole*, 27 A.D.3d 565, 565, 812 N.Y.S.2d 122, 123 (2d Dept. 2006) (affirming decision ordering Division of Parole to obtain prisoner's resentencing minutes and have a new hearing); *Edwards v. Travis*, 304 A.D.2d 576, 576, 758 N.Y.S.2d 121, 122 (2d Dept. 2003) (Parole Division's failure to consider sentencing judge's recommendation warranted judicial intervention). *But see* *Porter v. Alexander*, 63 A.D.3d 945, 947, 881 N.Y.S.2d 157, 159 (2d Dept. 2009) (holding that although the sentencing court's minutes were missing from the court file, this did not require a new hearing because there was no indication that the sentencing court made a positive recommendation regarding parole).

since the Parole Board may deny parole where “it is incompatible with the welfare of society.”¹⁰³ Thus, the Parole Board may consider additional factors (such as lack of remorse or insight and acceptance of responsibility) to determine whether your release is compatible with the welfare of society.

9. Rescission (Reconsideration of Grant of Parole)

Even if your parole release interview goes well and you receive a parole release date, the Parole Board may be able to reconsider and change its decision before your release date. The New York State Department of Corrections and Community Supervision has established procedures for reconsideration of parole.¹⁰⁴

The senior parole officer, or the parole officer in charge of a facility, may temporarily suspend a release date if he realizes that there may be a basis for Board reconsideration.¹⁰⁵ There are two general categories of events that might cause temporary suspension. The first is the discovery of “significant information which existed” or “significant misbehavior which occurred” *before* the parole release decision that was not known by the Board.¹⁰⁶ The second is an event that occurred *after* the Board’s decision to grant release.¹⁰⁷ The basis for Board reconsideration may include, but is not limited to, one or more of the following circumstances:

- (1) Significant misbehavior or a major violation of facility rules,
- (2) An escape or removal from temporary release,
- (3) A prisoner’s commitment to a psychiatric treatment center,
- (4) Imposition of an additional definite sentence,
- (5) Imposition of an additional indeterminate sentence, and
- (6) Any major changes to the sixteen factors listed in Part F(3) of this Chapter.¹⁰⁸

This list is not exclusive. For example, in a 2005 case, *Pugh v. Parole*, parole was rescinded (taken back) because the victims’ statements were not considered before granting parole. Once the victims complained, the Board considered their statements.¹⁰⁹ The parole officer should notify you in writing of the suspension “as soon as practicable,” investigate the circumstances leading to the suspension, and prepare a “rescission report” for a Board member.¹¹⁰ The Board member will then review the report and decide either to reinstate your release date or to hold a rescission hearing. A rescission hearing is a hearing held to determine if after being granted but before parole release officially occurs, parole will be taken back or not. If a rescission hearing is ordered, you will receive a copy of the rescission report and a notice of the rescission hearing at least seven days before the hearing.¹¹¹ The notice must state:

- (1) The date and place of the hearing;
- (2) The specific allegations that will be considered at the hearing; and
- (3) A description of your rights at the final hearing, like your right to counsel, to testify, to present witnesses and introduce evidence, and to cross-examine most of the government’s witnesses.¹¹²

103. *Silmon v. Travis*, 95 N.Y.2d 470, 477–478, 741 N.E.2d 501, 505–506, 718 N.Y.S.2d 704, 708–709 (2000) (holding that a decision by the Parole Board to deny parole for a prisoner who pleaded guilty to murdering his wife but denied culpability was not arbitrary or capricious).

104. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5 (2020).

105. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(1) (2020).

106. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(2)(i) (2020).

107. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(2)(ii) (2020).

108. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(2)(ii)(a)–(7) (2020).

109. *Pugh v. N.Y. State Bd. of Parole*, 19 A.D.3d 991, 993, 798 N.Y.S.2d 182, 184 (3d Dept. 2005) (holding that victim impact statements, which had not been available before, were substantial enough evidence to justify rescinding petitioner’s parole).

110. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(3) (2020).

111. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(5) (2020).

112. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(5)(i)–(iii) (2020).

There is no specific time limit, but the rescission hearing must be scheduled to take place within a “reasonable time after the board orders a hearing.”¹¹³ You have the right to be represented by a lawyer at a rescission hearing, but there is no requirement that a lawyer be appointed to you.¹¹⁴ You have the right “to appear and speak on [your] own behalf; to present witnesses and introduce documentary evidence; and to confront and cross-examine adverse witnesses.”¹¹⁵ But you cannot force witnesses to appear if the members of the Board of Parole conducting the hearing find good cause in the record for a witness not to appear.¹¹⁶

A majority of the Board members at the hearing (that is, at least two of the three members) must find there is substantial evidence presented at the hearing to support a decision to rescind parole.¹¹⁷ In general, if there was enough evidence to find you guilty of a violation of facility rules at the Superintendent’s Hearing, there is probably enough evidence to uphold parole rescission.¹¹⁸ The Parole Board will then rescind the release date. The Board will then set a new date for release consideration for not more than twenty-four months from the date of the original release interview, or it will set a new release date.¹¹⁹ If the majority of the Parole Board does not believe that there is enough evidence to support taking back parole, it will cancel the temporary suspension and restore the original release date. If that date has passed, the Board will set a new one for as soon as practicable.¹²⁰ The appeal process for rescission is the same as the process for appealing parole denial.¹²¹

It is not clear whether the rescission of parole creates a protected “liberty interest” that invokes due process protection.¹²² The Supreme Court held in *Jago v. Van Curen* that an incarcerated person whose parole date was revoked before his release did *not* have a liberty interest requiring due process protection.¹²³ The Court made this decision even though the incarcerated person did not receive notice or a hearing about the rescission of his parole. In *Lanier v. Fair*,¹²⁴ the First Circuit noted that *Van Curen* involved a state law that gave the Parole Board complete power in determining its parole policies. Thus, in that particular case, the law did not create a liberty interest. But other courts have found that you have a liberty interest when your parole is rescinded, and that you deserve due process protection in those cases.¹²⁵ For example, when a state law uses language that requires the consideration of parole, some courts have found that this language creates an “expectation of parole”. Exceptions of parole constitute a liberty interest protected by the U.S. Constitution.¹²⁶ Also, some

113. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(c)(1) (2020).

114. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(5)(iii)(a) (2020).

115. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(5)(iii)(b)–(c) (2020).

116. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(b)(5)(iii)(c) (2020).

117. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(d)(1) (2020).

118. *Brooks v. Travis*, 19 A.D.3d 901, 901–902, 797 N.Y.S.2d 183, 184 (3d Dept. 2005) (holding that petitioner’s guilty plea to an offense in a misbehavior report was enough evidence to show a significant misbehavior for the purpose of rescinding parole).

119. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(d)(1)(i)–(ii) (2020).

120. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.5(d)(2) (2020).

121. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1 (2020).

122. For a discussion of due process and “liberty interest,” see Parts B and C of Chapter 18 of the *JLM*.

123. *Jago v. Van Curen*, 454 U.S. 14, 17, 102 S. Ct. 31, 34, 70 L. Ed. 2d 13, 17 (1981).

124. *Lanier v. Fair*, 876 F.2d 243, 251 (1st Cir. 1989).

125. *See, e.g., Watson v. DiSabato*, 933 F. Supp. 390, 392 (D.N.J. 1996) (holding that New Jersey’s parole statute creates a sufficient expectation of parole eligibility to give rise to a liberty interest); *Harper v. Young*, 64 F.3d 563, 564–565 (10th Cir. 1995) (“[P]rogram participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself.”).

126. *See, e.g., Clarkson v. Coughlin*, 898 F. Supp. 1019, 1040 (S.D.N.Y. 1995) (holding that there is a state-created limited protected liberty interest in New York parole proceedings, extending as far as a prisoner’s rights to be heard and to know reasons for parole denial); *Wilson v. Kelkhoff*, 86 F.3d 1438, 1446 (7th Cir. 1996) (holding that Illinois’s parole statute provides for protectable liberty interest in release for most prisoners). *But see Allison v. Kyle*, 66 F.3d 71, 73–74 (5th Cir. 1995) (holding that Texas’ parole statute does not create a liberty interest in parole that is entitled to due process protection); *Hamm v. Latessa*, 72 F.3d 947, 955 (1st Cir. 1995) (finding no state-created liberty interest in parole for a parole proceeding governed by Massachusetts state law).

courts have decided that when a parole board narrows its rescission authority in its own regulations, it creates a liberty interest that requires due process protection.¹²⁷ Therefore, it is possible that since the New York State DOCCS has established a process for the reconsideration of parole, it has also created a liberty interest in parole that deserves due process protection. This issue has not yet been brought before a court of law.

G. Release on Parole

1. Release Procedures

If you are granted parole release, the first step is to complete your parole plan and have it approved. Upon the completion and approval of your parole plan, you will be given a “Conditions of Release” form to sign, and will have to report to a parole officer.¹²⁸ If you are approved for parole release prior to having an approved employment and residence program, you will be placed on “open date” status. This means that the Board will determine your release date when they receive your approved supervision plan.¹²⁹

If you were sentenced for a felony sex offense, a violent felony or a felony drug offense, the law requires that you serve post-release supervision for a period of time after your release.¹³⁰ Post-release supervision for a felony sex offense may be up to twenty-five years. For a violent felony or a felony drug offense, post-release supervision may last up to five years, depending on the type of offense for which you were imprisoned.¹³¹ The sentencing court has the power to choose a shorter term of post-release supervision within the ranges defined by law. Their decision to do so is depends on the nature of the crime that resulted in your conviction.¹³² If your sentence requires post-release supervision, do further research at your facility’s library or online. This Section of the *JLM* provides only a general overview of the law and its effects.

2. Supervision of Parole

After you are placed on parole, you will remain under the supervision of the Department of Corrections and Community Supervision. Supervision will end either at the end of your maximum sentence, at the end of your parole supervision (which may be granted early by the Parole Board if you have been on unrevoked community supervision for at least three consecutive years), or upon a return to prison.¹³³ Be sure you completely understand the conditions of your release. This includes any special conditions set by the parole officer or the Parole Board. The failure to follow any parole release requirement could result in a violation. Violations might result in the start of parole revocation proceedings. If you have any questions about the terms of your release or what type of activity is prohibited, ask your parole officer to explain.¹³⁴

127. See *Green v. McCall*, 822 F.2d 284, 287 (2d Cir. 1987) (holding that where a parole commission has limited rescission authority, parole grantees whose early release date was set but were not released had protectable liberty interest entitling them due process); *Ellard v. Ala. Bd. of Pardons & Paroles*, 824 F.2d 937, 943–944 (11th Cir. 1987) (“In view of the statutory restrictions on the authority of the Parole Board to revoke a parole, we conclude that [parole grantee] had a constitutionally protected liberty interest.”).

128. N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2 (2020).

129. N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision* (2020), at 12–13, available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 29, 2020).

130. N.Y. PENAL LAW § 70.45(1) (McKinney 2009).

131. N.Y. PENAL LAW §§ 70.45(2), 70.45(2-a)(i) (McKinney 2009).

132. N.Y. PENAL LAW §§ 70.45(2), 70.45(2-a) (McKinney 2009).

133. N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.1(a) (2020); N.Y. EXEC. LAW § 259-j(1) (McKinney 2018).

134. See generally N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision* (2020), at 19, available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 29, 2020).

It is very important to create a good working relationship with your parole officer. Your parole officer will be responsible for deciding whether you are able to serve the remainder of your sentence outside of prison. In addition, your parole officer can serve as an important resource to help you in many ways. For example, your parole officer may inform you of social service programs or emergency hotlines. Cooperate with your parole officer, but you should also know that the conversations you have with your parole officer are not confidential. *Statements that you make about your activities that might be considered parole violations could be deemed confessions or admissions, and these statements could be used against you in parole revocation proceedings.*¹³⁵ However, if your parole officer wrongly collects evidence, this evidence may not be used against you in a criminal prosecution. Even if the same evidence is admissible at your parole revocation hearing, it will not be allowed at your criminal proceeding.¹³⁶

There are several important conditions of release you must follow carefully. Failure to do so might result in a violation of your parole, which could result in parole revocation proceedings. The conditions of release are:

- (1) Within twenty-four hours of your release, you must report to your designated area of release immediately and file an *arrival report* with the office of the DOCCS;
- (2) You must not leave the state or any area defined in your “Conditions of Release” plan without permission;
- (3) You must not intentionally avoid supervision by avoiding your parole officer or avoiding the designated place of residence;
- (4) You must let your parole officer visit your home and work to inspect your property. You must immediately tell your parole officer of any change of address or change in employment status;
- (5) You must reply “promptly, fully, and truthfully” to any communication from your parole officer or a representative of the DOCCS;
- (6) You must tell your parole officer of any contact with police or any new arrest immediately. Even if the charges in the new arrest are dropped, failure to report an arrest can be a violation of your parole;
- (7) You may not associate with people who have criminal records;
- (8) You may not violate a law that has prison time as a possible penalty, and you may not threaten the safety of yourself or others;
- (9) You may not own, possess, or purchase any kind of firearm or dangerous knife without written permission from your parole officer. Other prohibited items include razors, stilettos, or imitation pistols, or any instrument that could easily cause physical injury without an acceptable explanation for having the item;
- (10) If you do leave the state of New York, you waive the right to challenge extradition to New York from another state or another country.
- (11) You may not use or possess any controlled substance or drug paraphernalia without medical authorization;
- (12) You must follow all instructions given by your parole officer; and
- (13) You will follow any special conditions set by your parole officer or a member of the DOCCS.¹³⁷

Other special conditions of parole may be set based on the nature of the underlying criminal conviction. Parole conditions may be set by a member of the Board of Parole, the DOCCS, or a parole

135. See, e.g., *People ex rel. King v. N.Y. State Bd. of Parole*, 65 A.D.2d 465, 468–469, 412 N.Y.S.2d 138, 140–141 (1st Dept. 1979) (holding that admission to parole officer of possession of heroin was admissible in a parole revocation hearing, even though evidence of heroin was suppressed in court proceeding because it had been illegally seized).

136. See, e.g., *People ex rel. King v. N.Y. State Bd. of Parole*, 65 A.D.2d 465, 468, 412 N.Y.S.2d 138 (1979) (1st Dept. 1979) (“We note at this juncture that a parole revocation hearing is not a stage of a criminal prosecution, and the standards applied to the former do not carry over to the latter.”).

137. The preceding release conditions are listed in N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(1)–(13) (2020).

officer as long as they are made in accordance with law.¹³⁸ Furthermore, the DOCCS has special guidelines for sex offenders, which may include residency restrictions and curfews.¹³⁹ This means it may be very difficult to qualify for the conditions of parole, as you may be required to live in a place not near a school or a school bus stop. Those with a sex offense may also be prohibited from living with a minor. For a discussion of special conditions that are often imposed on parolees convicted of sex offenses, see Chapter 36 of the *JLM*, “Special Considerations for Sex Offenders.”

If you are having any trouble with your parole officer, contact the parole officer’s supervisor.

3. Your Rights While on Parole

Your parole officer has a fair amount of discretion in supervising you and evaluating possible parole violations. When you sign your “Conditions of Release” form, you give “advance consent” to certain parole officer conduct that might be unconstitutional in other contexts. For example, your parole officer may search you and seize property without a warrant and without probable cause. He or she may visit your home frequently to make sure you still live there.¹⁴⁰ Your parole officer may also visit your place of employment.¹⁴¹

Since you are still considered to be in the constructive custody of the state, you—unlike an ordinary citizen—may not receive full constitutional protection against violations of your rights. There has been some litigation on the extent of privacy and other rights that you keep as a parolee. From this litigation, courts have decided that any search must be knowing and voluntary, and reasonably related to the rehabilitation goal. Any search must also be performed by a parole officer in his or her duty to monitor your rehabilitation.¹⁴² Since you usually must consent to home visits from your parole officer and searches at the time of parole, a court will likely find that the knowing and voluntary requirement is met. This is likely if you state that you understand and agree to abide by all the conditions your parole.¹⁴³ Furthermore, it is unlikely that a court will find that the other two requirements have not been met unless there is no foundation for the search or it has nothing to do with you.¹⁴⁴ For example,

138. N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.3 (2020); *Dickman v. Trietley*, 268 A.D.2d 914, 916, 702 N.Y.S.2d 449, 451 (3d Dept. 2000) (holding that a parolee’s field parole officer was authorized to impose the parole condition prohibiting the parolee from residing with a woman the parolee had never met, since restriction was rational and violated no statutory requirement).

139. See, e.g., *Monroe v. Travis*, 280 A.D.2d 675, 675–676, 721 N.Y.S.2d 377, 378 (2d Dept. 2001) (holding that Parole Division could require sex offender to secure approved housing before granting his request of conditional release); *Billups v. N.Y. State Div. of Parole*, 18 A.D.3d 1085, 1085–1086, 795 N.Y.S.2d 408, 409 (3d Dept. 2005) (holding that Parole Board’s requirement that prisoner find suitable residence as a condition of prisoner’s parole release was rational, because prisoner had a history of violent conduct and sexual offenses).

140. See N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision* (2020), at 23, available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 29, 2020).

141. N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(d). If you are worried that your parole officer visiting your job might be a problem, advise your parole officer about this. N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision* (2020), at 23, available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 29, 2020).

142. *People v. Hale*, 93 N.Y.2d 454, 464, 714 N.E.2d 861, 866, 692 N.Y.S.2d 649, 654–655 (1999) (holding that a parole officer’s search of the home of a parolee suspected of dealing drugs did not violate his constitutional rights when parolee had agreed to searches for illegal drugs as a condition of parole).

143. N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(4) (2020). See also *United States v. Yearly*, 740 F.3d 569, 581–582 (11th Cir. 2014) (finding that an incarcerated person who understood and accepted the terms of his release, which included unwarranted searches, knowingly and voluntarily consented to such searches).

144. *People v. Tony*, 30 Misc. 3d 867, 874–875, 914 N.Y.S.2d 585, 592 (Sup. Ct. Bx. County 2010) (holding that where a parole officer had no reason to suspect petitioner of a parole violation and searched his residence, the firearm located at the residence during the search would not be admissible in evidence because the search was not “rationally and reasonably related” to the parole officer’s duties).

courts have held that you may be required to give blood and have your DNA kept on file in a data bank as part of a legal search.¹⁴⁵

4. Special Parole

Special parole is different from regular parole. Special parole was created especially for drug offenses. It was repealed in 1984 but still covers crimes committed before November 1, 1987.¹⁴⁶ Special parole follows a prison term and is set by the sentencing judge. Regular or traditional parole allows for release before the end of a prison term and is set by the Parole Board. However, if you violate the conditions of special parole you must serve the remainder of the special parole term in prison. After serving the remainder of your special parole term, the Parole Commission may set a new term of imprisonment. Following your imprisonment, the Parole Commission also has the right to set a term of traditional parole.¹⁴⁷ The Parole Commission may also re-set another term of special parole after revoking a term of special parole.¹⁴⁸

H. Revocation of Your Parole (Taking Away Your Parole)

1. How and Why Parole Revocation Begins

If you do not follow the terms of your parole release, you may have to return to prison to serve the rest of your sentence. In order for the Parole Board to revoke (take away) your parole, you must have violated a condition of parole “in an important respect.”¹⁴⁹ This standard, however, is often met by a direct violation of one of the explicit conditions of parole. These conditions may include not making curfew¹⁵⁰ or being in an explicitly prohibited area.¹⁵¹ Decisions by the Parole Division to revoke parole may only be reviewed by a court. A court will decide whether the Parole Board followed the proper

145. N.Y. EXEC. LAW § 995-c(3) (McKinney 2020); *Kellogg v. Travis*, 188 Misc. 2d 164, 169, 728 N.Y.S.2d 645, 649 (Sup. Ct. N.Y. County 2001) (holding N.Y. Exec. Law § 995-c is constitutional and withdrawal of a parolee’s blood does not constitute an illegal search and seizure, even though less invasive means of getting a DNA sample exist).

146. 21 U.S.C. § 841(c) (repealed 1984). *See also*, *Strong v. U.S. Parole Comm’n*, 141 F.3d 429, 431 (2d Cir. 1998) (“Although [21 U.S.C. § 841(c)] was repealed by the Sentencing Reform Act of 1984, it still governs convictions for offenses committed before November 1, 1987”), *abrogated on other grounds by* *Rich v. Maranville*, 369 F.3d 83 (2d Cir. 2004).

147. *United States v. Caraballo*, No. 96 Civ. 6915 (KTD), 86 Cr. 336 (KTD), 2000 U.S. Dist. LEXIS 499, at *8–9 (S.D.N.Y. Jan. 20, 2000) (*unpublished*) (holding that the Parole Commission can re-impose a term of regular parole on a prisoner who violated special parole and was imprisoned for the remaining period of his special parole).

148. *Rich v. Maranville*, 369 F.3d 83, 90 (2d Cir. 2004) (holding that “when special parole is revoked that term is suspended and continues to exist. The Commission thus creates nothing when it re-imposes that court-created term of special parole after the revocation and incarceration”); *Billis v. United States*, 83 F.3d 209, 211 (8th Cir. 1996) (finding that district courts have the authority to impose a subsequent term of supervised release after revocation of an initial term of supervised release); *U.S. Parole Comm’n v. Williams*, 311 U.S. App. D.C. 416, 54 F.3d 820, 823 (1995) (finding that the Parole Commission may place the incarcerated person back on special parole). *But see* *Strong v. U.S. Parole Comm’n*, 141 F.3d 429, 432 (2d Cir. 1998) (holding that the Parole Commission lacks the authority to impose a second term of special parole after revoking the original term); *Artuso v. Hall*, 74 F.3d 68, 71 (5th Cir. 1996) (finding that the Parole Commission lacked statutory authority to impose a second period of special parole after it had revoked a first special parole term); *Fowler v. U.S. Parole Comm’n*, 94 F.3d 835, 837 (3d Cir. 1996) (finding that only traditional parole, not special parole, could be granted after special parole had been revoked).

149. N.Y. EXEC. LAW § 259-i(3)(c)(iv) (McKinney 2018); *People ex rel. Korn v. N.Y. State Div. of Parole*, 274 A.D.2d 439, 440, 710 N.Y.S.2d 124, 125 (2d Dept. 2000) (stating that a violation of a “substantial condition” of parole is sufficient to have parole revoked and that a curfew violation meets this standard).

150. *See People ex rel. Korn v. N.Y. State Div. of Parole*, 274 A.D.2d 439, 440, 710 N.Y.S.2d 124, 125 (2d Dept. 2000) (holding that a prisoner violated a “substantial condition” of his parole by missing his curfew without adequately explaining this violation, and this was a reasonable ground to support revoking prisoner’s parole).

151. *Bellamy v. N.Y. State Div. of Parole*, 274 A.D.2d 871, 872, 711 N.Y.S.2d 596, 597 (3d Dept. 2000) (holding that revocation of parole was justified where parolee was found on a street that he was twice told not to enter as a special condition of his parole).

procedural rules. The court cannot decide about the truthfulness of your reasons for violating parole.¹⁵² Courts usually uphold the Parole Commission's decisions. If your parole officer has "reasonable cause to believe that [you have] lapsed into criminal ways, company, or [have] violated one or more of the conditions of [your] release in an important respect,"¹⁵³ he or she may report such conduct to a member of the Parole Board or a designated officer. That individual may then secure a warrant for retaking and temporary detention.¹⁵⁴ A parole violation is called a "delinquency." If it is later proven that you violated your parole, your parole will be revoked from the date of this delinquency.¹⁵⁵ So it is important to know exactly when you allegedly violated your parole because if your parole is revoked, you must serve the prison time dating back to the delinquency date. You will, however, be credited for time spent on parole prior to the delinquency date.¹⁵⁶ If your parole is being revoked, you may contact the Legal Aid Society's Parole Revocation Defense Unit at 199 Water Street, 5th Floor, New York, NY 10038 (phone (212) 577-3300).

If you are being held on a parole warrant, you may not receive bail or release until the parole warrant is lifted.¹⁵⁷ If you are being detained on other charges (which may serve later as the basis for parole revocation), and bail is set on those charges, you cannot be released while the parole warrant is pending.

In *Morrissey v. Brewer*, the U.S. Supreme Court ruled that a paroled convict has a liberty interest protected by due process. This means that the revocation of parole release and re-incarceration must be decided under due process.¹⁵⁸ New York State's parole law provides for two due process hearings: preliminary and final. Within three days of the issuance of a warrant for your retaking, you must receive written notice of what conditions you have violated. The notice must also inform you of the date and location of the preliminary parole revocation hearing.¹⁵⁹ The notice shall be given within three days after the execution of a warrant for retaking and temporary detention. It cannot be given less than forty-eight hours before to the preliminary hearing.¹⁶⁰ If you are out of state, you should be given written notice of the time, place, and purpose of the hearing within five days of the issuance of the warrant for your retaking.¹⁶¹

2. Preliminary Hearing

The purpose of the preliminary hearing is to decide whether there is "probable cause" that you violated one or more of the conditions of your parole release.¹⁶² The Parole Board needs to show

152. *People ex rel. Bayham v. Meloni*, 182 Misc. 2d 831, 832, 700 N.Y.S.2d 649, 650 (County Ct. Monroe County 1999) (quoting *Zientek v. Herbert*, 606 N.Y.S.2d 479, 480, 199 A.D. 2d 1075, 1076 (4th Dept. 1993)) ("A court, when reviewing a determination by the Parole Board to revoke parole, may only 'examine the record to determine if the required procedural rules were followed and if there is any evidence which, if believed, would support the Parole Board's determination, but the court may not make its own determinations based on its assessment of the credibility of the witnesses.'").

153. N.Y. COMP. CODES R. & REGS. tit. 9, § 8004.2(a) (2020).

154. N.Y. COMP. CODES R. & REGS. tit. 9, § 8004.2(c) (2020) ("Reasonable cause exists when evidence or information which appears reliable discloses facts or circumstances that would convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that a releasee has committed the acts in question or has lapsed into criminal ways or company. Such apparently reliable evidence may include hearsay.").

155. N.Y. PENAL LAW § 70.40(3)(a)–(b) (McKinney 2009).

156. N.Y. PENAL LAW § 70.40(3)(c) (McKinney 2009).

157. *See, e.g., People ex rel. Calloway v. Skinner*, 33 N.Y.2d 23, 33–34, 300 N.E.2d 716, 720, 347 N.Y.S.2d 178, 184 (1973) (holding right to bail is statutory, and without statutory direction, prisoners are not entitled to either bail or release pending hearing before the Parole Board).

158. *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 2601, 33 L. Ed. 2d 484, 495 (1972) (discussing the nature of a parolee's liberty interest and finding that due process is required).

159. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.3 (2020).

160. N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.3(a) (2020).

161. N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.3(a) (2020).

162. N.Y. EXEC. LAW § 259-i(c)(iv) (McKinney 2018). "Probable cause" means a reasonable ground to believe that a person has committed, is committing a crime, or that a place is connected with a crime. BLACK'S LAW DICTIONARY (11th ed. 2019).

evidence of your alleged violation.¹⁶³ The hearing must be held within fifteen days of the issuance of the warrant of retaking. It also must be conducted by a hearing officer who has not had any prior supervisory involvement over you.¹⁶⁴

At the preliminary hearing, you are entitled to the following rights:

- (1) To speak on your own behalf or to have a lawyer represent you;¹⁶⁵
- (2) To introduce letters and documents;¹⁶⁶
- (3) To present witnesses who may provide relevant information in support of your case;¹⁶⁷ and
- (4) To confront and cross-examine witnesses testifying against you, unless the hearing officer finds good cause for their non-attendance.¹⁶⁸

The rules state that you may be represented by counsel at your preliminary hearing, but it is important to note that you do *not* have an absolute right to be represented by counsel. You also do not have an absolute right to have an attorney appointed if you cannot afford to hire one.¹⁶⁹ If you believe that you need the assistance of counsel at the preliminary hearing, try to get an attorney through the county or supreme court in the district where you are being held. You may also seek an attorney through the Legal Aid Society if you are in New York City. Unless you have a very complicated case, it may be hard to get an attorney assigned at this stage. You do not have to testify at this hearing or at the final hearing. You also do not have to make a statement to your parole officer while he or she is preparing the Parole Violation Report. Any statement you do make may be used as evidence at the final hearing.¹⁷⁰

An important difference between the preliminary hearing and the final hearing is that not all of the charges need to be heard at the preliminary hearing. If the hearing officer decides that probable cause exists after hearing one or more of the charges, the judge may decide that there is enough probable cause to end the preliminary hearing. The judge may then take appropriate action to make a final decision regarding the alleged violation.¹⁷¹ Probable cause means that there are reasonable grounds for the judge to believe that a parole violation occurred. If there is proof of conviction for a crime that was committed after release on parole (for example, a certificate of conviction), the judge will consider that enough to show probable cause.¹⁷² Unlike the final hearing, there is no opportunity

163. This means the Parole Board must create a sufficient case of a violation, which you have to explain or prove wrong. N.Y. EXEC. LAW § 259-i(c)(v) (McKinney 2018).

164. N.Y. EXEC. LAW § 259-i(3)(c)(i) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.4(a) (2020).

165. The attorney must file a notice of appearance. N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.3(c)(1) (2020); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.5(a)–(b)(2020).

166. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.3(c)(2) (2020).

167. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.3(c)(3) (2020).

168. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.3(c)(4) (2020). You may force witnesses against you to attend the hearing through subpoenas, unless you have been convicted of a new crime while under parole supervision, or the hearing officer finds good cause for the witnesses' non-attendance. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.3(c)(4). If you are proceeding *pro se* (without an attorney) at this stage, you may apply to the hearing officer or Board member presiding at the hearing for the subpoenas. N.Y. C.P.L.R. 2302(a) (McKinney 2010). You may also apply to the local supreme court for subpoenas for necessary witnesses or documents. N.Y. C.P.L.R. 2302(b) (McKinney 2010).

169. See, e.g., *People ex rel. Calloway v. Skinner*, 33 N.Y.2d 23, 32, 300 N.E.2d 716, 719, 347 N.Y.S.2d 178, 182–183 (1973) (noting that the New York State and Federal Constitutions confer only a conditional or discretionary right to counsel at a preliminary parole revocation hearing).

170. N.Y. COMP. CODES R. & REGS. tit. 9, § 8004.3(c) (2020); see, e.g., *People ex rel. King v. N.Y. State Bd. of Parole*, 65 A.D.2d 465, 468–469, 412 N.Y.S.2d 138, 140–141 (1st Dept. 1979) (holding that admission to parole officer of possession of heroin was admissible in a parole revocation hearing, even though evidence of heroin was suppressed in court proceeding because it had been illegally seized).

171. N.Y. EXEC. LAW § 259-i(3)(c)(viii) (McKinney 2018); N.Y. EXEC. LAW § 259-i(3)(d) (McKinney 2018).

172. N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.2(c)–(d) (2020).

at the preliminary hearing to present evidence of mitigating factors or suggestions for alternatives to incarceration.

3. Final Hearing

The preliminary hearing is like an arraignment (if you have not yet gone to trial) where the court will decide if there is probable cause to continue to hold you for a suspected parole violation. The final hearing is like a trial to decide whether you violated parole. Thus, if the hearing officer finds probable cause at the preliminary hearing (or if you have waived the preliminary hearing), a member of the Parole Board will review your case and decide whether to declare you delinquent.¹⁷³ Depending on the decision of the Board member, a final hearing will be set or you will be returned to supervision. If you are declared delinquent, a final hearing will be less no more than ninety days after the probable cause determination.¹⁷⁴ The final hearing date may only be set for a later date if you request and are granted an adjournment (delay). A final hearing may also be set for a later date if you agree to a postponement of the hearing.¹⁷⁵

Both you and your attorney can receive written notice of the date, time, and place of the hearing at least fourteen days before the hearing.¹⁷⁶ But if the hearing is adjourned or delayed for some reason, there is no additional fourteen-day notice requirement.¹⁷⁷ If the Parole Board does not obey the statutory time requirements, your parole violation warrant will be removed. In addition, your parole status will be restored.¹⁷⁸ Notice of final revocation proceedings will tell you the rights that you have at the hearing.

In a revocation hearing you have the following rights:

- (1) To have a lawyer represent you (if you have pending criminal charges, the attorney representing you in the criminal case is allowed to also represent you at your revocation hearing. If not, a different attorney will be assigned to you);¹⁷⁹
- (2) To appear and speak on your own behalf;
- (3) To confront and cross-examine witnesses testifying against you, unless the presiding officer finds good cause for the witnesses not to attend;
- (4) To present witnesses and documents in defense of the charges against you;
- (5) To present witnesses and documents about whether placing you back in prison is the appropriate action;¹⁸⁰ and

173. Waived means to voluntarily give up a claim or right. In this case, it would be to voluntarily give up your right to a preliminary hearing.

174. N.Y. EXEC. LAW § 259-i(3)(f)(i) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.17(a) (2020).

175. N.Y. EXEC. LAW § 259-i(3)(f)(i) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.17(c) (2020).

176. N.Y. EXEC. LAW § 259-i(3)(f)(iii) (McKinney 2014); N.Y. COMP. CODES R. & REGS. tit. 9 § 8005.17(b) (2020).

177. See, e.g., *People ex rel. Wentsley v. Hammock*, 89 A.D.2d 1058, 1058, 454 N.Y.S.2d 761, 762 (4th Dept. 1982) (holding that “[t]here is no requirement that an additional 14 days’ notice be given for a rescheduled or adjourned final parole revocation hearing.”).

178. See, e.g., *People ex rel. Levy v. Dalsheim*, 66 A.D.2d 827, 828, 411 N.Y.S.2d 343, 344 (2d Dept. 1978), *aff’d*, 48 N.Y.2d 1019, 402 N.E.2d 141, 425 N.Y.S.2d 802 (1980) (“[The] statute . . . makes clear that a delay beyond 90 days after the probable cause determination is unreasonable per se.”).

179. N.Y. EXEC. LAW § 259-i(3)(f)(v) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.16(a) (2020). See *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 2601, 33 L. Ed. 2d 484 (1972) (holding a paroled convict has a liberty interest that falls under the 14th Amendment, and its termination requires some due process). See Chapter 4 of the *JLM* for information on how to find a lawyer, and Appendix IV for information on how to contact the Legal Aid Society.

180. N.Y. EXEC. LAW § 259-i(3)(f)(v) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.18(b)(1)–(4) (2020).

- (6) To present mitigating evidence relevant to the restoration of parole.¹⁸¹ That is, you can present evidence that might justify or excuse the conduct that is alleged to be a parole violation.

Your rights at the revocation proceeding are almost the same as those in the preliminary hearing. The only exceptions are your right to an attorney and your right to present mitigating factors. The standard for revoking parole at the final hearing is a decision made by a “preponderance of the evidence” (meaning that it is more likely than not) that you violated one or more conditions of release in an important respect.¹⁸²

If you have pending criminal charges, the conduct that resulted in those charges can be considered by the Parole Board when deciding whether you violated your parole. If the parole revocation hearing takes place after any criminal case against you has gone to trial, several rules may apply. For example, if you were convicted or acquitted of those charges by any defense other than an affirmative defense, the Parole Board can consider the conduct underlying the charges.¹⁸³ Affirmative defenses are those explanations that you presented at trial that lessened or defeated the legal consequences of your trial. Examples of these defenses are insanity or self-defense. If you were acquitted through an affirmative defense, then the Parole Board probably cannot consider those charges in its parole revocation decision.¹⁸⁴ Courts have held that there is no denial of due process if the Board refuses to delay the final revocation hearing until after the pending criminal case is handled.¹⁸⁵ This is the case even if there is a lower standard of proof in parole revocation decisions

181. N.Y. EXEC. LAW § 259-i(3)(f)(vi) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.18(b)(5) (2020)..

182. N.Y. EXEC. LAW § 259-i(3)(f)(viii) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.19(e) (2020). “Preponderance of the evidence” is a legal standard meaning “more likely than not.” It is a lesser standard than “beyond a reasonable doubt,” the legal standard for conviction of a crime.

183. See, e.g., *People ex rel. Froats v. Hammock*, 83 A.D.2d 745, 745, 443 N.Y.S.2d 500, 501 (4th Dept. 1981) (holding that acquittal of criminal charges does not bar subsequent parole revocation based on underlying charges). As noted, an affirmative defense is an explanation that you provide as evidence to support that mitigates (lessens) or defeats the legal consequences that result from your trial. Examples of affirmative defenses include insanity, self-defense, and statute of limitations (most criminal prosecutions must be brought within a certain number of years after the crime was committed, and, if the prosecutor charges you after that time period, you would have the statute of limitations as a defense).

184. The Parole Board is prevented from considering the criminal charges in affirmative defense cases because of the doctrine of *collateral estoppel*, which means that issues brought before a court and decided in one case cannot be re-litigated by the same parties in another case. See *People ex rel. Matthews by Greenberg v. N.Y. State Div. of Parole*, 58 N.Y.2d 196, 201–203, 447 N.E.2d 689, 691–692, 460 N.Y.S.2d 746, 748–749 (1983) (explaining that while underlying conduct from a new criminal trial can be considered for revocation purposes even with an acquittal, collateral estoppel principles mean it cannot be considered when the acquittal is based on an affirmative defense). Whether the Board can use evidence that has been suppressed in a criminal proceeding against you in a parole revocation hearing is unsettled (that is, not certain). In *People ex rel. Piccarillo v. N.Y. State Bd. of Parole*, the Court held that evidence that could not be used in a criminal trial because it resulted from an illegal search or seizure also could not be used in a parole revocation hearing. *People ex rel. Piccarillo v. N.Y. State Bd. of Parole*, 48 N.Y.2d 76, 83, 397 N.E.2d 354, 358, 421 N.Y.S.2d 842, 846 (1979) (stating that the exclusionary rule applies to parole revocation hearings). However, *Pa. Bd. of Probation v. Scott* reached the opposite conclusion, holding that the federal exclusionary rule does not apply to parole proceedings. *Pa. Bd. of Probation v. Scott*, 524 U.S. 357, 364, 118 S. Ct. 2014, 2020, 141 L. Ed. 2d 344, 352 (1998). Some New York courts have interpreted *Scott* as overruling *Piccarillo*, while others have refused to do so. See *People ex rel. Gordon v. O’Flynn*, 3 Misc. 3d 963, 965, 775 N.Y.S.2d 507, 509 (Sup. Ct. Monroe County 2004) (holding that *Scott* overruled *Piccarillo* and that the federal exclusionary rule does not apply to parole proceedings); but see *State ex rel. Thompson v. Harder*, 8 Misc. 3d 764, 766 n.2, 799 N.Y.S.2d 353, 355 n.2 (Sup. Ct. Broome County 2005) (holding that the court will continue to apply the exclusionary rule to parole proceedings).

185. See, e.g., *People ex rel. Matthews v. N.Y. State Div. of Parole*, 58 N.Y.2d 196, 201, 447 N.E.2d 689, 460 N.Y.S.2d 746 (1983) (holding that refusal to adjourn a revocation hearing until criminal charges were tried did not constitute a violation of due process). The Board only needs to find it is more likely than not that you violated your parole; you can only be convicted of the crime if the court finds beyond a reasonable doubt that you committed the unlawful act.

Thus, the Parole Board can find that you violated your parole even if you are not later convicted of the criminal charges.

I. Appeals

You may appeal the revocation of your parole by filing a “Notice of Appeal” within thirty days of the date of the written notice of the Parole Board’s decision.¹⁸⁶ It is important to file your appeal within thirty days of the Board’s decision. If you do not, you will waive, or give up your right to appeal the decision.¹⁸⁷ You may be represented by an attorney during your appeal.¹⁸⁸ Within four months of the date that the notice of appeal was filed, you or your attorney must file the original and two copies of the appeal letter or brief with the Appeals Unit in Albany.¹⁸⁹ Your appeal letter or brief must state the rulings that you are challenging and explain the basis for your appeal.¹⁹⁰ The appeal must be based on the written record. You may get an extension “for good cause” if you request one in writing within the four months after the notice of appeal.¹⁹¹

Among the questions that may be raised on appeal are:

- (1) Whether the proceeding and/or decision was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was otherwise unlawful;
- (2) Whether the Board member or members making the decision relied on erroneous information as shown in the record of the proceeding, or relevant information was not made available for consideration;
- (3) Whether the determination made was excessive;¹⁹² and
- (4) Whether the decision was supported by a preponderance of the evidence.¹⁹³

In a revocation appeal, you cannot raise an allegation for newly discovered evidence. Such an issue must be raised in an application to the Board for a rehearing.¹⁹⁴ You should prepare for your appeal by first obtaining the minutes of the parole release hearing. You can get these minutes from the New York State Division of Parole at 1220 Washington Avenue, Building 2, Albany, NY 12226-2050.¹⁹⁵ Because the minutes can be expensive to acquire, an attorney may obtain them for you. You also may make a written request for “[a]ll other non-confidential, discoverable documents relating to the appeal.”¹⁹⁶ So, if you believe there is important information in your parole case record that support your appeal, you may ask for permission to access it. However, you will not receive unlimited access.¹⁹⁷

186. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(b) (2020).

187. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(b) (2020).

188. N.Y. EXEC. LAW § 259-i(4)(b) (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.2(d) (2020). If an attorney entered a notice of appearance, the Parole Board appeals unit will not act on any correspondence from a prisoner until receiving notice that the attorney is relieved. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.2(e) (2020). A notice of appearance is a document that tells the Parole Board that an attorney will appear on your behalf. Thus, this regulation means that if you have an attorney and the attorney enters a notice of appearance, the Parole Board will not answer mail, calls, or other communication from you unless you decide to not have that attorney represent you and you notify the Parole Board of your decision to relieve the attorney. The Parole Board will only answer contact from your attorney unless you notify them that you are no longer using that attorney.

189. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.2(a)–(b) (2020).

190. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.2(a)–(b) (2020).

191. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.2(a)–(b) (2020).

192. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.3(a)(1)–(3) (2020).

193. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.3(b)(1) (2020). This subsection also notes that “evidentiary or procedural challenges will be considered only if a timely objection was made at the hearing.” N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.3(b) (2020). This means that raising an objection about something like the evidence not meeting the preponderance standard is only allowed if you object on that ground at the revocation hearing itself.

194. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.3(c) (2020).

195. *See* N.Y. EXEC. LAW § 259-i(6)(a) (McKinney 2018) (“The board shall provide for the making of a verbatim record of each parole release interview ... and each preliminary and final revocation hearing. . .”).

196. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(e) (2020).

197. Restrictions to access parole records are set forth in this Chapter in Part F(7), “Appealing Denial of Parole Release.” *See also* N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.5 (2020).

The appeal will be decided by three members of the Parole Board. None of these members will have participated in the decision that you are appealing.¹⁹⁸ The Board will send its written decision, including its findings of fact and law, to you or your attorney.¹⁹⁹

If your appeal is unsuccessful, you have several other options. After you have tried all possible administrative remedies with no success, you can file an Article 78 petition in New York state court.²⁰⁰ You only have four months from the date the appeal decision is mailed to you to file a petition in state court.²⁰¹ If you do not file the petition within this time, the court will not hear your case.²⁰² If you are being held only on parole violation charges, and you seek to challenge the legality of your detention, you may file a petition for habeas corpus in the state supreme court.²⁰³ See Chapters 21 and 22 of the *JLM* for more information on New York State habeas corpus and Article 78 petitions.

J. Parole Violator Reappearances

If your parole is revoked and you have been returned to prison, you will be eligible for release on the date your *time assessment* expires.²⁰⁴ A time assessment is the period of re-imprisonment set by the Parole Board after a final revocation hearing. The Parole Board may also determine that an interview is necessary before release. However, an interview is only necessary if an incarcerated person:

- (1) Has committed a violation of facility rules;
- (2) Has shown a significant change in his mental or emotional condition (such as being transferred to a psychiatric ward or placed on suicide watch);
- (3) Has been arrested or convicted of a new felony after the final parole revocation hearing; or
- (4) Is not fit for release based on other information (such as information about self-destructive or threatening behavior).²⁰⁵

K. Release from Parole Supervision

After your original maximum sentence expires, and you have served your time on parole supervision without interruption, you will be released from parole. The parole statute also allows for discharge from parole only after you have served at least five years of post-release supervision. This statute also requires that you must have served three consecutive years of unrevoked parole.²⁰⁶ You should talk to your parole officer if you believe you might be eligible for a three-year discharge. He or she may apply to the Parole Board for you. The Board will not accept requests for early discharge from a parolee.²⁰⁷

If you have a felony conviction, you may have lost certain rights or privileges. This includes the right to vote, the ability to obtain a driver's license, and the opportunity to be employed in a bank or an establishment that serves liquor. It also includes the ability to get a job, and other rights important to your life.²⁰⁸ You can regain those rights after you serve your parole term. However, you may be able

198. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.4(d) (2020).

199. N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.4(a)(2) (2020).

200. See Chapters 5 and 22 of the *JLM* for information on Article 78 proceedings.

201. N.Y. C.P.L.R. 217(1) (McKinney 2019).

202. See *Carter v. State*, 95 N.Y.2d 267, 272, 739 N.E.2d 730, 733, 716 N.Y.S. 2d 364, 367 (2000) (dismissing a claim by a prisoner who brought an Article 78 claim six months after the decision was mailed to him as untimely because the claim violated the statute of limitations).

203. N.Y. C.P.L.R. 7001–7012 (2013). See Chapter 13 and Chapter 21 of the *JLM* for a more detailed discussion of federal and New York state habeas corpus.

204. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.6(a)–(b) (2020). The Parole Board makes the time assessment after the revocation hearing, and it begins running from the date the parole violation warrant was lodged.

205. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.6(c) (2020).

206. N.Y. EXEC. LAW § 259-j(3)(a) (McKinney 2018).

207. N.Y. COMP. CODES R. & REGS. tit. 9, § 8007.1 (2020).

208. N.Y. State Dept. of Corr. & Cmty. Supervision, *Community Supervision Handbook*, Questions and

to gain back the rights you have lost by applying for a certificate. If you only have one felony conviction, apply for a “Certificate of Relief from Disabilities” before or after your parole supervision ends.²⁰⁹ If you have more than one felony conviction, but you have completed parole and have shown five years of good conduct in the community, you should apply for a “Certificate of Good Conduct.”²¹⁰ If you have not yet completed your sentence, applications for Certificates of Relief are submitted by parole officers to the Board of Parole. If you have completed your sentence, apply directly to the Executive Clemency Bureau of the Department of Corrections and Community Supervision.

If you are harassed or discriminated against for being an ex-offender after your release from parole, you can seek help. You may contact the Fortune Society at 29-76 Northern Boulevard, Long Island City, NY 11101, or by phone at (phone (212) 691-7554).²¹¹ You may also contact the Legal Action Center at 225 Varick Street, New York, NY 10014, or by phone at (212) 243-1313. The Legal Action Center can also be contacted toll free at (800) 223-4044.²¹² These agencies help ex-offenders with their reentry into society. The New York Public Library publishes a practical handbook for pre-release and recently released incarcerated people called *Corrections III*. It gives information and addresses on topics including jobs, education, housing, finances, health, counseling, addiction, women’s issues, homosexuality, and disability issues. *Corrections III* is free for New York State residents and incarcerated people. You can get *Corrections III* from Institutional Library Services, The New York Public Library, 455 Fifth Ave., New York, NY 10016, or at (212) 340-0863.

L. Parole in California

If you are given a life sentence in California, you must serve at least seven years before you may be eligible for parole.²¹³ However, if you were sentenced under a law that has a minimum period of incarceration for a life sentence, you will not be eligible for parole release until you have served that minimum period.²¹⁴

One year prior to your minimum eligible parole release date, a panel of at least two Commissioners or Deputy Commissioners of the Board of Prison Terms will meet with you to set a parole release date. The Board considers aggravating and mitigating circumstances in its decision of your parole release date. Aggravating circumstances are those that might make the Board view your crime more harshly. For example, if your crime affected a large number of people that is an aggravating circumstance. Mitigating circumstances are those that might make the Board view your crime less harshly. For example, having no prior criminal record is a mitigating circumstance. The Board may choose not to set a parole release date if it finds that the seriousness of the offense presents a danger to public safety. The Board may also choose not to set a parole date if any past offenses are those where the interests of public safety require you to remain in prison longer.²¹⁵

Answers Concerning Release and Community Supervision (2019), at 33–35, *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Mar. 9, 2020).

209. N.Y. State Dept. of Corr. & Cmty. Supervision, Community Supervision Handbook, Questions and Answers Concerning Release and Community Supervision (2019), at 33, *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Mar. 9, 2020).

210. N.Y. State Dept. of Corr. & Cmty. Supervision, Community Supervision Handbook, Questions and Answers Concerning Release and Community Supervision (2019), at 34, *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Mar. 9, 2020).

211. More information about Fortune Society can be located online, *available at* <http://fortunesociety.org/> (last visited Mar. 9, 2020).

212. More information about Legal Action Center can be located online, *available at* <http://www.lac.org/> (last visited Mar. 9, 2020).

213. CAL. PENAL CODE § 3046(a)(1) (West 2018).

214. CAL. PENAL CODE § 3046 (West 2018).

215. CAL. PENAL CODE § 3041 (West 2018).

At the parole hearing, you may present evidence and speak on your own behalf. Only incarcerated people serving life sentences may have a lawyer at parole hearings.²¹⁶ In addition, victims have the right to make statements at parole hearings. These statements include “comments . . . to the effect of the enumerated crimes on the victim . . . and the suitability of the prisoner for parole.”²¹⁷

If you are granted parole, you will be notified of the parole release date within ten days after the hearing. You will also be notified of the conditions that you must meet to be released by that date, and the consequences if you do not meet those conditions.²¹⁸ A decision that you are fit for parole will become final within 120 days after the date of the hearing. During this time, the Parole Board may review the panel's decision. The Parole Board may reject the panel's decision and order a new hearing by majority vote. The Parole Board's decision to reject must be based on an error of the law, an error of facts, or new information that is presented to the Board.²¹⁹

If the Board decides not to set a parole date, you will be notified within twenty days.²²⁰ The Board will send you a written statement explaining why a parole date was not set. In addition, it will recommend activities that you may participate in to improve your chances of receiving a parole date at a future hearing.²²¹ The Board will usually rehear cases every fifteen years after it has declined to set a parole date but the Board has the power to rehear cases sooner. For example, the Board can rehear the case after only three or five years. The Board may choose to rehear the case sooner if it finds by clear and convincing evidence that consideration of the public and victim's safety does not require a longer period of incarceration.²²²

If you have been convicted of a violent felony in California, the state Department of Corrections will notify law enforcement agencies and the state attorney in the county that you were convicted of your scheduled release on parole. The Department of Corrections will also notify the county where you are scheduled to be released.²²³ The victim may also be notified of your release.²²⁴ If you have not been convicted of a violent felony, notice of your release on parole will be given only if the county of release requests it.²²⁵

You will usually be returned to the county of your last legal residence, but the Parole Board may send you to another county if that is found to be in the public interest. In making this decision, the Parole Board will consider:

- (1) The need to protect the life or safety of a victim, you (the parolee), a witness, or any other person;
- (2) Public concern that would decrease the chance that your parole would be successfully completed;
- (3) The verified existence of a work offer, or an educational or vocational training program;
- (4) The existence of family in another county with whom you have maintained strong ties and whose support would increase the chance of successful completion of your parole; and
- (5) The lack of necessary outpatient treatment programs for parolees receiving substance abuse treatment pursuant to Section 2960.²²⁶

If you were convicted of a violent felony, you may not go within thirty-five miles of the actual residence of the victim or a witness to the crime during your parole. This is the rule if the victim or

216. CAL. PENAL CODE § 3041.7 (West 2018).

217. CAL. PENAL CODE § 3043(b) (West 2018).

218. CAL. PENAL CODE § 3041.5(b)(1) (West 2018).

219. CAL. PENAL CODE § 3041(b) (West 2018).

220. CAL. PENAL CODE § 3041.5(b)(2) (West 2018).

221. CAL. PENAL CODE § 3041.5(b)(2) (West 2018).

222. CAL. PENAL CODE § 3041.5(b)(3) (West 2018).

223. CAL. PENAL CODE § 3058.6(a) (West 2011).

224. CAL. PENAL CODE § 3058.8(a) (West 2011); CAL. PENAL CODE § 679.03(a) (West 2010).

225. CAL. PENAL CODE §§ 3058.5, 3058.6, 3058.8(a) (West 2011).

226. CAL. PENAL CODE § 3003(a)–(b) (West 2011). Section 2960 is referring to prisoners who have a severe but treatable mental health disorder that was one of the causes of, or was an aggravating factor in, the commission of the crime for which they were incarcerated. CAL. PENAL CODE § 2960 (West 2011).

witness has requested additional distance. You may also not go to a location within thirty-five miles of their actual residence if the Board of Parole Hearings or the Department of Corrections and Rehabilitation finds a need to protect the victim or witness.²²⁷

If you violate your parole and there is a long delay between your parole revocation hearing and your placement back in prison, you may request to be restored to parole status. To do so, you must establish that you were prejudiced by the denial of a timely revocation hearing.²²⁸ If the Board decides to revoke your parole, you must receive a written record of the Board's decision. You must also be given the opportunity to pursue an administrative appeal.²²⁹ If your parole is revoked but you do not have a new conviction for a crime committed while you were on parole release, the time you are sent back to prison should not exceed twelve months.²³⁰ However, if you commit acts of misconduct during your time back in prison, you may be held for an additional twelve months.²³¹

M. Parole in Florida

Parole has been abolished in the state of Florida.²³² However, it is still available for certain incarcerated people who committed crimes that occurred prior to the dates provided in the list below. If you are currently in prison for one of the following crimes, you are still eligible for parole, and this Section applies to you:

- (1) First degree murder, a felony murder, or the crime of making, possessing, throwing, projecting, placing, or discharging a destructive device (or the attempt of) before May 25, 1994;
- (2) All other capital felonies before October 1, 1995;
- (3) A continuing criminal enterprise before June 17, 1993;
- (4) Murder of a law enforcement officer (and other specified officers) before January 1, 1990;
- (5) Murder of a judge before October 1, 1990;
- (6) Any felony before October 1, 1983, or you elected to be sentenced “outside the guidelines” for a felony committed prior to July 1, 1984.²³³

You will be given an initial interview with a hearing examiner to set a presumptive parole release date between eight months and five years after you begin your prison term.²³⁴ Within ninety days of your initial interview, the Parole Commission will notify you of the set presumptive parole release date.²³⁵ If your presumptive parole release date is more than two years after the initial interview, a hearing examiner will schedule an interview for review of the presumptive parole release date. This review will normally occur within two years of the initial interview and every two years thereafter.²³⁶ However, if you were convicted of a more serious offense, including murder, attempted murder, sexual battery, or attempted sexual battery, this review will only occur every seven years. It will also occur every seven years if you were sentenced to a minimum twenty-five-year mandatory sentence, and your presumptive release date is more than seven years away.²³⁷ Within ninety days before the presumptive

227. CAL. PENAL CODE § 3003(f) (West 2011).

228. *See In re Shapiro*, 537 P.2d 888, 893, 14 Cal. 3d 711, 720, 122 Cal. Rptr. 768, 773 (Cal. 1975) (“[A] prompt revocation hearing is essential because delay may result in the loss of essential witnesses or ... evidence and the continuation of unnecessary incarceration or other limitations on personal liberty”).

229. *See In re Ruzicka*, 281 Cal. Rptr. 435, 436–439, 230 Cal. App. 3d 595, 597–601 (Cal. Ct. App. 1991) (holding that parolee was entitled to a written record of the Board's parole revocation decision and to pursue an administrative appeal where the parolee filed petition for writ of habeas corpus to challenge parole revocation).

230. CAL. PENAL CODE § 3057(a) (West 2011).

231. CAL. PENAL CODE § 3057(c) (West 2011).

232. *See* FLA. STAT. §§ 3.701(b)(5), (d)(12) (2019).

233. FLORIDA COMMISSION ON OFFENDER REVIEW, RELEASE TYPES (2014), *available at* <https://www.fcor.state.fl.us/release-types.shtml> (last visited March 8, 2020).

234. FLA. STAT. ANN. § 947.16(1) (West 2010).

235. FLA. STAT. ANN. § 947.172(2) (West 2010); *see also* FLA. STAT. ANN. § 947.16(1) (West 2010).

236. FLA. STAT. ANN. § 947.174(1)(a) (West 2010).

237. FLA. STAT. ANN. § 947.174(1)(b) (West 2010).

parole release date, a hearing examiner will have a final interview with you to set an effective parole release date and a parole release plan.

If you want to ask for judicial review of the Parole Commission's calculation of your presumptive parole release date, you should file a *writ of mandamus* in circuit court, rather than in district court.²³⁸ A writ of mandamus is a document commanding a public official to perform his or her duty.²³⁹ To file a petition for *mandamus*, go to your facility's law library and ask to see a sample petition. Once you have prepared the petition to include the information in your case, send it to the local circuit court.

If your conduct while in prison has been unsatisfactory, or if you do not have a verified parole release plan, the Parole Commission may extend the presumptive parole release date. It will not be for more than one year.²⁴⁰ Otherwise, the presumptive parole release date will become the effective parole release date. But you will not be released on that date until a satisfactory plan for parole supervision has been completed.²⁴¹

If you have been convicted of certain serious felonies, you may remain under the authority of the trial judge for up to one-third of the maximum sentence set. When you are otherwise eligible for parole, the parole decision will be reviewed by the judge. The judge's decision whether or not to approve the release is not something that you can appeal.²⁴² If the judge refuses to release you on parole, you will be re-interviewed by the Parole Commission at intervals of no longer than two years. However, if you were convicted of a more serious offense, including murder, attempted murder, sexual battery, or attempted sexual battery, this review will only occur every seven years if your presumptive release date is more than seven years away. This is also true if you were sentenced to a minimum twenty-five-year mandatory sentence.²⁴³

You can be released on parole only if:

- (1) The Parole Commission finds with reasonable probability that if you are placed on parole, you will live and conduct yourself as a respectable and law-abiding person; and
- (2) Your release would be compatible with your welfare and the welfare of society.

You must also show the Parole Commission that if you are released on parole, you will be suitably employed, or at least that you will not become a public charge (collect public assistance of any kind).²⁴⁴

You may be eligible for conditional medical release if:

- (1) You are not sentenced to death and are permanently physically incapacitated by an illness, disease or injury, and are therefore no longer a danger to yourself or society; or
- (2) You are terminally ill and your death is imminent.²⁴⁵

If you are given conditional medical release, you will remain under supervision for the remainder of your sentence. This will not reduce your sentence, and nor will sentence will not be reduced by any credit for good behavior. During that period of supervision, you must undergo periodic physical examinations. If it is found that your medical condition no longer incapacitates you, you will be returned to prison. But, reductions for time spent on conditional medical release will be applied.²⁴⁶

Ordinarily, a condition of parole will be restitution to the victim of your offense. Restitution means to reimburse the victim for damages. Failure to make restitution is a violation of parole and may

238. See *Johnson v. Fla. Parole & Prob. Comm'n*, 543 So. 2d 875, 876 (Fla. Dist. Ct. App. 1989) (holding that writ of mandamus to challenge suspension of prisoners' presumptive parole release dates should be filed in the circuit court, rather than the district court of appeal), *overruled on other grounds by* *Sheley v. Fla. Parole Comm'n*, 720 So. 2d 216 (Fla. 1998).

239. See *Parole & Prob. Comm'n v. Fuller*, 491 So. 2d 275, 275 (Fla. 1986) (holding that judicial review of presumptive parole release dates is available only through writs of mandamus, not through writs of habeas corpus).

240. FLA. STAT. ANN. § 947.1745(2) (West 2010).

241. FLA. STAT. ANN. § 947.1745(4) (West 2010).

242. FLA. STAT. ANN. § 947.16(4)(g) (West 2010).

243. FLA. STAT. ANN. § 947.174(1)(b) (West 2010).

244. FLA. STAT. ANN. § 947.18 (West 2010).

245. FLA. STAT. ANN. §§ 947.149(1)–(2) (West 2010).

246. FLA. STAT. ANN. §§ 947.149(4)–(5) (West 2010).

result in revocation of parole.²⁴⁷ A violation of the terms of parole may also cause you to be arrested and returned to prison to serve out the term of your sentence. However, if your parole is revoked, the Parole Commission has the option to give you credit for any portion of time served while you were on parole release.²⁴⁸

If you are arrested for a suspected parole violation, a preliminary hearing will be held within thirty days of your arrest. You may be represented by a lawyer. At the preliminary hearing, if it is found that under reasonable grounds you have committed a parole violation, a final parole revocation hearing will be held. You may also be represented by a lawyer at the final hearing.²⁴⁹

The parole period of supervision may not exceed the maximum period of your sentence. If you are being paroled from a single or concurrent sentence, the Parole Commission must give reasons for extending the period of supervision beyond two years.²⁵⁰ These reasons must be in writing.

N. Parole in Illinois

Parole has been eliminated in the state of Illinois.²⁵¹ If you were sentenced after February 2, 1978, you will have received a determinate sentence, and this Chapter no longer applies to you. This Chapter only applies to you if you were sentenced prior to February 2, 1978.

The Prison Review Board (Board) sets a fixed release date for all incarcerated people sentenced after 1977. No fixed release date is set if you were given an indeterminate sentence prior to 1977.²⁵² When deciding on a fixed release date, the Board considers the sentencing court's intent, and any aggravating and mitigating factors. The Board will also consider good conduct credit, and your behavior since incarceration.²⁵³ If you accept a release date given by the Board, you are no longer eligible for parole. If you do not accept a fixed release date from the Board, you will be eligible for parole when you have served one of the following:

- (1) The minimum term of an indeterminate sentence minus time credit for good behavior, or twenty years minus time credit for good behavior, whichever is less; or
- (2) Twenty years of a life sentence minus credit for good behavior; or
- (3) Twenty years or one-third of a determinate sentence, whichever is less, minus credit for good behavior.²⁵⁴

In making its determination of parole, the Board considers reports prepared by corrections staff. The Board also considers materials submitted by you, the State's Attorney, and the victim.²⁵⁵ Even if you are eligible for parole, the Board will not parole you if it determines that:

- (1) There is a substantial risk that you will not follow reasonable conditions of parole,
- (2) Your release would minimize the seriousness of the offense or promote disrespect for the law, or
- (3) Your release would have a negative effect on the institution's ability to discipline others.²⁵⁶

If parole is denied, a re-hearing is usually scheduled one year later or up to a maximum of five years after the parole denial (with an exception for certain sexual crimes).

The Board will clearly mention whatever conditions of parole it thinks are necessary to assist you in leading a law-abiding life. However, parole will always put certain requirements on you. And if you were convicted of a sex offense, the Board will assign you more requirements.

As conditions of parole, you may not do any of the following:

- (1) Violate a criminal statute in any jurisdiction;

247. FLA. STAT. ANN. § 947.181(2) (West 2010).

248. FLA. STAT. ANN. § 947.21 (West 2010).

249. FLA. STAT. ANN. §§ 947.23(1)–(2) (West 2010).

250. FLA. STAT. ANN. § 947.24(1)(a) (West 2010).

251. 730 ILL. COMP. STAT. ANN. 5/3-3-2 (West 2016).

252. 730 ILL. COMP. STAT. ANN. 5/3-3-2.1(b) (West 2016).

253. 730 ILL. COMP. STAT. ANN. 5/3-3-2.1(e) (West 2016).

254. 730 ILL. COMP. STAT. ANN. 5/3-3-3(a) (West 2016).

255. 730 ILL. COMP. STAT. ANN. 5/3-3-4(d) (West 2016).

256. 730 ILL. COMP. STAT. ANN. 5/3-3-5(c) (West 2016).

- (2) Possess a firearm or other dangerous weapon;
- (3) Use or possess narcotics or any other controlled substance or instruments to use such substances;
- (4) Go to places where controlled substances are sold, used, or distributed;
- (5) Spend time with other people who you know are on parole or mandatory supervised release without permission from your parole agent, or with people who are in an organized gang.²⁵⁷

In addition, you must do all of the following:

- (1) Report to an agent of the Department of Corrections;
- (2) Allow the agent to visit you at your house, place of employment, or other places when necessary;
- (3) Attend or live at a facility for the instruction or residence of people on parole;
- (4) Obtain permission before writing or visiting a person who is incarcerated in an Illinois prison;
- (5) Report arrests to an agent within twenty-four hours of release from custody;
- (6) Obtain permission from an agent before leaving Illinois;
- (7) Obtain permission from an agent before changing your address or job;
- (8) Consent to a search of your body, property, and place where you live;
- (9) Agree to drug tests when instructed by a parole agent; and
- (10) Provide truthful information to parole agents in response to their questions.²⁵⁸

If you are released on parole and then suspected of having violated a requirement of your parole, you will have a preliminary hearing before an officer to determine whether there is a reason to hold you for a revocation (cancellation of your parole) hearing. A preliminary hearing is not required when the possible revocation is based on new criminal charges.²⁵⁹ You may appear at a revocation hearing before at least one member of the Board to respond to the charge brought against you and bring witnesses on your behalf. If you are found to have violated a condition of your parole, the Board may either (1) order your return to prison for any portion of the maximum term of imprisonment that you were previously sentenced to, or (2) it may take lesser actions that do not involve putting you back in prison, such as allowing you to remain on parole with different requirements or releasing you to a halfway house.²⁶⁰ Even if the Board orders your return to prison, you may still be eligible for future release on parole.²⁶¹

Every felony sentence, except a life sentence, includes a “parole term” which is a mandatory supervised release period that ranges from one to four years (with the exception of certain sex crimes, which have longer release periods).²⁶² The Board may remove your parole requirements when it determines that you are likely to remain a free person without committing another crime.²⁶³ If you have been released on parole, and you believe you are entitled to a final discharge (release) from your sentence, you may file a habeas corpus petition seeking to be fully released while you are on parole release.²⁶⁴ For a discussion on habeas corpus, see Chapter 21 of the *JLM*, “State Habeas Corpus: Florida, New York, and Michigan.”

O. Parole in Texas

Unless you have been convicted of certain serious felonies, including murder, indecency with a child, aggravated kidnapping, or sexual assault, you will be eligible for release on parole. You become

257. 730 ILL. COMP. STAT. ANN. 5/3-3-7 (West 2016).

258. 730 ILL. COMP. STAT. ANN. 5/3-3-7 (West 2016).

259. 730 ILL. COMP. STAT. ANN. 5/3-3-9(c) (West 2016).

260. 730 ILL. COMP. STAT. ANN. 5/3-3-9 (West 2016).

261. 730 ILL. COMP. STAT. ANN. 5/3-3-10 (West 2016).

262. 730 ILL. COMP. STAT. ANN. 5/5-8-1(d) (West 2007).

263. 730 ILL. COMP. STAT. ANN. 5/3-3-8(b) (West 2016).

264. See *Collins v. Sielaff*, 357 N.E.2d 1213, 1214 – 1215, 43 Ill. App. 3d 1022, 1023–1024, 2 Ill. Dec. 770, 771–772 (Ill. App. Ct. 1976) (allowing parolee to maintain a habeas corpus action claiming entitlement to final discharge).

eligible for release on parole when your time served, plus good conduct time, equals one-fourth of the maximum sentence imposed or fifteen years, whichever is less.²⁶⁵ If you are serving a life sentence for a capital felony in Texas, you will not be eligible for release on parole until the actual time that you have served is equal to forty calendar years, not including good conduct time.²⁶⁶ There are exceptions to this if you are serving a life sentence, considered to be a repeat or habitual offender, or convicted of more serious felonies listed in the statute. If these conditions apply, you may be released on parole only after a parole panel establishes that your release will not increase the likelihood of harm to the public.²⁶⁷ A lawyer may represent you at your parole hearing when you appear before the parole panel.

You may be placed on parole only when plans have been made for your employment or maintenance and care, and when the parole panel believes you are able and willing to fulfill the obligations of a law-abiding citizen. If you are released on parole, you may be subject to certain requirements, such as attendance at substance abuse or sex offender treatment programs, electronic monitoring, requirements for the place that you live, and payment towards the cost of parole supervision. Parole may be granted early to elderly, intellectually or physically disabled, mentally ill, or terminally ill prisoners.²⁶⁸

If you are released on parole and are then accused of or arrested for violating parole, you are usually entitled to a hearing within forty days after the arrest or within a reasonable time if you are arrested in another state.²⁶⁹ Proof that you were convicted and sentenced for another crime while out on parole is enough to justify parole revocation. However, you may request a hearing where you can present information in your favor for the later conviction. If your parole is revoked (cancelled), you may not get credit for the time that you were out on parole. If you want to challenge a revocation of parole, you should file a state habeas corpus petition with the court that convicted you of the original offense from which you were paroled.²⁷⁰

To complete the parole period, you must serve out the whole term for which you were sentenced.²⁷¹ Depending on your specific situation, the Paroles and Pardons Division may allow you to serve the remainder of your term without supervision.

P. Parole in Michigan

If you are serving an indeterminate sentence (when a judge did not decide the total time that you are ordered to spend in prison) in a Michigan state prison, and you have served your minimum sentence minus any allowances (such as good time or a disciplinary credit), the Michigan state Parole

265. TEX. GOV'T CODE ANN. § 508.145(f) (West 2012).

266. TEX. GOV'T CODE ANN. § 508.145(b) (West 2012).

267. TEX. GOV'T CODE ANN. § 508.145(b)–(d) (West 2012). Prisoners serving time for any offense listed in Article 42A.054(a) of the Texas Code of Criminal Procedure (except for capital murder), an offense for which the judgment had an affirmative finding of a use of a deadly weapon or firearm, an offense of continuous human trafficking, or an offense of engaging in or directing organized criminal (gang) activity will not be eligible for release on parole until “the inmate’s actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less, but in no event is the inmate eligible for release on parole in less than two calendar years.” TEX. GOV'T CODE ANN. § 508.145(d) (West 2012).

268. TEX. GOV'T CODE ANN. § 508.146 (West 2017).

269. TEX. GOV'T CODE ANN. §§ 508.281–508.282 (West 2012).

270. See Bd. of Pardons & Paroles *ex rel.* Keene v. Court of Appeals for the Eighth District, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (noting that when parolee sought state habeas corpus relief following the revocation of his parole, such a claim should be brought before the original convicting court).

271. TEX. GOV'T CODE ANN. § 508.155 (West 2012).

Board may decide to grant you parole.²⁷² You may be granted “special parole” before you finish serving your minimum term, if your sentencing judge gives written approval.²⁷³

If you are serving a sentence for a drug offense, you may be eligible for parole before your minimum term is over—after half your minimum sentence, after five years, after ten years, or after seventeen and a half years—depending on the severity of your offense.²⁷⁴

If you are serving a life sentence, you may still be eligible for parole, unless you were convicted of first degree murder, adulterating medicine/drugs or selling adulterated medicine/drugs, explosives-related offenses, or criminal sexual conduct.²⁷⁵ Depending on the crime for which you were convicted, you may become eligible for parole from a life sentence within as early as ten years.²⁷⁶ See Section 791.234(8) of the Michigan Compiled Laws for additional conditions that will apply.

If you have been sentenced for consecutive (back to back) terms, you become eligible for parole when you have served the total time of the added minimum terms, minus any good time and disciplinary credits, if you are not subject to added disciplinary time.²⁷⁷ If you have remaining consecutive terms to serve and have not received added disciplinary time while in prison, the Parole Board is allowed to end the time left in the sentence you are currently serving once you have served the minimum term of your present sentence.²⁷⁸

The Michigan Parole Board will not give you parole until you have made plans for employment, education, and any necessary mental health or medical care.²⁷⁹ Unless you were sentenced before December 15, 1998 or your minimum sentence was less than two years, you *must* have earned your high school diploma or GED if you were not employed when you committed the crime.²⁸⁰

The Parole Board must interview you at least one month before your minimum sentence has ended, minus applicable good time and disciplinary credits and as long as you are not subject to disciplinary time.²⁸¹ However, the Parole Board does not have to interview an incarcerated person in order to grant parole if it “determines that the prisoner has a high probability of being paroled and the parole board therefore intends to parole the prisoner.”²⁸² You may also waive your right to (decide not to do) an interview, but the waiver must be in writing and no later than thirty days after the notice of intent to conduct an interview is issued.²⁸³

If the Parole Board decides to interview you, you should receive a notice from the Parole Board at least one month before the interview date.²⁸⁴ The notice must state the specific issues and concerns that will be discussed at the interview and that may cause them to deny you parole. The board cannot deny your parole for a reason that is not stated in the notice, except for good cause as stated to you at or before your interview, and as listed in the required written explanation.²⁸⁵ Read the interview notice

272. MICH. COMP. LAWS ANN. § 791.234(1) (West 2007). Michigan does not require that every prisoner be eligible for parole. *See, e.g.,* *People v. Merriweather*, 447 Mich. 799, 809, 527 N.W.2d 460, 464 (Mich. 1994) (“We find no basis, however, to conclude . . . the Legislature intended . . . all defendants, or even simply this defendant, must be eligible for parole”).

273. MICH. COMP. LAWS ANN. § 791.233(1)(b) (West 2007).

274. MICH. COMP. LAWS ANN. §§ 791.234(7)(b)–(c), (8), (12) (West 2007).

275. MICH. COMP. LAWS ANN. §§ 791.234(6)–(7) (West 2007).

276. MICH. COMP. LAWS ANN. § 791.234(7) (West 2007).

277. MICH. COMP. LAWS ANN. §§ 791.234(3)–(4) (West 2007).

278. MICH. COMP. LAWS ANN. § 791.234(5) (West 2007).

279. MICH. COMP. LAWS ANN. § 791.233(1)(e) (West 2007).

280. MICH. COMP. LAWS ANN. § 791.233(1)(f) (West 2007). You are exempt from this requirement if you are over 65, have a learning disability, are not proficient (very capable) in English, or some other reason outside your control.

281. *See* MICH. COMP. LAWS ANN. § 791.235(1) (West 2007).

282. MICH. COMP. LAWS ANN. § 791.235(1) (West 2007).

283. MICH. COMP. LAWS ANN. § 791.235(6) (West 2007).

284. MICH. COMP. LAWS ANN. § 791.235(4) (West 2007).

285. MICH. COMP. LAWS ANN. § 791.235(4) (West 2007).

carefully, and be prepared to challenge and present evidence on any incorrect issues stated in the notice.

During the interview, you may be represented by an individual of your choice, but your representative cannot be a fellow prisoner or an attorney.²⁸⁶ You or your representative can present relevant evidence to support your release and challenge any inaccurate information in the notice. When making a parole determination, the Parole Board cannot consider an expunged (erased) juvenile record or any information it determines is incorrect.²⁸⁷ The Parole Board can consider—but cannot base a parole denial *solely* on—your marital history, or prior arrests that did not result in conviction or adjudication of delinquency.²⁸⁸ The Parole Board must consider any statements made by a victim.²⁸⁹ In addition, the Parole Board member conducting your interview must review information relevant to the notice of intent to conduct an interview, such as the parole eligibility report prepared by the institutional staff. The parole eligibility report includes information such as all the major misconduct of which you have been found guilty, your work and education record during confinement, and the results of any physical, mental, or psychiatric examinations performed on you during your time in prison.²⁹⁰

If the Michigan Parole Board decides not to release you, you will receive a written explanation of the reason for the denial, which may include specific recommendations for action that you may take to improve your future chances of release.²⁹¹ Only the prosecutor or crime victim can appeal a decision made by a Parole Board; your ability to appeal the Parole Board's decision has been eliminated.²⁹² The appropriate standard of review for the Parole Board's determination is an abuse of discretion standard.²⁹³ Habeas corpus is available only under extreme circumstances, such as where parole has been denied based on your race, religion, or national origin.²⁹⁴ The law does not require that you be re-interviewed within the next twelve months—the Court of Appeals of Michigan has held that there is “no statutory impediment” (restriction imposed by the law) to a Parole Board's decision not to reconsider a prisoner's eligibility for parole for two years.”²⁹⁵

Q. Conclusion

This Chapter provides a detailed summary of New York State parole procedures, from the release hearing to the revocation process. It also includes a brief overview of parole procedures and practices in these states: California, Florida, Illinois, Texas, and Michigan. Additionally, we hope that incarcerated people in states not specifically covered in this Chapter will get a better understanding of parole policies. In general, this Chapter may serve as a model for ideas on how to research and whom to contact when learning about the parole system in your own state. Note, however, many states

286. MICH. COMP. LAWS ANN. § 791.235(6) (West 2007).

287. MICH. COMP. LAWS ANN. §§ 791.235(1)(a)–(b) (West 2007).

288. MICH. COMP. LAWS ANN. §§ 791.235(3)(a)–(b) (West 2007).

289. MICH. COMP. LAWS ANN. § 791.235(1) (West 2007).

290. MICH. COMP. LAWS ANN. §§ 791.235(5), (7)(a)–(g) (West 2007).

291. MICH. COMP. LAWS ANN. § 791.235(20) (West 2007).

292. *Morales v. Mich. Parole Bd.*, 260 Mich. App. 29, 36, 676 N.W.2d 221, 227–228 (Mich. 2003) (noting that, “[b]y eliminating the phrase, ‘shall be appealable by the prisoner’ . . . the Legislature clearly intended” to eliminate the prisoner's right to appeal a parole board's decision).

293. *Wayne County Prosecutor v. Parole Board*, 210 Mich. App. 148, 153, 532 N.W.2d 899, 901 (Mich. 1995) (holding that the appropriate standard of review when a court reviews a Parole Board's decision to grant parole is abuse of discretion). This discretion is restricted by MICH. COMP. LAWS ANN. §§ 791.233(1), 791.235(1), (3), (4), (7)–(9) (West 2012). The abuse of discretion is a difficult standard to meet because in order for the Parole Board's decision to be overturned, you must show that the Board's decision was unsupported by the evidence, unlawful, or clearly incorrect.

294. *Morales v. Mich. Parole Bd.*, 260 Mich. App. 29, 40, 676 N.W.2d 221, 230 (Mich. 2003) (“[T]he writ of habeas corpus deals only with radical defects which render a judgment or proceeding absolutely void”). A radical defect would be if the Parole Board did something that was clearly against what is required by law.

295. *In re Parole of Roberts*, 232 Mich. App. 253, 256, 591 N.W.2d 259, 260 (Mich. 1998).

have eliminated parole and now impose determinate (fixed) sentences. All incarcerated people, even where the information is clear, should refer directly to the applicable statutes and regulations of their state to see if there have been changes made following the *JLM*'s publication.

CHAPTER 33

RIGHTS OF INCARCERATED PARENTS*

A. Introduction

This Chapter discusses the childcare and custody rights of incarcerated parents. Roughly 1,200,000 state and federally incarcerated people were parents to children under the age of eighteen in 2010.¹ There are approximately 2,700,000 children under the age of eighteen who have a parent in prison.²

As a parent in prison, you may fear that your child will not be cared for, that you will lose your child, or that your relationship with your child will suffer while you are incarcerated. This Chapter focuses on New York state law and describes how the law provides parents in prison with various tools to prevent these things from happening.

First, however, you should be aware that federal laws regulate the rights of incarcerated parents whose children are in the child welfare system (but not incarcerated parents whose children are under private custody or guardianship). In 1997, Congress passed the Adoption and Safe Families Act (ASFA),³ a series of laws that make it much harder for incarcerated parents to keep their parental rights. Different states have passed laws applying ASFA in different ways, so it is important for you to know the ASFA laws that apply in your state.

Some of the significant changes that were made to New York law following the passage of ASFA include:

- (1) In some cases, the state no longer has to try to reunite children in foster care with parents who are incarcerated;⁴
- (2) Unless certain exceptions apply, the State must file to “terminate” (get rid of) parental rights⁵ for: (1) children who have been in foster care for fifteen out of the last twenty-two months, (2) children who have been abandoned, or (3) children with parents who have been convicted of certain violent crimes;⁶

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1. THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4 (2010), *available at* https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf (last visited Mar. 10, 2020).

2. THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4 (2010), *available at* https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf (last visited Mar. 10, 2020).

3. The full text of ASFA can be found at 42 U.S.C. §§ 670–679(c). Several provisions of the Act have been amended in part or repealed in part since 1997. For further information on the history of AFSA and other federal child welfare laws, please see U.S. Dept. of Health & Human Servs., *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, CHILD WELFARE INFO. GATEWAY (current through May 2019), *available at* <http://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.pdf> (last visited Oct. 21, 2019).

4. N.Y. SOC. SERV. LAW § 358-a(3)(b) (McKinney 2003).

5. Termination of parental rights is when the state permanently ends your rights as a parent and either takes on those rights itself or grants them to another person through adoption.

6. N.Y. SOC. SERV. LAW § 384-b(3)(i)(i) (McKinney 2010). The formula used to determine how long your child has been placed in foster care may depend on where you and your child are located. In New York, the Department will start counting from sixty days after either the date of a family court judge determined that the child was “abused or neglected” or the date the child was removed from the home, whichever comes earlier. N.Y. SOC. SERV. LAW § 384-b(3)(i)(iii) (McKinney 2010). This means that the amount of time counted for ASFA purposes may be different than the amount of time your child has actually spent under the custody of the Department. For example, if your child was placed under custody of the Department upon your incarceration, the State will not start counting your child as “entered into foster care” until sixty days after that. So starting from the date of your incarceration,

- (3) People with certain criminal convictions or who live with an adult who has a criminal record cannot be foster parents.⁷

All of these provisions will be discussed more fully below. As a parent in prison, you may find yourself in one of three situations:

- (1) Your child is living with friends or family members who receive no state supervision or funding other than welfare.
 - a. This practice is known as “private placement” and will be discussed in Part B of this Chapter. ASFA does not apply to these placements.
- (2) You chose to place your child in foster care.
 - a. Again, your child may be living with foster parents who are relatives or persons unrelated to you. The state will supervise and provide funding to these foster parents for the care of your child. This practice is known as “voluntary placement” and will be discussed in Part C of this Chapter. If your child is in foster care and you would like to put him or her up for adoption, your options are discussed in Part F of this Chapter.
- (3) Your child was taken from your home by either the Office of Children & Family Services (a New York State agency) or by the Administration for Children’s Services (a New York City agency)⁸ and placed in foster care.
 - a. Your child may be living with foster parents who are relatives or persons unrelated to you. Again, the state will supervise and provide funding to these foster parents for your child’s care. This practice is known as “involuntary foster care” and will be discussed in Part C below.

New York law generally supports parents who want to take custody of their children after being in jail. The law states that it is desirable for a child to “be returned to the birth parent because the child’s need for a normal family life will usually best be met in the [natural] home, and . . . parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered.”⁹ However, the law will only prioritize your parental rights if you show interest and involvement in your child’s welfare and a commitment to parenting upon your release.¹⁰ Evidence of

you may have up to seventeen months before the State will begin proceedings. Note that other states may calculate the time period that a child has been in foster care somewhat differently, so you should always be sure to determine what the law says in your state. For more information on legal research, see *JLM* Chapter 2, “Introduction to Legal Research.”

7. N.Y. SOC. SERV. LAW § 378-a(2)(e) (McKinney 2010).

8. The Office of Children and Family Services (OCFS) is the state agency responsible for supervising and managing foster care in New York State. The Administration for Children’s Services (ACS) handles these duties in New York City, while county departments of social services manage foster care for areas outside of New York City. For simplicity, this Chapter uses “DSS” (Department of Social Services) to refer to all local child protective agencies that are responsible for foster care placement. Each county in New York has a social services department. *See County Departments of Social Services*, OFF. OF CHILD. & FAM. SERVS., available at <http://www.ocfs.state.ny.us/main/localdss.asp> (last visited Oct. 21, 2019); *About ACS*, N.Y.C. ADMIN. FOR CHILDREN’S SERVS., available at <http://www.nyc.gov/html/acs/html/about/about.shtml> (last visited Oct. 21, 2019).

For questions about foster care generally, you can call (800) 345-KIDS, a free phone number for OCFS. Also refer to the end of this Chapter for more contact information for OCFS and county-specific DSS offices.

9. N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii) (McKinney 2010); *see also In re Natasha RR*, 42 A.D.3d 762, 763, 839 N.Y.S.2d 623, 624 (3d Dept. 2007) (stating that this law seeks to return child to natural parent “if at all possible and responsible”).

10. The law exempts prolonged stays in foster care from mandatory termination of parental rights if “the parent or parents are incarcerated, or participating in a residential substance abuse treatment program, or the prior incarceration or participation of a parent or parents in a residential substance abuse treatment program is a significant factor in why the child has been in foster care for fifteen of the last twenty-two months, provided that the parent maintains a meaningful role in the child’s life.” N.Y. SOC. SERV. LAW § 384-b(3)(i)(i) (McKinney 2010); *see also In re Lindsey B.*, 16 A.D.3d 1078, 1078, 791 N.Y.S.2d 261, 262 (4th Dept. 2005) (finding that a father’s incarceration was not a defense to an abandonment petition where father made no effort to communicate

involvement in your child's life may include letter writing, telephone calls, visits with your child, and efforts to communicate and cooperate with your caseworker.¹¹

The beginning of this Chapter discusses how your child will be cared for while you are in prison, both under private placement (Part B) and under foster care (Part C). Part C further explains placement in both voluntary and involuntary foster care. It describes the procedures for voluntary and involuntary placement, including court hearings and reviews. Part C then discusses placement and planning for your child, which are the same under both foster care plans. Part C also describes your rights and obligations, and the obligations of the Department of Social Services (DSS)¹² while your child is in foster care. Finally, Part C explains how your child will be returned to you after your release.

Part D explains involuntary termination of your parental rights, a process that allows another person to adopt your child when he is in foster care. It details the ways you can defend yourself against involuntary termination and lists the steps you should take while your child is in foster care to make sure that your parental rights are not terminated. The end of Part D discusses the difficulties long-term incarcerated people face in preventing involuntary termination.

Part E discusses the procedure for voluntarily terminating your parental rights and putting your child up for adoption. Part F discusses challenges that are unique to incarcerated fathers, explaining the extra steps fathers in prison must take in order to protect their rights. Finally, Parts G and H explain your right to an attorney for different proceedings.

B. Private Placement with a Relative or Friend

Many incarcerated parents try to place their child in the home of a relative or friend without involving the foster care system. This practice is called "private placement." Private placement is the best way for parents in prison to keep their parental rights because the strict ASFA rules only apply to children in foster care, not those in private placements. The main advantage to private placement is that your child will be cared for by someone you know and trust. It also allows your child to live in familiar surroundings, which can decrease the trauma that a child may feel from being separated from his parent.

If you want a relative or friend (sometimes called a "caretaker") to care for your child, you should, if possible, write up an agreement that you and your relative or friend sign. The agreement should include three important points:

- (1) You are agreeing to give temporary custody of your child to that person while you are in prison;
- (2) Your child will be returned to you when you are released; and
- (3) The caretaker (the relative or friend) will bring your child to visit you in prison.

This agreement will allow your child's caretaker (relative or friend) to register the child for school, get public assistance, and receive medical care for the child. It will also help make sure you get custody of your child back when you are released from prison. Note that you may have to fill out paperwork or releases in order to legally allow the caretaker to register your child for school and other public services.

If you know someone who is willing to care for your child but does not have the money to do so, he may be eligible to receive public assistance, food stamps, and Medicaid if he assumes custody or guardianship of your child. Your child can also be placed with a close relative through the Department of Social Services (DSS), a practice called "kinship foster care." Under this arrangement, your child

with daughter or learn of her whereabouts despite contacting others by mail and phone during his incarceration); *In re Elizabeth Susanna R.*, 11 A.D.3d 619, 620, 783 N.Y.S.2d 641, 642 (2d Dept. 2004) (quoting *Matter of Jose Andres M.*, 8 A.D.3d 385, 385, 777 N.Y.S.2d 700, 701 (2d Dept. 2004)) (stating that "a parent's incarcerated status does not excuse him or her from establishing or maintaining contact with his or her child").

11. N.Y. SOC. SERV. LAW § 384-b(3)(l)(v) (McKinney 2010).

12. According to the State of New York, the 58 Departments of Social Services throughout the state are responsible for all publicly funded social services and cash assistance programs. Families qualify for DSS assistance based on income and other criteria. DSS assistance includes subsidies for childcare costs. *About ACS*, N.Y.C. ADMIN. FOR CHILDREN'S SERVS., available at <http://www.nyc.gov/html/acs/html/about/about.shtml> (last visited Oct. 21, 2019).

will be considered in foster care even though he is living with a relative. This arrangement, which is different from a private placement, is discussed in Part C(1)(d) of this Chapter.

Granting custody or guardianship to someone through private placement does not mean that you are permanently giving up your parental rights. It only means that you are giving permission for someone else to care and be responsible for your child for a temporary period until you can care for him yourself. It is worth checking with each agency that provides public benefits to find out what paperwork you must fill out in order for the caretaker to receive assistance both for himself and for your child.

C. Foster Care

If private placement with your relatives or friends is not possible, you may choose to apply through DSS to have your child placed in foster care. You must make sure that someone will be caring for your child while you are in prison. If you do not arrange for the care of your child during your incarceration, “permanent neglect proceedings” (which is a case about your custody rights) can be initiated against you, and you might lose the right to have custody, visit your child, and even to parent your child.¹³ Foster care is a way of providing for children whose parents cannot care for them. The state has legal custody of children in foster care, which means that the state takes responsibility for the children. The state may hire a private foster care agency that will work with you and your child to find a placement in foster care. Foster care is not supposed to be a permanent solution; it is meant to help families through difficult times and to make sure that children are living in safe and healthy environments.

There are several different ways children can be placed in foster care. When the parent or parents themselves choose to place their children in foster care, it is called “voluntary placement.” When a judge orders the child to be placed in foster care because the child’s previous caretakers were abusive or neglectful, it is called “involuntary placement.” Children may be placed with relatives (“kinship foster care”), with an agency-approved foster family, in a group home, or in a residential facility. All foster care parents receive funding and supervision either directly from DSS or from any separate foster care agency involved in their case.

1. Voluntary Placement

If you cannot arrange for your child to be cared for by family or friends or if you are not satisfied with the care your child is receiving, you may choose to place your child in foster care. Furthermore, under New York law, your child may have to be placed in foster care if you become “unavailable” due to “arrest, detainment, or imprisonment.”¹⁴

You do not permanently give up your parental rights by placing your child in foster care. You are still legally your child’s parent. It does not mean that you are giving up or abandoning your child, and it does not show that you are unfit as a parent. It only means that you are temporarily unable to provide your child with the care you think he needs. If you fulfill your foster care obligations and if you are released within a relatively short time, you will have a good chance of getting your child back after your release.

However, if you are going to be in prison for more than twelve months, then placing your child in foster care may create a risk of involuntary termination of your parental rights. You should seriously consider your decision to place your child in foster care because ASFA generally requires the state to file for termination of parental rights for children who have been in foster care for fifteen out of the last twenty-two months.

13. See Part D(1)(b) of this Chapter for a discussion of permanent neglect.

14. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.10(c). This section states that children must be removed from their homes and placed in foster care when removal is essential for securing proper care, nurturance, or treatment. It explains that one circumstance where foster care placement may be essential to ensuring proper care, nurturance, or treatment is when the parents of the child are arrested, detained, or imprisoned.

In summary, if you are able to privately place your child with a friend or relative, this may be the best way for you to protect your parental rights. It is important to consider all of your options carefully before placing your child in foster care for fifteen months or longer.

(a) Initial Placement Process

To arrange for your child's placement in foster care, you should first contact the Department of Social Services (DSS).¹⁵ Either you or someone you have entrusted with the care of your child can transfer your child to a foster care arrangement.¹⁶ However, if possible, you should be the one to contact DSS, because if a relative or friend places your child in foster care for you, the agency might only communicate with that person. Remember, a foster care arrangement made by someone else does not affect your rights and obligations as a parent.¹⁷ DSS must consult with you regarding your child. If you are not being contacted, inform DSS and/or the foster care agency that you are the parent and tell them that you wish to make the decisions about your child's care.

When you make contact with DSS, a caseworker will arrange to meet with you to explain the process of placing your child in the custody of DSS and the available foster care options. He will also ask you to sign a Voluntary Placement Agreement,¹⁸ which is a contract between you and DSS that places your child in foster care.¹⁹ By signing the Agreement, you agree to temporarily transfer the custody and care of your child to the Commissioner of DSS. Read the form carefully because it will state what DSS must do for your child while he or she is in foster care. The Agreement should list the responsibilities of DSS, as well as your obligations while your child is in foster care.²⁰ The Agreement must say that the agency may be required to file for termination of parental rights if your child remains in foster care for fifteen out of the most recent twenty-two months.²¹

The Agreement is a standard form, which means it is the same for everyone. If you want to add something to the agreement that you feel is important, you have the right to suggest changes.²² For instance, you may wish to add any or all of the following:

- (1) The date your child will be released from foster care (perhaps the date of your release from prison);
- (2) A request that your children, if you have more than one, be kept together;
- (3) A request that your child remain in his current school;
- (4) A request that your child be kept near the home neighborhood; and/or
- (5) The minimum number of hours per month that you wish to visit with your child.

You should strongly consider adding these items to the Agreement form because DSS is obligated to try to provide your child with the care established in the form.²³ You should be aware that DSS might resist making changes to the standard form. If you want the Agreement changed to fit your child's needs, you need to speak with your caseworker about it.

15. Contact the Department of Social Services (DSS) for the county in which your child is living, or the Administration for Children's Services (ACS) if your child lives in New York City. See the end of this Chapter for contact information for ACS and all other New York counties.

16. N.Y. SOC. SERV. LAW § 384-a(1) (McKinney 2010).

17. N.Y. SOC. SERV. LAW § 384-a(1) (McKinney 2010).

18. You can obtain a New York City Voluntary Placement Agreement Form by writing to the Administration for Children's Services (ACS), 150 Williams Street, 18th Floor, New York, New York 10038, or by calling ACS at (212) 619-1309. The website for ACS is www.nyc.gov/html/acs/home.html (last visited Oct. 22, 2019).

19. N.Y. SOC. SERV. LAW § 384-a(2) (McKinney 2010).

20. These obligations are described in Part C(4) of this Chapter.

21. N.Y. SOC. SERV. LAW § 384-a(2)(c)(ix) (McKinney 2010).

22. N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010).

23. If you believe that the care your child is receiving in foster care does not satisfy the requirements set forth in the Voluntary Placement Agreement, you should first tell your caseworker. Then you or your lawyer, if you have one, should petition the family court judge who signed your child's placement order to review the care the agency is providing for your child and to order the agency to follow the Agreement. *See* N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010) (requiring adherence to the placement order).

It is very important to ask for a copy of the final Agreement that you sign so you can look back at it when necessary. You should keep your own personal file, which should include a copy of the Agreement as well as any other letters between you and DSS.

During your first visit with your caseworker, you may also be asked to sign a Designation of Religious Preference for Children.²⁴ On this form, you may state whether you want your child to be placed with an independent foster care agency affiliated with a particular religion. You can state whether you want your child to receive religious training while in foster care. If you write down a religious preference and say that you want your child to be cared for by a family of that religion, DSS must either:

- (1) place your child with a family practicing that religion;
- (2) show that your child's faith will be protected in the family in which he is placed; or
- (3) show why finding a placement with such a family was not "practicable" or "in the best interests of the child."²⁵ This means that if DSS does not place your child with a family practicing your chosen religion, DSS must be able to prove that it was practically impossible to find such a family or they must be able to give a good reason why it would be better for your child not to be in such a family. If DSS does not place your child in such a family and fails to give a good reason, you can demand that they place your child with a family that practices your religion.

Your caseworker may ask you to sign a form in which you agree that you will be legally responsible for some of the costs of maintaining your child.²⁶ You must write down on this form whether or not you can contribute to your child's expenses while he or she is in foster care. Even though you are in prison, you still have a duty to financially support your child. However, DSS may take your situation into consideration and decide not to require you to contribute to your child's expenses because you are in prison and probably have little or no income.²⁷

You and the caseworker will develop a plan to help keep a close relationship between you and your child. This plan, which includes the rights and obligations of both you and the agency, is discussed in Part C(4) of this Chapter.

Finally, DSS should provide you with a list of lawyers or legal services groups to help you in placing your child. One source of help may be Prisoners' Legal Services.²⁸ Unfortunately, it is extremely unlikely that you will be able to find a free lawyer to help you with a voluntary placement before the 358a Hearing stage of your case (discussed in section (b) below). Because of this, do not be afraid to take as much time and ask as many questions as you need to in order to understand the forms that DSS will make you fill out. You will probably be the person making the decisions for the voluntary placement of your child.

(b) Court Approval of the Placement—358a Hearing

The next step in voluntary placement is court approval. New York state law requires a family court judge to review and approve every voluntary placement of a child in foster care lasting longer than thirty days.²⁹ This proceeding is called a "358a hearing" because it is required by Section 358a of the Social Services Law. DSS is responsible for filing a petition with the court asking for approval of the placement.³⁰ The petition will include a notice "in conspicuous print"—which means it must be clear,

24. The New York City Designation of Religious Preference for Children (Form CM-309) is similar to forms used throughout the state. You can get the appropriate form from the agency handling your case.

25. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.11(c)(2)(iii).

26. N.Y. SOC. SERV. LAW § 384-a(2)(c)(viii) (McKinney 2010).

27. N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(D) (McKinney 2010).

28. See Appendix IV of the JLM for addresses of legal services organizations.

29. N.Y. SOC. SERV. LAW § 358-a(1)(a) (McKinney 2003).

30. N.Y. SOC. SERV. LAW § 358-a(1)(a) (McKinney 2003).

obvious, and not in very small print—stating that if a child remains in foster care for fifteen of twenty-two months, the agency may be required to file for a termination of parental rights.³¹

The judge must give you notice of the hearing.³² In order to be present at the hearing, you should write a letter, similar to the one shown in Appendix A of this Chapter, asking the court to instruct the prison to bring you to the hearing.³³

Your caseworker may ask you to sign a waiver of your right to attend.³⁴ A waiver means that you formally agree to give up a particular right.³⁵ You do not have to waive your rights.³⁶ Sometimes people choose to waive rights as part of a deal with the state, because they get something from the state in return for signing the waiver. If you do choose to sign a waiver of your right to attend the hearing, the court does not have to make sure that you can attend the hearing.³⁷ Generally, signing a waiver is not a good idea because you give up the valuable opportunity to inform the judge of your problems or ask questions during the voluntary placement process.³⁸ However, you should discuss this with your caseworker.

You have a right to a lawyer for the hearing. If you cannot afford your own lawyer, the judge will assign you a free lawyer when you are brought to court for the hearing.³⁹ If you are using your own lawyer, make sure to contact him in advance about the proceeding. A lawyer is meant to be your voice during these proceedings, so if you have any questions or requests or if you are concerned about something, be sure to ask your lawyer.

At the hearing, the court is supposed to ensure that your child will be put in foster care only if the “best interest and welfare of the child will be promoted by the removal of such child from such home.”⁴⁰ This means that foster care is appropriate only when a child would not otherwise receive proper care, nurturing, or treatment.⁴¹ DSS must try to find relatives who can take care of your child.⁴² This arrangement, called “kinship foster care,” is not the same as the private placement discussed in Part B. Kinship foster care is explained in Part C(1)(d) of this Chapter. Apart from trying to find relatives who can care for your child, DSS must try to find and record information about your child’s other parent, any person to whom you had been married at the time of the conception or birth of your child, and any other person who would be entitled to a notice of a proceeding to terminate parental rights if such a hearing were to take place.⁴³

The judge must also verify that you knowingly and voluntarily signed the Voluntary Placement Agreement.⁴⁴ If you have any questions or problems regarding the placement process or the Agreement, you should make them known at this hearing.

If you have had any problems with the foster care agency, you should talk with the judge about that at the hearing. Such problems might include the following situations:

- (1) the agency refuses to add your requests to the Voluntary Placement Agreement;
- (2) there have not been enough (or any) visits between you and your child;

31. N.Y. SOC. SERV. LAW § 358-a(2)(a) (McKinney 2003).

32. N.Y. SOC. SERV. LAW § 358-a(4)(a) (McKinney 2003).

33. N.Y. SOC. SERV. LAW § 358-a(3)(e)(ii) (McKinney 2003) (stating that a parent has a right to be physically present at his child’s 358-a hearing).

34. N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2003).

35. *Waiver*, BLACK’S LAW DICTIONARY (11th ed. 2019).

36. N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2003).

37. N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2003).

38. N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2003).

39. N.Y. FAM. CT. ACT § 262(a)(iv) (McKinney 2008). Please note that the Family Court Act is contained in the Judiciary Court Acts volume of McKinney’s. See Part H of this Chapter for more on your right to counsel.

40. N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2003); N.Y. SOC. SERV. LAW § 358-a(1)(a) (McKinney 2003).

41. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.8(a)(2) ; N.Y. COMP. CODES R. & REGS. tit. 18, § 430.10(c).

42. N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney 2010).

43. N.Y. SOC. SERV. LAW § 384-a(1-b) (McKinney 2010).

44. N.Y. SOC. SERV. LAW § 358-a(3)(a) (McKinney 2003).

- (3) the agency has broken many of its promises; or
- (4) it is difficult for you to communicate with the agency (for example, the caseworker does not return your calls, the prison will not allow you to make calls, etc.).

If you signed a waiver and do not attend a 358a hearing, the judge will review the papers submitted by DSS, including the Voluntary Placement Agreement, and will generally approve the Agreement as you signed it.⁴⁵

(c) Court Review of Placement—Permanency Hearings

(i) Automatic Review

Once a placement has been approved in the 358a hearing described above, the agency is required to check in with the family court from time to time in order to review your child's situation in foster care. The agency must report to the family court within eight months of the date your child was removed from his or her home and then every six months after that.⁴⁶ The court may order a review at any time.⁴⁷ Also, you can ask the court for a review at any time.⁴⁸ If a court decides for any of the reasons listed in the statute⁴⁹ that the agency does not have to make "reasonable efforts" to reunite your family, then it will order a review called a "permanency hearing" within thirty days.⁵⁰ See Part C(4)(a) of this Chapter for a discussion of "reasonable efforts."

These reviews are called permanency hearings because they decide a permanent plan for your child.⁵¹ A permanent plan considers

- (1) whether your child will be returned to you, placed with a relative, or released for adoption;
- (2) the health, well-being, and status of the child;
- (3) the status of the parent; and
- (4) what services have been provided to reunite the family, where appropriate.⁵²

The state is authorized to seek an alternative permanent placement if you are unable to provide a normal family home for your child, and continued foster care is not appropriate.⁵³

The court must notify you at least fourteen days before each of these hearings, and you have a right to attend.⁵⁴ As with the 358a hearing, you must ask the judge to order the prison to take you to the permanency hearing. You or your lawyer, if you have one, should write to the judge as soon as you know when your hearing is scheduled in order to request such an order. Information on getting to court is included in Part G of this Chapter. Also, see the sample letter included in Appendix A of this Chapter.

At the hearing, explain to the judge any problems you have with the foster care your child is receiving.⁵⁵ By law, the judge has to look at what is in the "best interests" of the child, so if there is a problem, you should try to explain how your child's "best interests" are not being provided for.⁵⁶ The

45. N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2003).

46. N.Y. FAM. CT. ACT § 1089(a)(2)–(3) (McKinney 2010).

47. *See* N.Y. FAM. CT. ACT § 1088 (McKinney 2010) (providing the family court with the express power to rehear the case whenever it deems rehearing necessary or desirable).

48. *See* N.Y. FAM. CT. ACT § 1088 (McKinney 2010) (providing the family court with the power to rehear the case when any party to the case makes a motion to do so).

49. N.Y. SOC. SERV. LAW § 358-a(3)(b) (McKinney 2003).

50. N.Y. SOC. SERV. LAW § 358-a(3)(b) (McKinney 2003).

51. N.Y. FAM. CT. ACT § 1012(k) (McKinney 2010).

52. *See* N.Y. FAM. CT. ACT § 1089(c) (McKinney 2010) for a full description of what needs to be included in the permanency plan.

53. N.Y. SOC. SERV. LAW § 384-b(1)(a)(iv) (McKinney 2010).

54. N.Y. FAM. CT. ACT § 1089(b)(1)(i) (McKinney Supp. 2013).

55. Although you may wait until your court appearance to voice your complaints, you should try to write out any problems you have with your child's foster care ahead of time. You can discuss your concerns with your lawyer, if you have one. You may mail the concerns to the judge, DSS, or the child's attorney. You should also take a copy of the list of complaints you have made to court. You or your lawyer should mention your complaints in court so that they are not overlooked.

56. The court must determine how to protect the best interests of the children placed in the state's care by

judge can order DSS to provide a variety of services for you and your child, including arranging additional visits.⁵⁷

(ii) Requested Review

After the initial permanency hearing, you may request a permanency hearing to address problems that arise between scheduled hearings and that cannot be resolved with your caseworker.⁵⁸ You do not need to wait for another scheduled hearing to complain about your child's foster care.

In order to request a permanency hearing, you must explain, in a motion to the court: (1) why you need a new hearing, (2) the type of problem you are having, (3) the steps you have taken to resolve the problem, and (4) what changes you believe are necessary.⁵⁹ You may also file a motion to force the agency to obey court orders or to live up to agreements it has made with you.⁶⁰

2. Kinship Foster Care

DSS will sometimes approve close relatives for kinship guardianship.⁶¹ The technical name for this arrangement is "approved emergency relative foster home."⁶² If you have a relative who would like to care for your child, you may be able to arrange for kinship foster care. Under this program, your child will live with your relative. However, unlike in the private placement described above in Part B, DSS has legal custody of children in kinship foster care, just as it does in any other foster care arrangement.

ASFA has made it more difficult for people with certain kinds of criminal records to be approved as foster parents. The ASFA restrictions may affect your decision to place your child in kinship foster care because they may prevent the relatives you choose from becoming foster parents. In New York, a criminal history check must be performed on potential foster parents and on anyone over eighteen who is living in the home before the home can be certified as a foster home.⁶³ The criminal history check will also be repeated every time the foster parents apply for re-certification.⁶⁴

A prospective foster parent can be denied for several reasons, including:

- (1) A felony conviction at any time involving child abuse or neglect, spousal abuse, a crime against a child including child pornography, a violent crime including rape, sexual assault, or homicide;⁶⁵ or
- (2) A felony conviction within the past five years for physical assault, battery, or a drug-related offense.⁶⁶

A prospective foster parent's application can be put on hold while the agency waits to receive additional information for the following reasons:

- (1) The foster parent has a charge for an above-listed crime that has not been resolved yet;⁶⁷ or

a voluntary placement agreement. *See, e.g.,* *Nicholson v. Scopetta*, 3 N.Y.3d 357, 376–381, 820 N.E.2d 840, 850–854, 787 N.Y.S.2d 196, 206–210 (2004) (determining whether the removal of the child was in the child's "best interests," according to the legislative requirement).

57. N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F) (McKinney 2010).

58. N.Y. FAM. CT. ACT § 1088 (McKinney 2010).

59. N.Y. FAM. CT. ACT § 1089(c) (McKinney 2010).

60. N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F) (McKinney 2010); N.Y. FAM. CT. ACT § 255 (McKinney 2008).

61. A relative may be approved as a foster parent if DSS believes that living with him is the best way to maintain continuity in the child's environment. N.Y. FAM. CT. ACT § 1089-a(a)(i) (McKinney 2010).

62. This arrangement is approved by N.Y. SOC. SERV. LAW § 375 (McKinney 2010). "Approved emergency relative foster home" is defined in N.Y. COMP. CODES R. & REGS. tit. 18, § 443.1(g).

63. N.Y. SOC. SERV. LAW § 378-a(2)(a) (McKinney 2010).

64. N.Y. SOC. SERV. LAW § 378-a(2)(a) (McKinney 2010); *see also Requirements to Become a Foster Parent*, OFFICE OF CHILDREN AND FAMILY SERVICES, <https://ocfs.ny.gov/main/fostercare/requirements.asp> (last visited Mar. 22, 2020).

65. N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(A) (McKinney 2010).

66. N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(B) (McKinney 2010).

67. N.Y. SOC. SERV. LAW § 378-a(2)(e)(2)(A) (McKinney 2010).

- (2) The foster parent has a felony conviction that may be for an above-listed crime, but it is unclear whether such a crime was involved.⁶⁸

If a prospective foster parent has been convicted of one or more of the crimes listed above, the foster care agency will remove any foster child living with the foster parent.⁶⁹ Requests to become a foster parent can also be denied if:

- (1) the prospective foster parent has a criminal history consisting of crimes other than those specified above;⁷⁰ or
- (2) any other person over eighteen living in the proposed foster home has a criminal history (including a criminal charge or conviction).⁷¹

If either of these factors are found, the agency will check the safety of the home. When checking the safety of the home, the agency will consider whether the person who committed the crime lives there, the amount of contact that person has with the child, and the nature of the charge.⁷² Removing the child may be required to protect the child's health and safety.⁷³

A disadvantage of kinship foster care in comparison with private placement is that DSS will be involved in your relationship with your child. For example, DSS could decide to have your child removed from your relative's home to another foster home. It also means that you will not be able to simply ask your relative to return your child when you are released from prison, but must instead petition DSS to get custody of your child again.⁷⁴ Also, DSS may attempt to terminate your parental rights so that your relative or another person can adopt the child.⁷⁵

One advantage of kinship foster care is that your child's caretaker is eligible for the same foster care payments available to unrelated foster care parents.⁷⁶ You and the potential kinship foster parent should consult DSS together about the available funds. Another advantage is that the court can order DSS to support you with services, including providing regular visitation, parenting training, counseling for you or your child, and other services.⁷⁷ If you are an incarcerated parent, DSS's duty to you is generally limited to services offered by your facility, although your child is entitled to any services offered by the agency.⁷⁸

DSS should support your wishes for your child to be in kinship foster care because it is obligated to search for a relative to take care of your child.⁷⁹ If you disapprove of a particular relative that DSS is considering, you can tell the judge your concerns and ask that your child be placed with a different family member. At the hearing, you will have to convince the judge that the placement DSS wishes to make is not in the best interests of your child or that the individual being considered is unfit to care for your child. If you can arrange for the relative of your choice to attend the court hearing, the judge may have an opportunity to meet him.

3. Involuntary Placement

68. N.Y. SOC. SERV. LAW § 378-a(2)(e)(2)(B) (McKinney 2010).

69. N.Y. SOC. SERV. LAW § 378-a(2)(h) (McKinney 2010).

70. N.Y. SOC. SERV. LAW § 378-a(2)(e)(3)(A) (McKinney 2010).

71. N.Y. SOC. SERV. LAW § 378-a(2)(e)(3)(B) (McKinney 2010).

72. N.Y. SOC. SERV. LAW § 378-a(2)(h) (McKinney 2010).

73. N.Y. SOC. SERV. LAW § 378-a(2)(h) (McKinney 2010).

74. Petitioning for return of your child is discussed in Part C(5) of this Chapter.

75. Involuntary termination of parental rights is discussed in Part D of this Chapter.

76. Before relatives can get such payments, the DSS Commissioner must complete a foster care certification study of the relative's home. But, in an emergency, a relative can receive funds immediately. The caretaker can also receive Medicaid for the child but cannot get other forms of public assistance because foster care payments would replace them. N.Y. SOC. SERV. LAW §§ 458-b, 458-c, 458-d (McKinney 2003).

77. N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F) (McKinney 2010).

78. N.Y. SOC. SERV. LAW § 384-b (McKinney 2010).

79. New York state law requires that the state attempt to locate adequate living arrangements with a relative or friend of yours before it places your child with strangers. N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney 2010) (in the context of voluntary placement); N.Y. FAM. CT. ACT § 1017 (McKinney 2010) (in the context of involuntary placement); N.Y. COMP. CODES R. & REGS. tit. 18, § 430.10(b)(2) (2019).

In some circumstances, your child may be placed in foster care without your consent. This is known as “involuntary placement.” Involuntary placement can occur before you are incarcerated or as a result of your incarceration. If you do not consent in writing to the removal of your child and a preliminary hearing has not yet been held, your child can be removed only if there is an *immediate* danger to his health or life. In such an emergency, the court may order removal without a hearing, or DSS may remove your child before receiving a court order.⁸⁰

Involuntary placement does not mean that your child has been permanently taken from you. However, in order to avoid termination of your parental rights, you must fulfill certain obligations and demonstrate that you have taken some responsibility for your child. The state also has a duty to make “diligent efforts”⁸¹ to foster a close relationship between you and your child and to help you fulfill your duties as a parent so that you can get custody of your child back. ASFA has created some exceptions to the state’s duty to show “diligent efforts.” These obligations, rights, and exceptions are discussed below in Part C(4)(a) of this Chapter.

(a) Preliminary Hearing

DSS must petition the family court to hold a “preliminary hearing” where the judge will decide whether your child must be temporarily removed from your home. The judge will look to see if there is an immediate risk to your child’s health or life.⁸² This hearing must be held the day after the petition is filed.⁸³ If your child has already been removed, the judge will determine whether the child should remain in care outside of the home by looking to see if there is an immediate risk to your child’s health or life.⁸⁴ As in voluntary foster care placements, the state must search for a suitable relative to take your child into his or her care.⁸⁵ The court can order DSS to locate your child’s other parent and any relatives and to inform them of the procedure for seeking custody or becoming foster parents of your child.⁸⁶

DSS must try to notify you of the petition and proceedings, and you are allowed to attend them.⁸⁷ However, the judge may proceed with the hearing even if you are not present.⁸⁸ If your child is removed, a date will be set for a “permanency hearing.”⁸⁹ It is important for you to note this date, which will be included in the court’s order removing your child.

(b) Fact-Finding Hearing

After the preliminary hearing, the court will hold a full hearing to decide whether or not your child was neglected or abused, or is at risk of being neglected or abused.⁹⁰ This part of the case is called the “fact-finding hearing.”⁹¹ Since you will not be in the home while you are in prison, the state can easily

80. N.Y. FAM. CT. ACT §§ 1022(a), 1024(a) (McKinney 2010).

81. See Section 4(a) of this Part for examples of what DSS must do in order to meet the “diligent efforts” standard.

82. N.Y. FAM. CT. ACT § 1027(b)(i) (McKinney 2010).

83. N.Y. FAM. CT. ACT § 1027(a)(i) (McKinney 2010).

84. N.Y. FAM. CT. ACT § 1027(b)(i) (McKinney 2010).

85. N.Y. FAM. CT. ACT § 1017 (McKinney 2010).

86. N.Y. FAM. CT. ACT § 1017 (McKinney 2010).

87. N.Y. FAM. CT. ACT §§ 1023, 1027(a)(iv) (McKinney 2010).

88. N.Y. FAM. CT. ACT § 1027(b) (McKinney 2010).

89. N.Y. FAM. CT. ACT § 1027(h) (McKinney 2010 &); *see also* Subsection (d) of this Section, “Permanency Hearings.”

90. A child is “neglected” if he has suffered or is in danger of suffering physical, mental, or emotional harm because the parent cannot or will not provide the proper care. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2010). A child is “abused” when the parent causes, allows, or creates a risk of serious emotional or physical injury that is likely to cause death or serious physical harm, and the parent does not do so accidentally. A child is also considered abused when a parent commits or allows to be committed a sex offense against the child. N.Y. FAM. CT. ACT § 1012(e) (McKinney 2010).

91. N.Y. FAM. CT. ACT § 1044 (McKinney 2010).

show that your child is at risk of neglect, unless you have arranged for a relative or a friend to take care of your child in your absence.

The judge must make sure that you are present at the hearing or that every reasonable effort has been made to notify you of it.⁹² If you choose not to appear, the court will proceed without you.⁹³ If you do not have money to retain a lawyer, the judge must appoint a free lawyer to represent you at this hearing (and the later dispositional and permanency hearings)⁹⁴ and must also appoint a lawyer to represent your child.⁹⁵

To ensure you will be at the hearing, you or your lawyer should ask the judge to order the prison, using an Order to Produce, to bring you to court that day. Appendix A has a sample letter requesting that the judge submit an Order to Produce to your prison. If, because of your incarceration, you cannot be at the hearing on the day it is scheduled, you or your lawyer should explain that to the judge. The judge should change the date to make sure you can be there.

(c) Dispositional Hearing

If the court makes a finding of abuse or neglect, it will hold another hearing, called the “dispositional hearing.” This hearing may take place directly after the fact-finding hearing,⁹⁶ but it usually happens after an adjournment (when the court postpones the hearing until a later date). You and your lawyer have the right to participate in the dispositional hearing, and the judge cannot proceed without proof that the agency actually notified you of the hearing. After hearing the case, the judge can make one of several rulings: return your child to you, adjourn the case for several months with the intention of dismissing the case later, or order placement of your child in foster care.⁹⁷

The judge should inform you that if you fail either to maintain contact with your child or plan for your child's future, your parental rights may be terminated. Your duties as the natural parent are discussed in Part (C)(5)(b), and termination of parental rights is discussed in Part D of this Chapter.

Also, at the dispositional hearing or at the permanency hearing, (discussed in Subsection (d) of this Section), the court can order the foster care agency to make “diligent efforts” to “encourage and strengthen the parental relationship.”⁹⁸ For example, the judge can order the agency to arrange visits between you and your child by bringing your child to visit you. You or your lawyer should ask the judge to order this visitation because visiting with your child will strengthen your relationship and will help your case when you ask that your child be returned to you. The judge can also order the agency to assist you with housing, employment, counseling, medical care, psychiatric treatment, and any other appropriate services that your prison facility can provide.

The judge will make a dispositional order, which must include:

- (1) a description of the visitation plan;⁹⁹
- (2) a statement that you have the right to attend planning conferences (with a lawyer) about your child's foster care and that you should be told when those meetings will occur;¹⁰⁰ and
- (3) a notice that if your child remains in foster care for fifteen of the most recent twenty-two months, the agency may be required to file a termination of your parental rights.¹⁰¹

92. N.Y. FAM. CT. ACT § 1041 (McKinney 2010).

93. N.Y. FAM. CT. ACT § 1042 (McKinney 2010). If you did not willfully refuse to appear at the hearing, you may, within one year, petition the court for a rehearing, which the court should grant.

94. Dispositional hearings are discussed in Subsection (c) of this Section. Permanency hearings are discussed in Subsection (d) of this Section.

95. N.Y. FAM. CT. ACT §§ 249, 262 (McKinney 2010).

96. N.Y. FAM. CT. ACT § 1047(a) (McKinney 2010).

97. N.Y. FAM. CT. ACT § 1052(a) (McKinney 2010).

98. N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F) (McKinney 2010).

99. N.Y. FAM. CT. ACT § 1089(d)(2)(vii)(A) (McKinney 2010).

100. N.Y. FAM. CT. ACT § 1089(d)(2)(vii)(B) (McKinney 2010).

101. N.Y. FAM. CT. ACT § 1089(d)(2)(vii)(D) (McKinney 2010).

You have a right to a copy of this order, so remember to ask for a copy if one is not provided to you.¹⁰²

(d) Permanency Hearings

The agency that has custody of your child must conduct a permanency hearing within eight months of your child's removal.¹⁰³

The purpose of a permanency hearing is to determine the long-term plans for your child.¹⁰⁴ The court will also examine whether you and the agency have been following the plan for your child and whether the plan should be adjusted because of changed circumstances.¹⁰⁵ In considering whether extension of placement is in the best interest of your child, the court will look at the permanency goal.¹⁰⁶ As a result of the ASFA, the statute was changed to allow alternative permanent plans to be made for the child, like discharge to a "fit and willing relative."¹⁰⁷

As the natural parent, you are a necessary party to the hearing, and you have a right to be present and to have the court appoint a lawyer to represent you.¹⁰⁸ It is very important to attend the permanency hearing. The permanency hearing should be scheduled during the original hearing when your child was ordered removed,¹⁰⁹ but you must be re-notified of the date of the permanency hearing at least fourteen days in advance.¹¹⁰ You should also receive a copy of the agency's permanency hearing report,¹¹¹ a document that includes an update on your child's well-being and on the agency's recommendation for your child's future placement.¹¹²

If you are released from prison and want your child back immediately, or before the next permanency hearing, you should request that the agency return your child. If the agency does not fulfill your request within thirty days, you can ask the court to terminate your child's placement.¹¹³ However, this motion does not mean that the court will return your child immediately. The court may first have a hearing to determine whether your child should be returned.¹¹⁴

102. N.Y. FAM. CT. ACT § 1089(e) (McKinney 2010).

103. N.Y. FAM. CT. ACT § 1089(a)(2) (McKinney 2010). The statute states that the permanency hearing must take place "no later than six months from the date which is sixty days after the child was removed from his or her home . . . [and] shall be completed within thirty days of the scheduled date certain." Adding the six months and 60 days means that the hearing must happen within eight months from the day your child was removed from your home.

104. N.Y. FAM. CT. ACT § 1089(a) (McKinney 2010).

105. N.Y. FAM. CT. ACT § 1089(c)(5)(i) (McKinney 2010).

106. N.Y. FAM. CT. ACT § 1089(c)(1) (McKinney 2010).

107. N.Y. FAM. CT. ACT § 1089(c)(1)(iv) (McKinney 2010).

108. N.Y. FAM. CT. ACT § 1090(b) (McKinney 2010).

109. N.Y. FAM. CT. ACT § 1089(a)(2) (McKinney 2010).

110. N.Y. FAM. CT. ACT § 1089(b)(1)(i) (McKinney 2010); *see also In re Frederick W.*, 120 Misc. 2d 335, 342, 465 N.Y.S.2d 828, 833 (Fam. Ct. Queens County 1983) (requiring dismissal of agency's petition to extend the placement of the child where the agency failed to give notice to parent).

111. N.Y. FAM. CT. ACT § 1089(b)(1)(i) (McKinney 2010); *see also In re Three Children Free for Adoption*, 138 Misc. 2d 584, 586, 525 N.Y.S.2d 135, 137 (Fam. Ct. Delaware County 1988) (dismissing petition for a permanency hearing as it would require the notice of parents even for children freed from adoption); *In re Frederick W.*, 120 Misc. 2d 335, 342, 465 N.Y.S.2d 828, 833 (Fam. Ct. Queens County 1983) (dismissing petition to extend placement of child for failure to serve parent with petition).

112. N.Y. FAM. CT. ACT § 1087(e) (McKinney 2010); *see also In re Three Children Free for Adoption*, 138 Misc. 2d 584, 585, 525 N.Y.S.2d 135, 136 (Fam. Ct. Delaware County 1988) (stating that an argument that parents are not entitled to notice "flies directly in the face of case law and of the plain and unambiguous language of the statute.").

113. N.Y. FAM. CT. ACT § 1062 (McKinney 2010). You or your lawyer should go to the Petition Room at the family court. Someone there will help you put your case on the court calendar, which will schedule a hearing to determine whether your child will be returned to you.

114. N.Y. FAM. CT. ACT § 1064 (McKinney 2010).

4. Working with Foster Care Agencies

(a) Placement with an Agency

Soon after your child enters the foster care system, DSS may transfer the responsibility for the case to an authorized private foster care agency. This transfer is often done in New York City cases, but is not usually done in the rest of New York state. The transfer does not mean your child will be physically moved but only that an agency other than DSS will supervise the placement.

If your child is placed with a private agency, you should be told the name of that agency as well as the agency caseworker assigned to your child. Until you receive this notice, you should maintain contact with the caseworker from DSS so you can take care of the responsibilities you have.¹¹⁵ If you do not hear from the new caseworker, write to DSS and the new agency to let them know. You should show them that you are concerned about your child's well-being and that you want to be kept informed about your child's whereabouts. The more interest and concern you show for your child, the less likely it is that DSS will seek, or that the court will approve, termination of your parental rights. It may also make the foster care agency more open to using one of the ASFA exceptions to the requirements for terminating parental rights. Termination of parental rights is discussed fully in Part D of this Chapter.

(b) Development of a Service Plan

When you are assigned a caseworker from DSS or a private agency, the caseworker should contact you to arrange a meeting to discuss your child's service plan. However, this is not usually done while you are incarcerated, so you should request a meeting in writing. It may be possible to arrange a conference by telephone. You should also try to keep the agency caseworker informed about programs you are participating in while you are incarcerated, such as drug treatment or parenting skills classes.

If you and the caseworker are able to meet, you will develop a plan for your child's time in foster care.¹¹⁶ It is more likely, though, that the agency will develop the plan in your absence. If you voluntarily placed your child in foster care, the Voluntary Agreement Form might be the basis for this plan. The plan:

- (1) will include guidelines for the treatment your child will receive;
- (2) will state that a termination of parental rights proceeding may be filed against you by the agency if your child remains in foster care for fifteen out of the last twenty-two months;¹¹⁷
- (3) will outline the agency's program for helping to reunite you and your child;
- (4) should describe the care and services your child will receive while in foster care;
- (5) should state how often you will receive visits from your child;¹¹⁸
- (6) will state what you need to do to get your child back; and
- (7) will list your obligations for working to achieve a permanent home for your child.¹¹⁹

It is not always easy to get a copy of the plan. You should request it in writing. If the agency still does not provide you with the service plan for your family, you should inform the DSS case manager immediately in writing, as well as the judge at the next permanency hearing. When you get a copy of the plan, be sure to keep it for your records.

5. Rights and Obligations under Voluntary or Involuntary Foster Care

Both you and the agency have obligations (things you must do) towards each other and towards your child. If you do not fulfill your obligations, the agency may go to court to try to terminate your parental rights, which means that someone else could adopt your child without your consent. In a termination of parental rights proceeding where the agency accuses you of permanent neglect, the

115. See N.Y. SOC. SERV. LAW § 384-a(2)(c)(v) (McKinney 2010) (describing parents' obligations when they have a child in foster care).

116. N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6 (2019).

117. N.Y. SOC. SERV. LAW § 384-a(2)(c)(ix) (McKinney 2010).

118. N.Y. SOC. SERV. LAW § 384-a(2)(c)(iv) (McKinney 2010).

119. N.Y. SOC. SERV. LAW § 384-a(2)(c)(v) (McKinney 2010).

agency will first have to prove that it fulfilled its own obligations before the judge will consider ending your parental rights.

(a) The Department of Social Services' ("DSS") Obligations

DSS has certain responsibilities when it takes custody of your child. As previously discussed, its first obligation is to try to find a home for your child with a relative.¹²⁰ Again, if you know someone who can take good care of your child that your child likes, you can suggest this person or family member to DSS.

If DSS cannot find family members with whom your child might be able to live, it must do the following:

- (1) Place your child in a setting that allows for the least disruption of the child's life as possible.¹²¹
- (2) Keep a record of your child's progress;¹²²
- (3) Provide a caseworker who will regularly meet with you, your child, and your child's foster parents and who, with your help, will write a plan for the care of your child;¹²³
- (4) Demonstrate compliance with the plan;¹²⁴ and
- (5) Provide reasonable care for and supervision of the child during the course of the placement.¹²⁵

More importantly, in most cases, DSS has a general legal obligation to make what the law calls "diligent efforts" to encourage a relationship between you and your child,¹²⁶ although there are some exceptions created by ASFA. "Diligent efforts" include:

- (1) Keeping you informed of your child's progress;¹²⁷
- (2) Making arrangements with your correctional facility for your child to visit you regularly in the facility;¹²⁸ and

120. N.Y. SOC. SERV. LAW § 384-a(1-a)(a) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 18, § 430.10(b)(2) (2019) (describing standards for necessary activities prior to placement including search for a relative or family friend); N.Y. FAM. CT. ACT § 1017(1) (McKinney 2010) (describing DSS obligations for placing children and locating relatives).

121. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.11(c)(1)(i) (2019) (suggesting that the child be able to stay in touch with the "persons, groups and institutions" with which the child was involved before, where possible). Similarly, the child's setting should be the "least restrictive and most homelike" as possible. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.11(d)(1) (2019).

122. N.Y. COMP. CODES R. & REGS. tit. 18, § 428.3(b)(1)(vi) (2019).

123. N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6 (2019).

124. N.Y. COMP. CODES R. & REGS. tit. 18, §§ 428.1, 430.12(c)(1)(ii)(c) (2019).

125. *See Andrews v. Cnty. of Otsego*, 112 Misc.2d 37, 39, 446 N.Y.S.2d 169, 171 (Sup. Ct. Otsego County 1982) (holding that a county with custody of a foster care child has a continuing obligation to protect the child's health, safety, and welfare and can be held liable for negligent placement or supervision of a child).

126. N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney 2010); *see also In re Sheila G.*, 61 N.Y.2d 368, 385, 389, 462 N.E.2d 1139, 1148, 1150, 474 N.Y.S.2d 421, 430, 432 (1984) (explaining that the agency must make "affirmative, repeated, and meaningful efforts to assist" a parent before initiating a parental rights termination proceeding and approving dismissal of permanent neglect petition filed by foster care agency where father had made visits regularly, established paternity, and developed a plan to take custody of the child, but the agency did not fulfill its "diligent efforts" requirement); *In re Ericka M.*, 285 A.D.2d 986, 986-987, 727 N.Y.S.2d 234, 235 (4th Dept 2001) (dismissing petition for termination of parental rights because agency did not show, by clear and convincing evidence, that it made "diligent efforts" to strengthen the parent-child bond); *In re Jamie M.*, 96 A.D.2d 737, 737, 465 N.Y.S.2d 339, 340 (4th Dept 1983) (finding that the agency failed to make "diligent efforts" to help parents solve the very problems requiring removal of the children and causing the termination proceedings), *aff'd*, 63 N.Y.2d 388, 472 N.E.2d 311, 482 N.Y.S.2d 461 (N.Y. 1984).

127. N.Y. SOC. SERV. LAW § 384-b(7)(f)(4) (McKinney 2010); *see also Matter of Gerald BB. v. Sheila CC.*, 51 A.D.3d 1081, 1084, 857 N.Y.S.2d 314, 318 (3d Dept 2008) (holding that DSS satisfied the requirement to keep parents informed as to child's progress as "written reports" were "routinely sent to the mother charting her children's progress while they were in foster care," and finding "that efforts were repeatedly made by members of DSS to involve the mother in discussions regarding plans for the children's future").

128. N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010). The agency is also responsible for making

- (3) Providing or suggesting counseling or other services to resolve problems that may prevent your child's eventual return to you.¹²⁹

The exact meaning of "diligent efforts" will depend on the individual case. The agency may be required to maintain regular contact with you and inform you that failure to contact and plan for your child may result in a termination of your parental rights.¹³⁰ In one case, the court found that an agency did not make diligent efforts when it did not help parents satisfy agency requirements for the return of their child. Although the parents did not fulfill the agency's plan, which included finding a suitable home, having the means to support the child, and going to family counseling, the court held the agency should have made efforts to address problems, such as poverty, that kept the parents from fulfilling the agency requirements.¹³¹ In another case, an agency did not satisfy its statutory requirement when it failed to offer counseling to a child's incarcerated father, made no effort to help the father get visitation rights, and made no attempt to involve the father in his child's life.¹³²

In defining "diligent efforts" the highest court of New York has said that the foster care agency must make "meaningful efforts" to:

- (1) provide you with counseling for any problem, such as drug or alcohol abuse, that might be an obstacle to your child's eventual return to you;
- (2) help you find housing or employment;
- (3) help you plan for your child's future; and
- (4) provide opportunities for you and your child to have regular, meaningful visits.¹³³

Until the agency has demonstrated "some attempt" to assist you in these ways, a termination of parental rights should not be granted.¹³⁴

However, ASFA has changed the Department of Social Services' obligation to make reasonable attempts to preserve the family in some circumstances. In New York, the law states that if an incarcerated parent has failed more than once while incarcerated to cooperate with the agency's efforts to assist the parent to plan for the future of the child or with the agency's efforts to plan and arrange visits, then the agency will not have to present evidence that it made "diligent efforts."¹³⁵

Additionally, the law states that in making determinations involving reasonable or diligent efforts, "the health and safety of children" is the most important concern.¹³⁶ Efforts should be made to prevent removal of the child or to make it possible for the child to return home safely.¹³⁷

arrangements to transport your child to and from the facility to visit with you. N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010); *see also* Matter of Gerald BB. v. Sheila CC., 51 A.D.3d 1081, 1084, 857 N.Y.S.2d 314, 318 (3d Dept 2008) (finding that DSS met its burden as they "arranged for [the mother], while incarcerated, to have visits with the children").

129. N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010) (requiring the agency to coordinate with the prison to provide "rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent's ability to maintain contact with the child").

130. *See In re Shannon U.*, 210 A.D.2d 752, 753–754, 620 N.Y.S.2d 851, 852 (3d Dept 1994) (holding that agency was found to satisfy its duty because it had maintained regular contact with parents by phone, mail, home visits, and meetings and had arranged visits, counseling, and parenting classes).

131. *See In re Jamie M.*, 63 N.Y.2d 388, 394–395, 472 N.E.2d 311, 314, 482 N.Y.S.2d 461, 464 (1984) (dismissing petition for termination of parental rights because the agency failed to show diligent efforts in addressing the unemployment and financial instability of parents).

132. *See In re Jennifer Ann W.*, 198 A.D.2d 881, 882, 605 N.Y.S.2d 698, 699 (4th Dept 1993).

133. *In re Sheila G.*, 61 N.Y.2d 368, 384–385, 462 N.E.2d 1139, 1147–1148, 474 N.Y.S.2d 421, 429–430 (1984).

134. *In re Jamie M.*, 63 N.Y.2d 388, 394–395, 472 N.E.2d 311, 314, 482 N.Y.S.2d 461, 464 (N.Y. 1984).

135. N.Y. SOC. SERV. LAW § 384-b(7)(e)(ii) (McKinney 2010); *see also* Matter of Heart Share Human Servs. of N.Y., 28 Misc. 3d 1107, 1124, 906 N.Y.S.2d 472, 486 (Fam. Ct. Queens County 2010), *reversed in part on other grounds*, Matter of Charle Chiedu E., 2011 NY Slip Op 6842, 87 A.D.3d 1140, 930 N.Y.S.2d 456 (App. Div.) (recognizing three statutory exceptions to the diligent efforts requirements).

136. N.Y. SOC. SERV. LAW § 384-b(1) (McKinney 2010).

137. N.Y. SOC. SERV. LAW § 358-a(2) (McKinney 2003).

Reasonable efforts to prevent the removal of a child or to reunite a child with the birth family are **not** required in the following situations:¹³⁸

- (1) when a court has determined that the parent has subjected the child to aggravated circumstances, defined in New York as severe or repeated abuse;¹³⁹
- (2) when a court has determined that a parent has committed a serious act of violence, including murder or voluntary manslaughter, against one of the parent's children;¹⁴⁰ attempted, conspired, or solicited to commit such murder or voluntary manslaughter;¹⁴¹ or committed assault or aggravated assault on a child under eleven years old, resulting in serious bodily harm to the child or another child of the parent;¹⁴² or
- (3) when the parent's rights to one of the child's siblings (including half-siblings) have been terminated involuntarily.¹⁴³

If the agency decides not to make reasonable efforts to reunite your family, it must file a motion in court and the judge will decide if the agency can avoid making such efforts.¹⁴⁴ You should be notified of and given a copy of the motion.

(b) Your Obligations as a Parent

Like DSS, you must meet certain obligations while your child is in foster care. If you fail to satisfy these requirements, DSS may claim that you have abandoned or permanently neglected your child and may ask a court to terminate your parental rights.¹⁴⁵ New York law states that a parent who wishes to be reunited with a child in foster care has the following obligations:

- (1) To visit with the child;¹⁴⁶
- (2) To plan for the future of the child;¹⁴⁷
- (3) To consult with the foster agency about the child's foster care plan;¹⁴⁸
- (4) To contribute financially to the support of the child, if the parent is able;¹⁴⁹

138. N.Y. SOC. SERV. LAW § 358-a(3)(b) (McKinney 2003).

139. N.Y. SOC. SERV. LAW § 358-a(12) (McKinney 2010). Severe abuse is defined to include conviction for (1) committing or soliciting murder or manslaughter of another child of the parent or another child for whom the parent is legally responsible; (2) assault against a child less than eleven years old; and (3) conviction for an above crime in any other jurisdiction. N.Y. SOC. SERV. LAW § 384-b(8)(a)(iii) (McKinney 2010). Repeated abuse is defined to include (1) a finding of abuse of the child; (2) a finding of abuse, within the past five years, of that child or any other child for whom the parent is or was legally responsible; and (3) a finding that diligent efforts by the agency to encourage the parental relationship and to rehabilitate the parent have been unsuccessful and are "unlikely to be successful in the foreseeable future." N.Y. SOC. SERV. LAW § 384-b(8)(b) (McKinney 2010).

140. N.Y. SOC. SERV. LAW § 358-a(3)(b)(2) (McKinney 2010). Convictions for these offenses can occur in jurisdictions other than New York as long as (1) the offense includes all the essential elements of the New York crime, and (2) the victim of such offense was the child or another child of the parent. N.Y. SOC. SERV. LAW § 358-a(3)(b)(5) (McKinney 2010).

141. N.Y. SOC. SERV. LAW § 358-a(3)(b)(3) (McKinney 2003). Convictions for these offenses can occur in jurisdictions other than New York as long as (1) the offense includes all the essential elements of the New York crime, and (2) the victim of such offense was the child or another child of the parent. N.Y. SOC. SERV. LAW § 358-a(3)(b)(5) (McKinney 2003).

142. N.Y. SOC. SERV. LAW § 358-a(3)(b)(4) (McKinney 2003). Convictions for these offenses can occur in jurisdictions other than New York as long as (1) the offense includes all the essential elements of the New York crime, and (2) the victim of such offense was the child or another child of the parent. N.Y. SOC. SERV. LAW § 358-a(3)(b)(5) (McKinney 2003).

143. N.Y. SOC. SERV. LAW § 358-a(3)(b)(6) (McKinney 2003); N.Y. SOC. SERV. LAW § 358-a(3)(d) (McKinney 2003).

144. N.Y. SOC. SERV. LAW § 358-a(1) (McKinney 2003).

145. N.Y. SOC. SERV. LAW §§ 384-a(2)(c)(vi), 384-b(4)(b), 384-b(4)(d) (McKinney 2010).

146. N.Y. SOC. SERV. LAW §§ 384-a(2)(c)(v)(A), 384-b(5), 384-b(7)(a), 384-b(7)(b) (McKinney 2010).

147. N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(B), 384-b(7)(a) (McKinney 2010). For a definition of planning for the future of the child, see N.Y. SOC. SERV. LAW § 384-b(7)(c) (McKinney 2010) and the discussion in Part C(4)(b)(ii) below.

148. N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(C) (McKinney 2010).

149. N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(D) (McKinney 2010).

- (5) To inform the agency of the parent's address every six months, even if it remains the same, and to inform the agency immediately of any change of name or address;¹⁵⁰ and
- (6) To cooperate with the agency.¹⁵¹

The courts interpret these requirements look at both “the particular facts and [the] totality of circumstances.”¹⁵² This means the court will look at the facts of your particular case as a whole when deciding whether to terminate your parental rights. Because the judge is supposed to look at the “totality of the circumstances” of your situation, he might decide not to terminate your parental rights even if you have not met all the obligations listed above. Also, the law says that, at the very least, an incarcerated parent has to “cooperate with [the agency] in its efforts to ... plan for the future of the child.”¹⁵³ If an incarcerated parent on more than one occasion fails to cooperate or has failed to inform the agency of his address for six months, the agency does not have to continue making diligent efforts to preserve the family, including providing for visitation.¹⁵⁴

If you want to retain your parental rights, you should make every effort to fulfill your obligations. In a termination proceeding, DSS has the burden of proof to show, by clear and convincing evidence, that you failed to fulfill your obligations.

(i) Visiting with Your Child

The law recognizes that incarcerated parents may have a difficult time arranging to visit with their children and planning for their children's futures. It will not be held against you if you cannot visit with your child as often as you would like or if the agency does not provide you with visits.¹⁵⁵ Remember, though, that visiting regularly is one of the most effective ways to maintain a healthy relationship with your child and to avoid termination of your parental rights. Visitation and other parental contacts, such as letters and phone calls, are generally seen as being in the best interests of the child.

Not visiting with your child can be proof of abandonment or permanent neglect and can lead to termination of your parental rights.¹⁵⁶ For example, one court held that a parent who failed to substantially maintain contact with her children during a period of over one year had not lived up to her foster care obligations.¹⁵⁷ You should try very hard to maintain contact with your child. Whether your child is in the custody of a relative, a friend, your ex-spouse, or in foster care, that person should bring your child to visit you.¹⁵⁸ Your parental rights are at stake, so make sure that you continuously try to visit with your child even if the foster parents or agency are making it difficult for you to see your child. If the judge sees that you did all that you could to try and maintain contact with your child, it will help you to regain custody of your child when you are released. Some prisons have programs to

150. N.Y. SOC. SERV. LAW §§ 384-a(2)(c)(v)(E), 384-b(7)(e)(i) (McKinney 2010).

151. N.Y. SOC. SERV. LAW §§ 384-a(2)(c)(v), 384-b(5), 384-b(7) (McKinney 2010).

152. *In re Orlando F.*, 40 N.Y.2d 103, 111, 351 N.E.2d 711, 716, 386 N.Y.S.2d 64, 68 (N.Y. 1976) (holding that finding of permanent neglect and termination of parental rights was appropriate where mother maintained contact with son but failed to plan for his future by not getting stable housing for three years).

153. N.Y. SOC. SERV. LAW § 384-b(7)(e)(ii) (McKinney 2010).

154. N.Y. SOC. SERV. LAW § 384-b(7)(e) (McKinney 2010).

155. N.Y. SOC. SERV. LAW §§ 384-b(7)(e)(i), 384-b(7)(f)(5) (McKinney 2010).

156. N.Y. SOC. SERV. LAW §§ 384-b(5), 384-b(7)(a), 384-b(7)(b) (McKinney 2010).

157. *See In re Comm'r. of Soc. Serv.*, 84 Misc. 2d 253, 258–259, 376 N.Y.S.2d 387, 393 (N.Y. Fam. Ct. 1975) (explaining that a parent's failure to maintain continuous contact with the child can result in the termination of parental rights); *see also In re I.R.*, 153 A.D.2d 559, 561, 544 N.Y.S.2d 216, 217–218 (N.Y. App. Div. 1989) (explaining that incarceration alone does not excuse a parent from maintaining contact with his child).

158. *See Wise v. Del Toro*, 122 A.D.2d 714, 714–715, 505 N.Y.S.2d 880, 881 (N.Y. App. Div. 1986) (reversing denial of visitation to an incarcerated father because he did not have the opportunity to present evidence and because incarceration alone does not make visitation inappropriate); *R.J. v. D.J.*, 133 Misc. 2d 883, 887, 508 N.Y.S.2d 838, 841 (N.Y. Fam. Ct. 1986) (holding that while incarceration alone does not prevent visitation with parent's child, frequent visits were unnecessary because of the stress to the mother who had to take the child to visits).

help incarcerated people keep in contact with their children.¹⁵⁹ You should look into any such programs available at your facility and tell your caseworker that you and your child wish to participate in the programs.

The foster care agency is required by law to make “diligent efforts” to encourage frequent and regular visits between you and your child.¹⁶⁰ The agency usually has to provide visits every other week if the permanency plan for the child is returning the child to you (or “reunification”).¹⁶¹ The agency must do whatever it can to help make sure you get to meet with your child, including providing you with financial assistance or help arranging transportation.¹⁶² A court may even order that you be allowed to visit with your child in a different facility if that will make it easier for your child to visit you, but this will usually be a day trip with a guard and not a permanent transfer.¹⁶³ Prison officials do not have to set up visits between you and your child outside of your correctional facility unless it is “reasonably feasible” (not very difficult or inconvenient) and is in the best interests of your child.¹⁶⁴

Because prisons generally restrict visitation hours, it may be difficult for a caseworker to arrange for your child to meet with you in prison. However, logistical difficulties are not an excuse for caseworkers to stop arranging visits. The law *requires* the caseworker to set up visits. It also requires jail officials to cooperate with the caseworker to arrange the visits.¹⁶⁵

In very specific cases, the court might prevent you from being able to visit with your child. A court can also determine that visitation is harmful to the child’s welfare and order that no visits occur. In New York, “[t]he denial of visitation to a natural parent is a drastic remedy and should be done only where there are compelling reasons and substantial evidence that such visitation is detrimental to the children’s welfare.”¹⁶⁶ This means there has to be an extremely important reason why visits would be harmful to your child, and the agency must be able to prove that such a reason actually exists and that it is truly harmful. Also, if visitation is not permitted, then the lack of visits cannot be used against you as the basis for a permanent neglect or abandonment proceeding.¹⁶⁷

(ii) Planning for Your Child

Courts recognize that your ability to participate in your child’s upbringing is limited because you are incarcerated. Nevertheless, they still require that you think ahead and have a plan to care for your child. This may include finding a home for your child among friends or relatives or preparing yourself for reunification. Planning ahead will demonstrate that you care about your child and have an interest in being a parent.

According to one parental rights specialist, your plan should include the following:

- (1) How you will support yourself and your child after your release (for example, by getting public assistance or finding a job);
- (2) Where you and your child will live;
- (3) Where your child will go to school;

159. You may, for example, be eligible to apply for the Family Reunion Program (“FRP”) if it is offered by your correctional facility. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2 (1998).

160. N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010).

161. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(d)(1)(i) (2006).

162. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(d)(1) (2006).

163. *See In re Gadson*, 124 Misc. 2d 1024, 1026–1027, 478 N.Y.S.2d 498, 500 (N.Y. Fam. Ct. 1984) (permitting visitation at a facility different from the one where parent was incarcerated because it was in the best interests of the children, the alternate facility allowed for meaningful visitation, and transportation was feasible).

164. N.Y. SOC. SERV. LAW § 384-b(7)(f)(2) (McKinney 2010).

165. N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010); N.Y. CORRECT. LAW § 619 (McKinney 2014).

166. *Parker v. Ford*, 89 A.D.2d 806, 807, 453 N.Y.S.2d 465, 466 (N.Y. App. Div. 1982) (holding that petitioner father, despite alcohol abuse, was improperly denied supervised visitation, where there was no evidence that supervised visitation would be detrimental to the child’s welfare). *But see Sullivan Cnty. Dep’t. of Soc. Serv. v. Richard C.*, 260 A.D.2d 680, 682–683, 687 N.Y.S.2d 470, 472 (N.Y. App. Div. 1999) (denying visitation between father and child where psychologist and child’s therapist recommended that visits be suspended until child developed the strength to deal with family problems, since child consistently showed regression after contact with father).

167. N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010).

- (4) How you will provide for your child's medical needs (for example, with Medicaid);
- (5) What kind of religious upbringing, if any, you want for your child;
- (6) Who will watch your child if you are out of the house; and
- (7) How you will provide for any special needs your child may have.¹⁶⁸

To prepare yourself as a parent, you should take part in any parenting courses available at your institution, attend vocational training classes to improve your chances of getting a job, and join drug or alcohol rehabilitation classes if necessary or ordered by a court. In general, you should do your best to participate in any programs that your caseworker suggests.

If you are incarcerated for an extended period of time, the court may not think arranging long-term foster care (as opposed to adoption) is an acceptable plan for your child's future. Courts have terminated parental rights of incarcerated people who made long-term foster care arrangements for their children when the parent would not get out of prison until the children were over 18.¹⁶⁹ If you are in this situation, the government has the authority to terminate your parental rights. See Section D below for a longer discussion of what happens when the government tries to permanently terminate your parental rights.

(iii) Contact with Your Child and the Foster Care Agency

In addition to visiting with your child whenever you can, you should stay in touch by sending letters, birthday and holiday cards, and gifts to your child. If your child is too young to read, draw a picture or send a note that someone else can read aloud to them. These actions will show the court that you are interested in and planning for your child's future and that you have made an effort to fulfill your parental obligations.

You should also contact your caseworker regularly, both to inform him of your progress in prison and to ask about your child. If you do not tell the agency about your current address for six months or more, the agency is no longer required to try as hard to facilitate the relationship between you and your child.¹⁷⁰ Keep track of all your communication with your child and with your caseworker, including making copies of letters and cards and keeping a list of phone calls you make. Keeping accurate records is very important because if the agency ever petitions to terminate your parental rights, you will have proof that you were, in fact, fulfilling your obligations.

4. Assuming Care of Your Child after Release

If you voluntarily place your child in foster care, your Voluntary Placement Form may include a specific release date for your child. In that case, the agency must return the child to you on that date.¹⁷¹ If you will still be incarcerated on the release date specified in the Voluntary Placement Form, you should inform your caseworker. A new release date can be chosen, and your child can remain in foster care until then.¹⁷²

If you wish to have your child returned earlier than the date listed on the Voluntary Placement Form, you must send a written request to the agency stating the new requested date of return and

168. Philip M. Genty, Memorandum for Incarcerated Parents with Children in Foster Care 3 (1988) (on file with the *Columbia Human Rights Law Review*).

169. *In re Gregory B.*, 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (N.Y. 1989) (upholding termination of parental rights for incarcerated parents who made arrangements for long-term foster care until children were no longer minors); *In re "Female" V.*, 21 A.D.3d 1118, 1119, 803 N.Y.S.2d 636, 637–638 (N.Y. App. Div. 2005) (upholding termination of parental rights for an incarcerated father who, among other things, "was unable to provide any 'realistic and feasible' alternative" to having his children remain in foster care until they became adults or he was released from prison) (quoting N.Y. Soc. Serv. Law § 384-b(7)(c) (McKinney 2010)).

170. N.Y. SOC. SERV. LAW § 384-b(7)(e)(i) (McKinney 2010).

171. N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010).

172. See N.Y. SOC. SERV. LAW § 384-a(3) (McKinney 2010) (describing how to amend a Voluntary Placement Form).

your reasons for wanting to change the date.¹⁷³ The agency may return your child, or they have ten days to deny your request.¹⁷⁴ If your request is denied, you can challenge the denial in court.¹⁷⁵

If the Placement Form does not say a specific release date, you can request the return of your child at any time by writing a letter to the agency. The agency must return your child to you within twenty days or get a court order to keep them in foster care. If the agency does get this court order, it will probably bring neglect proceedings against you.¹⁷⁶ Generally, the agency will have to prove that you would not be able to provide for your child—meaning that your child would be at risk of neglect or abuse—before it can get an order extending your child’s foster care.

If you did not voluntarily place your child in foster care, but were forced to do so by the state (meaning you did it “involuntarily”), you may file a motion with the court to end the involuntary placement.¹⁷⁷ However, cannot go straight to the court to ask for your child back. You must first apply to the agency asking them to terminate the foster care placement. Once they deny your request, then you can file the motion with the court.

Regardless of whether your child was placed in foster care voluntarily or involuntarily, you may be eligible for assistance from DSS once you are released from prison and have regained custody of your child. After your release, DSS must provide supportive and rehabilitative services, called “preventive services,” to you and your family if there is a serious risk that you will not be able to care for your child and that the child will be put in foster care again.¹⁷⁸ You should discuss getting additional assistance with your DSS caseworker *before* your release from prison. If you fail to do this and realize that you need additional assistance after returning home, you can still discuss it with your caseworker because your caseworker must meet with you at least three times after your child is released from foster care.¹⁷⁹

If you need housing after your release from prison, you may be eligible for a housing subsidy from DSS of up to \$300 every month for up to three years. DSS gives this subsidy to parents when the main reason their child is being kept in foster care is that the parent cannot find adequate housing.¹⁸⁰ If you need help paying for housing, ask your caseworker about the subsidy and explain that you want to apply for it.

D. Involuntary Termination of Parental Rights

There are a few different people who can start court proceedings to convince a court that terminating your parental rights and placing your child up for adoption is the best solution for your child. These people include DSS, foster parents, a relative with care or custody of your child, or your child’s legal guardian.¹⁸¹ New York state law says that the state cannot terminate your parental rights just because you are in prison.¹⁸² The law also recognizes that incarcerated parents have special

173. N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010). Reasons for changing the date of your child’s release from foster care might include, for example, a shorter prison sentence than originally anticipated or your decision to place your child with a relative or friend.

174. N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010).

175. N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010); *see also* N.Y. SOC. SERV. LAW § 358-a(8) (McKinney 2010) (pointing out that any order by a family court can be appealed pursuant to Article 11 of the Family Court Act).

176. N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010).

177. *See* N.Y. FAM. CT. ACT § 1062 (McKinney 2010).

178. You may be eligible for any of the services described in N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2 (2014), which include daycare, housekeeper/chore services, psychiatric counseling, and parent training services. *See also* N.Y. SOC. SERV. LAW § 409 (McKinney 2010) (defining preventive services); N.Y. SOC. SERV. LAW § 409-a (McKinney 2010) (detailing the duties of social services officials to provide preventative services); N.Y. SOC. SERV. LAW § 384-a(2)(c)(iv)–(vii) (McKinney 2010) (describing the terms for transfer of care and custody of children).

179. N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4(h) (2014).

180. N.Y. SOC. SERV. LAW § 409-a(5)(c) (McKinney 2010).

181. N.Y. SOC. SERV. LAW § 384-b(3)(b) (McKinney 2010).

182. N.Y. SOC. SERV. LAW § 384-b(2)(b) (McKinney 2010) (stating that the term parent “shall include an incarcerated parent unless otherwise qualified”). *But see In re Love Russell J.*, 7 A.D.3d 799, 800, 776 N.Y.S.2d 859, 859 (N.Y. App. Div. 2004) (finding that termination of parental rights due to permanent neglect was proper

circumstances that judges should consider when looking at a parent's efforts to maintain contact with and plan for their children.¹⁸³ However, ASFA has made it easier for the state to terminate your rights as a parent.

If you do not consent to giving your child up for adoption, a court *may* terminate your parental rights *only* if it finds that at least one of the following things is true:

- (1) You have abandoned your child for a period of at least six months immediately prior to the date on which the termination petition was filed,¹⁸⁴
- (2) You permanently neglected your child,¹⁸⁵
- (3) You cannot and will not be able to provide proper care because of mental illness or intellectual disability (which used to be called mental retardation),¹⁸⁶ or
- (4) You have severely or repeatedly abused your child.¹⁸⁷

Under ASFA in New York, if any of the following are true, the foster care agency *must* file for termination of parental rights:

- (1) Your child has been in foster care for fifteen of the most recent twenty-two months;¹⁸⁸
- (2) The child has been determined by a court to be abandoned;¹⁸⁹
- (3) You have been convicted of certain crimes, such as conspiring, soliciting, attempting, or committing murder or manslaughter of another of your children for whom you are legally responsible,¹⁹⁰ or attempting or committing assault on a child under eleven years of age who is a child of the parent (you) or a child for whom you are legally responsible;¹⁹¹ or
- (4) You have been convicted of any of the above crimes in another jurisdiction.¹⁹²

The State is still required to prove its case in order to actually terminate your rights. But even if any of the four conditions above apply to you (where the agency is required to file under ASFA), the agency does not need to file for termination proceedings if any of the following things are also true:

- (1) Your child is being cared for by a relative;¹⁹³
- (2) The agency has documented in the plan a compelling reason that filing a petition to terminate parental rights would not be in the best interest of the child;¹⁹⁴ or

against an incarcerated father whose only plan for his children's welfare was extended placement in foster care, especially when he had been warned by the agency that this plan was insufficient).

183. See N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010); see also *In re Custody & Guardianship of Sasha R.*, 246 A.D.2d 1, 7, 675 N.Y.S.2d 605, 609 (N.Y. App. Div. 1998) (discussing how the New York legislature acknowledged that incarcerated parents have "special circumstances" that should be taken into account when evaluating the parent's efforts to meet the statutory contact and planning requirements) (citing *In re Gregory B.*, 74 N.Y.2d 77, 89, 542 N.E.2d 1052, 1057, 544 N.Y.S.2d 535, 540–541 (N.Y. 1989)).

184. N.Y. SOC. SERV. LAW § 384-b(4)(b) (McKinney 2010). Under New York state law, a parent abandons a child when he shows "an intent to forego his or her parental rights and obligations ... by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency." N.Y. SOC. SERV. LAW § 384-b(5)(a) (McKinney 2010).

185. N.Y. SOC. SERV. LAW § 384-b(4)(d) (McKinney 2010). A parent permanently neglects a child when he "continuously or repeatedly" fails for a period of either one year, or fifteen out of the most recent twenty-two months, "to maintain contact with or plan for the future of the child, although physically and financially able to do so" N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010).

186. N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney 2010).

187. N.Y. SOC. SERV. LAW § 384-b(4)(e) (McKinney 2010). See Part C(4)(a) of this Chapter for a definition of severe and repeated abuse. Under N.Y. SOC. SERV. LAW § 384-b(8)(b)(ii)(A) (McKinney 2010), repeated abuse that will lead to the termination of parental rights also includes a parent committing or "knowingly" allowing a felony sex offense to be committed against his child.

188. N.Y. SOC. SERV. LAW § 384-b(3)(i)(i) (McKinney 2010).

189. N.Y. SOC. SERV. LAW § 384-b(3)(i)(i) (McKinney 2010).

190. N.Y. SOC. SERV. LAW § 384-b(8)(a)(iii)(A)–(B) (McKinney 2010).

191. N.Y. SOC. SERV. LAW § 384-b(8)(a)(iii)(C) (McKinney 2010).

192. N.Y. SOC. SERV. LAW § 384-b(8)(a)(iii)(D) (McKinney 2010).

193. N.Y. SOC. SERV. LAW § 384-b(3)(i)(i)(A) (McKinney 2010).

194. N.Y. SOC. SERV. LAW § 384-b(3)(i)(i)(B) (McKinney 2010). Compelling reasons are defined in N.Y. SOC. SERV. LAW § 384-b(3)(i)(ii) (McKinney 2010).

- (3) The agency has not provided you) with adequate reunification services in cases where those services are part of the reasonable efforts requirement.¹⁹⁵

When the foster care agency alleges in a petition that your case falls into one of the four categories listed above and files for termination of parental rights (where the agency is required to file under ASFA), the court will first hold a fact-finding hearing to see if the agency's allegation is true. Then, in all cases involving permanent neglect or severe or repeated abuse, it will hold a "dispositional hearing."¹⁹⁶ In the dispositional hearing, the judge will decide whether terminating your parental rights is in your child's best interest. In cases of abandonment or mental illness, dispositional hearings are not required, and your parental rights may be terminated automatically if the court finds there is abandonment or mental illness in the fact-finding hearing. However, the court may still choose to hold a dispositional hearing in those instances.

One possible compromise in a proceeding to terminate parental rights is a "suspended judgment" for one year.¹⁹⁷ A suspended judgment means that the court will monitor the situation for a year and then determine what to do before entering the actual judgment. That year is similar to being on probation. The court will require you to satisfy certain conditions. For example, the court may require you to communicate and visit with your child regularly, enroll in counseling programs, and cooperate with the agency in planning for your child's future. If you do not comply with the conditions of the order, the court may take back the suspended order and terminate your parental rights.

1. DSS-Initiated Termination Proceedings

Most termination proceedings against incarcerated parents charge the parent with abandonment or permanent neglect. These terms have specific legal meanings which are explained below.

(a) Abandonment

"Abandonment" means that that for a period of six months before the termination petition was filed, you failed to communicate and visit with your child¹⁹⁸ even though you were able to do so and the agency never told you *not* to visit or communicate.¹⁹⁹ If the agency wants to terminate your parental rights for abandonment, they will have to show that you did these things. However, in order to prove abandonment, the agency does not have to show that it attempted to help you meet with your child.²⁰⁰ So, it is good to keep your own records of your attempts to communicate with the child and with the agency. This way you will have evidence to support you if the agency says things that are not true, such as that you never tried to see your child.

(b) Permanent Neglect

Under New York law, a parent "permanently neglects" his child who is in the care of an agency when the parent fails to maintain contact with the child or plan for his future for a period of either one year, or fifteen out of the most recent twenty-two months, even though he was capable to do so (both physically and financially).²⁰¹ During that period of time, the agency must make diligent efforts to

195. N.Y. SOC. SERV. LAW § 384-b(3)(l)(i)(C) (McKinney 2010).

196. N.Y. SOC. SERV. LAW § 384-b(3)(e) (McKinney 2010); N.Y. FAM. CT. ACT § 623 (McKinney 2009). See Part C(2)(c) of this Chapter for information on dispositional hearings.

197. N.Y. FAM. CT. ACT § 633 (McKinney 2009); *see also* Comm'r. of Soc. Serv. v. Rufelle C., 156 Misc. 2d 410, 416, 593 N.Y.S.2d 401, 405 (N.Y. Fam. Ct. 1992) (granting respondent parent a rehearing to determine whether parent had fulfilled the conditions of the suspended judgment).

198. N.Y. SOC. SERV. LAW § 384-b(4)(b) (McKinney 2010).

199. N.Y. SOC. SERV. LAW § 384-b(5)(a) (McKinney 2010).

200. N.Y. SOC. SERV. LAW § 384-b(5)(b) (McKinney 2010).

201. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010).

strengthen the parental relationship.²⁰² The agency does not have to make diligent efforts where a court has previously decided that those efforts are not necessary.²⁰³

When the agency charges permanent neglect, the court must first look at the actions that DSS took in your case before they look at your behavior. DSS must prove that, where required, DSS or the foster care agency involved made diligent efforts (as discussed in Part C(4)(a)) to strengthen the relationship between you and your child, and to reunite your family.²⁰⁴ If you believe that the agency has not made diligent efforts, you or your lawyer needs to explain this to the judge and show that the agency did not actually make proper efforts. For example, if the agency never brought your child to prison for a visit, even though you repeatedly requested that they do so, or if the agency did not help you with a problem related to your parenting, you could bring that up to show the agency did not make diligent efforts to strengthen your relationship. Use telephone logs and copies of bills to establish that you made these efforts. Ask your lawyer to subpoena people from the prison to testify on your behalf.

Once a court has found permanent neglect, it will hold a dispositional hearing to consider the best interests of the child. A child's best interests (legally speaking) involve his physical and emotional well-being, including a permanent home and a normal, stable family atmosphere.²⁰⁵

2. Defending Yourself Against Termination of Parental Rights

It is very important that you attend the termination hearing. The agency must serve you with notice (meaning they must tell you the time and location) of the hearing,²⁰⁶ and inform you that you have a right to attend.²⁰⁷ At the hearing, DSS will challenge your capabilities as a parent, and you

202. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010). *Compare In re Sheila G.*, 61 N.Y.2d 368, 380, 462 N.E.2d 1139, 1145, 474 N.Y.S.2d 421, 427 (1984) (finding that the foster care agency did not exercise diligent efforts in fostering the relationship between a biological father and his child), *with In re Demetrius F.*, 176 A.D.2d 940, 941, 575 N.Y.S.2d 552, 552 (2d Dept. 1991) (finding that it is unnecessary for the agency to show that it exercised diligent efforts to foster the relationship between a parent and child where the ground for termination of parental rights is mental illness).

203. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010).

204. N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney 2010) (defining diligent efforts).

205. *In re Michael B.*, 80 N.Y.2d 299, 311–312, 314–315, 604 N.E.2d 122, 129–131, 590 N.Y.S.2d 60, 67, 69 (1992) (concluding that the Appellate Division had used an incorrect test to decide what was in the child's best interests; the Appellate Division relied on the child's length of stay and his bonding with foster parents instead of considering the fitness of the biological parent, the agency's plan for the child, and the child's emotional well-being); *In re Suzanne N.Y.*, 77 A.D.2d 433, 434, 433 N.Y.S.2d 580, 581–582 (1st Dept. 1980) (granting termination of parental rights where an eight-year-old child had lived with her foster parents since the age of four months and her mother was a schizophrenic who required medication to remain minimally functional), *rev'd on other grounds*, 54 N.Y.2d 824, 427 N.E.2d 1187, 443 N.Y.S.2d 722 (1981).

206. N.Y. SOC. SERV. LAW § 384-b(3)(e) (McKinney 2010).

207. New York courts have recognized the right to attend termination proceedings. *See In re Daniel Aaron D.*, 49 N.Y.2d 788, 791, 403 N.E.2d 451, 452, 426 N.Y.S.2d 729, 730 (1980) (ruling that the mother should have been present at the hearing during the testimony of the court-appointed psychiatrist since mother had not waived her right to be present); *see also In re Tyrell M.*, 283 A.D.2d 500, 501, 724 N.Y.S.2d 874, 875 (2d Dept. 2001) (finding that the family court erred in not allowing the mother to testify on her own behalf at the next court date prior to finding that she had neglected her children); *In re Cleveland W.*, 256 A.D.2d 1151, 1151–1152, 684 N.Y.S.2d 121, 121 (4th Dept. 1998) (finding family court abused its discretion by proceeding with termination hearing even though respondent mother had called the court to inform them that she was too ill to attend; her attorney appeared and also told the court about the mother's illness, and the mother supplied a doctor's note documenting her illness); *In re Kendra M.*, 175 A.D.2d 657, 658, 572 N.Y.S.2d 583, 585 (4th Dept. 1991) (finding that the family court erred in conducting the fact-finding hearing on a date when the incarcerated parent could not attend; also finding that the court should have made arrangements to have the parent brought from jail to be present at the hearing); *In re Guardianship of Victory*, 78 A.D.2d 843, 844, 433 N.Y.S.2d 445, 446 (1st Dept. 1980), *aff'd*, 52 N.Y.2d 1071 (N.Y. 1981) (affirming the right that a father of a child born out of wedlock has to participate and be heard at all stages of the proceeding regarding the child's foster care status). The only other states that have found such a right are Arizona, California, and Florida. Texas has held specifically that an incarcerated person has no right to be at the termination hearing. *See Philip M. Genty, Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. Fam. L. 757,

should be there to respond to any issues they raise. If you are not at the hearing, you will not be able to defend yourself, and it might look like you are not interested in protecting your parental rights.

Although you have a right to attend the hearing, if you are in a facility outside of the state where the hearing will be held, the officials at your correctional facility probably will not bring you to the hearing. In one such case, a court held that a hearing could proceed without the presence of the incarcerated parent because the interests of the state and the child outweighed the parent's interest in being at the hearing.²⁰⁸ In other words, the court found that it was less important to wait for the incarcerated parent than for the state and the child to have the hearing.

If you are unable to attend the hearing, other ways to participate include testifying through a telephone conference call during the hearing, aggressive representation by your attorney (having your lawyer argue strongly for you), and testifying by deposition. A deposition is a special legal tool where you answer questions or make statements in another place and it is brought before the court in writing instead of you being there in person to testify.

To decide that you have not "abandoned" or "permanently neglected" your child, the court must find that you: (1) made an effort to keep in contact with your child (which includes contact that you have with the agency), and (2) planned for your child's future during your incarceration. These two conditions were discussed above.

In New York, you have a right to a lawyer for the termination hearing.²⁰⁹ The lawyer will help you argue your case for keeping your parental rights. You can either hire a lawyer yourself or ask the judge to assign one to you. Unfortunately, the family court is unlikely to appoint an attorney if you do not appear at the hearing. You may try to write to the court and respond to the allegations (accusations against you) in the petition or ask to have an attorney appointed.

(a) Maintaining Contact with Your Child

The best way to show that you have maintained contact with your child is to give the judge copies of all letters and proof of other communications that you have had with DSS, the caseworker, your child, the family court, the foster parent, and anyone else involved in your child's foster care. You should keep a file with photocopies or carbon copies of all of these documents. If you cannot photocopy the letters, keep a written record of each letter and a brief summary of what you wrote in the letter. You should also keep a telephone log of all of the calls you make. If you get charged for and pay for phone calls that you make, make sure to get receipts to show the judge.

The court will not accept being in jail or prison as an excuse for losing contact with your child. An incarcerated parent who does not make an effort to keep in touch with the child may be charged with permanent neglect or abandonment.²¹⁰ You must personally make contact and cannot rely on a relative

774–775 (1991/92).

208. See *In re A.O.*, 157 Misc.2d 177, 179, 596 N.Y.S.2d 971, 973 (Fam. Ct. Bronx County 1993) (finding that a hearing could proceed because the incarcerated father's correctional facility in Connecticut refused to produce him and the father refused alternate methods for out-of-court participation, such as telephone conference and written sworn testimony); see also *In re James Carton K.*, 245 A.D.2d 374, 376–77, 665 N.Y.S.2d 426, 428–29 (2d Dept. 1997) (affirming termination of parental rights despite parent's absence, and holding that a parent's right to be present for fact-finding and dispositional hearings in termination cases must be balanced with the child's right to a prompt and permanent adjudication), *appeal denied*, 91 N.Y.2d 809, 693 N.E.2d 750, 670 N.Y.S.2d 403 (1998). All the states that have decided this issue have ruled that a person incarcerated out of state does not have a right to be produced for the termination hearing. See Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. Fam. L. 757, 775–76 (1991/92).

209. N.Y. FAM. CT. ACT § 262(a)(iv) (McKinney 2008). See Part H of Chapter 33 for more information on your right to counsel.

210. See *In re Antia Siami D.*, 192 A.D.2d 389, 389, 596 N.Y.S.2d 64, 64 (1st Dept. 1993) (terminating incarcerated the parent's rights because the parent had failed to contact the child for more than six months, even though the parent could have sent a letter or communicated through another person); see also *In re Ravon Paul H.*, 161 A.D.2d 257, 257–258, 555 N.Y.S.2d 49, 49 (1st Dept. 1990) (finding termination of parental rights to be in the best interests of the child where the incarcerated parent did not write, send gifts, telephone, or otherwise try to keep a relationship with the child or the agency; also stating that "sporadic and minimal attempts to maintain

to make contact.²¹¹ Also, visitation and contact may not be enough if the court finds the quality of the visits or contacts poor or too infrequent.²¹²

The court may decide not to terminate your parental rights if you can show that you had a good reason for not communicating with your child and the agency. Usually, this means you must show that it was *impossible* for you to communicate with either the child or the agency.²¹³ However, in one case, an incarcerated father who had not communicated with his child or the agency for six months won against the agency in an abandonment proceeding by arguing that his child would be upset by visiting him in a prison setting, and explained that he could not communicate through letters or telephone calls because the child was an infant.²¹⁴ He also explained that he was scared to contact the agency because he was incarcerated, although he had attempted unsuccessfully to contact them once. In addition, this father had made plans for the child's future and he had asked his girlfriend to seek visitation with the child. The court concluded that the father's conduct demonstrated that he did not intend to give up his parental rights and responsibilities.²¹⁵

(b) Planning for Your Child

The second requirement you must satisfy to maintain your parental rights involves planning for your child. Planning for your child is discussed above in Part C(4)(b)(ii). Your plan must be reasonable and achievable.²¹⁶

To show that you are planning for your child's future, you can participate in whatever programs your facility offers for parents, such as parenting courses and drug and alcohol abuse counseling. It is very important that you have evidence of participating in those programs, so you should try to get a certificate that shows that you participated in or completed the program. Otherwise, you can ask your lawyer to *subpoena* a supervisor or counselor who can testify at the hearing about your progress and participation in a program. (A subpoena is an official court document that requires a person to appear in court at a specific time and place.)

3. Termination Proceedings Against Prisoners with Long-Term Sentences

Incarcerated people with long-term sentences will have a harder time keeping their parental rights. A plan for long-term foster care, even with adequate visitations and contacts, is not enough to

a parental relationship are insufficient to prevent a finding of abandonment"); *In re Shannon Q.*, 262 A.D.2d 679, 680, 690 N.Y.S.2d 788, 789 (3d Dept. 1999) (stating that "incarceration alone does not excuse respondent's failure to contact his child" where the parent did not try to contact Social Services to find out the location of his daughter).

211. See *In re Thomas G.*, 165 A.D.2d 729, 729, 564 N.Y.S.2d 32, 33 (1st Dept. 1990) (holding that communication between a paternal grandmother and an agency did not satisfy the incarcerated father's obligation to make contact with his child); see also *In re Christopher MM.*, 210 A.D.2d 767, 767, 620 N.Y.S.2d 853, 854 (3d Dept. 1994) (finding father's contacts to be "minimal and insubstantial" for the purposes of an abandonment proceeding when the only attempts to contact the child were three phone calls placed to child's grandparents), *appeal denied*, 85 N.Y.2d 807, 651 N.E.2d 918, 628 N.Y.S.2d 50 (1995).

212. See *In re Cecelia A.*, 199 A.D.2d 582, 583, 604 N.Y.S.2d 327, 329 (3d Dept. 1993) (finding "sporadic and unsubstantial contacts" insufficient to defeat an abandonment petition supported by "clear and convincing evidence"); *In re Tasha Monica B.*, 156 A.D.2d 247, 247, 548 N.Y.S.2d 508, 509 (1st Dept. 1989) (finding that visitation alone was insufficient to show parent was fulfilling obligations where the quality of visitation was poor).

213. See *In re Trudell J.W.*, 119 A.D.2d 828, 828, 501 N.Y.S.2d 453, 453 (2d Dept. 1986) (finding that the termination of parental rights was appropriate where the mother did not produce evidence that her failure to contact the child or agency was a result of circumstances that made it impossible for her to do so).

214. See *In re Baby Girl I.*, 210 A.D.2d 601, 602–603, 619 N.Y.S.2d 832, 833 (3d Dept. 1994).

215. See *In re Baby Girl I.*, 210 A.D.2d 601, 602–03, 619 N.Y.S.2d 832, 833 (3d Dept. 1994).

216. See *In re Leon RR*, 48 N.Y.2d 117, 125–26, 397 N.E.2d 374, 379, 421 N.Y.S.2d 863, 868–69 (1979) (finding that the parents' plans for child's future were adequate where the parent solved personal problems that had led to the child's initial removal, found employment, found suitable housing, and sought psychological counseling).

fulfill the obligation of planning for an alternative living arrangement for your child.²¹⁷ ASFA's time limits make protecting your parental rights especially difficult in this situation.

New York's highest court has held that parents who will be in prison for a long time (ten to twenty years or twenty-five years to life), and who have no plan for their children other than to have the children remain in long-term foster care, should lose their parental rights.²¹⁸ The court decided that the law was not meant to allow children to stay in long-term foster care when their incarcerated parent could not find another place for the child to live.²¹⁹ In other words, foster care cannot be used to preserve your parental rights if it is clear that you will never be able to care for your children, and that you have not arranged for another person to care for them while you are in prison. The court acknowledges the importance of the rights of incarcerated parents but decided that the laws were meant to prioritize putting children in permanent homes.²²⁰

In another case, an incarcerated father planned for his child to stay in foster care until the father was eligible for parole, in seven years. The court did not believe this plan was good enough and terminated the father's parental rights.²²¹ A father in a similar situation also had his parental rights terminated for permanent neglect. The court said that his plan for his child to remain in foster care for six or more years until the father was released was not a good enough plan and that the father should have made other efforts to be involved in his child's life.²²²

A plan for long-term foster care is not enough to make sure you keep your parental rights even when you have maintained contact and a close relationship with your child. If you are serving a long sentence and your child is in foster care, it is very important that you try to remove your child from foster care by privately placing him with a relative or another person. If the court sees that your child will be cared for by a relative while you are in prison, it is less likely to terminate your parental rights.²²³ Otherwise, you risk losing your parental rights.

4. Practical Tips for Preventing Termination of Parental Rights

- (1) *Know the Legal Status of Your Child's Placement.* Is your child in foster care or private custody? If your child is in foster care, what type is it? Was your child voluntarily or involuntarily placed there? Gather all documents relating to your child's placement in one place, and keep safe and precise records.
- (2) *Maintain Contact with Your Child.* Write letters and cards. If possible, call your child. Try to arrange for visitation as often as possible. Keep copies of everything you send and a log of your phone calls.

217. See *In re Gregory B.*, 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (1989) (finding that leaving a child to foster care until he is no longer a child is not an acceptable plan for the purposes of planning an alternate living arrangement for a child).

218. See *In re Gregory B.*, 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (1989) (finding that leaving a child to foster care until he is no longer a child is not an acceptable plan for the purposes of planning an alternate living arrangement for a child).

219. *In re Gregory B.*, 74 N.Y.2d 77, 89, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (N.Y. 1989) (finding that leaving a child to foster care until he is no longer a child is not an acceptable plan for the purposes of planning an alternate living arrangement for a child).

220. *In re Gregory B.*, 74 N.Y.2d 77, 89, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (N.Y. 1989) (quoting *In re Joyce T.*, 65 N.Y.2d 39, 47, 478 N.E.2d 1306, 1311–12, 489 N.Y.S.2d 705, 711 (N.Y. 1985)) (emphasis added); see also N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney 2010) (describing legislative intent behind guardianship and custody statutes).

221. See *In re Omar Garry G.*, 198 A.D.2d 149, 149, 603 N.Y.S.2d 860, 861 (1st Dept. 1993) (finding that the termination of parental rights was appropriate where the incarcerated parent's only plan for his child was to have the child remain in foster care until his release; the court said that the termination of parental rights was especially appropriate since there were relatives who appeared to be "ready, willing, and able" to care for the child during the parent's incarceration), *appeal denied*, 83 N.Y.2d 753, 634 N.E.2d 603, 612 N.Y.S.2d 107 (1994).

222. See *In re Latasha C.*, 196 A.D.2d 756, 756, 602 N.Y.S.2d 11, 12 (1st Dept. 1993).

223. See *In re Omar Garry G.*, 198 A.D.2d 149, 149, 603 N.Y.S.2d 860, 861 (1st Dept. 1993); see also *In re Gregory B.*, 74 N.Y.2d 77, 88, 542 N.E.2d 1052, 1057, 544 N.Y.S.2d 535, 540 (1989).

- (3) *Maintain Contact with Your Caseworker or Your Child's Guardian.* Write or call your caseworker or child's guardian often. Ask about your child: their interests, physical and mental health, progress in school, and any problems. Also ask to establish a regular schedule for visitation. Again, keep accurate records of your contact with caseworkers and guardians.
- (4) *If Your Child Is in Foster Care, Maintain Contact with the Social Services Agency.* At least once every six months, notify the agency of your current address in writing. Cooperate with the foster care agency if it asks you to attend classes or complete programs at your facility or if the agency attempts to arrange visits in order to help you plan your child's future.
- (5) *Attend Court Hearings.* Make sure that the judge knows you are involved and are concerned about your child. If you learn that a court hearing has been scheduled, send a letter to the family court clerk asking that you be produced in court and asking to have legal representation assigned to you. Once your lawyer is assigned, make sure you know his or her name, address, and telephone number.
- (6) *Most Importantly, Keep Records.* Make a record of every phone call you make to your child, your caseworker, a court, or foster care agency. If possible, make copies of every letter you send. This is very important and might mean the difference between keeping and losing your child after you are released.

E. Voluntary Adoption

You might decide that adoption is the best choice for your child. To do this, you must “surrender” your child, which generally means that you give up all your parental rights to your child. Generally, you give up the right to visit your child, call your child, and even learn how your child is doing.²²⁴ This is called a “total surrender.” However, it may be possible to negotiate some conditions to the surrender of your child, such as naming the person who adopts your child or preserving your right to see your child after adoption.²²⁵ This option is called a “conditional surrender.” If you negotiate these conditions and the person who adopts your child prevents you from seeing your child, you may petition a court for visitation. The court would then conduct a hearing to determine if visitation is in the best interests of the child.²²⁶

Whether you choose a total or conditional surrender, you are making a serious decision and you should get all the advice and help that you think you need. You have the right to talk with a lawyer before you sign the form you sign to give up your child, which is called a “Surrender Instrument.” If your child is in foster care, you have the right to supportive counseling before you sign the surrender instrument.²²⁷ Make sure you have read and fully understand any and all documents that you are asked to sign. If you do not understand something in a document, ask your lawyer to explain it. Do not sign anything until you are sure that you understand what the consequences of signing will be, and you are sure that this is what you want to do and what you think is best for your child.

The adoption process is different depending on whether your child is in foster care or has been placed privately with friends or relatives.

224. N.Y. SOC. SERV. LAW § 383-c(3)(b) (McKinney 2010). However, a surrender of a child in foster care may include a provision for visitation with the child after adoption.

225. N.Y. SOC. SERV. LAW § 383-c(2)(b) (McKinney 2010).

226. *See In re Sabrina H.*, 245 A.D.2d 1134, 1135, 666 N.Y.S.2d 531, 531 (4th Dept. 1997) (finding that a biological mother can petition the court for enforcement of conditions in the surrender agreement). However, an adoptive parent's refusal to let a biological parent see the child would not allow the biological parent to automatically revoke the surrender.

227. N.Y. SOC. SERV. LAW §§ 383-c(3)(b), (5)(b)(i) (McKinney 2010).

1. If Your Child Is in Private Placement

If your child is living with a friend or relative through a private arrangement, you can surrender your child either by giving him to a foster care agency or adoption agency or by making a private adoption agreement.²²⁸ You make the surrender by signing the form in or out of court.

After you have surrendered your child to the agency, you have thirty days to change your mind.²²⁹ If you change your mind after thirty days, you may regain your parental rights only if your child has not yet been placed in an adoptive home.²³⁰ If you change your mind about the surrender and your child is already in an adoptive home, the judge will decide who has legal custody based solely on the “best interests of the child.”²³¹

2. If Your Child Is in Foster Care

If your child is in foster care, contact your child’s caseworker and explain that you are interested in giving up your child for adoption. When the child is already in foster care, the surrender can take place in one of two ways. The first is to “execute and acknowledge” the surrender instrument in court before a judge.²³² If the surrender takes place in court, your parental rights are irrevocably terminated.²³³ This means you cannot change your mind and regain parental rights to your child.

The second type of surrender takes place outside of court and is called an “extra-judicial surrender.” If you sign the surrender instrument outside of court, you have forty-five days after signing the surrender to change your mind.²³⁴

As with foster parents, ASFA requires that the agency check the criminal records of prospective adoptive parents. The requirements for approval or denial of an adoptive parent are the same as for a foster parent.²³⁵

F. Incarcerated Fathers with Children in Foster Care

Incarcerated fathers with children in foster care face unique challenges. As a father, your biological link to your child is not enough to protect your rights as a parent.²³⁶ You must take affirmative actions to protect your rights, such as maintaining contact with your child while he or she is in foster care. Without these actions, you risk losing your child to adoption without the court seeking your consent or even notifying you of its actions.

1. Establishing Paternity—Becoming a “Legal Father”

If you are a man, in order to exercise the parental rights described in this Chapter, you must establish paternity by proving to a court that you are the legal father of your child. Apart from giving you rights, establishing paternity also gives you responsibilities. One of the major responsibilities that goes along with a court finding that you are a child’s father is a possible obligation to pay child support.²³⁷

228. N.Y. DOM. REL. LAW §§ 115–16 (McKinney 2010). A private adoption involves a contract between the birth parents and adoptive parents without agency involvement.

229. N.Y. SOC. SERV. LAW § 384(5) (McKinney 2010).

230. N.Y. SOC. SERV. LAW § 384(5) (McKinney 2010).

231. N.Y. SOC. SERV. LAW § 384(6) (McKinney 2010).

232. N.Y. SOC. SERV. LAW § 383-c(3)(a) (McKinney 2010).

233. N.Y. SOC. SERV. LAW § 383-c(3)(b) (McKinney 2010).

234. N.Y. SOC. SERV. LAW § 383-c(5)(d)(ii) (McKinney 2010).

235. *See* N.Y. SOC. SERV. LAW § 378-a(2)(a) (McKinney 2010); *see also* Part C(1)(d) of this Chapter.

236. Robert O., 80 N.Y.2d 254, 265, 604 N.E.2d 99, 104, 590 N.Y.S.2d 37, 42 (1992) (holding that the biological link of the father is insufficient to create a constitutionally protected interest and that the unwed biological father must demonstrate some action for him to enjoy protection of his parental rights); *see also* Caban v. Mohammad, 441 U.S. 380, 392, 99 S. Ct. 1760, 1768, 60 L. Ed. 2d 297, 307 (1979) (finding that where the father has not taken action to “participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child”).

237. N.Y. FAM. CT. ACT § 413 (McKinney 2008).

Establishing paternity is only necessary if your child was born out of wedlock. If you were or are married to the mother of your child, you are automatically considered to be the father of all children conceived or born to the mother during the marriage, and you do not have to establish paternity. However, if you are unmarried, you are not the child's legal father even if you lived with the mother of your children for a number of years. Additionally, having your name on your child's birth certificate does not automatically make you the child's legal father.²³⁸ Therefore, if you were not married to the mother of your child when your child was conceived or born, you will have to prove your paternity. Fathers who married their child's mother after the child was born must also prove paternity.

To prove your paternity, you should file a petition for an order of "filiation"²³⁹ (another word for paternity) in family court in the county where either the child or the child's mother lives.

Your paternity petition must:

- (1) be in writing, either handwritten or typed;
- (2) state that you ("petitioner") are the father of the child. You must say you are the father of the child and why. This is done by alleging that you had sexual intercourse with the child's mother during a time about nine months prior to the child's birth;
- (3) be verified. You must have a notarized statement saying that the reasons you give in the petition and the claims you make about paternity are true; and
- (4) be served on the respondent. This means you must have someone over the age of eighteen deliver a copy of the petition to your child's mother. This will inform the mother of the paternity proceedings in family court so that she can be present during the proceedings.²⁴⁰

If on the court date the mother agrees that you are the child's father, the judge may find that paternity has been proven. If the mother disputes that you are the father, the judge may order DNA testing to prove paternity, which you may be required to pay for. Once your paternity is established, you have the right to request visits with your child and to be involved in planning for your child's future (called permanency planning) while he is in foster care. If paternity is not proven, you do not have a legal right to visits or to a say in permanency planning.

Even if you prove paternity, you may not necessarily have the right to stop your child's adoption proceedings. The following Section outlines the steps you can take to become a "consent" father (one who has the right to consent to adoption). It also explains the requirements for being considered a "notice" father (one who has a right to be notified of termination of parental rights and subsequent adoption).

2. Types of Fathers

As explained in Part D, while your child is in foster care, proceedings may begin to convince the court that terminating parental rights and placing your child for adoption is the best option for your child. Your permission, or consent, may or may not be required for these proceedings to go forward.

238. See *In re Strong's Estate*, 168 Misc. 716, 723, 6 N.Y.S.2d 300, 306 (Sur. Ct. N.Y. County 1938) ("The fact of birth may be established by a birth certificate, although such certificate is not admissible to establish parentage."), *aff'd*, 256 A.D. 971, 11 N.Y.S. 2d 225 (1st Dep't 1939); see also *Stanford v. Union Labor Life Ins. Co.*, 74 Misc. 2d 781, 786, 345 N.Y.S.2d 928, 934 (Sup. Ct. Monroe County 1973) ("It is the rule in New York that a birth ... certificate is admissible as a public document only to show the fact of birth ... , and not as evidence of the additional facts recited therein pursuant to law.").

239. N.Y. FAM. CT. ACT § 542 (McKinney 2009).

240. This step may be both difficult and expensive, but it is required. If you do not do this, the court will dismiss your petition and you will have to start all over again. However, if reasonable and numerous attempts are made to serve the mother and these are documented with affidavits of attempted service, the court can authorize "service by alternative means," which can include sending a letter to her last known address, putting an advertisement in a local paper, or posting a legal notice in the local post office. See New York City, Administration for Children's Services, *Out of Sight, Not out of Mind: Important Information for Incarcerated Parents Whose Children Are in Foster Care* (February 5, 2005). You can obtain a copy of this pamphlet by writing to the Administration for Children's Services, 150 William Street, 18th Floor, New York, New York 10038, or by calling ACS at (212) 341-4883.

Your right to consent to adoption or even to be notified about the adoption depends on how the law classifies you as a father.

(a) Married Fathers

Married fathers have all the rights and obligations that a biological mother would have.²⁴¹ If you are a married father, your consent will be needed before any adoption takes place, and you have the right to be present at all hearings, as well as to initiate hearings, as described generally in Part D of this Chapter.

(b) Consent Fathers

If your child was born out of wedlock, you will retain your right to withhold consent for your child's adoption only if you fulfill the obligations of a "consent father." As a consent father, you will have the right to be present at all proceedings concerning your child, and, unless your parental rights have been terminated, you must give consent for your child to be adopted.²⁴² To be considered a consent father, you must maintain "substantial and continuous" contact with your child.²⁴³ Substantial and continuous contact is demonstrated by paying a reasonable sum to support the child, based on your means.²⁴⁴ Additionally, you must demonstrate that you have either:

- (1) Visited the child at least monthly when physically and financially able to do so, unless you were prevented from visiting by the person or agency with custody of your child;²⁴⁵ or
- (2) Had regular communication with your child (or the person or agency with custody) when you are unable to visit.²⁴⁶

Even if you are a consent father, if the court rules that you have abandoned your child (see Part D(1)(a) of this Chapter), the court will say that you have lost your right to consent to the adoption and will not require your consent for the adoption to proceed.²⁴⁷

(c) Notice Fathers

Being a "notice father" means that the court must inform you if proceedings to terminate parental rights of your child and/or free him for adoption are initiated. As a notice father, your consent will not be required before your child is adopted, but you will be able to present evidence to the court about what you believe is in the best interest of your child. If you do not satisfy the requirements to be considered a consent father, but you meet one of the following requirements, you may be considered a notice father:

- (1) If a court has officially declared that you are the child's father;²⁴⁸

241. See N.Y. FAM. CT. ACT § 417 (McKinney 2008) ("A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage."); N.Y. DOM. REL. LAW § 111(1)(b) (McKinney 2010) ("[C]onsent to adoption shall be required ... of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock.").

242. Note that until your child is six months old, if you are not married to the mother of your child, she can place the child for adoption without your consent. If this happens, you can attempt to block the adoption only by seeking full custody of the child. See *In re Raquel Marie X*, 76 N.Y.2d 387, 408, 559 N.E.2d 418, 428, 559 N.Y.S.2d 855, 865 (N.Y. 1990).

243. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2010).

244. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2010).

245. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2010).

246. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2010).

247. N.Y. DOM. REL. LAW § 111(2)(a) (McKinney 2010) (failing to visit or communicate with your child for over six months is considered an abandonment of your parental rights); see *In re Eugene MM*, 132 A.D.2d 780, 781, 517 N.Y.S. 2d 326, 328 (3d Dept. 1987) (holding that father who had minimal contact with mother and child, had failed to pay any child support, and had never requested visitation while incarcerated, failed to meet the threshold criteria needed to require his consent to the adoption); *In re Joshua II*, 296 A.D.2d 646, 647–648, 745 N.Y.S.2d 112, 113 (3d Dept. 2002) (holding that incarcerated father's consent to adoption was not required because father abandoned child).

248. N.Y. DOM. REL. LAW § 111-a(2)(a) (McKinney 2010).

- (2) If you have filed an unrevoked notice to claim paternity of your child on time;²⁴⁹
- (3) If you are on the child's birth certificate;²⁵⁰
- (4) If you were openly living with your child and your child's mother when the proceedings started, and you presented yourself as your child's father;²⁵¹
- (5) If the mother has identified you as the child's father in a written sworn statement;²⁵²
- (6) If you were married to the child's mother within six months after the birth;²⁵³ or
- (7) If you have filed an Acknowledgement of Paternity (a sworn statement on a prescribed form) with the Putative Father Registry.²⁵⁴

Note that these categories include persons who are listed on the child's birth certificate and persons who have been found to be "legal fathers" by the court. Therefore, even if you are the legal father or the father on the birth certificate, your consent may not be required before your child is adopted, unless you meet the additional requirements listed above for consent fathers. Your status as a notice father or consent father is not permanent. You can move from the notice category to the consent category by maintaining substantial and continuous contact with your child. Likewise, if you do not continue to maintain contact with your child, the court will consider you a notice father, even if at one point you may have qualified as a consent father.

If you have had minimal to no contact with your child and you do not fall under any of the above categories (married, notice, consent, or legal father), you have no rights or duties with regard to your child. The court will not need to notify you or ask for your consent before placing your child up for adoption.

G. Getting to Court

Parents have a right to attend all court proceedings involving the foster care and adoption of their child. For parents who are incarcerated people, you will have to arrange to be brought to court. You should request permission to attend such proceedings from your correctional facility as far in advance of the court date as possible. You should also contact your caseworker and tell him or her you wish to attend. You have to write to the judge well in advance of the hearing date and explain why your presence at the hearing is essential and request that the judge order the Department of Corrections and Community Supervision to produce you in court. See Appendix A of this Chapter for a sample letter asking the judge to order you to be produced for the hearing.

H. The Right to Counsel

Even though the U.S. Supreme Court has held that there is no constitutional guarantee of a right to a lawyer in proceedings for termination of parental rights or foster care, New York state law does guarantee this right.²⁵⁵ In most other states, the right to a lawyer in such proceedings has been granted either by the state constitution or by state law. Usually, if you cannot afford to hire your own attorney, the court will appoint what in New York is called an "18-b attorney" when you get to court.²⁵⁶ You can also try to contact a legal services organization for help, but attorneys at these organizations are generally unavailable for these kinds of cases. See Appendix B of this Chapter, as well as Appendix IV of the JLM, for a list of legal service organizations.

249. N.Y. DOM. REL. LAW § 111-a(2)(c) (McKinney 2010).

250. N.Y. DOM. REL. LAW § 111-a (2)(d) (McKinney 2010).

251. N.Y. DOM. REL. LAW § 111-a(2)(e) (McKinney 2010).

252. N.Y. DOM. REL. LAW § 111-a(2)(f) (McKinney 2010).

253. N.Y. DOM. REL. LAW § 111-a(2)(g) (McKinney 2010). Note that marriage within six months of the child's birth makes you a notice father, but not necessarily a consent father. You can become a consent father by maintaining substantial and continuous contact with your child.

254. N.Y. DOM. REL. LAW § 111-a(2)(h) (McKinney 2010).

255. N.Y. FAM. CT. ACT § 262 (McKinney 2008).

256. "18-b" refers to a free attorney assigned by the court under Article 18-b of the County Law. N.Y. COUNTY LAW § 722 (McKinney 2017).

I. Conclusion

If you are incarcerated and have a child, it is important for you to know the options you have in order to maintain your relationship with your child. First, you should decide whether you want your child in private placement (meaning with a family or friend) or in foster care. There are different benefits and drawbacks for each situation, so it is important to weigh all of your options. To have the best opportunity possible to retain custody of your child when you are outside of prison, you should maintain contact with your child and with your caseworker. You should also keep records of all of the contact you have with both your child and caseworker in case you need to prove your efforts. You should also maintain contact with your child's custodian and keep records of all contact.

Appendix A

SAMPLE REQUEST FOR AN ORDER TO PRODUCE

This is a sample form. **DO NOT TEAR IT OUT OF THE JLM** Instead, you may copy the form by handwriting or on a typewriter, filling in and editing the language to fit your circumstances.

Date: _____, 20__

ATTENTION: Court Clerk
Family Court
State of New York
County of [Name of County]
[Street Address]
[City or Town], New York, [Zip Code]

RE: [Child's Name], [Child's Birth Date]

Dear Sir or Madam:

I respectfully request to be present for the hearing that is to be held on the [##] day of [month], 20[##], for my child/children, [Name of Children]. I am presently incarcerated at [name of facility], located at the below address. Please submit an "Order to Produce" upon this institution, so that I may be available for this pending hearing.

I am also requesting that the court assign an attorney to represent me in the above proceeding and that all court proceedings be adjourned until I am able to be physically present.

[If applicable: I have not been informed of the date that my child/children will be appearing before your court. Would you kindly notify me of the date and enter this into the record as a Notice of Appearance and request to be produced?]

NOTIFY: [Warden's Name]
[Your Name and Address]

Sworn to me on the [##] day of [month] of 20[##].

Name of Parent (Print): _____

NYSID #: _____

Signature of Parent: _____

Notary Public Signature: _____

APPENDIX B

SERVICES FOR INCARCERATED PARENTS

Edwin Gould Services for Children and Families

Incarcerated Mothers Program

413 East 120th Street

New York, NY 10035

Phone: (646) 315-7600

<https://egscf.org/programs/preventive-services/>

Area Served: New York City

The purpose of this organization is to prevent placement of children in foster care. This organization provides counseling for mothers incarcerated in New York City or New York State, makes monthly visits to your children, and encourages visits between mothers and children. To be eligible for these services, your child or children must be under 18 years old and must not already be in foster care.

Correctional Association of New York

2090 Adam Clayton Powell Blvd., Suite 200

New York, NY 10027

Phone: (212) 254-5700

<https://www.correctionalassociation.org/>

Area Served: New York State

Legal Action Center

225 Varick Street, Fourth Floor

New York, NY 10014

Phone: (212) 243-1313

Toll-free: (800) 223-4044

www.lac.org

Area Served: New York State

Provides legal information for people with criminal records.

Administration for Children's Services ("ACS")

Office of Advocacy/Parents' and Children's Rights Unit

150 William Street, First Floor

New York, NY 10038

Collect Call Number for Incarcerated Parents:
(212) 619-1309

Phone: (212) 676-9421

You can contact this branch of ACS if your child is in foster care in New York City and

your child's foster care agency is refusing to bring your child to visit you in prison.

The Osborne Association, "Family Resource Center" and "Family Works"

175 Remsen Street, Eighth Floor

Brooklyn, NY 11201

Toll-Free Hotline: (800) 344-3314

Phone: (718) 637-6560

www.osborneny.org

Area Served: New York State

The Family Resource Center runs a toll free hotline and a support group. Family Works manages a parent education program for incarcerated fathers and a children's center in the visiting areas at Sing Sing, Woodbourne, and Shawangunk Correctional Facilities.

Hour Children

36-11 12th Street

Long Island City, NY 11106

Phone: (718) 433-4724

www.hourchildren.org

Area Served: New York State

Provides five community residential programs for female ex-offenders and their children.

Provides parent education, enhanced visiting, and transportation assistance for women incarcerated in two New York State prisons.

Women's Prison Association

110 Second Avenue

New York, NY 10003

Phone: (646) 292-7740

www.wpaonline.org

Area served: New York City

Provides comprehensive services to incarcerated and formerly incarcerated women. Services include parent education, self-help support group, information, referrals, case management, mentoring, group activities, gifts for children, nursery family reunification support, family therapy, community residential services, and legal services and information.

The following organizations provide free legal services. Contact them if you need to take some action for your child and you cannot afford a lawyer. For a more extensive list of legal services organizations throughout New York State, turn to Appendix IV of the JLM.

Legal Services for New York City

40 Worth Street, Suite 606
New York, NY 10013
Phone: (646) 442-3600

Prisoners' Legal Services of NY (PLSNY)

Please note that the PLSNY does not accept phone calls from incarcerated people or their families.

Ithaca Office

114 Prospect Street Ithaca, NY 14850
Phone: (607) 273-2283
Prisons Served: Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

Albany Office

41 State Street, Suite M112
Albany, NY, 12207
Phone: (518) 438-8046
Prisons Served: Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Cossackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

Buffalo Office

14 Lafayette Square, Suite 510
Buffalo, NY 14203
Phone: (716) 854-1007
Prisons Served: Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

Plattsburgh Office

24 Margaret Street, Suite 9
Plattsburgh, NY 12901
Phone: (518) 561-3088
Prisons served: Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.

REGIONAL OCFS OFFICES

WEBSITE: [HTTPS://OCFS.NY.GOV/DIRECTORIES/REGIONAL-OFFICES.PHP](https://ocfs.ny.gov/directories/regional-offices.php)

Monroe, Ontario, Schuyler, Seneca, Steuben,
Wayne, Yates

ALBANY REGIONAL OFFICE

Capital View Office Park, Room 234N
52 Washington Street
Rensselaer, NY 12144-2796
Phone: (518) 486-7078
Counties served: Albany, Clinton, Columbia,
Delaware, Essex, Franklin, Fulton, Greene,
Hamilton, Montgomery, Otsego, Rensselaer,
Saratoga, Schenectady, Schoharie, Warren,
Washington

BUFFALO REGIONAL OFFICE

Ellicott Square Building
295 Main Street, Room 545
Buffalo, NY 14203
Phone: (716) 847-3828
Counties served: Allegany, Cattaraugus,
Chautauqua, Erie, Genesee, Niagara, Orleans,
Wyoming

LONG ISLAND REGIONAL OFFICE

Courthouse Corporate Center
320 Carelton Avenue, Suite 4000
Central Islip, NY 11722
Phone: (631) 342-7100
Counties served: Nassau, Suffolk

NEW YORK CITY REGIONAL OFFICE

163 West 125th Street, 18th Floor
New York, NY 10027
Phone: (212) 383-1788
Counties served: 5 Boroughs of New York City
—Manhattan, Brooklyn, Bronx, Staten Island,
Queens

ROCHESTER REGIONAL OFFICE

259 Monroe Avenue, Room 307
Rochester, NY 14607
Phone: (585) 238-8531
Counties served: Chemung, Livingston,

LONG ISLAND REGIONAL OFFICE

11 Perlman Drive, Pascack Plaza
Spring Valley, NY 10977
Phone: (845) 708-2498
Counties served: Dutchess, Orange, Putnam,
Rockland, Sullivan, Ulster, Westchester

SYRACUSE REGIONAL OFFICE

The Atrium
100 S. Salina Street, Suite 350
Syracuse, NY 13202
Phone: (315) 423-1202
Counties served: Broome, Cayuga, Chenango,
Cortland, Herkimer, Jefferson, Lewis,
Madison, Oneida, Onondaga, Oswego, St.
Lawrence, Tioga, Tompkin

CONTACT INFORMATION FOR COUNTY DEPARTMENTS OF SOCIAL SERVICES

Website: [HTTP://WWW.OCFS.STATE.NY.US/MAIN/LOCALDSS.ASP](http://www.ocfs.state.ny.us/main/localdss.asp)

Albany County DSS

162 Washington Avenue
Albany, NY 12210
Phone: (518) 447-7300

**Albany County Department for Children,
Youth & Families**

112 State Street, Room 300
Albany, NY 12207
Phone: (518) 447-7324

Allegany County DSS

County Office Building
7 Court Street
Belmont, NY 14813-1077
Phone: (585) 268-9622

Broome County DSS

Thomas P. Hoke Human Services Center
36-42 Main Street
Binghamton, NY 13905-3199
Phone: (607) 778-8850

Cattaraugus County DSS

One Leo Moss Drive, Suite 6010
Olean, NY 14760-1158
Phone: (716) 373-8065

Cayuga County DSS

County Office Building
160 Genesee Street, 2nd Floor
Auburn, NY 13021-3433
Phone: (315) 253-1204

Chautauqua County DSS

Hall R. Clothier Building
7 North Erie Street
Mayville, NY 14757
Phone: (716) 753-4421

Chemung County DSS

Human Resource Center
425 Pennsylvania Avenue
P.O. Box 588
Elmira, NY 14902
Phone: (607) 737-5309

Chenango County DSS

5 Court Street, P.O. Box 590
Norwich, NY 13815
Phone: (607) 337-1500
Toll Free: (877) 337-1501

Clinton County DSS

13 Durkee Street
Plattsburgh, NY 12901-2911
Phone: (518) 565-3222

Columbia County DSS

25 Railroad Avenue
P.O. Box 458
Hudson, NY 12534
Phone: (518) 828-9411

Cortland County DSS

County Office Building
60 Central Avenue
Cortland, NY 13045-5590
Phone: (607) 753-5248

Delaware County DSS

111 Main Street, P.O. Box 469
Delhi, NY 13753
Phone: (607) 832-5300

Dutchess County DSS

60 Market Street
Poughkeepsie, NY 12601-3299
Phone: (845) 486-3000

Erie County DSS

Rath County Office Building
95 Franklin Street, 8th Floor
Buffalo, NY 14202-3959
Phone: (716) 858-8000

Essex County DSS

7551 Court Street
P.O. Box 217
Elizabethtown, NY 12932
Phone: (518) 873-3441

Franklin County DSS

355 West Main Street
Malone, NY 12953
Phone: (518) 481-1808

Fulton County DSS

4 Daisy Lane
P.O. Box 549
Johnstown, NY 12095
Phone: (518) 736-5600

Genesee County DSS

5130 East Main Street, Suite #3
Batavia, NY 14020-3397
Phone: (585) 344-2580

Greene County DSS

411 Main Street, P.O. Box 528
Catskill, NY 12414-1716
Phone: (518) 719-3700
Toll-Free: (877) 794-9268

Hamilton County DSS

White Birch Lane
P.O. Box 725
Indian Lake, NY 12842-0725
Phone: (518) 648-6131

Herkimer County DSS

301 North Washington Street, Suite 2110
Herkimer, NY 13350
Phone: (315) 867-1291

Jefferson County DSS

Human Services Building
250 Arsenal Street
Watertown, NY 13601
Phone: (315) 782-9030

Lewis County DSS

5274 Outer Stowe Street
P.O. Box 193
Lowville, NY 13367
Phone: (315) 376-5400

Livingston County DSS

1 Murray Hill Drive
Mt. Morris, NY 14510-1699
Phone: (585) 243-7300

Madison County DSS

Madison County Complex, Building 1
133 North Court Street
P.O. Box 637
Wampsville, NY 13163
Phone: (315) 366-2211

Monroe County DSS

111 Westfall Road
Rochester, NY 14620-4686
Phone: (585) 753-6298

Montgomery County DSS

County Office Building
P.O. Box 745
Fonda, NY 12068
Phone: (518) 853-4646

Nassau County DSS

60 Charles Lindbergh Blvd.
Uniondale, NY 11553-3656
Phone: (516) 227-8519

**New York City Administration for
Children's Services**

150 William Street, 18th Floor
New York, NY 10038-0900
Phone: (212) 341-0900 or 311

**New York City Department of Social
Services**

150 Greenwich Street
Commissioner – 42nd Floor / Legal – 38th Floor
New York, NY 10007
Phone: (718) 557-1399

Niagara County DSS

20 East Avenue
P.O. Box 506
Lockport, NY 14095-0506
Phone: (716) 439-7600

Oneida County DSS

County Office Building
800 Park Avenue
Utica, NY 13501-2981
Phone: (315) 798-5700

Onondaga County DSS

John H. Mulroy Civic Center, 12th Floor
421 Montgomery Street
Syracuse, NY 13202-2923
Phone: (315) 435-2985

Ontario County DSS

3010 County Complex Drive
Canandaigua, NY 14424-1296
Phone: (585) 396-4060
Toll-free: (877) 814-6907

Orange County DSS

11 Quarry Road, Box Z
Goshen, NY 10924-0678
Phone: (845) 291-4000

Orleans County DSS

14016 Route 31 West
Albion, NY 14411-9365
Phone: (585) 589-7000

Oswego County DSS

100 Spring Street
P.O. Box 1320
Mexico, NY 13114
Phone: (315) 963-5000

Otsego County DSS

County Office Building
197 Main Street
Cooperstown, NY 13326-1196
Phone: (607) 547-4355

Putnam County DSS

110 Old Route 6
Carmel, NY 10512
Phone: (845) 808-1500-2110

Rensselaer County DSS

127 Bloomingrove Drive
Troy, NY 12180-8403
Phone: (518) 833-6000

Rockland County DSS

Robert L. Yeager Health Center
Sanatorium Road, Building L
Pomona, NY 10970
Phone: (845) 364-3100

St. Lawrence County DSS

Harold B. Smith Country Office Building
6 Judson Street
Canton, NY 13617
Phone: (315) 379-2111

Saratoga County DSS

152 West High Street
Ballston Spa, NY 12020
Phone: (518) 884-4140

Schenectady County DSS

797 Broadway
Schenectady, NY 12305
Phone: (518) 388-4470

Schoharie County DSS

County Office Building
P.O. Box 687
Schoharie, NY 12157
Phone: (518) 295-8334

Schuyler County DSS

323 Owego Street, Unit 3
Montour Falls, NY 14865
Phone: (607) 535-8303

Seneca County DSS

1 DiPronio Drive
P.O. Box 690
Waterloo, NY 13165-0690
Phone: (315) 539-1800

Steuben County DSS

3 East Pulteney Square
Bath, NY 14810
Phone: (607) 776-7611

Suffolk County DSS

Mary Gordon Building
3085 Veterans Memorial Highway
Ronkonkama, NY 11779
Phone: (631) 854-9935

Sullivan County DSS

16 Community Lane
P.O. Box 231
Liberty, NY 12754
Phone: (845) 292-0100

Tioga County DSS**1062 State Route 38**

P.O. Box 240

Owego, NY 13827

Phone: (607) 687-8300

Tompkins County DSS**Human Services Building**

320 West State Street

Ithaca, NY. 14850

Phone: (607) 274-5252

Ulster County DSS

1061 Development Court

Kingston, NY 12401-1959

Phone: (845) 334-5000

Warren County DSS

Warren County Municipal Center

1340 State Route 9

Lake George, NY 12845-9803

Phone: (518) 761-6300

Washington County DSS

Municipal Center, Building B

383 Broadway

Fort Edward, NY 12828

Phone: (518) 746-2300

Wayne County DSS

77 Water Street

P.O. Box 10

Lyons, NY 14489-0010

Phone: (315) 946-4881

Westchester County DSS

112 East Post Road

White Plains, NY 10601

Phone: (914) 995-6521

Wyoming County DSS

466 North Main Street

Warsaw, NY 14569-1080

Phone: (716) 786-8900

Yates County DSS

County Office Building

417 Liberty Street, Suite 2122

Penn Yan, NY 14527-1118

Phone: (315) 536-5183

CHAPTER 34

THE RIGHTS OF PRETRIAL DETAINEES*

A. Introduction

“Pretrial detention” refers to the time period during which you are incarcerated after being arrested but before your trial. Pretrial detention is only supposed to be used to make sure that you will not flee before trial. It is not supposed to be used to punish or rehabilitate you because, under the U.S. Constitution, a person accused of a crime is presumed innocent until proven guilty. As a pretrial detainee, you have not been convicted of a crime and cannot legally be punished.

This Chapter discusses what rights you have when interacting with police and prosecutors while your case is pending (before you are found guilty or not guilty, through a trial, plea, or dismissed case). Any time the government accuses you of a crime in court, they must provide you with a lawyer if you cannot afford one. This Chapter does not replace the advice of your lawyer. Instead, this Chapter can help you and your family understand your rights at different stages of the criminal process and figure out what questions you want to ask your lawyer. You should always discuss anything you do and any questions you have with your lawyer.

Part B of this Chapter talks about your rights under the Fifth and Sixth Amendments before you are formally charged with a crime but may be interacting with law enforcement, such as through an investigation. It also discusses your rights at the time of arrest. It explains what happens if you do make a statement to the police, how that statement may be used, and ways the police might try to get you to make a statement. Part C deals with your rights under the Sixth Amendment once you have been formally charged with a crime in court. These rights include your right to have a lawyer assigned to you if you cannot afford one and what happens if you make any statements to law enforcement after you have been charged. Part D discusses the different legal mechanisms that affect whether you stay in jail or not while your case is pending, focusing on bail and speedy trial. Part E talks about your rights with respect to the conditions of your pre-trial confinement. This Chapter mainly focuses on federal and New York State law. Be sure to check the footnotes for information on researching claims in other states.

If you are not a U.S. citizen, you also have a treaty right to communicate with consular officers from your home government.¹ Consular access means that you have the right to contact your local consulate or embassy, as well as the right to have regular communications with consular officers from your native country. If you have citizenship from another country, you should read Chapter II of the *JLM Immigration and Consular Access Supplement* (“ICA”). It explains your right to consular access as well as the reasons you may want to contact your consulate and reasons why you may not want to do so. Consular officers may be able to help you in criminal cases. For example, they can gather “mitigating evidence” (evidence showing that there are reasons why you should receive a less severe sentence) in death penalty cases. Your consular officers may also help you if your rights have been violated, and they may assist you in deportation proceedings. Chapter II of the *JLM Immigration and Consular Access Supplement* (ICA) will give you some practical advice on when and how to contact your consulate.

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1. See *JLM ICA Supplement*, Chapter II “The Right to Consular Access”; see also Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States of America Dec. 24, 1969) (stating that a national may inform his consulate of his arrest or pretrial detention, and consular officers have the right to visit the national in custody, to speak with him and arrange his legal representation).

This Chapter does not cover most “search and seizure” law under the Fourth Amendment, which determines when the police can legally arrest you or search you or your possessions. This area of law is complicated and beyond the scope of this Chapter.²

B. Your Rights Before You Are Charged

Even before you are officially charged with a crime in court, you have rights when interacting with law enforcement. Sometimes, people are arrested at the scene of the crime and charges are filed right away based on what the police know about a crime. For example, if the police see you shoot and kill someone, the police will arrest you on the spot and charge you with murder. Other times, the police will conduct an investigation before deciding who they want to arrest and charge for a crime. For example, if a person is found dead, the police may question a number of people they believe are connected to the crime before choosing who to arrest and charge. In either of these scenarios, you have rights under the Fifth Amendment if the police start asking you questions.³

1. Your rights if the police are investigating you for a crime⁴

If a crime takes place and the police are not immediately sure who did it or who they suspect did it, they will conduct an investigation to decide who to arrest and charge. As part of the investigation, the police will usually question people they believe may have been involved. You may become a suspect if, for example, someone else named you to the police as someone who was involved, if you look like someone caught on a security camera, if you knew the victim or if you were nearby when a crime took place. During this process, the police may also get copies of surveillance footage, phone records, photographs and medical records, depending on what type of crime they are investigating.

If you are approached by the police or other law enforcement officials who want to ask you about a crime that has taken place, you have rights. If you are not being detained, the police do not have to read you those rights.⁵ However, just because the police have not read you your rights does not mean you do not have them. You always have the right to tell the police you do not want to talk to them or that you want to speak to a lawyer. You can ask police officers if you are free to leave. If they say yes, you may leave. If you are not free to leave, you are detained or arrested and the police must read you your rights before asking you any more questions.

2. If you want to learn more about search and seizure law, a good overview is found in 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE (5th ed. 2010). You should also read the cases regarding search and seizure law in your own state. *See also* 2 Search & Seizure § 40.09 (LexisNexis), part of a compilation of sources on the topic on *Lexis*.

3. U.S. CONST. amend. V; *see also* *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964) (holding that the states cannot take away or limit your 5th Amendment right against self-incrimination because the 14th Amendment makes the 5th Amendment applicable to states); *Missouri v. Seibert*, 542 U.S. 600, 607, 124 S. Ct. 2601, 2607, 159 L. Ed. 2d 643, 652 (2004) (noting that the 5th and 14th Amendment voluntariness tests are identical (citing *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964))).

4. The term “police” here may include state agents such as jailhouse informants, i.e., fellow incarcerated people that are cooperating closely with and acting for the police. *See United States v. Henry*, 447 U.S. 264, 273–275, 100 S. Ct. 2183, 2188–2189, 65 L. Ed. 2d 115, 124–125 (1980) (finding that an incarcerated person’s 6th Amendment right to counsel was violated when a court admitted statements made by the incarcerated person to a jailhouse informant deliberately trying to solicit damaging information). The term “police” also refers to federal agents from any of the different federal law enforcement agencies, and any other law enforcement or prosecution official. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273–275, 113 S. Ct. 2606, 2616–2617, 125 L. Ed. 2d 209, 226–227 (1993) (holding that where prosecutors allegedly fabricated evidence during investigations, they performed “investigative functions normally performed by a detective or police officer,” and were only entitled to the same amount of immunity from liability as a police officer would).

5. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966) (stating that the holding of this case only applies to custodial interrogations, which means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”).

2. Your rights once you have been detained or arrested

If the police detain you anywhere, or arrest you, you still have rights if they try to ask you questions. You have likely heard about your *Miranda* rights. Your *Miranda* rights include the right to tell police you do not want to speak to them or that you want to speak to a lawyer before speaking with them. The Supreme Court decided that law enforcement has to tell you what your rights are before they interrogate you. This requirement exists because you have a right to counsel under the Fifth Amendment, which protects you from making statements that are self-incriminating (statements that could be used to show you are guilty in court).⁶ Your *Miranda* rights are: (1) the right to remain silent, since anything you say may be used against you in court; (2) the right to counsel, both before and during interrogation; and (3) the right to a lawyer throughout your case, including a free lawyer if you cannot afford one.⁷

Most people have seen crime shows on TV where the police inform someone of their rights while they are arresting him. In reality, your *Miranda* rights apply specifically to custodial interrogations, so police are only required to give them to you before they ask you questions. *Miranda* does not apply to an arrest where you are not interrogated.⁸ It also does not apply to non-custodial interactions.⁹ The word “custodial” refers to either: (1) after you have been taken into police custody (so handcuffed, put into a police car, taken to the precinct, etc.),¹⁰ or (2) when you have been deprived of your freedom of movement (if you ask the police if you can leave and they say no, you have been deprived of your freedom of movement even if you are not yet handcuffed).¹¹ “Interrogation” can mean either: (1) direct questioning by the police; or (2) the “functional equivalent” of direct questioning.¹² The functional equivalent of direct questioning usually means when the police say or do something to you that they should know is likely to cause you to confess or say something incriminating.¹³ In summary, when you are approached by the police and they do not allow you to leave, they must read you your *Miranda* rights before asking you any questions. Even if you are not in custody, you can still choose not to answer any questions the police ask you.

6. The right to counsel under the Fifth Amendment is different from the Sixth Amendment right to counsel discussed in Part C of this Chapter. The Sixth Amendment right ensures that you have good representation once formal criminal proceedings have been initiated against you. “Self-incriminating” describes statements that could make you legally responsible for a crime that has taken place. *Self-Incriminating*, BLACK'S LAW DICTIONARY (11th ed. 2019).

7. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706–707 (1966).

8. *Rhode Island v. Innis*, 446 U.S. 291, 300–302, 100 S. Ct. 1682, 1689–1690, 64 L. Ed. 2d 297, 307–308 (1980).

9. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966) (stating that the holding of this case only applies to custodial interrogations, which means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way”).

10. Whether you are considered “in custody” depends on “how a reasonable man in the suspect's position would have understood his situation.” *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984).

11. For example, in *Berkemer v. McCarty*, the Court held that an ordinary traffic stop, where the officer had decided that the suspect would be taken into custody as soon as he exited his car but did not tell the defendant of that decision, was not custody for *Miranda* purposes. In other words, the Court looked at whether or not a reasonable person in the suspect's position would have thought they were in custody. The only thing that mattered was what the suspect reasonably thought at the time he made the statement. *Berkemer v. McCarty*, 468 U.S. 420, 440, 441–442, 104 S. Ct. 3138, 3150–3151, 82 L. Ed. 2d 317, 334–336 (1984). The courts apply this reasoning because they are concerned about people being forced to make statements, and courts believe that people decide whether to speak based on how they perceive (or view) the situation they are in.

12. *Rhode Island v. Innis*, 446 U.S. 291, 300–301, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297, 307–308 (1980) (“[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.”).

13. See *Rhode Island v. Innis*, 446 U.S. 291, 302–303, 100 S. Ct. 1682, 1690–1691, 64 L. Ed. 2d 297, 309 (1980) (holding that a short conversation between policemen in front of a suspect was not the “functional equivalent” of interrogation, as a reasonable police officer would not think that the conversation would lead to an incriminating statement from the suspect).

Once a police officer or law enforcement agent reads you your Miranda rights, you get to decide if you want to invoke (**use**) or waive (**give up**) those rights. If you invoke your rights, it means you want to use them and you will not speak to the officer without a lawyer present. If you waive your rights, you are telling the officer that you understand your right not to speak but wish to do so anyway. If you assert your right to remain silent after having your *Miranda* rights read to you, the interrogation must stop.¹⁴

Something that may be confusing is that to make the police stop asking you questions, you have to say out loud that you want to remain silent and that you want to speak with an attorney. Simply remaining silent will not be considered enough to demonstrate that you have chosen to exercise your rights, and officers may continue interrogating you despite your silence until you clearly communicate your choice to remain silent and stop cooperating with the interrogation.¹⁵ Similarly, if you ask for a lawyer during the interrogation, the interrogation must stop until you have had time to talk to a lawyer or until you yourself restart the interrogation.¹⁶ However, you must be clear that you are asking for an attorney to represent you in this circumstance.¹⁷ In addition, you are entitled to an attorney whenever the interrogation begins again.¹⁸ If you do not invoke your rights out loud, the police can keep asking questions (although you can still decide not to answer them). After a break in custody of at least two weeks, police can start questioning you again unless you reinvoke your right to counsel (ask for a lawyer again).¹⁹

3. What happens if you do make a statement to the police?

Let's say that the police do read you your rights, you say that you are waiving them and then make an incriminating statement to the police. Just because the police read you your *Miranda* rights does not mean that any statements you have made are automatically admissible (usable in court). In some

14. *Miranda v. Arizona*, 384 U.S. 436, 473–474, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966). Note that the police can continue to question you about unrelated crimes. *See Michigan v. Mosley*, 423 U.S. 96, 104–106, 96 S. Ct. 321, 326–328, 46 L. Ed. 2d 313, 321–323 (1975) (holding that although the suspect invoked the right to remain silent on robbery charges, several hours later another police officer could permissibly question the suspect about an unrelated homicide upon providing the *Miranda* warnings and securing a waiver from the suspect). *But see People v. Boyer*, 768 P.2d 610, 623, 48 Cal. 3d 247, 273, 256 Cal. Rptr. 96, 109 (Cal. 1989) (finding that under California state law, police can no longer attempt to question a suspect in custody once the suspect has invoked both a right to remain silent and a right to an attorney, unless the suspect initiates further communication), *overruled on other grounds by People v. Stansbury*, 889 P.2d 588 (Cal. 1995).

15. *See United States v. Ramirez*, 79 F.3d 298, 305 (2d Cir. 1996) (holding that a suspect can selectively assert his right to remain silent, but simply failing to answer certain questions “does not constitute invocation of the right to remain silent.”).

16. *See Edwards v. Arizona*, 451 U.S. 477, 484–485, 101 S. Ct. 1880, 1884–1885, 68 L. Ed. 2d 378, 386 (1981) (holding that once the suspect asks for an attorney, interrogation cannot resume until counsel has been made available, or the accused himself initiates further conversations with the police). *But see Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S. Ct. 3138, 3148–3149, 82 L. Ed. 2d 317, 333 (1984) (holding that *Miranda* must be enforced strictly, but only in those situations where “the concerns that powered the decision are implicated.”). This has been interpreted by lower courts as allowing police to ask clarifying questions to suspects who have volunteered information after asserting their rights to remain silent and to counsel. *See, e.g., United States v. Rommy*, 506 F.3d 108, 133 (2d Cir. 2007) (holding that “simple clarifying questions do not necessarily constitute interrogation”).

17. *See Davis v. United States*, 512 U.S. 452, 462, 114 S. Ct. 2350, 2356–2357, 129 L. Ed. 2d 362, 373 (1994) (holding that a suspect must be clear in his desire for counsel; it is not enough for the suspect to state, “Maybe I should talk to a lawyer”). *But see Downey v. State*, 144 So. 3d 146, 151 (Miss. 2014) (holding Mississippi exceeds this minimum standard by its state constitution).

18. *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 723 (1966) (“[T]he individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.”).

19. *Maryland v. Shatzer*, 559 U.S. 98, 110–111, 130 S. Ct. 1213, 1223, 175 L. Ed. 2d 1045, 1056–1057 (2010) (finding that the *Edwards* rule does not extend indefinitely, but rather expires after a suspect has been out of investigative custody for 14 days). After two weeks, police may again initiate an interrogation, unless the suspect reasserts his *Miranda* rights. Note that here “custody” means in the custody of police for the purpose of investigating this specific offense, not just in prison more generally.

cases, the police may try to force you to waive your *Miranda* rights or try to pressure you to say something self-incriminating after you have waived your *Miranda* rights. If they do that, your statement may not be admissible. Even if the police read you your *Miranda* rights (commonly referred to as “mirandizing” you), a statement or confession you make to the police must still be voluntary if the prosecution wants to use it at your trial to show you are guilty of your charges.²⁰ The word “voluntary” may be confusing, however, because it means something like “not coerced” in this context.²¹ To coerce someone means to pressure that person into doing something by the use of force or threats. For example, if the police mirandize you and then threaten to hurt you if you do not confess, your confession is not voluntary and the prosecution cannot use it in court to convince a jury you committed the crime.

Several things can make a court decide that your confession was not voluntary. The police cannot use or threaten to use physical violence in order to get you to confess.²² If the police threaten to administer a painful medical procedure in an attempt to get you to confess, even though they may be legally entitled to order this procedure, the court may consider the statements you make after this threat to be involuntary.²³ In addition, the use of deception or promises of leniency in sentencing can sometimes make the confession involuntary.²⁴ Your confession is not likely to be considered involuntary simply because it occurred after the police interrogated you for a long period of time, but if you were subject to a long interrogation and were deprived of food or sleep, your confession may be deemed involuntary.²⁵ Likewise, if you were held in very bad conditions for your interrogation, courts may find your confession to be involuntary.²⁶ If your confession is involuntary (that is, if it has been improperly compelled), it cannot be used at trial for *any* purpose.²⁷

20. See *Miranda v. Arizona*, 384 U.S. 436, 462, 86 S. Ct. 1602, 1621, 16 L. Ed. 2d 694, 716 (1966) (holding that a confession must be excluded where the accused was “involuntarily impelled to make a statement, when but for the improper influences he would have remained silent”). In other words, if the police: (1) use incorrect methods, such as using force or threats; and 2) these methods cause a person to confess *when he would have otherwise remained silent*, then the confession is invalid.

21. See *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S. Ct. 515, 521, 93 L. Ed. 2d 473, 483 (1986) (holding that there must be an “essential link between coercive activity of the State...and a resulting confession by a defendant” if the evidence is to be excluded).

22. See *Brown v. Mississippi*, 297 U.S. 278, 287, 56 S. Ct. 461, 465–466, 80 L. Ed. 682, 687–688 (1936) (holding that the defendant could not be convicted on the basis of a confession obtained during a physical beating by a police officer); *United States v. Abu Ali*, 395 F. Supp. 2d 338, 380 (E.D. Va. 2005), *aff’d*, 528 F.3d 210 (4th Cir. 2008) (holding that evidence obtained by extreme physical coercion “ha[s] no place in the American system of justice”); see also *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S. Ct. 1246, 1252–1253, 113 L. Ed. 2d 302, 316 (1991) (noting that “a finding of coercion need not depend upon actual violence by a government agent,” and a “credible threat of physical violence” is enough to find coercion); *Colorado v. Connelly*, 479 U.S. 157, 170, 107 S. Ct. 515, 523, 93 L. Ed. 2d 473, 486 (1986) (“The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching....”).

23. See, e.g., *State v. Phelps*, 456 N.W.2d 290, 294, 235 Neb. 569, 574–575 (1990) (holding that a rape suspect’s confession, made after police described a painful penile swab procedure that would be unnecessary if suspect confessed, was involuntary).

24. See *Lynumn v. Illinois*, 372 U.S. 528, 531–534, 83 S. Ct. 917, 919–920, 9 L. Ed. 2d 922, 925–927 (1963) (finding confession to be involuntary where police told defendant that state financial aid to her child would be cut off and her children taken from her if she failed to cooperate); *United States v. Tingle*, 658 F.2d 1332, 1336 (9th Cir. 1981) (holding that intentionally causing the suspect to fear that she would not see her children for a “long time” was “patently coercive”).

25. See *Spano v. New York*, 360 U.S. 315, 322, 79 S. Ct. 1202, 1207, 3 L. Ed. 2d 1265, 1271 (1959) (finding a confession involuntary, in part, because the suspect was subjected to prolonged interrogation of almost eight hours); *Ashcraft v. Tennessee*, 322 U.S. 143, 154, 64 S. Ct. 921, 926, 88 L. Ed. 1192, 1199 (1944) (finding a confession to be coerced where suspect was questioned for 36 hours without sleep or rest); see also *Mincey v. Arizona*, 437 U.S. 385, 398–402, 98 S. Ct. 2408, 2416–2418, 57 L. Ed. 2d 290, 304–306 (1978) (holding that the statements of a suspect were involuntary where an interrogation lasted for four hours while the suspect was severely injured).

26. See *Stidham v. Swenson*, 506 F.2d 478, 481 (8th Cir. 1974) (holding a prisoner’s confession to be coerced in part because the condition of his cell was “subhuman”).

27. See *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 2416, 57 L. Ed. 2d 290, 303 (1978) (noting that

If the police do not mirandize you but you make a *voluntary* statement, that statement *may* be used to impeach you if you testify at your own trial.²⁸ To “impeach” you means the prosecution can use the statement to say that you are not believable or that your testimony is inconsistent, even though they technically cannot use it to prove that you are guilty.²⁹ Again, a statement that a court decides was *involuntary* cannot be used for anything.³⁰

If you waive your *Miranda* rights and make a statement to law enforcement that the prosecution wants to use at trial to show you are guilty, the prosecutor has the burden to first show that you waived your rights “voluntarily, knowingly, and intelligently.”³¹ They have to show that the officers who questioned you read you your *Miranda* rights and did not do anything to force you to speak to them.

4. A final note about police tactics

Sometimes police will try to get around the *Miranda* requirements. A common tactic is the use of two-step interrogations. In this scenario, the police would start questioning you without giving you the *Miranda* warnings until you confess to committing the crime (this statement cannot be admitted in court except for impeachment purposes, to challenge your credibility). After you confessed, the officer would then give you your *Miranda* warnings and the police would ask similar questions to try to get you to give up the same information.³² People in this situation often confess again, believing that since they have already confessed once, there is no harm in doing so again.

In fact, whether or not that second statement can be used to prove you are guilty at trial depends on a few different things. One factor is simply what jurisdiction you are in. Another major factor is what exactly happened during the interrogation. Courts will ask whether or not the two-step interrogation process was done intentionally or accidentally, and if anything happened between the two interrogations that leads the court to believe the second statement was given voluntarily. If the police did this on purpose to get you to confess, the statement you made will probably be excluded (kept out of your trial) unless the police did anything to fix their mistake (took curative measures).³³ If the two-step interrogation was accidental (if, for example, the officer simply forgot to mirandize you before beginning questioning and then stopped to fix his mistake), the court will probably analyze your

any use at trial of an involuntary statement violates the defendant’s due process rights).

28. *See Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966) (“Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.”); *United States v. Washington*, 431 U.S. 181, 186–187, 97 S. Ct. 1814, 1818, 52 L. Ed. 2d 238, 244–245 (1977) (“[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.”).

29. *Harris v. New York*, 401 U.S. 222, 226, 91 S. Ct. 643, 646, 28 L. Ed. 2d 1, 5 (1971) (holding that *Miranda* does not prohibit the police from using a defendant’s statement to challenge his credibility and consequently impeach him).

30. *See Rogers v. Richmond*, 365 U.S. 534, 540, 81 S. Ct. 735, 739, 5 L. Ed. 2d 760, 766 (1961) (“Our decisions under [the 14th] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand”). *But see Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 1251, 113 L. Ed. 2d 302, 315 (1991) (extending the harmless-error rule adopted in *Chapman v. California* to the admission of involuntary confession). The admission of an involuntary confession may be permitted if the defendant fails to establish, beyond a reasonable doubt, that such admission was a harmless error. *Arizona v. Fulminante*, 499 U.S. 279, 295, 111 S. Ct. 1246, 1257, 113 L. Ed. 2d 302, 322 (1991).

31. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 707 (1966). However, the prosecution does *not* need to prove this beyond a reasonable doubt. *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473, 485 (1986) (“[T]he State need prove waiver only by a preponderance of the evidence.”). *See also* *People v. Seymour*, 14 A.D.3d 799, 801, 788 N.Y.S.2d 260, 261 (3d Dept. 2005) (holding that a valid waiver of *Miranda* rights is established if defendant “understood the immediate meaning of the warnings”).

32. *See Missouri v. Seibert*, 542 U.S. 600, 604–606, 124 S. Ct. 2601, 2605–2606, 159 L. Ed. 2d 643, 650–651 (2004) (plurality opinion) for a full discussion of the two-step interrogation and an example of this technique.

33. *Missouri v. Seibert*, 542 U.S. 600, 621, 124 S. Ct. 2601, 2615, 159 L. Ed. 2d 643, 661 (2004).

statement to decide if it was voluntary or not. If it was not voluntary, it cannot be used against you at trial.³⁴

C. Your Rights After You Are Charged

When the prosecution is ready to begin your case, they will file a charging document in court saying what they think you did and what laws they believe you broke.³⁵ At this point, the Sixth Amendment guarantees your right to the assistance of counsel, among other things.³⁶ The Sixth Amendment starts protecting you the moment formal criminal proceedings are started against you and continues through trial preparation, the trial itself, the sentencing phase, and beyond.³⁷

1. Right to Assigned Counsel

You may have been assigned a public defender at your arraignment (your first court appearance where the judge reads your charges). If you cannot afford a lawyer, the government must provide one for you if: (1) you are being prosecuted in a federal court; or (2) you are prosecuted for any crime in state court for which you are sentenced to a term of imprisonment.³⁸ Let's say, for example, that you are charged with a misdemeanor for which you could be sentenced to a fine *or* a short term of imprisonment. The state does not have to provide you with a free lawyer, but if they do not then you cannot be sentenced to prison time. If they do provide you with a free lawyer, the judge may sentence you to prison time (although they do not have to).³⁹

34. *See* *Rogers v. Richmond*, 365 U.S. 534, 540–541, 81 S. Ct. 735, 739–740, 5 L. Ed. 2d 760, 766 (1961) (confirming that confessions must be voluntary to be admissible); *Chambers v. Florida*, 309 U.S. 227, 240, 60 S. Ct. 472, 479, 84 L. Ed. 716, 724 (1940) (same); *Lisenba v. California*, 314 U.S. 219, 236, 62 S. Ct. 280, 289–290, 86 L. Ed. 166, 179–180 (1941) (same); *Rochin v. California*, 342 U.S. 165, 172–174, 72 S. Ct. 205, 209–210, 96 L. Ed. 183, 190–191 (1952) (same); *Spano v. New York*, 360 U.S. 315, 320–321, 79 S. Ct. 1202, 1205–1206, 3 L. Ed. 2d 1265, 1270 (1959) (same); *Blackburn v. Alabama*, 361 U.S. 199, 206–207, 80 S. Ct. 274, 279–280, 4 L. Ed. 2d 242, 247–248 (1960) (same).

35. The prosecutor/prosecution is the lawyer for the government that is trying to prove the charges against you. In state court, the prosecutor is the Assistant District Attorney (ADA or DA). In federal court, the prosecutor is the Assistant U.S. Attorney (AUSA). Throughout this Chapter and in court, you may see or hear the prosecutor referred to as the ADA, DA, AUSA, state's attorney, and the government, depending on whether you are in state or federal court, and customs in your region. All these terms mean pretty much the same thing. You may hear the charging document referred to as an information, a complaint or an indictment. They have differences you can ask your attorney about, but all begin the process of charging you in court with a crime.

36. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.”). Note that the 6th Amendment does not apply to civil proceedings. For example, if you were to bring a 42 U.S.C. § 1983 civil rights claim against the state, you would not have 6th Amendment protections during that case. The 6th Amendment also guarantees your right to a speedy trial. *See* Part D(2) of this Chapter for more information. Other rights under the 6th Amendment not covered in this Chapter include trial by jury and the right to cross-examine witnesses against you.

37. *See* *Fellers v. United States*, 540 U.S. 519, 523, 124 S. Ct. 1019, 1022, 157 L. Ed. 2d 1016, 1022 (2004) (holding that the right to counsel under the 6th Amendment “is triggered ‘at or after the time that judicial proceedings have been initiated ... whether by way of formal charge, preliminary hearing, indictment, information, or arraignment’” (quoting *Brewer v. Williams*, 430 U.S. 387, 398, 97 S. Ct. 1232, 1239, 51 L. Ed. 2d 424, 436 (1977))); *Mempa v. Rhay*, 389 U.S. 128, 134–137, 88 S. Ct. 254, 257–258, 19 L. Ed. 2d 336, 340–342 (1967) (holding that the right to counsel extends to every stage of criminal proceedings where the defendant's substantive rights might be affected).

38. *See* *Gideon v. Wainwright*, 372 U.S. 335, 339–343, 83 S. Ct. 792, 794–797, 9 L. Ed. 2d 799, 802–807 (1963) (holding that the 6th Amendment should be interpreted to mean that defendants in criminal cases must be provided with counsel in federal courts, unless the right is waived, and that this right is extended to state court matters through the 14th Amendment).

39. *See* *Argersinger v. Hamlin*, 407 U.S. 25, 40, 92 S. Ct. 2006, 2014, 32 L. Ed. 2d 530, 540 (1972) (holding that although local law may permit it, a judge may not impose prison time unless the defendant is represented by counsel); *Scott v. Illinois*, 440 U.S. 367, 373–374, 99 S. Ct. 1158, 1162, 59 L. Ed. 2d 383, 389 (1979) (limiting the constitutional right to appointed counsel, as adopted in *Argersinger*, to matters in which imprisonment upon conviction is actually imposed, not merely authorized).

In the beginning of this Chapter you learned that when you are being questioned by the police you have the right to a lawyer but you must ask for one. Once you are charged, you are supposed to get one automatically; you do not need to ask for one (although you should ask if you have not been given one).⁴⁰

2. Post-charge interrogations

Once you have been charged in court, the prosecution and law enforcement can no longer try to talk to you about your case.⁴¹ If anyone from the government (the ADA, AUSA, police officer, agent, or anyone working with them) tries to ask you about your case, you do not have to answer. If you do answer, the prosecutor cannot use what you say in court to prove you are guilty because they have violated your Sixth Amendment rights. If you do not have a lawyer or your lawyer is not present with you, the government still cannot ask you about your case. If they do, they cannot use what you say against you at trial.⁴²

However, the Sixth Amendment is “offense-specific.”⁴³ It only applies to crimes you have been officially accused of in court, and *not* things the police may think you have done. If law enforcement wants to question you formally, they must read you your *Miranda* rights and you can ask for your lawyer. But, if you choose to speak to law enforcement anyway, those statements can later be used against you to prove you are guilty of this new charge.

For example: let’s say you are formally charged with murder and the police suspect (for reasons not related to the murder case) that you may have also committed an unsolved robbery that happened six months ago, unconnected to the murder. The police *can* ask you questions about the robbery. You do not have to answer and you can ask for a lawyer, but if you do not ask for a lawyer and instead answer the question, the government can use your statement to charge you with the robbery and to try to show you are guilty of it in court (as long as they do not violate the Fifth Amendment). In other words, the rules that apply to the police when they are questioning you about the un-charged robbery are the ones discussed in Part B of this Chapter.

If you are detained pretrial, your lawyer will probably have told you not to discuss your case with anyone in the jail or on any recorded phone calls. This advice is important because statements you casually make to other inmates or to your family over the phone can often be used against you in

40. See *Carnley v. Cochran*, 369 U.S. 506, 513, 82 S. Ct. 884, 889, 8 L. Ed. 2d 70, 76 (1962) (holding that “it is settled that where the assistance of counsel is a constitutional [requirement], the right to be [appointed] counsel does not depend on a request.”).

41. See *Maine v. Moulton*, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) (“The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused’s choice to seek this assistance.”).

42. See *Fellers v. United States*, 540 U.S. 519, 524–525, 124 S. Ct. 1019, 1023, 157 L. Ed. 2d 1016, 1023 (2004) (holding that evidence obtained from a discussion that took place after the defendant’s indictment was inadmissible because it was obtained “outside the presence of counsel, and in the absence of any waiver of petitioner’s Sixth Amendment rights”); *Massiah v. United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (holding that petitioner’s 6th Amendment protections had been violated where evidence of his own incriminating words were used against him at his trial and agents had intentionally drawn out those words after he had been indicted without his counsel present).

43. See *Texas v. Cobb*, 532 U.S. 162, 174, 121 S. Ct. 1335, 1344, 149 L. Ed. 2d 321, 332 (2001) (holding that where a pretrial detainee had been indicted for one crime but had not yet been charged with a closely related crime, his “Sixth Amendment right to counsel did not bar police from interrogating” him regarding the related crime); *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207, 115 L. Ed. 2d 158, 166 (1991) (“The Sixth Amendment right... is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced...”); *Rothgery v. Gillespie County*, 554 U.S. 191, 213, 128 S. Ct. 2578, 2592, 171 L. Ed. 2d 366, 383 (2008) (holding that the 6th Amendment right to counsel attaches when a defendant first appears before a judicial officer and learns the charges against him). Some states treat the question of crime relatedness slightly differently, and depending on where you have been charged, this may be to your advantage. See, e.g., *People v. Bing*, 76 N.Y.2d 331, 349–350, 558 N.E.2d 1011, 1022, 559 N.Y.S.2d 474, 485 (1990) (“[P]ermitting questioning on unrelated crimes violates neither the State Constitution nor...our prior right to counsel cases.”).

court.⁴⁴ Because the Sixth Amendment only applies to crimes you have been charged with, the police could plant an informant in the jail to talk to you about crimes you have not yet been charged with. If you do not know the person is law enforcement, they do not have to read you your *Miranda* rights.⁴⁵ The same rule applies if you are on the street—the police may pay someone to pretend to be someone else and try to talk to you about a crime the suspect you of. If you have any questions about what your lawyer has told you and why, you should always ask them.

3. Right to Counsel in New York State

This Sixth Amendment right and the Supreme Court cases explaining it apply in both federal and state court trials.⁴⁶ If you are facing state court proceedings, that state where you are being tried may also have a similar “right to counsel” provision in its state constitution. This provision would provide you with additional protection. In New York, for example, the right to counsel is guaranteed under the New York State Constitution, Article 1 § 6.⁴⁷ If you are charged with a crime in the federal system or the state system, the Sixth Amendment right to counsel goes into effect automatically. However, the police may still ask you about crimes you have not been charged with yet without your lawyer being present. There are two exceptions to this rule in New York: if the uncharged and charged crimes are related to each other *or* the police know you are represented by a lawyer on the other crime they believe you committed, they are not allowed to question you about it.⁴⁸

44. Under the 6th Amendment, at trial, the state also may not use incriminating remarks that were “deliberately elicited” from you *after* you were charged with a crime. A remark is “deliberately elicited” if the government purposefully caused you to make statements against yourself. These incriminating remarks may not be used at trial if: (1) the statements are about the crime you are charged with, and (2) you have not waived your right to counsel. *See* *Massiah v. United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (finding a 6th Amendment violation where prosecutors relied on remarks deliberately elicited from defendant after he was indicted and in the absence of his counsel); *see also* *Maine v. Moulton*, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) (“The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused’s choice to seek [the assistance of counsel.]”); *Brewer v. Williams*, 430 U.S. 387, 415, 97 S. Ct. 1232, 1248, 51 L. Ed. 2d 424, 447 (1977) (“[T]he lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the [suspect]. If...we are seriously concerned about the individual’s effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.”) (Stevens, J., concurring). In practice, this means the government cannot plant an informant in the jail with you and have the informant ask you questions. They can, however, ask someone in the jail to report back to them if the person happens to overhear you say something incriminating. This is because then they have not forced or coerced you in any way to incriminate yourself. *See* *Maine v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496 (1985). This loophole is why your lawyer will probably tell you not to talk to anyone in the jail about your case or anything criminal you may have done. For further discussion of paid informants in the jail, *see* *United States v. Henry*, 447 U.S. 264, 265, 100 S. Ct. 2183, 2184, 65 L. Ed. 2d 115, 119 (1980). The same rules apply if you are out on bail pretrial. The government cannot set you up with a paid informant to ask you questions. *See* *Massiah v. United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964).

45. *Compare* *Illinois v. Perkins*, 496 U.S. 292, 299–300, 110 S. Ct. 2394, 2399, 110 L. Ed. 2d 243, 253 (1990) (holding that an undercover agent, while in jail posing as a fellow incarcerated person, may question an incarcerated person about a crime without giving a *Miranda* warning if the incarcerated person has not yet been charged with that crime), *with* *Mathis v. United States*, 391 U.S. 1, 4–5, 88 S. Ct. 1503, 1505, 20 L. Ed. 2d 381, 384–385, (1968) (holding that questioning of an incarcerated person by a person known to be an Internal Revenue Service (IRS) official about tax violations, without the giving of a *Miranda* warning, violated the incarcerated person’s 5th Amendment rights, when the incarcerated person was in prison for an entirely different offense). *See* Part B of this Chapter for more information on your 5th Amendment rights.

46. *Gideon v. Wainwright*, 372 U.S. 335, 342–345, 83 S. Ct. 792, 796–797, 9 L. Ed. 2d 799, 804–807 (1963) (holding that the right to counsel applies in state proceedings).

47. “In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself.. .” N.Y. CONST. art. I, § 6.

48. *People v. Henry*, 31 N.Y.3d 364, 368, 102 N.E.3d 1056, 1058–1059, 78 N.Y.S.3d 275, 277–278 (2018).

You also have the right to have your lawyer present during any swabbing for DNA.⁴⁹ Ask your lawyer about whether or not you will be required to give a DNA sample.

D. What Determines Whether You Stay in Jail or Are Released Pretrial

Two important court mechanisms determine whether or not you stay in jail while your case is going on: bail and speedy trial rights. While reading this Part, it is important to remember that these particular areas of law are currently undergoing major changes in New York State and also vary greatly between states and between the state and federal systems. The words used or the law may be different in your state. This Part is meant to give you a broad overview of how these two mechanisms work. You should ask your lawyer to explain the specific laws in your jurisdiction.

1. Bail

At your arraignment (your first court appearance after you are arrested), your lawyer will probably ask the judge to release you while your case is pending. There are a few different options for conditions under which you might be released. One is Release on your Own Recognizance (ROR). ROR means you are released without having to pay any money. In other situations, the judge may require you to wear an ankle monitor, enroll in programs, or report to supervision, similar to probation. The judge may also require that someone pay money or post bond (a debt you promise to the court) in an amount set by the judge to have you released.⁵⁰

The purpose of bail is to make sure you appear before the court at the assigned time.⁵¹ The judge is supposed to set the combination of money and other conditions that they believe will make sure you come back to court. If the judge believes that the risk you will run away to avoid prosecution is too high, they may “remand” you, meaning they will order that you stay in jail while your case is in progress. If the judge does set bail but no one can pay it, then you will also stay in jail unless someone comes up with the money. In some cases, the court may allow someone to sign a bond saying that *if* you do not come back to court, the signer will have to pay a lot of money. The next two Sections discuss the bail/bond process in the federal system and some recent changes to the New York bail law.

(a) Bail in the federal system

If you are charged in federal court, the judge deciding if you stay in jail or not during your case will follow the rules set in the Federal Bail Reform Act. This Act explains the federal government’s authority to detain or release you before trial, rules for appeals of a release or detention order, what happens if you fail to appear or get rearrested while on release, and what factors the judge should consider when ruling on your request for bond.⁵² The two main questions the judge will consider are:

- (1) Whether you are likely to return to court as required;
- (2) Whether you will be a danger to the community if you are released.⁵³

To answer these two questions, the court will consider a number of factors, including:

- (1) The offense you are charged with.
- (2) The weight of the evidence against you (the likelihood that you will actually be convicted of the thing you are charged with).

49. *People v. Smith*, 30 N.Y.3d 626, 629 92 N.E.3d 789, 790, 69 N.Y.S.3d 566, 567 (2017) (holding that a DNA test counts as a “critical stage of the proceedings” for which defendants have a constitutional right to counsel).

50. A cash bail is an amount of money that someone pays to get you released from jail. There are a few different kinds of bonds, but a bond is generally an enforceable promise to pay *if* the defendant does not show up to court. *Bond*, BLACK’S LAW DICTIONARY (11th ed. 2019).

51. *Bail*, BLACK’S LAW DICTIONARY (11th ed. 2019).

52. Bail Reform Act, 18 U.S.C. §§ 3141–3156, *available at* <https://www.justice.gov/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et> (last visited Aug. 26, 2020).

53. Bail Reform Act, 18 U.S.C. §§ 3142(f)–(g); *see also* *United States v. Salerno*, 481 U.S. 739, 747–748, 107 S. Ct. 2095, 2101–2102, 95 L. Ed. 2d 697, 708–709 (1987) (holding that prevention of danger to the community is a legitimate goal of pretrial detention).

- (3) Your history and characteristics, such as your character, health, family and community ties, employment, any substance abuse history, any criminal history, and any record of returning or not returning to court.
- (4) Whether you were on probation or parole when you were charged with the current offense.
- (5) Anything that the judge thinks would make you a danger to other people if you were released.⁵⁴

In theory, the judge is supposed to consider your ability to pay bond,⁵⁵ but what the judge *thinks* you can pay and what you can *actually* pay might be different. If the judge finds that no condition or combination of conditions will make you likely to return to court, and keep you from being a danger to your community when you are released, the judge must order detention before trial (remand).⁵⁶

(b) Bail in New York State

In New York, whether you are detained pre-trial is governed by Articles 510 and 530 of the New York Criminal Procedure Law. If you were charged in a state other than New York, you should check the bail statutes of the state you were charged in.

Under Section 510.10, at your first court appearance, the judge will issue what is called a “securing order” that either releases you on your own recognizance, fixes bail or other non-monetary conditions, or sends you back to jail.⁵⁷ Under Section 510.20, you can then apply for bail or recognizance, as opposed to waiting in jail, and present arguments and evidence in support of your application in court. Technically, your request for bail can be made at the time of the original securing order or any time afterward.⁵⁸ In practice, bail applications usually happen at either your post-arrest arraignment or the arraignment on your indictment unless there is a later change in the circumstances of your detention. You are entitled to have a lawyer during this part of your case, and if you cannot afford one, the court must appoint one for you.⁵⁹

(i) How does New York’s new bail statute apply to you?

The decision on your bail application is not left entirely up to the judge’s discretion. As of January 1, 2020, New York is operating under a revised bail statute with some important changes. Because the law is so new, there are not a lot of cases explaining how it should be applied. You will have to do a bit of research to see if there are any new cases by the time you are reading this, and you should speak with your lawyer.

The new statute says that for less serious charges, called “non-qualifying offenses,” the judge must release you on your own recognizance (ROR) unless they find that you are a flight risk. If they find that you are a flight risk, they must explain why they believe so. If you are charged with a non-qualifying offense and are not a flight risk, the judge is required to set the least restrictive non-monetary conditions that will ensure that you return to court to be prosecuted for the crime you are charged with (meaning they may not set cash bail).⁶⁰ If the court releases you on your own

54. Bail Reform Act, 18 U.S.C. § 3142(g).

55. See Bail Reform Act, 18 U.S.C. § 3142(g) (mentioning both financial resources and possible inquiries into property designated as collateral for bond as factors to be considered).

56. Bail Reform Act, 18 U.S.C. § 3142(e)(1).

57. N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2009). In the statute, you will see that it says “commit...to the custody of the sheriff,” which means send you back to jail. In court, the judge may say you are being remanded or you are remaining in pretrial detention/custody, all of which also mean being sent back to jail.

58. N.Y. CRIM. PROC. LAW § 510.20 (McKinney 2009); see, e.g., *People ex rel. Rosenthal v. Wolfson*, 48 N.Y.2d 230, 233, 397 N.E.2d 745, 746, 422 N.Y.S.2d 55, 56 (N.Y. 1979) (holding that when pertinent new evidence becomes available the trial court may reconsider their initial decision to grant or withhold bail).

59. N.Y. CRIM. PROC. LAW § 510.10(2) (McKinney 2009).

60. N.Y. CRIM. PROC. LAW § 510.10(3) (McKinney 2009).

recognizance, you will be released from custody with the understanding that you will later appear in court.⁶¹

If you are charged with a more serious charge, called a “qualifying offense,” the judge can put monetary conditions on your release, but he is not required to so. If the judge finds that no combination of money bail and conditions will ensure your return to court, the judge may remand you.⁶² The following is a list of the qualifying offenses the bail statute says allow the judge to set money bail. You can look up each statute in the New York Penal Law:

- (1) most violent felonies (§ 70.02) except burglary in the second degree (§ 140.25) or robbery in the second degree (§160.10 of the penal law);
- (2) witness intimidation (§ 215.15);
- (3) witness tampering (§§ 215.11, 215.12 or 215.13);
- (4) any class A felony (except controlled substance offense (art. 220) unless you are a major trafficker (§ 220.77));
- (5) a felony sex offense (§ 70.80) or incest (§§ 255.25, 255.26 or 255.27), or a misdemeanor sex offense (parts of art. 130);
- (6) conspiracy in the second degree (§ 105.15 of the penal law) where the underlying allegation is that you conspired to commit a class A felony related to homicide (art. 125)
- (7) money laundering in support of terrorism in the first degree (§ 470.24); money laundering in support of terrorism in the second degree (§ 470.23); or a felony crime of terrorism (art. 490 with exception of § 490.20);
- (8) criminal contempt in the second degree (§ 215.50(3)), criminal contempt in the first degree (§ 215.51(b), (c), or (d)) or aggravated criminal contempt (§ 215.52), where the underlying allegation of the contempt charge is that the you violated an order of protection that had been served on you where the protected party is a member of your family or household (§ 530.11); or
- (9) facilitating a sexual performance by a child with a controlled substance or alcohol (§ 263.30), use of a child in a sexual performance (§ 263.05) or luring a child (§ 120.70(1)).⁶³

To decide if you are a flight risk, the judge will consider a few different factors about you. The prosecutor may tell the judge they consent to your release, or they may say that they think you should have a high bail or be remanded. Your defense lawyer will make arguments about why you should be released. Your lawyer, the prosecutor and the judge will discuss the factors that are listed as subsections (a) through (h) of Section 510.30(1). These factors include:

- (a) Your “activities and history” (such as community involvement and family ties to New York);
- (b) The charges you are facing;
- (c) Any past criminal convictions you may have;
- (d) Certain cases you had as a juvenile;
- (e) Whether or not you have failed to show up to court in the past when required;
- (f) If the judge is allowed to set monetary bail, they must consider your ability pay and the hardship that paying will impose on you, as well as your ability to get a secured, unsecured, or partially secured bond;
- (g) If you are charged with a crime against a member of your family or household, the court will also consider:
 - i. If you have every violated a protective order towards anyone in your family or household;
 - ii. If you have ever used or possessed a firearm.

61. N.Y. CRIM. PROC. LAW § 500.10(2) (McKinney 2009). Most of the terms used in this Section, including different kinds of bail, bond, and conditions of release, are defined in N.Y. CRIM. PROC. LAW § 500.10 (McKinney 2020).

62. N.Y. CRIM. PROC. LAW § 510.10(4) (McKinney 2009).

63. N.Y. CRIM. PROC. LAW § 510.10(4) (McKinney 2009).

(h) If you are requesting a securing order while you have a pending appeal, the court will consider the likelihood that your appeal will actually be successful.⁶⁴

Subsection (h) only applies if you have already been convicted but have appealed your conviction and want to request that you be released on bail while your appeal is pending. If the judge believes that there is only a small chance you will win your appeal, the judge can deny your request for bail even if you are not a flight risk.⁶⁵

If you are charged with a felony and are released on bail or RORed, the court must explain to you that your release is conditional. If you commit another felony while released on bail or your own recognizance, you can be remanded while your case is pending.⁶⁶

(c) Procedure for Bail Decisions Made in Local Criminal and Town Courts

If you are in New York State but outside of New York City, you may be charged in a local justice court (sometimes referred to as a village or town court). These local courts can hear low-level criminal cases that occur within the borders of the town or village. They can also handle arraignments and preliminary hearings for felony cases.⁶⁷

For most charges, the same bail rules apply as the ones described above.⁶⁸ However, these lower courts cannot release you on recognizance or bail if you are charged with certain types of felonies (class A felonies) or if you have been convicted of two prior felonies.⁶⁹ A town court also may not order recognizance or bail if you are charged with a felony until the district attorney has had an opportunity to express their opinion in court and both the court and your lawyer have received a report of your prior criminal record. However, if a report on your past criminal behavior is unavailable, the district attorney may consent to recognizance or bail without it.⁷⁰

If you are denied bail or recognizance in a town court because of your prior felonies or current felony charge, you can still ask a superior court judge to grant recognizance or bail anyway.⁷¹ You can also appeal to a higher court when the town court has 1) denied your application for recognizance or bail, 2) ordered excessive bail, or 3) released you under non-monetary conditions that are more restrictive than necessary to make sure you come back to court.⁷² The court must apply the least restrictive conditions rule and explain its reasoning. The reasoning can be explained either on the record (verbally at the hearing) or in writing.⁷³ If you have been charged with a felony, the district attorney must have the opportunity to be heard in court before a decision is made and the higher court judge must be provided with a copy of your criminal record.⁷⁴ You may appeal your bail to the higher court only once.⁷⁵

The higher court will review your bail determination from the lower court *de novo*, meaning they will review it as though they were seeing it for the first time and will not take the decision of the lower court into account when making their own decision.⁷⁶ Even though only one application to a higher court is allowed, you can still apply for *habeas corpus* to appeal the denial of bail from the higher court.⁷⁷ In that case, however, the court will review the custody determination for error – this means they will only look for violations of law or the constitution, or abuse of discretion of the court. Unlike

64. N.Y. CRIM. PROC. LAW § 510.30(1)(a)–(h) (McKinney 2009).

65. N.Y. CRIM. PROC. LAW § 510.30(2) (McKinney 2009).

66. N.Y. CRIM. PROC. LAW § 510.30(3) (McKinney 2009).

67. *City, Town & Village Courts*, NYCOURTS.GOV, available at <https://www.nycourts.gov/courts/townandvillage/introduction.shtml> (last visited Aug. 27, 2020).

68. N.Y. CRIM. PROC. LAW § 530.20(1) (McKinney 2009).

69. N.Y. CRIM. PROC. LAW § 530.20(2)(a) (McKinney 2009).

70. N.Y. CRIM. PROC. LAW § 530.20(2)(b)(i)–(ii) (McKinney 2009).

71. N.Y. CRIM. PROC. LAW § 530.30(1)(a) (McKinney 2009).

72. N.Y. CRIM. PROC. LAW § 530.30(1)(b)–(d) (McKinney 2009).

73. N.Y. CRIM. PROC. LAW § 530.30(1) (McKinney 2009).

74. N.Y. CRIM. PROC. LAW § 530.30(2) (McKinney 2009).

75. N.Y. CRIM. PROC. LAW § 530.30(3) (McKinney 2009).

76. Preiser, Practice Commentaries, Book 11A, N.Y. CRIM. PROC. LAW § 530.20 (McKinney 2009).

77. Preiser, Practice Commentaries, Book 11A, N.Y. CRIM. PROC. LAW § 530.20 (McKinney 2009).

in *de novo* review, they will not start from scratch and review all the evidence that was originally presented to the court.

2. Speedy Trial

Once you are arrested and brought to court for the first time, the government has deadlines for completing certain tasks that move your case forward. Your right to have your case proceed without too much delay is called your right to a speedy trial. The right is guaranteed by the Sixth Amendment of the U.S. Constitution. It applies to trials in both federal and state courts.⁷⁸ You have a right to a speedy trial even if you are released on bail.⁷⁹ This right does not apply until you have been formally charged or are arrested.⁸⁰ The remedy, or solution, for a violation of the right to a speedy trial is release from detention if you are in jail and eventually the dismissal of the case if the government does not meet the deadline.⁸¹

Because the Constitution does not give a specific number of days, the federal government and many states have speedy trial statutes that say how much time the government gets for different parts of your case. Even if your state does not have a speedy trial statute, your right is still protected by the Sixth Amendment. You will just have to read cases about speedy trial in your state to see how much time the government has typically gotten.

However, the government is only responsible for the time the government uses up. Delays that you cause or request do not count toward your speedy trial time. The days that do count are often referred to as days that are “chargeable to the prosecution.” There are a few different situations in which certain amounts of time will not count towards the government’s deadline. The parts of the speedy trial statutes that explain this are generally called “Stop-the-Clock” Provisions and are explained below.

Even if your state does have a speedy trial statute, you still have a constitutional speedy trial right. So, if you are in a situation where a small number of days have been charged to the prosecution but your case has dragged on for a long time, you may be able to make a constitutional speedy trial claim even though the prosecution has not violated the state’s speedy trial statute. Success on this type of claim is difficult but not impossible.

The following sections give a brief overview of these mechanisms in federal court and New York State court as well as the constitutional standards underlying these laws. You can look up your own state’s speedy trial statute using Appendix A to this Chapter.

(a) Federal Constitutional Right to a Speedy Trial

Outside of the speedy trial statutes explained below, your right to a speedy trial is protected by the Sixth Amendment. This right may apply even if the state’s speedy trial statute has not been violated or if you are in a state that doesn’t have a speedy trial statute.

The Supreme Court has created a balancing test for courts to use in speedy trial cases. When the court uses a balancing test, it considers a few specific factors and then weighs them against each other to decide if the delay in your trial reached the level of a constitutional violation.

The four factors the court will consider in determining whether there has been a violation of your constitutional right to a speedy trial are:

78. U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1; *see* *Klopfer v. North Carolina*, 386 U.S. 213, 222–223, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 7–8 (1967) (holding that the 6th Amendment is enforceable in state as well as federal actions).

79. *United States v. MacDonald*, 456 U.S. 1, 8, 102 S. Ct. 1497, 1502, 71 L. Ed. 2d 696, 704 (1982) (stating that the speedy trial guarantee is designed in part to “reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail”).

80. *See* *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, 479 (1971) (“[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision . . .”).

81. *See* *Strunk v. United States*, 412 U.S. 434, 440, 93 S. Ct. 2260, 2264, 37 L. Ed. 2d 56, 62 (1973) (holding that the only remedy available for a violation of the right to a speedy trial is reversing the conviction, vacating the sentence, and dismissing the indictment); *see also* *United States v. Ray*, 578 F.3d 184, 191, 198–199 (2d Cir. 2009) (holding that, although the remedy for a 6th Amendment violation is dismissal, the 6th Amendment does not apply to sentencing proceedings).

- (1) the length of the delay;
- (2) the reason for the delay (for example, whose fault was it? What happened?);
- (3) the defendant's assertion of his right (did you make a claim in court that your speedy trial right was being violated?); and
- (4) prejudice to the defendant (were you hurt by this delay? Did it actually affect your case?).⁸²

The first factor the court will consider is prejudice. Unless there is some delay that is “presumptively prejudicial”—meaning, a delay that most likely damaged your case—the court will not consider the three other factors (length, reason, and your assertion).⁸³ In considering the reason the government gives for the delay (factor 2) the court is more likely to decide that there was a constitutional violation when the government did something the court thinks is bad, like try to delay your trial on purpose. The court will probably be more lenient when the delay is caused by an accident on the part of the government, or just by overcrowding of the court system. The court will still consider these reasons since they are not your fault, but they weigh less heavily in favor of dismissal than something the government did on purpose with bad intentions.⁸⁴

In some cases, if the delay is long enough, the court will automatically look at all four factors to see if your constitutional rights have been violated.⁸⁵ This full inquiry happens because the court may find that a very long delay is “presumptively prejudicial.” As a general guideline, note that the Supreme Court has previously decided that delays of about one year or longer usually require a full, four-part analysis.⁸⁶

Finally, if you believe your speedy trial rights are being violated, you must file a complaint in court saying so. Otherwise, it will be hard to prove that your rights were actually violated.⁸⁷

(b) The Federal Speedy Trial Act⁸⁸

If you are charged with a crime in federal court, your right to a speedy trial is protected by the Federal Speedy Trial Act. Congress passed this Act to provide some guidelines for how courts can comply with the Sixth Amendment speedy trial right. The Act gives specific numbers of days the government has to complete different parts of your case.

The different time limits are:

- (1) The prosecution has thirty days to file an indictment against you, starting from the date you were arrested or served with a summons for the charges.⁸⁹

82. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116–117 (1972) (holding that courts must conduct a balancing test when considering speedy trial cases and listing some of the factors that courts should weigh).

83. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116–117 (1972) (“Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.”).

84. *See Barker v. Wingo*, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972) (stating that a “deliberate attempt to delay the trial” should be weighed more heavily than a more neutral reason).

85. *See Barker v. Wingo*, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972) (“To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.”).

86. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 2691 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992).

87. *See Barker v. Wingo*, 407 U.S. 514, 531–532, 92 S. Ct. 2182, 2192–2193, 33 L. Ed. 2d 101, 117–118 (1972) (“We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”).

88. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174. The most important sections are § 3161, which deals with time limits, and § 3162, which specifies the sanctions imposed when the time limits are violated.

89. 18 U.S.C. § 3161(b). However, the section also states that if you are charged with a felony in a district where no grand jury has been in session during this 30-day period, the period of time for filing the indictment will be extended by an additional 30 days.

- a. If the prosecution misses this deadline, the charges in your complaint that they were going to indict must be dismissed.⁹⁰
- (2) The prosecution has seventy days to start your trial, starting from *either* the date you first appeared in court *or* the date they filed an indictment against you, whichever date is later.⁹¹
 - a. If the prosecution fails to bring your case to trial within seventy days of filing an indictment,⁹² the indictment will be dismissed if you make a motion, meaning formally ask the court, to have it dismissed for a violation of your speedy trial rights.⁹³ If you *don't* file a motion for dismissal *before* going to trial or entering a plea of guilty or *nolo contendere* (no contest), you will lose the right to have the charges dismissed under the statute.⁹⁴
- (3) Your trial can't begin *less* than thirty days from when you first get a lawyer in court (or from when you specifically waive your right to counsel and decide to represent yourself *pro se*).⁹⁵

(c) Federal “Stop the Clock” Provisions

The time periods in the speedy trial statutes are not as straightforward as they seem because not every single day counts towards the number of days listed in the statute. For example, if you request a delay to allow your attorney to do additional investigation, those days will not count towards your speedy trial time. Otherwise, defendants would all just delay their cases until they were dismissed. Instead, the speedy trial rules look at unexplained and unjustified delay, mainly caused by the government. To know whether or not your right to a speedy trial has been violated, you would have to add up all the days of unjustified delay and compare the number of unjustified days to the statutory deadlines.

The parts of the speedy trial statute that explain which days do and do not count are called “stop the clock” provisions because they tell you when the speedy trial “clock” starts and stops. Subsection 3161(h) of the Speedy Trial Act allows the clock to stop in certain circumstances.⁹⁶ When the clock stops, the days between when it stops and starts again are **excluded** from the speedy trial calculation (do not count towards the deadlines explained above). Delay because of general business of the court,

90. 18 U.S.C. § 3162(a)(1). *See* United States v. Cortinas, 785 F. Supp. 357, 362 (E.D.N.Y. 1992), *aff'd mem.*, 999 F.2d 537 (2d Cir. 1993) (holding that a violation of the Speedy Trial Act requires dismissal only of charges alleged in the complaint; prosecution for other conduct arising out of the same criminal incident, even though it was known or reasonably should have been known at the time of the complaint, is not barred).

91. 18 U.S.C. § 3161(c)(1).

92. 18 U.S.C. § 3161(c)(1).

93. 18 U.S.C. § 3162(a)(2).

94. *No Contest*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating that a plea of no contest means that the defendant, “while not admitting guilt...will not dispute the charge” and that “[t]his plea is often preferable to a guilty plea, which can be used against the defendant in a later civil lawsuit”). As for losing your right to dismiss the charges, *see* 18 U.S.C. § 3162(a)(2); *see also* United States v. Brown, 498 F.3d 523, 532 (6th Cir. 2007) (observing that the defendant had not asserted his right to a speedy trial before this appeal and stating that this fact “weighs heavily toward a conclusion that no Sixth Amendment violation occurred”); United States v. Morgan, 384 F.3d 439, 442–443 (7th Cir. 2004) (dismissing defendant’s appeal based on speedy trial grounds because he did not file a pretrial motion on the issue); United States v. Jackson, 30 F.3d 572, 575 (5th Cir. 1994) (holding that defendant waived right to dismissal by conditionally pleading guilty to one count before moving for dismissal).

95. 18 U.S.C. § 3161(c)(2).

96. 18 U.S.C. § 3161(h)(1)–(8). The following are some examples of the periods of delay that are included in this subsection: (1) delay resulting from “other proceedings,” including, but not limited to, from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant, from a trial with respect to other charges against the defendant, from any pretrial motion, or from the removal of the case to another district, 18 U.S.C. §§ 3161(h)(1)(A)–(B), 3161(h)(1)(D)–(E); (2) any period of delay during which the prosecution is deferred pursuant to written agreement with the defendant, for the purpose of allowing the defendant to demonstrate his good conduct, 18 U.S.C. § 3161(h)(2); (3) any period of delay resulting from the absence or unavailability of the defendant or an essential witness, 18 U.S.C. § 3161(h)(3)(A).

lack of preparation, or the prosecution's failure to obtain witnesses will not be excluded.⁹⁷ Still, there are a lot of different provisions that "stop the clock" and your case will often take a long time without violating your statutory right to a speedy trial.

The Supreme Court has previously decided that, when scheduling the trial, the prosecutor may not rely on the defendant's promise not to raise a speedy trial claim.⁹⁸ In other words, even if you believe that you intentionally opted out of your speedy trial rights before the trial, you are not prevented from raising these rights during trial.⁹⁹

(d) Constitutional Speedy Trial In New York

If you are in state court in New York, you can still make a constitutional speedy trial claim even if the speedy trial statute has not been violated. Although the New York Constitution does not have a clause specifically about your right to a speedy trial, you still have a state constitutional right to a speedy trial under the guarantee of due process clause in article 6 of the New York Constitution.¹⁰⁰ When the court is deciding if your right to a speedy trial has been violated according to the state constitution, they will apply a test similar to the one used in federal court. This means they will ask a series of questions about the case and then weigh the answers against each other to decide if your case should be dismissed for a speedy trial violation. The questions, or factors, that the court will consider are:

- (1) the extent of the delay;
- (2) the reason for the delay;
- (3) the nature of the underlying charge;
- (4) whether there has been an extended period of pretrial incarceration;
- (5) whether there is any indication that your defense has been hurt by the delay (prejudice, as described in the federal section).¹⁰¹

To bring a constitutional speedy trial claim in state court, you would apply the above test and also cite to New York Criminal Procedure Law § 30.20.¹⁰²

(e) The New York Speedy Trial Statute

The New York State speedy trial statute is usually better for defendants. Your right to a speedy trial under New York law is governed by Section 30.30 of the New York Criminal Procedure Law.¹⁰³ If you are making a claim in court that your speedy trial rights have been violated, you should talk about both the statute and the state constitution in order to keep your right to a speedy trial.

Under the New York speedy trial statute, you can be released or your charges can get dismissed, depending on the amount of time the government is taking to be ready for trial. How much time the government gets depends on your charges.

97. 18 U.S.C. § 3161(h)(7)(C).

98. *Zedner v. United States*, 547 U.S. 489, 503, 126 S. Ct. 1976, 1986–1987, 164 L. Ed. 2d 749, 765 (2006).

99. *Zedner v. United States*, 547 U.S. 489, 501, 126 S. Ct. 1976, 1985, 164 L. Ed. 2d 749, 764 (2006) (holding that the "public interest cannot be served ... if defendants may opt out of the Act").

100. N.Y. CONST. art. I, § 6; *People v. Singer*, 44 N.Y.2d 241, 253, 376 N.E.2d 179, 186, 405 N.Y.S.2d 17, 25 (1978) (holding that unreasonable delay in prosecution violates the defendant's state constitutional right to due process of law and noting that "the State due process requirement of a prompt prosecution is broader than the right to a speedy trial guaranteed by statute ... and the Sixth Amendment" (citation omitted)). *But see* *People v. Vernace*, 96 N.Y.2d 886, 888, 756 N.E.2d 66, 68, 730 N.Y.S.2d 778, 780 (2001) (holding that good faith determinations to delay prosecution with cause, "will not deprive defendant of due process even though there may be some prejudice to defendant").

101. *People v. Taranovich*, 37 N.Y.2d 442, 445, 335 N.E.2d 303, 306, 373 N.Y.S.2d 79, 81–82 (1975) (explaining that the court must balance these factors to determine if the defendant was deprived of his constitutional right to a speedy trial); *People v. Vernace*, 96 N.Y.2d 886, 887–888, 756 N.E.2d 66, 67, 730 N.Y.S.2d 778, 779 (2001) (weighing the factors and deciding that defendant's speedy trial rights were not violated by 14 year delay, when there was virtually no harm to defendant and his case).

102 N.Y. CRIM. PROC. LAW § 30.20(1) (McKinney 2018) ("After a criminal action is commenced, the defendant is entitled to a speedy trial.").

103. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2018).

The chart below shows the amount of time for the two speedy trial deadlines for the four different categories of charges.

Type of Offense	Deadline 1 (Release) ¹⁰⁴	Deadline 2 (Dismissal) ¹⁰⁵
Felony	Ninety days	Six months
Misdemeanor punishable by more than three months	Thirty days	Ninety days
Misdemeanor punishable by three months or less	Fifteen days	Sixty days
Violation	Five days	Thirty days

If you are released at your arraignment, the first deadline does not apply to you, since all that happens if the prosecution violates it is that you are released.¹⁰⁶ If you are in custody, the clock starts running when you are put into custody.¹⁰⁷ If you reach the second deadline and the prosecution is still not ready for trial, your charges must be dismissed.¹⁰⁸ The clock for the second deadline begins to run on the day following the commencement of the criminal action, meaning the day the prosecution files a document in court accusing you of a crime.¹⁰⁹ If new accusations have been filed to replace the original charges, the amount of time the state has to be ready for trial will be determined by the new offense. The state's time will start from the time the new charges are filed. However, if the government takes too long to file the new charging document, a new clock will not start. Your case and any motion to dismiss for speedy trial violations that you make will be judged under the old speedy trial clock from your first charging document, subtracting any time that cannot count under section 30.30(4), discussed below.

(f) New York “Stop-the-Clock” Provisions

Just like under the federal statute, there are certain event that can stop the speedy trial clock, meaning the days between that event and when the clock starts again do not count towards the two deadlines. The list of things that stop the clock can be found in section 30.30(4). They include a delay that you request or consent to,¹¹⁰ delay resulting from the unavailability of the defendant,¹¹¹ and certain delays requested by the district attorney for purposes of preparing the case.¹¹² Importantly, if are released and you do not show up to court as required, the clock will stop.¹¹³

If you believe that you have been denied access to a speedy trial, you must raise this issue before the trial begins or before you plead guilty.¹¹⁴ The claim will not be preserved for appeal if it is not properly raised in the trial court, meaning you will not be able to bring it up later.¹¹⁵ Unlike statutory

104. N.Y. CRIM. PROC. LAW §§ 30.30(2)(a)–(d) (McKinney 2018).

105. N.Y. CRIM. PROC. LAW §§ 30.30(1)(a)–(d) (McKinney 2018).

106. N.Y. CRIM. PROC. LAW § 30.30(2) (McKinney 2018).

107. N.Y. CRIM. PROC. LAW § 30.30(2) (McKinney 2018).

108. N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2018). You may hear this dismissal date referred to as a “30.30 date” and the amount of time the government has used up as “30.30 time.”

109. N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2018).

110. N.Y. CRIM. PROC. LAW § 30.30(4)(b) (McKinney 2018).

111. N.Y. CRIM. PROC. LAW § 30.30(4)(c) (McKinney 2018).

112. N.Y. CRIM. PROC. LAW § 30.30(4)(g) (McKinney 2018).

113. N.Y. CRIM. PROC. LAW § 30.30(4)(c)(i) (McKinney 2018).

114. N.Y. CRIM. PROC. LAW §§ 170.30(2), 210.20(2) (McKinney 2007); *see* *People v. Cintron*, 7 A.D.3d 827, 828, 776 N.Y.S.2d 919, 919 (3d Dept. 2004) (holding defendant's guilty plea waived appellate review of his statutory right to speedy trial).

115. *See* *People v. Bancroft*, 23 A.D.3d 850, 850–851, 803 N.Y.S.2d 824, 825–826 (3d Dept. 2005) (holding that the right to a speedy trial may be waived where a defendant fails to raise the claim in either a pretrial motion “or otherwise register an appropriate objection on this ground throughout the course of his prosecution”).

speedy trial claims, properly asserted constitutional speedy trial claims are not waived by a guilty plea or by making a plea bargain agreement.¹¹⁶ Most speedy trial claims are raised in pretrial motions (such as a motion to dismiss) or state habeas corpus petitions.¹¹⁷ If you are represented by a lawyer, ask them which procedure best fits your case.

E. Conditions of Confinement

If you stay in jail while your case is pending, you will likely have some concerns about the living conditions at the jail. In theory, the jail has legal obligations to not subject you to certain conditions. In practice, it can be difficult to get a jail to make improvements. This Part will explain why that is and give some examples of conditions you may be able to challenge because they violate the constitution. This Part will also give you a basic overview of the laws that may help you if you have issues with the conditions of your pretrial detention.¹¹⁸

Your rights as a pretrial detainee are protected under the Fifth and Fourteenth Amendment due process clauses. Because you have not been convicted of anything and are simply being held to assure your return to court, you cannot be punished. So, if a guard does something to you that is intended as punishment and was unnecessary to maintain security at the jail, your rights have been violated because you are being punished without due process. Your rights have also been violated if a measure taken by the jail is excessive in relation to the jail's legitimate security concerns. Finally, as a pretrial detainee you have the right to communicate privately with your defense attorney and you have the right to vote.

If you do want to file a claim, refer to Chapter 16 of the *JLM* to learn about the procedure for filing a § 1983 civil rights claim, including who specifically you should name as a defendant. You must also read Chapter 14 of the *JLM* to learn about the Prison Litigation Reform Act and how to make sure you are properly preserving your claim. If you do not follow these procedures, the court will not consider your claim. The rest of this Part will explain the substantive law you would cite in your claim: the constitutional status of pretrial detainees and how that status applies to a series of different jail conditions.¹¹⁹ This Part will begin with a bit of background history on the law about conditions of

116. See *People v. Savage*, 54 N.Y.2d 697, 698, 426 N.E.2d 468, 468, 442 N.Y.S.2d 974, 975 (1981) (noting that a guilty plea does not waive the constitutional speedy trial right, just the statutory right under § 30.30); *People v. Blakley*, 34 N.Y.2d 311, 313, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 460–461 (1974) (dismissing defendant's indictment because plea bargain should not have been made in exchange for withdrawal of claim of speedy trial violation); *People v. Thorpe*, 160 Misc. 2d 558, 559, 613 N.Y.S. 2d 795, 796 (App. Term 2d Dept. 1994) (holding that “a constitutional speedy trial claim is not waived by a guilty plea”).

117. For more information on state habeas corpus petitions, see *JLM*, Chapter 21, “State Habeas Corpus: Florida, New York, and Michigan.” Note that the New York Court of Appeals has held that habeas corpus petitions asserting a denial of the defendant's right to speedy trial cannot be brought during a pending criminal proceeding. *People ex rel. McDonald v. Warden*, 34 N.Y.2d 554, 555, 310 N.E.2d 537, 537, 354 N.Y.S.2d 939, 939 (1974).

118. This area of law can be very confusing because courts have said different things about what exactly your rights are when you are a pretrial detainee. The law may be very different depending on whether you are in state or federal custody and your jurisdiction. So, while you always have the right not to be punished, courts in different places may have very different ideas about what counts as punishment. This Chapter gives a basic overview of your rights as a pretrial detainee. You must research how courts in the jurisdiction where you are incarcerated have handled these questions. Refer to Chapter 2 of the *JLM* for information on how to conduct legal research.

119. You may have heard of the 8th Amendment rule against cruel and unusual punishment. The reason pretrial cases are analyzed under the 5th and 14th Amendment and not the 8th Amendment is because the 8th Amendment applies to your sentence, or punishment, for a crime. In the pretrial stage, you have not been convicted of anything and are not being punished for a crime. However, because a lot of the same jail problems affect people incarcerated both pre- and post-trial, courts are often influenced by cases that talk about conditions that violate the 8th Amendment. Generally, if a jail condition is too harsh for someone who *has* been convicted of a crime (as in, the condition violates the 8th Amendment) it is almost definitely too harsh for someone who has not been convicted of anything. So, you can use cases that talk about the 8th Amendment and say that they still apply to you because you are being punished without *due process*, which you are entitled to under the 14th Amendment.

pretrial confinement so that when you come across these cases in your research, you know how to use them correctly.

1. The Reasoning of Pretrial Conditions of Confinement Law: Right Not to be Punished

As a pretrial detainee, you must be presumed innocent because you have not been convicted of a crime. Without a conviction, you cannot be punished. When courts are deciding if a condition of pretrial confinement is unconstitutional, one major question they will ask is if the condition is so bad that it amounts to punishment. At the same times, the court will also consider the need of the jail to maintain security. So, to decide if a particular condition is equal to punishment the court will ask two questions:

- (1) is the goal of the jail's action legitimate and non-punitive. In other words, is the goal of the jail something it makes sense for the jail to want to do, like maintain order, and is the goal something besides punishment. If the jail passes this first test, the court will turn to the second question:
- (2) are the conditions an excessive way to achieve that goal? In other words, could the jail have reached the same goal without doing something so extreme?¹²⁰

This test was established in *Bell v. Wolfish*. If the goal of the conditions is to punish or otherwise not legitimate, then the conditions amount to punishment. Likewise, if the goal is legitimate but the conditions are an excessive way to achieve that goal, then the conditions amount to punishment. Keeping order and security in the jail is usually treated by courts as a legitimate, non-punitive government goal.¹²¹ Jail officials will generally claim that whatever they did to you was for legitimate purposes of maintaining order and security—not for punishment. But a court can still decide that the conditions you were subjected to were not justified or lawful despite what the officer says.¹²²

120. *Bell v. Wolfish*, 441 U.S. 520, 538, 99 S. Ct. 1861, 1873–1874, 60 L. Ed. 2d 447, 468 (1979) (holding that without a showing of an expressed intent to punish, whether conditions or restrictions amount to punishment “generally will turn on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]’” (alterations in original) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–169, 83 S. Ct. 554, 567–568, 9 L. Ed. 2d 644, 661 (1963))).

121. *Bell v. Wolfish*, 441 U.S. 520, 540, 99 S. Ct. 1861, 1875, 60 L. Ed. 2d 447, 469 (1979) (“The effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.”).

122. *See Bell v. Wolfish*, 441 U.S. 520, 538–539, 99 S. Ct. 1861, 1873–1874, 60 L. Ed. 2d 447, 468–469 (1979) (allowing courts to decide on their own whether jail conditions amount to “punishment” under the Constitution); *see, e.g., Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001) (upholding the lower court’s ruling that restraints that were characterized as non-punitive by the city’s corrections department caused so much pain to detainees that they had the same effect as punishment).

How to apply the *Bell v. Wolfish* steps

To give an extreme example, let's say that at a certain jail the inmates keep having food fights which cause chaos and mess. The jail wants to stop this from happening, so they stop serving food.

1) Is the goal of the jail's actions legitimate and non-punitive?

a. Yes. The jail understandably does not want constant food fights in their facility because it is messy, wasteful and chaotic. The jail's desire not to have constant food fights has nothing to do with punishing you for the thing you are charged with in court.

2) But, are the conditions an excessive way to achieve that goal?

a. Yes. The jail cannot deprive you of food to prevent food fights or for any other reason.

So, even though the goal of the jail in not serving food is legitimate and non-punitive, the condition they imposed is excessive and not proportional to the problem. Because they cannot satisfy both parts of the test, they violated the constitution when they imposed the no-food condition.

(Note: If there was no food fight problem in the jail and the jail started severely restricting your meals anyway, they would probably fail the first step. There would be no legitimate reason to restrict your food and they might just be trying to punish you. In that case, the court would not have to ask the second question.)

(a) The Legal Standard for Conditions of Pretrial Confinement Claims:
Deliberate Indifference

In your research, you will read a case called *Farmer v. Brennan*. *Farmer* dealt with a failure to protect claim. In the case, an incarcerated person said that the jail officials were responsible for an attack he suffered at the hands of other incarcerated people. Because the incarcerated person in this case was already convicted of a crime, the claim was evaluated under the Eighth Amendment ban on cruel and unusual punishment. The court said that a "prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."¹²³ In *Farmer*, the court decided that in order to show that a prison official was intentionally indifferent to a risk of harm, the prison had to show that the official *knew* about the harm or possibility of harm. In other words, that they were "subjectively aware of the risk."¹²⁴ "Subjective" in this context means the court will look into the mind of the actual jail officials in the case to ask if they knew what was going on.

For a long time, claims about conditions of pretrial confinement were treated the same way. If a pretrial detainee wanted to make a claim about a condition of their confinement, they had to show not just that the condition amounted to punishment (the first question under *Bell v. Wolfish*, explained above) but that the jail officials responsible for the condition knew it was happening and *meant* for it to be a punishment.

A recent Supreme Court case changed this standard for claims of excessive force against a pretrial detainee by a prison or law enforcement official. In *Kingsley v. Hendrickson*,¹²⁵ the Court decided that the appropriate legal standard to use in considering a claim of violence against a pretrial detainee was an *objective* standard of deliberate indifference. "Objective" means that if the court is deciding if the force used against you was constitutional or not, the court will not go inside the mind of the jail official to ask if the official meant to punish you or hurt you. They will only ask if the official meant to commit the action that hurt you and if they did, was it reasonable for them to do it given the circumstances.

123. *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 1974, 128 L. Ed. 2d 811, 820 (1994).

124. *Farmer v. Brennan*, 511 U.S. 825, 829, 114 S. Ct. 1970, 1974, 128 L. Ed. 2d 811, 820 (1994).

125. *Kingsley v. Hendrickson*, 576 U.S. 389, 396–397, 135 S. Ct. 2466, 2472–2473, 192 L.Ed.2d 416, 426 (2015).

If you are bringing an excessive force claim against a jail or police official as a pretrial detainee *anywhere in the country*, you would cite to *Kingsley* and answer the following two questions in your complaint:

- (1) Was the officer's action deliberate, i.e. on purpose? (So, accidentally tripping and falling on an inmate, for example, will not count. Neither will behavior that was only negligent.)
- (2) Was the condition objectively unreasonable? In other words, would a reasonable person in the same position as the officer have acted in the same way?

Depending on where you are, you may be able to use the reasoning from *Kingsley* for other pretrial conditions of confinement claims. Some circuits have applied the logic of *Kingsley* to any conditions of pretrial confinement questions and some have applied it to specific categories of claims, such as medical neglect and failure to protect claims.¹²⁶ If you are filing your claim in a circuit that has extended *Kingsley*, you would first argue that the condition you were subjected to was sufficiently bad under *Bell* to violate your constitutional rights and then you would argue under *Kingsley* that the prison officials responsible for this condition meant to act the way they did and that their actions were objectively unreasonable. If you are in a circuit that has not extended *Kingsley* and are bringing a claim besides excessive force, you will cite to *Farmer* and try to show that the prison officials *knew* that you were in unreasonable conditions. You can also try to argue that the objective standard in *Kingsley* should apply to your case, but you should make sure you have read the cases from your jurisdiction that have already considered *Kingsley*.

The next few Sections discuss some common problems that come up in pretrial detention and what the law says about them. You would use these cases or similar ones from your own jurisdiction when you are applying the tests in *Bell*, *Farmer* and *Kingsley*. The cases discuss conditions that are unreasonable and what officers can and cannot do. But first, there is one important exception to the right not to be punished.

(b) Exception to the Right Not to be Punished: Disciplinary Measures for Infractions of Prison Rules

One exception to your right not to be punished while you are detained before trial is the process you go through if you break one of the jail rules. Unfortunately, there is little guidance to distinguish “discipline” from “punishment.”¹²⁷ Jails can discipline you for breaking one of their internal rules as long as they are not punishing you for your charges.

126. Because this case is not very old, you should look into whether or not your circuit has extended *Kingsley* after this Chapter was last updated (February 2020). In the **First Circuit**, *Kingsley* still only applies to excessive force claims. *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016). **Second Circuit**: Applies to all pretrial conditions of confinement claims. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017). **Third Circuit**: Undecided, so *Kingsley* is still used only for excessive force claims. *Moore v. Luffey*, 767 F. App'x 335, 340 (3d Cir. 2019). **Fourth Circuit**: Undecided. **Fifth Circuit**: Undecided. **Sixth Circuit**: Undecided. Just excessive force but has considered the decision of the Second Circuit to extend it. *Powell v. Med. Dept. Cuyahoga Cnty. Corr. Ctr.*, No. 18-3783, 2019 U.S. App. LEXIS 10461, at *5 n.1 (6th Cir. Apr. 8, 2019) (*unpublished*), *cert. denied*, 140 S. Ct. 150, 205 L. Ed. 2d 183 (2019). **Seventh Circuit**: Extended to all pretrial conditions of confinement claims. *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019). **Eighth Circuit**: Declined to extend. *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018). **Ninth Circuit**: Extended specifically to failure to protect cases, *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016), and medical care cases. *Gordon v. County of Orange*, 888 F.3d 1118, 1120 (9th Cir. 2018), *cert. denied sub nom.* *County of Orange v. Gordon*, 139 S. Ct. 794, 202 L. Ed. 2d 571 (2019). **Tenth Circuit**: Undecided but has considered extending. *See Perry v. Durborow*, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018); *Estate of Duke ex rel. Duke v. Gunnison Cnty. Sheriff's Office*, 752 F. App'x 669, 673 n.1 (10th Cir. 2018); Extended beyond excessive force to cases involving public exposure of the incarcerated person's nude body. *Colbruno v. Kessler*, 928 F.3d 1155, 1163–1164 (10th Cir. 2019). **Eleventh Circuit**: Declined to extend. *Nam Dang ex rel. Vina Dang v. Sheriff*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); *Johnson v. Bessemer*, 741 F. App'x 694, 699 n.5 (11th Cir. 2018).

127. *See Fuentes v. Wagner*, 206 F.3d 335, 343 (3d Cir. 2000) (holding that eight hours in restraint chair after disruptive behavior would be unconstitutional if it were found to have been imposed as punishment,

When you break prison rules, you can be subjected to additional restraints on your liberty. These restraints include being placed in administrative detention or isolation,¹²⁸ having privileges taken away,¹²⁹ and being held in handcuffs or other restraining devices.¹³⁰

Jails are required to follow certain procedures when they want to punish you for an action they say you committed in jail.¹³¹ *Wolff v. McDonnell* describes the due process rights of convicted incarcerated people at a prison disciplinary hearing.¹³² These rights would generally apply to pretrial detainees as well.¹³³ You are entitled, for example, to be given written notice of the charges against you, to be given a hearing on the charges before an impartial officer, and to call witnesses and present evidence at that hearing.¹³⁴ Courts do not agree about the exact procedure you should get. Some courts have said you have the right to a full trial-like process before additional restrictions on your liberty are imposed.¹³⁵ Other courts have allowed the restrictions first, as long as they were followed up with a procedure that satisfies due process.¹³⁶ The punishment you get cannot be too extreme. For a more

although there was also evidence that defendant was put in the restraint chair “to stop his disruptive behavior and maintain prison order and security”); *McFadden v. Solfaro*, No. 95 Civ. 1148, 1998 U.S. Dist. LEXIS 5765, at *31 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (finding the disciplinary segregation of pretrial detainee for breaking prison regulations acceptable because it was not punitive and instead was “tied to the legitimate objective of maintaining order and impressing the need for discipline”).

128. See *McFadden v. Solfaro*, No. 95 Civ. 1148, 1998 U.S. Dist. Lexis 5765, at *31 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (upholding constitutionality of pretrial detainee’s administrative segregation for acting against prison regulations by “committing . . . unhygienic acts” and threatening guards). But see *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) (ruling that a due process hearing is required in order to subject pretrial detainees to discipline for breaking prison rules).

129. See *McFadden v. Solfaro*, No. 95 Civ. 1148, 1998 U.S. Dist. LEXIS 5765, at *32 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (upholding loss of privileges including “commissary, walkman, phone”).

130. See *Fuentes v. Wagner*, 206 F.3d 335, 343 (3rd Cir. 2000) (holding that a jury could reasonably conclude that the use of a restraint chair by prison officials for eight hours is not punitive but a method to “quell a disturbance and restore the order and security of the institution”). On the other hand, prison officials are not allowed to go too far with their disciplinary actions. When they do, you may have a valid constitutional claim under the 14th Amendment. See *Danley v. Allen*, 540 F.3d 1298, 1309 (11th Cir. 2008) (holding that when jailers continue using “substantial force against a incarcerated person who has clearly stopped resisting—whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated—that use of force is excessive”).

131. See *Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001) (holding that imposition of non-punitive restrictions which nonetheless were significant restraints on detainees’ liberty required subsequent due process protections); *Rapier v. Harris*, 172 F.3d 999, 1004–1005 (7th Cir. 1999) (holding that pretrial detainees, unlike convicted incarcerated people, are entitled to procedural protection before the imposition of punishment for misconduct); *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) (holding that a due process hearing is required before imposing disciplinary segregation on a pretrial detainee). But see *Wilson v. Blankenship*, 163 F.3d 1284, 1295 (11th Cir. 1998) (finding temporary placement of pretrial detainee in isolation, without bedding, for causing a disturbance was permissible without a hearing). The rule that punishments must be “atypical and significant” to require due process protections applies only to convicted incarcerated people, not to pre-trial detainees. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995). If you are a convicted incarcerated person and want a more complete explanation on this topic, see *JLM*, Chapter 18, Your Rights at Prison Disciplinary Proceedings.

132. *Wolff v. McDonnell*, 418 U.S. 539, 556–572, 94 S. Ct. 2963, 2975–2982, 41 L. Ed. 2d 935, 951–960 (1974).

133. *Benjamin v. Fraser*, 264 F.3d 175, 190 n.12 (2d Cir. 2001) (noting that although *Wolff* involved a convicted incarcerated person, the same standard applied to pretrial detainees).

134. *Benjamin v. Fraser*, 264 F.3d 175, 190 (2d Cir. 2001); see *Wolff v. McDonnell*, 418 U.S. 539, 564–566, 570–571, 94 S. Ct. 2963, 2979, 2982, 41 L. Ed. 2d 935, 956, 959 (1974) (requiring that incarcerated person disciplinary hearings observe due process requirements related to notice, presentation of evidence, and impartiality).

135. See *Rapier v. Harris*, 172 F.3d 999, 1005 (7th Cir. 1999) (finding that “punishment can be imposed only after affording the detainee some sort of procedural protection”); *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) (finding that “a pretrial detainee may not be punished without a due process hearing”).

136. See *Benjamin v. Fraser*, 264 F.3d 175, 189–190 (2d Cir. 2001). (upholding the district court holding that detainees placed in high security or restraint status should “reasonably promptly” receive due process hearings after being placed on that status).

detailed discussion of due process rights in prison disciplinary hearings, see *JLM*, Chapter 17, “Your Rights at Disciplinary Proceedings.”

Finally, jail officials cannot charge you with jail actions you did not commit just to punish you for your charges or some other reason. For example, if one prison official makes up a false charge against you to punish you for your charges and then other guards act on that accusation, causing you harm, you may be able to establish unconstitutional pretrial punishment if you can trace back the harmful treatment to the accusing prison official.¹³⁷

2. Your Right to be Free from Violence

You may experience violence or force from jail guards or other inmates. Jail guards are not allowed to use excessive force on you. Guards can only use force for a legitimate reason, as explained above. In some circumstances, jail officials also have an obligation to protect you from violence by other inmates. Because violence from guards and violence from other inmates are treated differently under the law, they are explained separately below.

(a) Violence and Use of Force by Jail Guards

If a jail guard uses force against you and you challenge it in court, the court will apply the *Kingsley* test mentioned above and ask:

- (1) Was the officer’s action deliberate (meaning done on purpose)? Note that accidents, like if a guard trips and falls on you, will not count.¹³⁸ Neither will behavior that was only negligent.¹³⁹
- (2) Was the amount of force used objectively unreasonable? In other words, would a reasonable person in the same position as the officer have acted in the same way?¹⁴⁰

To answer these questions, the court will look at the facts from each individual incident. The court may consider other things, such as alternative actions the officer could have taken, whether you were resisting, and the security threat the officer faced.¹⁴¹

In the *Kingsley* case for example, the Court considered a claim from a pretrial detainee who said that guards used excessive force when they removed him from his cell, restrained him in another room, tased him, and kned him in the back while handcuffed.¹⁴² *Kingsley*, the detainee, filed a § 1983 action saying the jail guards violated his due process rights under the Fourteenth Amendment.¹⁴³

These concepts also apply to physical force used as punishment. In one case, incarcerated people were chained and handcuffed for over twelve hours and deprived of access to toilets after a failed escape attempt. The court held that a reasonable jury could conclude that such restraints violate the Fourteenth Amendment. In that case, there would be a violation if there was evidence that guards did this with the intent to punish, if the punishment was not a reasonable way to prevent another prison break, or if there were “alternative and less harsh methods” of preserving security and order at the jail.¹⁴⁴ In another case, the court decided that severely cutting the amount of time a pretrial detainee could spend out of their cell might count as punishment,¹⁴⁵ even when dealing with incarcerated people who were “prone to: escape; assault staff or other inmates ... or likely to need protection from other

137. *Surprenant v. Rivas*, 424 F.3d 5, 14 (1st Cir. 2005) (holding that fabricating a serious charge, knowing that the lie would have serious negative consequences for a pretrial detainee, is an illegal manipulation of legitimate prison regulations and “can constitute arbitrary punishment by a correctional officer, even if the response by other (unwitting) prison officials is legitimate and non-punitive”).

138. *Kingsley v. Hendrickson*, 576 U.S. 389, 396, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416, 425–426 (2015).

139. *Kingsley v. Hendrickson*, 576 U.S. 389, 396, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416, 425 (2015).

140. *Kingsley v. Hendrickson*, 576 U.S. 389, 396–397, 135 S. Ct. 2466, 2472–73, 192 L. Ed. 2d 416, 426 (2015).

141. *Kingsley v. Hendrickson*, 576 U.S. 389, 397 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015).

142. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470, 192 L. Ed. 2d 416, 423–424 (2015)

143. *Kingsley v. Hendrickson*, 576 U.S. 389, 393, 135 S. Ct. 2466, 2470–2471, 192 L. Ed. 2d 416, 424 (2015).

144. *Putman v. Gerloff*, 639 F.2d 415, 420 (8th Cir. 1981).

145. *Pierce v. County of Orange*, 526 F.3d 1190, 1208 (9th Cir. 2008) (holding that pretrial detainees must be given adequate time out of their cells to observe their religions and conduct physical exercise, and that less than ninety minutes of physical exercise per week violated the detainees’ constitutional rights).

inmates [sic].”¹⁴⁶ Another time, a pretrial detainee was assaulted by an officer who caught him while he was trying to escape. In that case, the court held that if the officer’s purpose was to “injure, punish, or discipline” the person (not just stop the escape), then the assault was illegal punishment.¹⁴⁷

Ultimately, not all violence you experience from jail guards is a violation of your rights. But, if jail officials purposefully use an objectively unreasonable amount of force against you, your rights have been violated.

(b) Violence from Other Incarcerated People

If you are being attacked by other incarcerated people, the jail must protect you as long as they know what is going on (or, in the Second, Seventh, and Ninth Circuits, as long as they *knew or should have known* what was going on). The issue of violence between incarcerated people was addressed by the Supreme Court in *Farmer v. Brennan*.¹⁴⁸ In that case, prison officials ignored information that someone was being assaulted by other incarcerated people and failed to take protective measures.¹⁴⁹ *Farmer* applies a “subjective standard” (meaning the court only asks if the prison guards *actually knew* that Farmer was in danger). The court then asks if the guards responded reasonably to that knowledge.¹⁵⁰

By contrast, if you are in the Ninth Circuit, you would only have to show that the guards *should have known* about the danger (the “objective standard”) and that the guards acted unreasonably in not knowing it and not doing more to protect you.¹⁵¹ See *JLM* Chapter 23 for more information on your right to be free from assault.

3. Medical Care¹⁵²

As a pretrial detainee, you have the right to access medical care (both physical and psychiatric) that is adequate. In *City of Revere v. Mass. Gen. Hosp.*, a man was shot by the police during arrest and taken to the hospital. The Court held that the city had an obligation to bring the man to the hospital, but the city did not automatically have to pay for his care. However, if someone in pretrial detention can only get medical care if the government pays for it, then the government must provide the care and pay for it.¹⁵³

146. *Pierce v. County of Orange*, 526 F.3d 1190, 1196 n.3 (9th Cir. 2008) (quoting CAL. PENAL CODE § 1053).

147. *Putman v. Gerloff*, 639 F.2d 415, 420–422 (8th Cir. 1981); *see also* *Collazo-Leon v. U.S. Bureau of Prisons*, 51 F.3d 315, 318 (1st Cir. 1995) (noting that an otherwise legitimate restriction or condition may be viewed as punitive and therefore violate the detainee’s constitutional rights if the condition is “excessive in light of the seriousness of the [detainee’s] violation [of the prison rules]”).

148. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

149. *Farmer v. Brennan*, 511 U.S. 825, 829–831, 114 S. Ct. 1970, 1974–1976, 128 L. Ed. 2d 811, 820–821 (1994).

150. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

151. *See, e.g.,* *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (*en banc*). In *Castro*, the court said that a detainee making a failure to protect claim would have to show that: “(1) The defendant [the defendant in this case is the jail] made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and (4) By not taking such measures, the defendant caused the plaintiff’s injuries. With respect to the third element, the defendant’s conduct must be objectively unreasonable, a test that will necessarily ‘turn[] on the facts and circumstances of each particular case.’” *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (*en banc*) (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 396, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015) (alteration in original)).

152. There are some big differences in how abortion and reproductive healthcare are treated in the state and federal systems. For more information about issues affecting women, see Chapter 41 of the *JLM*, including Part C(2), “Abortion.”

153. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244–245, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983); *see also* *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) (“The rights of one who has not been convicted are protected by the Due Process Clause; and while the Supreme Court has not precisely limned the duties of a custodial official under the Due Process Clause to provide needed medical treatment to a pretrial detainee, it is

If you are in a jurisdiction that applies a subjective standard (see above) to medical care cases, you must show that prison officials knew you had medical conditions that were not being treated and decided not to treat them. If you are in a jurisdiction that uses an objective standard, you must show that the jail official knew *or should have known* you needed treatment, and also that by not providing the treatment, they made your condition worse.¹⁵⁴

To learn more about your right to medical care while incarcerated, see *JLM* Chapter 23, Your Right to Adequate Medical Care. Remember, you can cite Eighth Amendment cases about denial of medical care that seem to involve conditions similar to yours and then say that the case applies because you are being punished without due process.

4. Access to your Lawyer

Under the Sixth Amendment, you have a right to counsel in the preparation of your defense. (See Parts B and C of this Chapter for a broader discussion of your right to counsel.) This right includes the right to meet with and communicate with your attorney while you are detained awaiting trial. If the conditions of your detention interfere with your ability to meet with your attorney or to communicate in private to discuss your case, then those conditions may violate your Sixth Amendment right to counsel.¹⁵⁵ When pretrial detainees are kept from effectively communicating with their attorneys, “the ultimate fairness of their eventual trial can be compromised.”¹⁵⁶

As an incarcerated person, you also have the right to have access to the courts, which includes access to members of your legal team.¹⁵⁷ Regulations and conditions that unlawfully interfere with this right include limits on detainees’ telephone conversations with attorneys,¹⁵⁸ inadequate privacy during such telephone discussions,¹⁵⁹ inadequate or inadequately private space in which to meet with your attorneys,¹⁶⁰ and prison regulations that create substantial and unpredictable delays when your

plain that an unconvicted detainee’s rights are at least as great as those of a convicted prisoner.”); *Bryant v. Maffucci*, 923 F.2d 979, 983 (2d Cir. 1991) (finding that it is unclear whether pretrial detainees must meet the “deliberate indifference” standard under *Estelle* or a lower standard, but plaintiff must show something more than simple negligence). The question remaining after *Bryant* is whether there is some standard of care for pretrial detainees that falls between the negligence standard (which is not sufficient to establish a due process violation) and the deliberate indifference standard applicable to convicted people. Pretrial detainees are, at a very minimum, entitled to not be treated with deliberate indifference.

154. See *Gordon v. County of Orange*, 888 F.3d 1118, 1124–1125 (9th Cir. 2018), *cert. denied sub nom. County of Orange v. Gordon*, 139 S. Ct. 794, 202 L. Ed. 2d 571 (2019).

155. You should also look at the chapters of the *JLM* describing the rights of access to counsel of convicted people because these rights certainly apply to pretrial detainees as well. See *JLM*, Chapter 3, “Your Right to Learn the Law and Go to Court,” on your right of access to a law library, and Chapter 19, “Your Right to Communicate with the Outside World,” on your right to correspond with and visit with your attorney.

156. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (citation omitted).

157. See *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L.Ed.2d 224, 243 (1974). For additional information about the right of access to counsel while incarcerated, see also Johanna Kalb, Gideon *Incarcerated: Access to Counsel in Pretrial Detention*, 9 U. CAL. IRVINE L. REV. 101 (2018).

158. See *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–1052 (8th Cir. 1989) (noting that, if proven, restrictions on access to counsel were “inadequately justified” where detainees were effectively permitted one attempt at a 20-minute phone call with attorneys during office hours every other week).

159. See *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–1053 (8th Cir. 1989) (finding inadequate privacy where phones were brought to a noisy public space and conversations with counsel could be overheard by guards and other incarcerated people).

160. See, e.g., *Benjamin v. Fraser*, 264 F.3d 175, 187–188 (2d Cir. 2001) (holding that detention facility must provide attorneys with an adequate number of visitation rooms in which to meet with their clients prior to and during trial, and these rooms must provide adequate privacy).

attorneys come to meet with you.¹⁶¹ A transfer from one detention facility to another may also violate your right to counsel, if the transfer is to a place so distant that your access to counsel is impaired.¹⁶²

However, certain conditions that make it difficult (but not impossible) to communicate with your attorney are sometimes allowed. The Supreme Court has held that an incarcerated person must demonstrate the “actual injury” caused by the alleged rights violation.¹⁶³ Some examples of things courts have decided were not enough to be constitutional violations by themselves include: attorney visiting rooms where incarcerated people had to speak to their attorneys through telephones, making it very easy for other incarcerated people and law enforcement officers to eavesdrop;¹⁶⁴ mail screening policies allowing prison officials to read attorney mail before giving it to their clients;¹⁶⁵ and sometimes, even monitoring phone calls with attorneys.¹⁶⁶ Importantly, in all of these cases, the plaintiff was unable to “show an injury” and so the incarcerated person lost the lawsuit.¹⁶⁷ Jails may not, however, have a policy of monitoring all attorney visits with incarcerated people,¹⁶⁸ nor can they withhold mail between attorneys and detainees.¹⁶⁹ If the facilities are so bad that you actually cannot communicate with your legal team at all, your rights have been violated.

The Sixth Amendment right to counsel may also protect your right to access a law library while detained.¹⁷⁰ In particular, under *Faretta v. California*, incarcerated people who wish to proceed “*pro*

161. See *Benjamin v. Fraser*, 264 F.3d 175, 179, 188 (2d Cir. 2001) (affirming that the 6th Amendment was violated when attorneys “routinely face[d] unpredictable, substantial delays in meeting with clients” after their arrival at the facility—from 45 minutes to two hours or more—because of various factors including a limited number of counsel rooms, a rule requiring that certain detainees not be moved to counsel rooms without escorts, and a rule prohibiting incarcerated people from being brought to counsel rooms during counts of incarcerated people).

162. See *Covino v. Vt. Dept. of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991) (*per curiam*) (requiring trial court to determine whether detainee’s transfer to a facility 56 miles away from his prior facility impaired his 6th Amendment right to counsel); see also *Cobb v. Aytch*, 643 F.2d 946, 960 (3d Cir. 1981) (affirming an order limiting future transfers of detainees to distant facilities “without consent of pretrial detainees, unless and until [prison officials] can present a change in circumstances” justifying the transfers, because such transfers substantially interfere with detainees’ right to counsel).

163. See *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606, 616 (1996) (holding that an incarcerated person must show “actual injury” to file a lawsuit).

164. See *United States v. Roper*, 874 F.2d 782, 790 (11th Cir. 1989).

165. See *Oliver v. Fauver*, 118 F.3d 175, 178 (3d Cir. 1997); *McCain v. Reno*, 98 F. Supp. 2d 5, 7–8 (D.D.C. 2000); *Morgan v. Montanye*, 516 F.2d 1367, 1370 (2d Cir. 1975).

166. *United States v. Brooks*, 66 M.J. 221, 225 (C.A.A.F. 2008).

167. See *United States v. Irwin*, 612 F.2d 1182, 1186–1187 (9th Cir. 1980) (“[M]ere government intrusion into the attorney-client relationship, although not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel.”).

168. See *Case v. Andrews*, 603 P.2d 623, 627 (Kan. 1979) (holding that visual surveillance of a detainee’s meetings with his attorney violated the 6th Amendment where the jail “made no showing that the [surveillance] furthers any substantial governmental interest in security, order, or rehabilitation”).

169. See *Lamar v. Kern*, 349 F. Supp. 222, 224 (S.D. Tex. 1972).

170. See, e.g., *Walton v. Toney*, 44 Fed. App’x 49, 51 (8th Cir. 2002) (*per curiam*) (“To prevail on an access-to-courts claim, an inmate must...demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim....”) (internal quotation marks and citation omitted). But see *United States v. Smith*, 907 F.2d 42, 45 (6th Cir. 1990) (finding that “by knowingly and intelligently waiving his right to counsel, [a pretrial detainee] also relinquished his access to a law library”); *United States v. Wilson*, 690 F.2d 1267, 1271–1272 (9th Cir. 1982) (asserting that where a defendant chooses not to represent himself and where adequate legal assistance is offered, such as a free attorney, no constitutional right to access a law library exists, and noting that “[t]he Supreme Court, in requiring meaningful access to the courts, has been careful to note that providing access to law libraries is but one of a number of constitutionally permissible means of achieving that objective.... When such adequate access is provided, as was here, an inmate may not reject the method provided and insist on an avenue of his or her choosing”). To learn more about your right to access a law library, see *JLM*, Chapter 3, “Your Right To Learn The Law And Go To Court.”

se” (advocating for yourself without a lawyer) may have a right to a law library.¹⁷¹ However, not every circuit recognizes that right.¹⁷²

5. Voting Rights

You still have the right to vote as a pretrial detainee.¹⁷³ Denying your right to vote violates your rights under the Equal Protection Clause of the Fourteenth Amendment. The jail cannot make it impossible for you to vote. However, you do not have the right to a specific mechanism for voting. For example, there is no guaranteed right to vote through an absentee ballot (a ballot that allows you to vote through the mail).¹⁷⁴ But, if the state officials (or the jail) do not let you access absentee ballots *and* there is no other way to vote, then your Fourteenth Amendment Equal Protection rights have been violated.¹⁷⁵

6. Other jail practices

Not every problem that comes up in pretrial detention is unconstitutional. *Bell v. Wolfish* itself involved a wide range of prison practices, all of which were found constitutional. For example, permissible actions include double-bunking of pretrial detainees,¹⁷⁶ random shakedown searches of detainees’ cells,¹⁷⁷ a “publishers-only” rule that blocks detainees from receiving hardcover books unless they are mailed directly from the publisher,¹⁷⁸ and routine body cavity searches after contact visits.¹⁷⁹ The court decided these are reasonable security measures that do not violate the due process rights of pretrial detainees.

F. Conclusion

171. *Faretta v. California*, 422 U.S. 806, 819–820, 95 S. Ct. 2525, 2533–2534, 45 L. Ed. 2d 562, 572–573 (1975) (upholding one’s right to self-representation and stating that “other defense tools” besides an attorney are guaranteed by the 6th Amendment).

172. *Compare* *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989) (“[T]he Sixth Amendment right to self-representation...includes a right of access to law books, witnesses, and other tools necessary to prepare a defense.” (citing *Milton v. Morris*, 767 F.2d 1443, 1446 (9th Cir. 1985))), *with* *United States v. Cooper*, 375 F.3d 1041, 1051–1052 (10th Cir. 2004) (“[P]retrial detainees are not entitled to law library usage if other available means of access to court exist.... When a prisoner voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding, he is not entitled to access to a law library or other legal materials.”) (citations omitted).

173. *See, e.g.,* *Murphree v. Winter*, 589 F. Supp. 374, 380 (S.D. Miss. 1984) (noting that, under the Equal Protection Clause of the Constitution, a state statute that denies pretrial detainees the right to vote must be interpreted to allow pretrial detainees to vote, or it becomes unconstitutional).

174. *See* *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 809–810, 89 S. Ct. 1404, 1409, 22 L. Ed. 2d 739, 746 (1969) (“It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants’ claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois’ Election Code so operate as a whole, for the State’s statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants.”) (citations omitted).

175. *O’Brien v. Skinner*, 414 U.S. 524, 530, 94 S. Ct. 740, 743, 38 L. Ed. 2d 702, 707–708 (1974) (holding it unconstitutional for the state to deny detainees “any alternative means of casting their vote although they are legally qualified to vote”).

176. *Bell v. Wolfish*, 441 U.S. 520, 542, 99 S. Ct. 1861, 1875, 60 L. Ed. 2d 447, 470 (1979) (stating that there is no “one man, one cell” principle lurking in the Due Process Clause).

177. *Bell v. Wolfish*, 441 U.S. 520, 556–562, 99 S. Ct. 1861, 1883–1886, 60 L. Ed. 2d 447, 480–483 (1979) (finding that the searches did not violate the 4th Amendment and did not constitute punishment under the Due Process Clause).

178. *Bell v. Wolfish*, 441 U.S. 520, 550–552, 99 S. Ct. 1861, 1879–1881, 60 L. Ed. 2d 447, 475–477 (1979) (finding no 1st Amendment violation or punishment in violation of the Due Process Clause).

179. *Bell v. Wolfish*, 441 U.S. 520, 558–561, 99 S. Ct. 1861, 1884–1885, 60 L. Ed. 2d 447, 482–484 (1979) (finding no 4th Amendment violation or punishment in violation of the Due Process Clause). *But see* *United States v. Calhoun*, No. 02-10120-01-WEB, 2002 U.S. Dist. Lexis 23277, at *14 (D. Kan. Nov. 13, 2002) (stating that strip searches of people arrested on non-violent misdemeanors must be justified by a reasonable suspicion outside the confinement context).

As a pretrial detainee, you have rights that are protected under the Constitution, and national and state laws. These rights protect you when you are being investigated for a crime, and they continue to protect you once you have been arrested and charged. You have the right to an attorney and you should request one as soon as you are detained or taken into custody. An attorney can help you from the pretrial stage, including bail hearings, through the resolution of your case. Finally, you have rights regarding the jail conditions if you are not released before your trial. As always, remember to check the law in your own state and make sure the cases and statutes you are citing are current.

APPENDIX A

STATE SPEEDY TRIAL STATUTES

This list covers state speedy trial provisions, either in statutes or court rules. If no statute is listed for a state, that state likely still has a speedy trial guarantee, but the guarantee is constitutional rather than statutory.

Alabama

None

Alaska

Alaska R. Crim. P. 45 (West 2019).

Arizona

ARIZ. REV. STAT. ANN. § 13-114 (2010).

Arkansas

Ark. R. Crim. P. 27.1–30.2 (West 2020).

California

CAL. PENAL CODE § 1381-82 (West 2000).

Colorado

COLO. REV. STAT. ANN. § 18-1-405 (West 2004 & Supp. 2011).

Connecticut

CONN. GEN. STAT. ANN. § 54-82m (West 2009).

Delaware

None. However, there is a state constitutional guarantee for a speedy trial.¹⁸⁰

District of Columbia

D.C. CODE ANN. § 23-1322 (West 2012).

Florida

Fla. R. Crim. P. 3.191 (West 2019).

Georgia

Ga. Code § 17-7-170 (West 2011).

Hawaii

Haw. R. Penal. P. 48(b) (West 2020).

Idaho

IDAHO CODE ANN. § 19-3501 (West 2020).

Illinois

725 ILL. COMP. STAT. ANN. 5/103-5 (West 2014).

180. DEL.C.ANN. CONST., Art. 1, § 7.

Indiana

Ind. R. Crim. P. 4 (West 2020).

Iowa

Iowa R. Crim. P. 2.33(2) (West 2002).

Kansas

KAN. STAT. ANN. § 22-3402 (West 2017).

Kentucky

KY. REV. STAT. ANN. § 500.110 (West 2019).

Louisiana

LA. CODE CRIM. PROC. ANN. ART. 701 (2020).

Maine

Maine Rules U. Crim. P. 48(b) (West 2020).

Maryland

MD. CODE ANN., CRIM. PROC. § 6-103 (West 2011).

Massachusetts

MASS. GEN. LAWS ANN. ch. 41, R. 36(b) (West 2006).

Michigan

MICH. COMP. LAWS ANN. § 768.1 (West 2000).

Minnesota

Minn. R. Crim. P. 11.09(b) (West 2020).

Mississippi

MISS. CODE ANN. § 99-17-1 (West 2020).

Missouri

MO. ANN. STAT. § 545.780 (West 2002).

Montana

MONT. CODE ANN. § 46-1-506 (West 2009.).

Nebraska

REV. STAT. OF NEB. ANN. § 29-1207 (West 2009).

Nevada

NEV. REV. STAT. ANN. § 178.556 (West 2015).

New Hampshire

None. However, in New Hampshire, courts have recognized a state constitutional right to a speedy trial.¹⁸¹

New Jersey

N.J. STAT. ANN. § 2A:162-22 (West 2015)

181. N.H. CONST. PT. 1, art. XIV; *State v. Allen*, 150 N.H. 290, 292, 837 A.2d 324, 326 (2003).

New Mexico

None.

New York¹⁸²

N.Y. CRIM. PROC. LAW §§ 30.20–30 (McKinney2020).

North Carolina

GEN. STAT. N.C. ANN. § 15-10 (West 2009).

North Dakota

N.D. CENT. CODE ANN. § 29-19-02 (West 2008).

Ohio

OHIO REV. CODE ANN. § 2945.71 (West 2006).

Oklahoma

OKLA. STAT. ANN. Tit. 22, § 812.1 (West 2008).

Oregon

OR. REV. STAT. ANN. § 135.746 (West 2003).

Pennsylvania

Pa. R. Crim. P. 600 (West 2017).

Rhode Island

R.I. GEN. LAWS § 12–13–7 (West 2020).

South Carolina

None.

South Dakota

S.D. CODIFIED LAWS § 23A–44–5.1 (2018).

Tennessee

TENN. CODE ANN. § 40–14–101 (West 2017).

Texas

TEX. CRIM. PROC. CODE ANN. art. 32.01 (West 2006).

Utah

UTAH CODE ANN. § 77–1–6 (West 2017).

Vermont

VT. STAT. ANN. tit. 13, § 7553b (West 2007).

Virginia

VA. CODE ANN. § 19.2-243 (West 2007).

Washington

WASH. REV. CODE ANN. § 10, CrRLJ Rule 3.3 (West 2002).

182. See Part D(2)(e) of this Chapter for in-depth information about New York’s statute.

West Virginia

W. VA. CODE ANN. § 62–3–21 (West 2020).

Wisconsin

WIS. STAT. ANN. § 971.10(2007).

Wyoming

Wyo. R. Cr. P. Rule 48 (West 2020).

CHAPTER 35

GETTING OUT EARLY: CONDITIONAL AND EARLY RELEASE*

A. Introduction

This Chapter explains the different ways you can be released from prison before serving your full sentence. Parts B through J of this Chapter discuss New York State law, which only applies to incarcerated people in New York state prison. If you are incarcerated in state prison in another state, look at your state's appropriate laws and regulations. Parts K through P discuss federal law, which only applies to incarcerated people in federal prisons.

B. New York State

There are four main ways that you can be released from state prison in New York before serving your full or maximum sentence: parole, conditional release, early release, and presumptive release. This Chapter will provide you with information about the last three: Part E explains merit-time credit, Part F explains conditional release, Part G explains early release, and Part H explains presumptive release. This Chapter does not discuss parole. If you are looking for information about parole, see *JLM*, Chapter 32, "Parole."

You must do three things to determine whether or not you are eligible for one of these early release programs: (1) you must figure out which type of sentence you are serving, (2) you must figure out whether you have earned good-time credit, and (3) you must figure out how much good-time credit you have earned. Parts C and D will help you figure out these three things: Part C(1) explains the different types of sentences in New York and how they relate to conditional, early, and presumptive release programs; Part D explains good-time credit.

You can also be released from state prison before serving your full or maximum sentence in two other ways: clemency and compassionate release. "Clemency" means the power of an executive officer (for example, the Governor of New York) to change a criminal defendant's sentence to prevent injustice from occurring.¹ "Compassionate release" means a program for releasing dying or seriously ill incarcerated people. Clemency and compassionate release are harder to get than conditional, early, and presumptive release. If you are interested in pursuing these options, see Part I, which explains clemency (with a focus on battered women), and Part J, which explains compassionate release.

C. Sentencing Structure in New York

1. Definite, Determinate, and Indeterminate Sentences

There are three kinds of sentences in New York: (1) definite sentences, (2) determinate sentences, and (3) indeterminate sentences. Knowing which kind of sentence you have is important because your sentence type will affect your eligibility for good-time credit, early release, conditional release, and presumptive release.

A definite sentence is the type of sentence given to someone who is convicted of a misdemeanor, violation, or certain felonies.² A definite sentence is for a fixed term (that is, a specific length of time). For example, if you were convicted of a violation and you received a sentence of ten days, then your

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1. New York State, Department of Corrections and Community Supervision, *Apply for Clemency*, available at www.ny.gov/services/apply-clemency (last visited Feb. 23, 2020).

2. N.Y. PENAL LAW § 70.15 (McKinney 2009). Note that, if convicted of certain felonies (including drug offenses and sex offenses), the judge may, at his discretion, sentence you to a determinate sentence. N.Y. PENAL LAW §§ 70.00(4), 70.20(2), 70.70(2)(c), (3)(e), 70.80(4)(c) (McKinney 2009).

sentence is a definite sentence.³ A violation carries a maximum definite sentence of fifteen days.⁴ If you were convicted of a Class A misdemeanor, your maximum definite sentence is 364 days.⁵ If you were convicted of a Class B misdemeanor, your maximum definite sentence is three months.⁶ You serve a definite sentence in a county or regional jail, unless you have also received an additional determinate or indeterminate sentence.⁷

A determinate sentence is the type of sentence given to persons convicted of most types of violent felonies,⁸ drug felonies,⁹ and felony sex offenses.¹⁰ A determinate sentence is for a fixed term. For example, if you were convicted of a violent felony and received a two-year sentence, your sentence is determinate. While a definite sentence cannot last more than one year, the minimum determinate sentence is one-and-a-half years.¹¹ You usually serve a determinate sentence in state prison.¹²

An indeterminate sentence is the type of sentence given to you if you are convicted of a felony not requiring a determinate sentence.¹³ An indeterminate sentence is not for a fixed term. Instead, an indeterminate sentence is a range of time that includes (1) a minimum term (which must be at least one year), and (2) a maximum term (which must be at least three years, but can be as much as life imprisonment).¹⁴ For example, a sentence of “five to ten years” is an indeterminate sentence where the minimum term is five years and the maximum term is ten years. You must serve the maximum term of an indeterminate sentence if (1) there are no reductions to your sentence or (2) you are not paroled. You generally serve an indeterminate sentence in state prison.¹⁵

It is important to understand what type of sentence or sentences you are serving because the rules for when and how you can become eligible for early release are different for each of the three types of sentences. Below is a brief overview of good-time credit, conditional, early, and presumptive release (more detailed information is provided later in this Chapter).

2. Good-Time Credit

A good-time credit is a credit that you can earn in prison for good behavior.¹⁶ If you are serving a definite sentence, and you earn good-time credit, you can use the credit to shorten your sentence. You cannot, however, use the credit to get conditional release.

On the other hand, if you are serving a determinate or indeterminate sentence, and you earn good-time credit, you can use this credit to get conditional release. Note, however, that if you are serving an indeterminate sentence with a maximum term of life imprisonment or an “intermittent sentence” (that is, a sentence only requiring that you be in jail on certain days of the week or during certain hours of

3. N.Y. PENAL LAW § 70.15 (McKinney 2009).

4. N.Y. PENAL LAW § 70.15(4) (McKinney 2009).

5. N.Y. PENAL LAW § 70.15(1) (McKinney 2009).

6. N.Y. PENAL LAW § 70.15(2) (McKinney 2009).

7. N.Y. PENAL LAW § 70.20(2) (McKinney 2009). Youth and adolescent offenders are “committed to the custody of the commissioner of the office of children and family services who shall arrange for the confinement of such offender in secure facilities of the office.” N.Y. PENAL LAW § 70.20(4)(a) (McKinney 2009).

8. N.Y. PENAL LAW § 70.02(2)(a)–(c) (McKinney 2009) (defining the various classes of felony offenses subject to determinate sentence); N.Y. PENAL LAW § 70.04(2) (McKinney 2009) (stating current requirement to impose a determinate sentence for second violent felony offenders). Starting September 1, 2020, if you are convicted of a Class B or Class C violent felony offense, your sentence must be indeterminate. N.Y. PENAL LAW §§ 70.02(2)(a), 70.04(2) (McKinney 2009).

9. N.Y. PENAL LAW § 70.70(2) (McKinney 2009).

10. N.Y. PENAL LAW § 70.80(3) (McKinney 2009).

11. N.Y. PENAL LAW § 70.02(3)(d) (McKinney 2009).

12. N.Y. PENAL LAW § 70.20(1)(a) (McKinney 2009). Note that, if convicted of certain felonies (including drug offenses and sex offenses), the judge may, at his discretion, sentence you to a determinate sentence. N.Y. PENAL LAW §§ 70.70(2)(c), (3)(e), 70.80(4)(c) (McKinney 2009).

13. N.Y. PENAL LAW § 70.00(1) (McKinney 2009).

14. N.Y. PENAL LAW § 70.00(2) (McKinney 2009).

15. N.Y. PENAL LAW § 70.20(1)(a) (McKinney 2009).

16. N.Y. CORRECT. LAW §§ 804(1), 803(1) (McKinney 2014).

the day), you are ineligible for good-time credit.¹⁷ Part D of this Chapter discusses good-time credit in more detail.

3. Conditional Release

Conditional release is a way that you can be released from prison before you serve your full or maximum sentence. Your rights and responsibilities while on conditional release will be very similar to those of someone on parole. If you get out on conditional release, you will sign the same agreement signed by parolees. Additionally, you must follow the rules set by the parole or probation department, or you could lose your conditional release. For more information, see *JLM*, Chapter 32, “Parole.”

Although New York State law uses the same word to refer to conditional release from a definite sentence and conditional release from determinate and indeterminate sentences, they are not actually the same thing. Part E of this Chapter discusses conditional release in more detail.

4. Early Release and Presumptive Release

Early release and presumptive release are other ways you can be released from prison before serving a full sentence. Part F of this Chapter discusses early release in more detail. You can get presumptive release if you are serving one or more indeterminate sentences for non-violent crimes, you have not committed any serious disciplinary violations, and you have not filed or continued “frivolous” (meaning, so unlikely to win that courts consider them a bother) legal claims. Presumptive release works like parole and conditional release. But unlike those programs, it allows you to leave prison without appearing before the parole board. Part G of this Chapter discusses presumptive release in more detail.

D. Good-Time Credit

1. How to Earn Good-Time Credit

You can earn good-time credit for “good behavior and efficient and willing performance of duties” assigned to you in prison, or for “progress and achievement in an assigned treatment program.”¹⁸ On the other hand, you can lose good-time credits for “bad behavior, violation of institutional rules or failure to perform properly” any duties or programs assigned to you in prison.¹⁹ If you fail to complete a “recommended” program, prison officials may also withhold good-time credits.²⁰

You do not have a right to good-time credits.²¹ In other words, prison officials are not required to give you good-time credits. But if prison officials think your behavior in prison is acceptable, they will probably give you good-time credits.

17. N.Y. CORRECT. LAW § 803(1) (McKinney 2014); N.Y. PENAL LAW § 85.00(3) (McKinney 2009); *see also* Ferrara v. Jackson, 99 A.D.2d 545, 546, 471 N.Y.S.2d 629, 630 (2d Dept. 1984) (holding that incarcerated people serving intermittent sentences in accordance with Article 85 of the New York Penal Law are ineligible for good behavior allowances).

18. N.Y. CORRECT. LAW §§ 803(1), 804(1) (McKinney 2014).

19. N.Y. CORRECT. LAW §§ 803(1), 804(1) (McKinney 2014).

20. *See* Ferry v. Goord, 268 A.D.2d 720, 721, 704 N.Y.S.2d 315, 316 (3d Dept. 2000) (finding that good-time credit was properly withheld where an incarcerated person refused to enroll in recommended—non-mandatory—sex offender counseling and substance abuse treatment program); Burke v. Goord, 273 A.D.2d 575, 575, 710 N.Y.S.2d 136, 137 (3d Dept. 2000) (finding that good-time credit was lawfully withheld where an incarcerated person refused to enroll in recommended sex offender program); Lamberty v. Schriver, 277 A.D.2d 527, 528, 715 N.Y.S.2d 510, 511 (3d Dept. 2000) (holding that the fact that sex offender treatment and aggression therapy programs were “recommended” instead of “assigned” did not prevent time allowance committee from withholding good-time credit).

21. *See* Bradley v. Ward, 81 Misc. 2d 713, 716, 366 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 1975) (finding no statutory right to good behavior time under New York law); N.Y. CORRECT LAW §§ 803(4), 804(3) (McKinney 2014).

You can earn good-time credit only while you are in prison and not while you are on parole, conditional release, or supervised release. In most jurisdictions, prisons do not have to—and will not—accept credits that you earned in a different state prison or a federal prison.²²

Depending on the type of sentence you are serving, you can use good-time credit to shorten your sentence, earn unconditional early release, or, in the case of determinate and indeterminate sentences, earn conditional release.

(a) Good-Time Credit in Definite Sentences

If you are serving a definite sentence and earn good-time credit, prison officials will use the credit to shorten your sentence and decide if and when you can get unconditional early release. The process where prison officials decide whether to grant you good-time credit depends on whether you are incarcerated in jail or prison. If you are serving your definite sentence in a county or regional jail, the sheriff, warden, or other person in charge of the jail will decide whether to give you good-time credit.²³ If you are serving your definite sentence in a state prison, the prison's Time Allowance Committee ("TAC") will recommend to the superintendent the amount of good-time credit it thinks you should receive.²⁴ Every prison in New York is required to have a TAC consisting of at least eight prison employees.²⁵ The prison superintendent will review the TAC's recommendation and may add comments to it. He will then forward the recommendation to the Commissioner of Correctional Services, who will make the final decision about how much good-time credit you will receive.²⁶

(b) Good-Time Credit in Determinate and Indeterminate Sentences

If you are serving a determinate or indeterminate sentence and you earn good-time credit, prison officials will use your credit to decide whether you are eligible for conditional release. Unlike for definite sentences, if you are serving a determinate or indeterminate sentence, you cannot use good-time credit to shorten your sentence or earn unconditional early release.

The TAC starts the process by deciding how much good-time credit you will receive. If you are scheduled to receive the maximum amount of good-time credit, the TAC will review your file four months before you would earn conditional release. During the review, the TAC will decide whether you should, in fact, receive the maximum amount of good-time credit.²⁷ In deciding whether to grant the maximum good-time credit, the TAC will look for good behavior, efficient and willing performance of assigned duties, and progress and achievement in an assigned treatment program.²⁸ All of these aspects of your behavior will be considered in light of (1) your attitude, (2) your capacity (meaning your ability), and (3) the efforts you made within your capacity.²⁹ Although the TAC will review your entire file, it is not required to interview you at this stage.³⁰

After it reviews your file, the TAC will either (1) recommend to the superintendent that you receive the maximum amount of good-time credit or (2) delay making a recommendation because it believes that there might be a sufficient reason not to grant you the maximum amount of good-time credit.

22. *Holtzinger v. Estelle*, 488 F.2d 517, 518 (5th Cir. 1974) (holding that based on Texas statutes, a person incarcerated in Texas was not entitled to good-time credit earned for time spent in California); *Alexander v. Wilson*, 540 P.2d 331, 334 (Colo. 1975) (finding that the Colorado legislature had not extended good-time credit to incarcerated people for time spent outside of a Colorado state prison.).

23. N.Y. CORRECT. LAW § 804(3) (McKinney 2014).

24. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.2 (2020).

25. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.1(a)–(b) (2020).

26. N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(b) (2020).

27. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(a) (2020).

28. N.Y. COMP. CODES R. & REGS. tit. 7, § 260.3(b)(1)–(3) (2020).

29. N.Y. COMP. CODES R. & REGS. tit. 7, § 260.3(b)(1)–(3) (2020).

30. Please note that your prison's TAC is required to interview you if a prior superintendent's hearing recommended a loss of good-time credits. The TAC will then consider if it should restore these lost good-time credits. The TAC will base its recommendation on your behavior since the prior superintendent's hearing. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(b) (2020).

If the TAC decides that there is sufficient reason not to grant you the maximum amount of good-time credit, it will hold a time allowance hearing.³¹ The TAC will notify you at least forty-eight hours before the hearing.³² After you receive notice about the hearing, you will be given the opportunity to present facts that you believe the TAC should consider in making its decision. You will also have the opportunity to have factual matters investigated. At the hearing, the TAC will reconsider your file and consider any factual matter you (or your appointed assistant) brought to its attention. The TAC can also hear witnesses at its discretion.³³ In other words, the TAC has the power to decide whether or not to hear witnesses. After the hearing, the TAC will make its recommendation to the superintendent.³⁴ The TAC will inform you of any factual circumstances that appear to support its decision to not authorize good-time credit.³⁵ After the TAC provides this information, it has to give you the opportunity to comment on its decision and make a statement that can be submitted about your good-time credit and time allowance.³⁶

The superintendent will review the TAC's recommendation about how much good-credit time you should receive, add comments, and forward the report to the Commissioner.³⁷ The Commissioner can (1) accept the recommendation, (2) change the amount of good-time credit granted, or (3) send the report back to the TAC for reconsideration.³⁸ Once the Commissioner makes a decision, you will receive a copy of the determination.³⁹

If the Commissioner does not grant the maximum amount of good-time credit, you can file a lawsuit in state court under Article 78 of the New York Civil Practice Law and Rules. For more information about bringing a lawsuit in state court, you should read *JLM*, Chapter 22, "How to Challenge Administrative Provisions Using Article 78 of the New York Civil Practice Law and Rules," and *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings."

If you decide to file a lawsuit in federal court because you believe you unlawfully lost good-time credits, you *must* read *JLM*, Chapter 14, which discusses the Prison Litigation Reform Act ("PLRA"). If you do not follow the requirements of the PLRA, you may lose your good-time credit, become unable to receive presumptive release (see Part H of this Chapter), or lose your right to bring future lawsuits in federal court without paying the full filing fee at the time you file your lawsuit.

2. How Much Good-Time Credit You Can Earn

In New York State, the amount of good-time credit you can earn depends on the type of sentence you are serving.

(a) Good-Time Credit for Definite Sentences

If you are serving a definite sentence, the maximum good-time credit you can earn is one-third of your sentence. For example, if you are serving a definite sentence of fifteen days, the maximum good-time credit you can earn is five days (one-third of fifteen days). If you are serving definite sentences "consecutively" (meaning, one after the other), you can earn good-time credits equal to one-third of the total length of your combined sentences.⁴⁰ For example, if you are serving two fifteen-day sentences consecutively, the maximum good-time credit you can earn is ten days (one-third of thirty days).

31. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(a) (2020).

32. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(b) (2020).

33. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(f) (2020).

34. N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(a) (2020).

35. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(g) (2020).

36. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(g) (2020).

37. N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(b) (2020).

38. N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(c) (2020).

39. N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(d) (2020).

40. N.Y. CORRECT. LAW § 804(1)–(2) (McKinney 2014).

(b) Good-Time Credit for a Single Determinate or Indeterminate Sentence

If you are serving a single determinate or indeterminate sentence, you can receive good-time credit as long as your maximum term is not life imprisonment.⁴¹ If you are serving a determinate sentence, the maximum good-time credit you can earn is one-seventh of your sentence.⁴² For example, if you are serving a determinate sentence of twenty-one years, the maximum good-time credit you can earn is three years (one-seventh of twenty-one years).

If you are serving an indeterminate sentence, the maximum good-time credit you can earn is one-third of your maximum term.⁴³ For example, if you are serving an indeterminate sentence of fifteen to thirty years, the maximum good-time credit you can earn is ten years (one-third of thirty years).

The calculation is more complicated if you are serving more than one sentence, as shown below.

(c) Good-Time Credit for Concurrent Determinate Sentences

If you are serving more than one determinate sentence “concurrently” (at the same time), the maximum good-time credit you can earn is one-seventh of the determinate sentence that ends last.⁴⁴ For example, if you are serving one determinate sentence of seven years and a second determinate sentence of fourteen years, the maximum good-time credit you can earn is two years (one-seventh of the longer fourteen-year sentence). In this example, if you earn the maximum credit of two years, you are entitled to conditional release after serving twelve years of your sentence. In other words, after twelve years, your two-year credit would equal the amount of time you had left to serve.

(d) Good-Time Credit for Consecutive Determinate Sentences

If you are serving more than one determinate sentence “consecutively” (one after the other), the maximum good-time credit you can earn is one-seventh of the combined sentences.⁴⁵ For example, if you are serving a seven-year sentence and a fourteen-year sentence consecutively, the maximum good-time credit you can earn is three years (one-seventh of twenty-one years, the combined length of your two sentences). In this example, if you earn the maximum good-time credit of three years, you are entitled to conditional release after serving eighteen years of your sentence (that is, the total time of your sentences minus the maximum credit).

(e) Good-Time Credit for Concurrent Indeterminate Sentences

If you are serving more than one indeterminate sentence concurrently, the maximum good-time credit you can earn is one-third of the total term of the *latest ending* indeterminate sentence.⁴⁶ For example, if you are serving one indeterminate sentence of one to three years and a second indeterminate sentence of three to six years, the maximum good-time credit you can earn is two years (one-third of the longest maximum sentence of six years). In this example, if you earn the maximum good-time credit, you are entitled to conditional release after four years (that is, the longest maximum sentence minus the maximum credit).

(f) Good-Time Credit for Consecutive Indeterminate Sentences

If you are serving more than one indeterminate sentence consecutively, the maximum good-time credit you can earn is one-third of the combined maximum terms.⁴⁷ For example, if you are serving two consecutive indeterminate sentences, one sentence for one to three years and another for three to six years, the maximum good-time credit you can earn is three years (one-third of the total maximum

41. N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2014).

42. N.Y. CORRECT. LAW § 803(1)(c) (McKinney 2014).

43. N.Y. CORRECT. LAW § 803(1)(b) (McKinney 2014).

44. N.Y. CORRECT. LAW § 803(2)(c) (McKinney 2014).

45. N.Y. CORRECT. LAW § 803(2)(d) (McKinney 2014).

46. N.Y. CORRECT. LAW § 803(2)(a) (McKinney 2014).

47. N.Y. CORRECT. LAW § 803(2)(b) (McKinney 2014).

sentence of nine years). In this example, if you earn the maximum credit you are entitled to release after six years (that is, the total of the maximum sentences minus the maximum credit).

(g) Good-Time Credit for Combined Concurrent Determinate and Indeterminate Sentences

If you are serving one or more determinate and one or more indeterminate sentences concurrently, the maximum good-time credit you can earn is *either* (1) one-seventh of the latest ending determinate sentence, *or* (2) one-third of the maximum term of the latest ending indeterminate sentence—whichever allowance is larger.⁴⁸ For example, suppose you are serving a determinate sentence of fourteen years at the same time as an indeterminate sentence of six to nine years. You could earn either one-seventh of the determinate sentence (one-seventh of fourteen years, which is two years) or one-third of the indeterminate sentence (one-third of nine years, which is three years). Since the allowance for the indeterminate sentence (three years) is larger than the allowance for the determinate sentence (two years), the maximum good-time credit you can earn is three years. If you earn the maximum credit, you are entitled to conditional release after eleven years (that is, the determinate sentence of fourteen years minus the maximum credit of three years).

(h) Good-Time Credit for Combined Consecutive Determinate and Indeterminate Sentences

If you are serving one or more determinate sentences and one or more indeterminate sentences consecutively, the maximum good-time credit you can earn is one-third of the maximum terms of the indeterminate sentences added together, plus one-seventh of the terms of the determinate sentences added together.⁴⁹ For example, suppose you are serving a determinate sentence of fourteen years consecutively with an indeterminate sentence of six to nine years. You can earn up to two years of good-time credit from the determinate sentence (one-seventh of fourteen years) *and* up to three years of good-time credit for the indeterminate sentence (one-third of nine years). If you receive the maximum credit of five years, you are entitled to conditional release after eighteen years (that is, the total of your maximum sentences—twenty-three years—minus the total of your good-time credit—five years).

(i) Potential Changes in Law and How They Affect your Sentence

Suppose your state government passes a new law to reduce the good-time credit that you could have received under an older law. If your offense occurred before the enactment of the new law, then the new law cannot apply to you because it would violate “*ex post facto*” principles. “*Ex post facto*” principles state that you can only be punished under a law that was in effect at the time when you committed the offense, and your punishment cannot be increased if stricter laws are passed after you committed the offense.⁵⁰ If you received a harsher punishment based on a law that was passed after the commission of your offense, you may have a valid constitutional claim.⁵¹

3. Loss of Good-Time Credit

You can lose good-time credit in two ways. First, your prison’s TAC may decide not to grant you the maximum good-time credit. The TAC is not required to recommend that you receive the maximum

48. N.Y. CORRECT. LAW § 803(2)(e) (McKinney 2014).

49. N.Y. CORRECT. LAW § 803(2)(f) (McKinney 2014).

50. *See Weaver v. Graham*, 450 U.S. 24, 30–33, 101 S. Ct. 960, 964–966, 67 L. Ed. 2d 17, 22–24 (1981) (holding that applying new requirements for good-time credit to an incarcerated person whose crime occurred before the new requirements were established is a violation of the *ex post facto* clause). *But see In re Ramirez*, 39 Cal. 3d 931, 936, 705 P.2d 897, 901, 218 Cal. Rptr. 324, 328 (Cal. 1985) (finding that a law is not a violation of the *ex post facto* principle when applied to prison misconduct that occurred after the new law’s enactment, even if the original crime occurred before the enactment of the law).

51. For more information, see *JLM*, Chapter 9, “Appealing Your Conviction or Sentence,” and *JLM*, Chapter 20, “Using Article 440 of the NY Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence.”

credit allowed by the law.⁵² Second, officials may penalize you with a loss of good-time credits after a disciplinary hearing.⁵³ Please see *JLM*, Chapter 18, “Your Rights at Prison Disciplinary Hearings,” to learn more about some of your rights in these proceedings. These proceedings are usually only held when an incarcerated person is charged with serious misconduct.

Even if you lose good-time credit in a disciplinary hearing, you may regain it later. The loss is not permanent until it affects your consideration for parole, conditional release, or other release.⁵⁴ When your prison’s TAC reviews your file for the last time before your earliest possible parole or conditional release date, it may decide that you should get back the good-time credit you previously lost. A record of good behavior since the time you lost your good-time credit increases the chance of regaining it.⁵⁵

Note: if you are released early on conditional release or parole, and you later violate the terms of your release or parole and return to prison, you cannot use the good-time credit you earned before release. If you are sent back to prison for a violation, you must start earning good-time credit all over again.⁵⁶

4. Challenging the Loss of Good-Time Credit

The Supreme Court has ruled that because good-time credit leads to a shorter time in prison, procedures that take away good-time credit must meet the requirements of the U.S. Constitution’s Due Process Clause.⁵⁷ This means that if prison officials have not followed the appropriate procedures, then you have the right to challenge their decision under Article 78, state habeas proceedings, or federal habeas proceedings. To learn how to do this, see *JLM*, Chapter 22, “How to Challenge Administrative Proceedings Using Article 78 of the New York Civil Practice Law and Rules,” *JLM*, Chapter 21, “State Habeas Corpus,” and *JLM*, Chapter 13, “Federal Habeas Corpus.” *JLM*, Chapter 18, “Your Rights at Prison Disciplinary Hearings,” also explains your right to good-time credit.

As noted above, if you decide to file a lawsuit in federal court, you *must* first read *JLM*, Chapter 14, which discusses the Prison Litigation Reform Act (“PLRA”). If you do not follow the requirements in the PLRA, you may lose your good-time credit, you may become unable to receive presumptive release (see Part H of this Chapter), or you may lose your right to bring future claims in federal court without paying the full filing fee at the time you file your claim.

E. Merit-Time Credit

In addition to good-time credit, incarcerated people may also earn merit-time credit. Merit-time credit can shorten certain indeterminate and determinate sentences.⁵⁸

If you are serving an indeterminate sentence, merit-time credit can shorten it by reducing the *minimum* length of the indeterminate sentence (unlike good-time credit, which reduces the *maximum* length of an indeterminate sentence).⁵⁹ Merit-time credit can only be applied to your indeterminate sentence if you were in the custody of the Department of Corrections and serving an indeterminate

52. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(c) (2020).

53. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(ii) (2020).

54. N.Y. COMP. CODES R. & REGS. tit. 7, § 260.4(b) (2020).

55. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(b) (2020).

56. N.Y. CORRECT. LAW § 803(5) (McKinney 2014).

57. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974); *see also* *Sandin v. Conner*, 515 U.S. 472, 477–478, 115 S. Ct. 2293, 2297, 132 L. Ed. 2d 418, 425–426 (1995) (holding that neither the Due Process Clause nor the Hawaii regulations created a liberty interest in avoiding disciplinary confinement for 30 days; restating the holding in *Wolff v. McDonnell* that good-time credits could not be revoked without adequate procedures because the statute had created a “liberty interest”).

58. N.Y. State Dept. of Corrections and Community Supervision Programs, *Guidance and Counseling*, available at <http://www.doccs.ny.gov/ProgramServices/guidance.html#earn> (last visited Feb. 23, 2020).

59. N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014). Information about merit-time credits is available online. *See* New York State Department of Corrections and Community Supervision Programs, *available at* <http://www.doccs.ny.gov/ProgramServices/guidance.html#earn> (last visited Feb. 23, 2020).

sentence between December 14, 2005 and September 1, 2011.⁶⁰ If you were serving an indeterminate sentence for a non-violent crime during this time period,⁶¹ you may receive merit-time allowances of up to one-sixth of the minimum period of your sentence.⁶² For example, if you are serving a sentence of twelve to sixteen years, you may receive a merit-time allowance of up to two years, which is one-sixth of your twelve-year minimum sentence. If you receive this credit, you are first eligible for release (conditional or presumptive) after serving five-sixths of the minimum period of your sentence. In this example, you would be eligible for release after ten years.

Merit-time credit may also shorten determinate sentences for certain felony drug crimes by one seventh.⁶³ This is in addition to good time credit.⁶⁴ Merit-time credit is only available to incarcerated people who were sentenced to a qualifying determinate sentence before September 1, 2011.⁶⁵ If you are serving a determinate sentence that qualifies for merit-time, you may receive merit-time allowances of up to one-seventh of your sentence.⁶⁶ For example, if you are serving a sentence of seven years, you may receive a merit-time credit of up to one year, which is one-seventh of your seven-year sentence. If you receive this credit, you are first eligible for release (conditional or presumptive) after serving six years (six-sevenths of your seven-year sentence).

To obtain merit-time credit you must also complete other requirements. First, you must successfully complete a work and treatment program.⁶⁷ Second, you must obtain at least one of the following:

- A general equivalency diploma (GED),
- An alcohol and substance abuse treatment certificate,
- A vocational trade certificate after completing six months of vocational programming, or
- 400 hours of service on a community work crew.

Like good-time credit, you do not have a right to merit-time credit. This means that prison officials are not required to give you merit-time credit. If you receive a serious disciplinary infraction or file a frivolous lawsuit against a prison official, you may not receive merit-time credit.⁶⁸ Frivolous means the lawsuit was filed or continued in bad faith, to harass someone, or the suit has no reasonable basis and is not supported by the law.⁶⁹ Please note that merit-time credit may be used to gain presumptive release. To learn more about the Presumptive Release Program, your eligibility

60. N.Y. CORRECT. LAW § 803(1)(d)(v) (McKinney 2014).

61. Under New York state law, an incarcerated person is not eligible for merit-time if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I felony, (2) a violent felony offense under Section 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law (“relating to sex offenses”), (7) incest, (8) an offense defined in Article 263 of the New York Penal Law (“relating to the use of a child in a sexual performance”), or (9) aggravated harassment of an employee by an inmate. N.Y. CORRECT. LAW § 803(1)(d)(ii) (McKinney 2014).

62. N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014).

63. If you are serving time for committing a drug-related crime and were sentenced to a determinate sentence, you may be eligible for merit-time credits if the crime you were convicted of was a felony offense under Sections 70.70 or 70.71 of the New York Penal Law. *See* N.Y. CORRECT. LAW § 803(1)(d)(i) (McKinney 2014).

64. N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014).

65. N.Y. CORRECT. LAW § 803(1)(d)(v) (McKinney 2014).

66. N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014).

67. N.Y. CORRECT. LAW § 803(1)(d)(iv) (McKinney 2014).

68. N.Y. CORRECT. LAW § 803(1)(d)(iv) (McKinney 2014).

69. N.Y. C.P.L.R. 8303-a(c) (McKinney 1997).

for it, and how your merit-time credit can be used in the program, read Part H, “Presumptive Release.”

F. Conditional Release

1. Conditional Release from a Definite Sentence

If you are serving a definite sentence with a term of more than ninety days, you are eligible for conditional release after you have served sixty days of your sentence.⁷⁰ Conditional release is at the discretion of the Board of Parole. The Board of Parole can also impose certain conditions for your release.⁷¹

Conditional release from a definite sentence lasts for one year no matter how much time you have remaining in your sentence when you are released. Also, if you violate the terms of your conditional release at any time during that year, you may be returned to prison where you would have to finish out your full sentence as if you had never been released.⁷²

2. Conditional Release from a Determinate or Indeterminate Sentence

Based on the type of determinate or indeterminate sentence or sentences you are serving, you may be eligible for conditional release from prison as soon as the good-time credit you have earned in prison is equal to the amount of time that you have left to serve on your maximum sentence or sentences.⁷³ For example, if you are serving an indeterminate sentence of three to six years and you have earned two years of good-time credit, you are eligible for release when you have served four years of your sentence (the maximum sentence of six years minus the two years of good-time credit earned).

Note that if you are serving one or more determinate and one or more indeterminate sentences concurrently (that is, at the same time), you cannot be granted conditional release until you have served six-sevenths of the determinate sentence with the longest time to run.⁷⁴ For example, if you are serving a determinate sentence of twenty-one years at the same time as an indeterminate sentence of ten to twenty-one years, you cannot be released until you have served eighteen years (six-sevenths of your determinate sentence), even if you have earned more than three years of good-time credit against your indeterminate sentence.

3. The Release Agreement

Before you can leave prison on conditional release, you must sign a release agreement. This agreement explains the conditions of your release. By signing the agreement, you promise to obey all of the listed rules. The rules of your conditional release may change at any time before your sentence is over. A parole officer may also add special conditions. For example, the parole officer may impose a curfew, require that you attend an alcohol treatment program, or require you to find housing.⁷⁵ See *JLM*, Chapter 32, “Parole,” for an explanation of parole in New York.

If you are conditionally released from a determinate sentence as a violent felony offender or a drug offender serving a sentence other than life in prison, you will be required to sign a post-release supervision agreement that will extend your supervision for three to five years.

70. N.Y. PENAL LAW § 70.40(2) (McKinney 2009).

71. N.Y. PENAL LAW § 70.40(2) (McKinney 2009).

72. N.Y. PENAL LAW § 70.40(3)(b) (McKinney 2009).

73. N.Y. PENAL LAW § 70.40(1)(b) (McKinney 2009).

74. N.Y. PENAL LAW § 70.40(1)(b) (McKinney 2009).

75. See, e.g., *People ex rel. Travis v. Coombe*, 219 A.D.2d 881, 881–882, 632 N.Y.S.2d 340, 340 (4th Dept. 1995) (conditions of release included requirement that parolee find housing, and when potential parolee failed to do so, he was not released); *People ex rel. DeFlumer v. Strack*, 212 A.D.2d 555, 555, 623 N.Y.S.2d 1, 1 (2d Dept. 1995) (conditions of release included that parolee must live in approved housing, which in this case was the home of parolee’s sister).

4. Jenna's Law and Post-Release Supervision for All Determinate Sentences and Drug Offenses

In 1998, the New York state legislature passed Jenna's Law.⁷⁶ This law imposes a period of mandatory post-release supervision for all incarcerated people serving determinate sentences. The Drug Law Reform Act of 2004 requires that all sentencing for felony drug offenses include, as a part of the sentence, a period of post-release supervision.⁷⁷ Unlike incarcerated people serving definite sentences, who are conditionally released with one year of supervision, and unlike incarcerated people serving indeterminate sentences, who are conditionally released on terms very similar to parole, those serving determinate sentences are subject to mandatory post-release supervision.⁷⁸

If you received a determinate sentence for a crime committed on or after September 1, 1998, you will be subject to post-release supervision. Generally, for felony offenses that are not sex offenses, the period of post-release supervision for determinate sentences is five years. However, drug offenses and first-time violent felony offenses listed in section (a) (see below) may have shorter periods of supervision.⁷⁹ The court has the power to set your post-release supervision period anywhere between the minimum and the maximum possible periods under the law.⁸⁰ If the court does not specify a time, however, you will most likely be subject to the maximum possible post-release supervision time available for the particular crime for which you were convicted.

(a) Length of Post-Release Supervision

Three groups of offenses lead to different lengths of post-release supervision: felony drug offenses, first-time violent felony offenses, and felony sex offenses committed after April 13, 2007. For more information on felony sex offenses see *JLM*, Chapter 36, "Special Considerations for Sex Offenders." The tables below show possible post-release supervision time, depending on your sentence's type and class.

Drug Offenses

	First Time	Non-first Time
Class D or E	1 year	1–2 years
Class B or C	1–2 years	1 ½–3 years

Violent Felony Offenses

	First Time / Non-first time
Class D or E	1 ½–3 years
Class B or C	2 ½–5 years

76. Jenna's Law is named after Jenna Griebshaber, who was murdered by an individual who had been convicted of a violent felony and had been released early from prison after serving two-thirds of his indeterminate sentence. The purpose of Jenna's Law was to ensure that violent offenders are appropriately monitored upon their reintroduction into society. See Barry Kamins, *New Criminal Law and Procedure Legislation*, 81-FEB N.Y. St. B.J. 28, 28 (2009).

77. See, e.g., N.Y. PENAL LAW § 70.70(2)(a), (3)(b), (4)(b) (McKinney 2009); N.Y. PENAL LAW § 70.71(2)(b), (3)(b), (4)(b) (McKinney 2009).

78. N.Y. PENAL LAW § 70.45(1) (McKinney 2009).

79. N.Y. PENAL LAW § 70.45(2) (McKinney 2009).

80. See e.g., N.Y. PENAL LAW § 70.45(2)(b) (McKinney 2009) ("[S]uch period shall be not less than one year nor more than two years whenever a determinate sentence of imprisonment is imposed ... upon a conviction of a class B or class C felony offense[.]").

Felony Sex Offenses

	First Time	Non-first Time
Class D or E	3–10 years ⁸¹	5–15 years ⁸²
Class C	5–15 years ⁸³	7–20 years ⁸⁴
Class B	5–20 years ⁸⁵	10–25 years ⁸⁶
Child Sexual Assault		10–20 years ⁸⁷

(b) Results of Violating a Condition of Post-Release Supervision

If you violate any of the terms of your post-release supervision, you will receive a revocation hearing. The rules for revocation hearings for post-release supervision are the same as the rules for parole revocation.⁸⁸ See *JLM*, Chapter 32, “Parole,” for an explanation of parole revocation hearings in New York. If your post-release supervision is revoked at the hearing, and you are not a felony sex-offender, then you may be sent back to prison. You cannot be sent back to prison for more time than you have remaining in your post-release supervision period and you can never be sent back for more than five years.⁸⁹

For example, if you are a first time Class D drug offender, you will undergo 1 year of post-release supervision; that is 12 months of supervision. If 6 months into your post-release supervision, you were to violate one of the terms in your post-release supervision agreement, you could be sent back to jail for 6 months, to serve out the remaining 6 months of post-release supervision remaining on your scale. If instead you had 10 years of post-release supervision, and you violated a term of your agreement 2 years into your post-release supervision, you could be sent back to jail for at most five years, even though you have 8 years remaining on your post-release supervision.

If you were convicted of a felony sex offense, the maximum amount of time that you can be sent back to prison is the amount of time remaining in your post-release supervision period, even if it is longer than five years.⁹⁰ If you have fewer than three years remaining of post-release supervision, you will be released after you serve three years. If you have three or more years of supervised release left when you are given an additional term of imprisonment for violating the terms of your supervised release, you will not be automatically released after serving three years. Instead, after serving three years, your case will be reviewed by the Board of Parole. The Board will determine whether you can be released to post-release supervision or whether you should stay in prison and have your case reviewed a second time at a date not more than twenty-four months after the Board's determination on whether to release you.⁹¹

If your post-release supervision is revoked, you may be sentenced for a period longer than the maximum time periods listed above if you were given both determinate *and* indeterminate sentences.⁹² If you had more time left on the combined amount of your indeterminate and determinate sentences

81. N.Y. PENAL LAW § 70.45(2-a)(a), (d) (McKinney 2009).

82. N.Y. PENAL LAW § 70.45(2-a)(g) (McKinney 2009).

83. N.Y. PENAL LAW § 70.45(2-a)(b), (e) (McKinney 2009).

84. N.Y. PENAL LAW § 70.45(2-a)(h) (McKinney 2009).

85. N.Y. PENAL LAW § 70.45(2-a)(c), (f) (McKinney 2009).

86. N.Y. PENAL LAW § 70.45(2-a)(i) (McKinney 2009).

87. N.Y. PENAL LAW § 70.45(2-a)(j) (McKinney 2009).

88. N.Y. EXEC. LAW § 259-i(3) (McKinney 2018).

89. N.Y. PENAL LAW § 70.45(1) (McKinney 2009).

90. N.Y. PENAL LAW § 70.45(1) (McKinney 2009).

91. N.Y. PENAL LAW § 70.45(1-a) (McKinney 2009).

92. N.Y. PENAL LAW § 70.45(1) (McKinney 2009).

when you left prison on supervised release, you may be sentenced to serve that remaining amount of time instead of the shorter period of supervised release.

The amount of time you served under post-release supervision will not count if the Board of Parole declares you “delinquent.” The Board will declare you “delinquent” if you violate a condition of your release.⁹³ Violating a condition of your release will result in your incarceration and essentially stops the clock counting the time you have spent in post-release supervision. The clock will remain stopped until you are released from prison back to supervision. The time you spend in custody while awaiting the decision of whether or not your post-release supervision is revoked will be credited towards your maximum sentence, or aggregate maximum sentences (if you have multiple sentences) for which you were released. If you are sentenced to a new determinate or indeterminate sentence, your remaining period of post-release supervision will be on hold until you are re-released from prison, at which time you will begin serving that period of post-release supervision again.⁹⁴ Any amount of time you spent in custody due to a delinquency declaration exceeding your maximum sentence will be credited against your remaining period of post-release supervision.⁹⁵

(c) Challenging Post-Release Supervision

If you have received a term of post-release supervision, you should read this section carefully to ensure that your sentence is lawful, as there have been a number of important changes in New York law that will affect many incarcerated people.

You may challenge your term of post-release supervision if you are serving a determinate sentence, and your sentencing judge failed to impose a term of post-release supervision at your sentencing. Prior to 2008, the New York Department of Corrections (DOCS) (not the sentencing judge) occasionally imposed a mandatory period of post-release supervision for incarcerated people at the time of release. In 2008, however, the New York Court of Appeals held that DOCS may not do this—only a *judge* can impose post-release supervision.⁹⁶ In addition, the judge must have imposed or stated the term of post-release supervision *at sentencing*.⁹⁷ Because the law has changed, if you were given post-release supervision, you should confirm that this was given to you by your sentencing judge and *not* by DOCS. If your post-release supervision was imposed by DOCS at the time of release and not by your sentencing judge at the time of your sentencing, you may be able to challenge the post-release supervision.

This change in the law affects thousands of incarcerated people in New York State. In order to help deal with these cases in which judges failed to impose or state post-release supervision at sentencing, the New York legislature passed N.Y. Penal Law § 70.85, effective as of June 30, 2008.⁹⁸ This statute applies to cases in which a determinate sentence requiring post-release supervision was imposed between September 1, 1998 and June 30, 2008, and the court failed to impose or state the term of post-release supervision at sentencing. If your case fits within this category, the court may (with the approval of the district attorney) resentence you and re-impose your original determinate sentence without requiring the term of post-release supervision.⁹⁹ In addition, the judge must have imposed or stated the term of post-release supervision *at sentencing*.¹⁰⁰ Because the law has changed, if you were given post-release supervision, you should confirm that this was given to you by your

93. N.Y. PENAL LAW § 70.45(5)(d) (McKinney 2009).

94. N.Y. PENAL LAW § 70.45(5)(e), (f) (McKinney 2009).

95. N.Y. PENAL LAW § 70.45(5)(d) (McKinney 2009).

96. *People v. Sparber*, 10 N.Y.3d 457, 468–470, 889 N.E.2d 459, 463, 859 N.Y.S.2d 582, No. 53, slip op. at 7 (2008) (finding that sentencing is a “uniquely judicial responsibility” that can only be imposed by the courts).

97. *People v. Sparber*, 10 N.Y.3d 457, 468–469, 889 N.E.2d 459, 463, 859 N.Y.S.2d 582, No. 53, slip op. at 7 (2008).

98. N.Y. PENAL LAW § 70.85 (McKinney 2009).

99. N.Y. PENAL LAW § 70.85 (McKinney 2009).

100. *People v. Sparber*, 10 N.Y.3d 457, 468–469, 889 N.E.2d 459, 463, 859 N.Y.S.2d 582, No. 53, slip op. at 7 (2008).

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This change in the law affects thousands of incarcerated people in New York State. In order to help deal with these cases in which judges failed to impose or state post-release supervision at sentencing, the New York legislature passed N.Y. Penal Law § 70.85, effective as of June 30, 2008.¹⁰¹ This statute applies to cases in which a determinate sentence requiring post-release supervision was imposed between September 1, 1998 and June 30, 2008, and the court failed to impose or state the term of post-release supervision at sentencing. If your case fits within this category, the court may (with the approval of the district attorney) resentence you and re-impose your original determinate sentence without requiring the term of post-release supervision.¹⁰² In the resentencing process, you have certain rights. DOCS or the Division of Parole must notify you, as well as the sentencing judge, that resentencing must take place.¹⁰³ Within ten days of receiving the notice, the sentencing judge must appoint counsel for you.¹⁰⁴ Within forty days after the notice, the judge must make a decision and resentence you.¹⁰⁵ Note that you may waive these deadlines.¹⁰⁶

Even if DOCS imposed post-release supervision on you, a judge may re-sentence you and still impose a term of post-release supervision.¹⁰⁷ Additionally, if you were placed on post-release supervision, and the terms of that post-release supervision were imposed by DOCS (not the sentencing judge), *and* you are then charged with violating the terms of your post-release supervision, you *cannot* be re-incarcerated for violating those terms.¹⁰⁸ If you are incarcerated for these reasons, you are entitled to immediate release.

There is also another way that you can challenge your term of post-release supervision. If you pleaded guilty and received a sentence that included a mandatory term of post-release supervision, you may be able to vacate (take back) your guilty plea if you were not informed that your sentence would include post-release supervision during the plea colloquy (the exchange of questions and answers between a judge and defendant who is pleading guilty). The New York State Court of Appeals (the highest court in New York) held that if you pleaded guilty without being informed that you would be subject to post-release supervision, you could vacate your guilty plea, because the plea was not a “voluntary and intelligent choice.”¹⁰⁹ The New York Appellate Division also held that if you pleaded guilty, and the sentencing judge did not advise you of the post-release supervision during the plea colloquy, but did impose post-release supervision at sentencing, N.Y. Penal Law § 70.85 does not apply, and the plea has to be vacated.¹¹⁰

Note that if you were not informed of the post-release supervision during your plea colloquy, although you can take back your plea, you will not be able to take back the guilty judgment against you.¹¹¹ This means that you will either be given a new trial or re-sentencing. If you are re-sentenced, however, you will likely get the same sentence, so only take back your plea if you want to go to trial

101. N.Y. PENAL LAW § 70.85 (McKinney 2009).

102. N.Y. PENAL LAW § 70.85 (McKinney 2009).

103. N.Y. CORRECT. LAW § 601-d(2) (McKinney 2014).

104. N.Y. CORRECT. LAW § 601-d(4)(a) (McKinney 2014).

105. N.Y. CORRECT. LAW § 601-d(4)(d) (McKinney 2014).

106. N.Y. CORRECT. LAW § 601-d(4)(e) (McKinney 2014).

107. *People v. Sparber*, 10 N.Y.3d 457, 471, 889 N.E.2d 459, 464, 859 N.Y.S.2d 590 (2008) (finding the procedure through which post-release supervision was imposed did not comply with the statutory mandate, but still remanding to trial court for re-sentencing).

108. *People ex rel. Lucas Foote v. Piscotti*, 51 A.D.3d 1407, 1408, 857 N.Y.S.2d 515, 515 (4th Dept. 2008); *People ex rel. Gerard v. Kralik*, 51 A.D.3d 1045, 1046, 858 N.Y.S.2d 771, 772 (2d Dept. 2008); *see also* *Prendergast v. N.Y. State Dept. of Corr.*, 51 A.D.3d 1133, 1133–1134, 856 N.Y.S.2d 725, 726 (3d Dept. 2008) (holding that only a court may impose post-release supervision).

109. *People v. Catu*, 4 N.Y.3d 242, 245, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005).

110. *People v. Rucker*, 67 A.D.3d 1126, 1128, 888 N.Y.S.2d 313, 316 (3d Dept. 2009).

111. *People v. Louree*, 8 N.Y.3d 541, 546, 869 N.E.2d 18, 21–22, 838 N.Y.S.2d 18 (2007).

instead of keeping your plea. Even if you do not wish to vacate your plea or if you have already served your sentence, you may be able to challenge your post-release supervision without setting aside your sentence.

5. Length of Your Conditional Release

If you are conditionally released from a definite sentence, you will be on conditional release for one year—no matter how little time you have remaining on your sentence.¹¹² During this year, the Board of Parole will supervise you, and you must continue to follow the terms of your conditional release agreement.¹¹³

If you are conditionally released from an indeterminate sentence, your conditional release will last for the maximum amount of time remaining on your sentence.¹¹⁴ For example, if you get out on conditional release after twenty years of an indeterminate sentence of fifteen to thirty years, you will be on conditional release for ten years. For those ten years, you will be in the legal custody of the Board of Parole. You will have to obey the conditions of your release, and you will have to report regularly to a parole officer, just like a person on parole.¹¹⁵ For more information about parole, see Chapter 32, “Parole,” of the *JLM*.

If you are granted conditional release from a determinate sentence, you will be under supervision for six months to five years. For more information about conditional release after a determinate sentence, see Part E(4) above.

If you are granted conditional release from a determinate or indeterminate sentence, you may be able to end your conditional release supervision early (which is also called a “merit termination”). The Board of Parole has the power to grant an absolute discharge to individuals on conditional release, unless you received a determinate sentence after being convicted of a felony other than one under N.Y. Penal Law Section 220 or 221 (the sections on marijuana or other controlled substance offenses).¹¹⁶ This kind of merit termination satisfies all the remaining time on your sentence, as if you had served it all in prison.

The Board of Parole has the discretion to grant or withhold early discharges from conditional release. Ask your parole officer about early discharge to find out whether and when it may be a possibility for you.

6. Revocation of Conditional Release

Conditional release can be revoked in the same way that parole can be revoked. Both the Conditional Release Commission and the Board of Parole have broad discretion to revoke conditional release.¹¹⁷ If an officer of the Conditional Release Commission (applicable if your conditional release is from a definite sentence) or a parole officer (applicable if your conditional release is from a determinate or indeterminate sentence) has reasonable cause to believe that you violated the terms of your conditional release, your conditional release may be revoked.¹¹⁸ Examples of such violations include failure to appear for a scheduled meeting with your parole officer or participation in criminal

112. N.Y. PENAL LAW § 70.40(2) (McKinney 2009).

113. N.Y. PENAL LAW § 70.40(2) (McKinney 2009).

114. N.Y. PENAL LAW § 70.40(1)(b) (McKinney 2009).

115. See N.Y. PENAL LAW § 70.40(1) (McKinney 2009).

116. But see N.Y. EXEC. LAW § 259-j(1) (McKinney 2018) (allowing for a discharge of post-release supervision after three consecutive years if certain conditions are met). Please note that if you were convicted of a felony sex offense, discharge of post-release supervision is available only after five years if certain conditions are met.

117. See *Hyser v. Reed*, 318 F.2d 225, 234 (D.C. Cir. 1963) (*en banc*) (finding statute gives Board of Parole broad discretion to both grant and revoke parole, without requiring adversarial hearings). See also N.Y. PENAL LAW § 70.40(3)(b) (McKinney 2009) (stating that the local Conditional Release Commission or Board of Parole that supervises a person on conditional release has discretion to revoke their conditional release).

118. N.Y. CORRECT. LAW § 274(1) (McKinney 2014); N.Y. EXEC. LAW § 259-i(3)(a)(i) (McKinney 2018).

activities. Before your conditional release can be revoked, however, your parole officer must report your actions to a member of the Board, who may then issue a warrant for temporary detention.¹¹⁹

Before revoking your conditional release, the government must schedule a hearing and notify you about it. The written notice must state the date, place, and purpose of the hearing.¹²⁰ The notice must also inform you of which conditions you are alleged to have violated, your right to appear and speak on your own behalf, your right to present evidence, and your right to confront the witnesses who testify against you.¹²¹ The government will hold a preliminary revocation hearing, which you are required to attend, within fifteen days of the execution of the warrant for temporary detention.¹²² At this hearing, the government will determine whether there is probable cause (that is, a legally sufficient reason) to believe that you violated the conditions of your release.¹²³ If probable cause is not found, the case will be dismissed, and you will be released again.¹²⁴ If probable cause is found, however, the government must hold a revocation hearing within ninety days.¹²⁵ The government must notify you in writing at least fourteen days before the revocation hearing. The notice must include the date, place, and time of the hearing.¹²⁶

The Conditional Release Commission or the Board of Parole must provide you with due process before permanently revoking your conditional release.¹²⁷ In order to satisfy the requirements of the Constitution's due process clause, there must be a finding by a "preponderance of the evidence" (meaning that it must be "more likely than not") that you violated a term of your conditional release, and you must be given an opportunity to be heard.¹²⁸ You are also entitled to a lawyer at the revocation hearing.¹²⁹ If you are unable to afford a lawyer, the local county court must provide you with a lawyer for the hearing.¹³⁰ At the hearing, you will be given the opportunity to make a statement.¹³¹ You also have the right to present evidence and to confront and cross-examine witnesses testifying against you.¹³² If it cannot be determined by a preponderance of the evidence that you violated a condition of your release, the case will be dismissed and you will again be released.¹³³ But if it is determined by a

119. N.Y. EXEC. LAW § 259-i(3)(a)(i) (McKinney 2018).

120. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018).

121. N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018).

122. N.Y. EXEC. LAW § 259-i(3)(c)(iv) (McKinney 2018).

123. N.Y. EXEC. LAW § 259-i(3)(c)(iv) (McKinney 2018).

124. N.Y. EXEC. LAW § 259-i(3)(c)(vii) (McKinney 2018).

125. N.Y. EXEC. LAW § 259-i(3)(f)(i) (McKinney 2018). Please take note that this ninety day time may be extended if you request and receive a postponement of your conditional release revocation hearing, or if you consent to the Conditional Release Commission's or Parole Board's request for a revocation hearing beyond the ninety day time limit.

126. N.Y. EXEC. LAW § 259-i(3)(f)(iii) (McKinney 2018).

127. *See Morrissey v. Brewer*, 408 U.S. 471, 482–484, 92 S. Ct. 2593, 2601–2602, 33 L. Ed. 2d 484, 495–497 (1972) (holding that because a parolee faces a severe loss of liberty if his parole is revoked, due process is required before parole can be revoked). Although this ruling dealt with parole revocation, one can argue the reasoning should apply equally to the conditional release revocation. *See Kroemer v. Joy*, 2 Misc. 3d 265, 268, 769 N.Y.S.2d 357, 360 (Sup. Ct. Yates County 2003) (finding incarcerated people in temporary release status have a due process right to a hearing before their status is revoked since it would be a loss of liberty); *Friedl v. City of New York*, 210 F.3d 79, 84 (2d Cir. 2000) (finding that an incarcerated person on work release is entitled to procedural due process before his status can be denied to prevent a deprivation of his liberty); *Anderson v. Recore*, 446 F.3d 324, 333–334 (2d Cir. 2006) (finding that incarcerated people have a protected liberty interest in continuation in a temporary release program that affords them due process rights including notice and a hearing before its revocation).

128. N.Y. CRIM. PROC. LAW § 410.70(1)(b), (3) (McKinney 2005); N.Y. EXEC. LAW § 259-i(3)(f)(v)–(vi) (entitlement to hearing), (viii)–(ix) (requiring preponderance of evidence) (McKinney 2018).

129. N.Y. CRIM. PROC. LAW § 410.70(4) (McKinney 2005); N.Y. EXEC. LAW § 259-i(3)(f)(v) (McKinney 2018).

130. N.Y. EXEC. LAW § 259-i(3)(f)(v) (McKinney 2018).

131. N.Y. CRIM. PROC. LAW § 410.70(2) (McKinney 2005).

132. N.Y. CRIM. PROC. LAW § 410.70(3) (McKinney 2005); N.Y. EXEC. LAW § 259-i(3)(f)(iv)–(vi) (McKinney 2018).

133. N.Y. CRIM. PROC. LAW § 410.70(3), (5) (McKinney 2005); N.Y. EXEC. LAW § 259-i(3)(f)(ix) (McKinney

preponderance of the evidence that you violated one or more conditions of your release in an important respect (such as failing to appear for a scheduled meeting with your parole officer), your conditional release may be revoked, and you will again be detained or your release may be modified.¹³⁴ If you are released again, the time you spent in detention will be credited against the time you must serve.¹³⁵

7. Disadvantages of Conditional Release for Incarcerated people Serving Definite Sentences

Under some circumstances, it may be preferable to stay in prison rather than take advantage of conditional release. For example, if you are a definite-sentence incarcerated person, and you are conditionally released, you must remain under the supervision of the Conditional Release Commission for a full year, no matter how little time is left on your original sentence.¹³⁶ When you are near the end of a definite sentence (which could even be shortened by good-time credit), you might have to choose between conditional release *now* (followed by a year of supervision) or another month or so in prison (followed by complete freedom from supervision). The local Conditional Release Commission may try to grant you conditional release near the end of your sentence just to keep you under supervision for a year. For example, incarcerated people often apply for conditional release as soon as they become eligible for it, but the local Conditional Release Commission often deny these requests until shortly before their sentence ends so as keep these incarcerated people under supervision for a year. If you are serving a definite sentence and the Commission agrees to grant you conditional release, be sure you know exactly how much additional time you would have to serve in prison to finish your sentence. You should think about whether you would rather serve a short additional time in prison, or spend what might be a longer time (one year) under supervision. There are different reasons to make either of these choices, so neither is the wrong decision. But it is important to be aware of your options, and to realize how much of your life you are committing to supervision (either by being incarcerated or by being under post-release supervision). You are in the best position to decide which option makes the most sense for you.

G. Early Release from a Definite Sentence

If you are serving a definite sentence but do not get out on conditional release, you can still get out before the end of your sentence if you have earned good-time credit. Remember, good-time credit is not used to determine eligibility for conditional release from a definite sentence.

If the amount of good-time credit you have earned equals the time remaining on your definite sentence, you should request to be unconditionally released. Because you cannot earn good-time credit for more than one-third of your definite sentence, you will have to serve at least two-thirds of your definite sentence before being eligible for this automatic early release.¹³⁷ For example, if you were sentenced to nine months and earned three months of good-time credit, your sentence can be reduced by three months, making it a six-month sentence.

As soon as you are eligible and request to be released, your sentence will be over—there is no post-release supervision. Accordingly, unlike incarcerated people released on parole or on conditional release, you will not need to sign a release agreement or worry about supervision or parole officers. Although both conditional and early release allow you to leave prison before serving your entire sentence, only early release also frees you from post-release supervision.

2018).

134. N.Y. CRIM. PROC. LAW § 410.70(3), (5) (McKinney 2005); N.Y. EXEC. LAW § 259-i(3)(f)(x) (McKinney 2018).

135. N.Y. EXEC. LAW § 259-i(3)(h) (McKinney 2018).

136. N.Y. PENAL LAW § 70.40(2) (McKinney 2009).

137. N.Y. CORRECT. LAW § 804(1) (McKinney 2014).

H. Presumptive Release

In 2003, the New York state legislature enacted a new kind of release program called presumptive release.¹³⁸ In some ways, presumptive release is a lot like parole. The one major difference, however, is that presumptive release is designed to encourage the early release of model, well-behaving incarcerated people serving indeterminate sentences. That is, presumptive release is intended to be readily available for incarcerated people who have followed prison rules and participated in their assigned work and treatment programs. In addition, unlike parole, you do not have to appear before the Board of Parole to be released. Please take note, however, that this release program is scheduled to end on September 1, 2021.¹³⁹

Although you do not have a right to demand presumptive release,¹⁴⁰ you may be eligible if you meet certain requirements. First, the presumptive release program is only available to incarcerated people serving one or more indeterminate sentences. Second, the presumptive release program is only available to incarcerated people serving sentences for non-violent crimes,¹⁴¹ who have not committed any serious disciplinary infractions,¹⁴² and who have not been deemed to have filed or continued frivolous (that is, not serious) legal complaints.¹⁴³

1. Earned Eligibility Program

To be eligible for presumptive release, you must first receive a “certificate of earned eligibility.”¹⁴⁴ Whether you are serving an indeterminate or a determinate sentence, you should have been assigned a work and treatment program.¹⁴⁵ Two months before your earliest possible parole date, or at some point after that, the commissioner will review your record to determine whether you have complied with this program.¹⁴⁶ If the commissioner decides you have successfully participated in your program, he may issue you a certificate of earned eligibility.¹⁴⁷ This certificate will factor into your parole hearing and also play a key role in getting presumptive release.

2. Requesting Presumptive Release

To get presumptive release, you must (1) have a certificate of earned eligibility,¹⁴⁸ (2) not have been convicted of a violent offense,¹⁴⁹ (3) not have committed any serious disciplinary violations while

138. N.Y. CORRECT. LAW § 806 (McKinney 2014). Please note that more information about the presumptive release program is available online. *See* New York State Department of Corrections and Community Supervision Programs, Directive No. 4791, Presumptive Release (2017), *available at* <http://www.doccs.ny.gov/Directives/4791.pdf>, (last visited Feb. 23, 2020).

139. This law is scheduled to expire on September 1, 2021. After this date, you should check for updates about the presumptive release program. Updates may be available online. *See* New York State Department of Corrections and Community Supervision Programs, Directive No. 4791, Presumptive Release (2017), *available at* <http://www.doccs.ny.gov/Directives/4791.pdf>, (last visited Feb. 23, 2020).

140. N.Y. CORRECT. LAW § 806(5) (McKinney 2014).

141. Under New York State law, an incarcerated person is not eligible for presumptive relief if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I felony, (2) a violent felony offense under § 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law (“relating to sex offenses”), (7) incest, or (8) an offense defined in Article 263 of the New York Penal Law (“relating to the use of a child in a sexual performance”). N.Y. CORRECT. LAW § 806(1)(i) (McKinney 2014).

142. N.Y. CORRECT. LAW § 806(1)(ii) (McKinney 2014).

143. N.Y. CORRECT. LAW § 806(1)(iii) (McKinney 2014).

144. N.Y. CORRECT. LAW § 806(1) (McKinney 2014).

145. N.Y. CORRECT. LAW § 805 (McKinney 2014).

146. N.Y. CORRECT. LAW § 805 (McKinney 2014).

147. N.Y. CORRECT. LAW § 805 (McKinney 2014).

148. N.Y. CORRECT. LAW § 805 (McKinney 2014).

149. Under New York state law, an incarcerated person is not eligible for presumptive relief if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I

in prison, and (4) not have filed any frivolous lawsuits.¹⁵⁰ In addition to these requirements, one final requirement is contingent on whether or not you have received merit-time credit. If you have received merit-time credit, you must have already served at least five-sixths of your minimum sentence (or total minimum sentences). If you have not received merit-time credit, you must have already served your entire minimum sentence (or total minimum sentences).¹⁵¹

The conditions of presumptive release are very similar to the conditions of parole or conditional release.¹⁵² You will be subject to the supervision of the Board of Parole for the remainder of your sentence.

I. Clemency and Commutation in New York

“Clemency” is a general term for the power of an executive officer (for example, the Governor of New York) to change the sentence of a criminal defendant to prevent injustice from occurring.¹⁵³

There are several different types of clemency, including amnesty, reprieve, pardon, and commutation. A pardon attempts to clear a person’s name of a crime and restore their reputation. “Amnesty” refers to an official pardon for people who have been convicted of political offenses. A reprieve postpones a scheduled execution. Finally, a commutation either fully or partially reduces the current sentence being served, either fully or partially.¹⁵⁴

All forms of clemency are generally difficult to obtain. You may have a stronger chance at clemency, however, if you are a non-violent offender or a woman who is in jail for killing an abusive partner. This Section focuses on clemency for battered women.¹⁵⁵ If you are not a battered woman and are still seeking clemency, the outlined procedures will still be helpful to you in preparing your petition. This is because the basic procedures for filing a good petition apply to all types of clemency petitions, even those that are not based on domestic abuse.

If you are currently seeking clemency for a death sentence, you may be entitled to a lawyer.¹⁵⁶ For more information on clemency in the State of New York, see “Guidelines for Review of Executive Clemency Applications,” which is on file in the law library of each correctional facility in New York.¹⁵⁷

felony, (2) a violent felony offense under § 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law (“relating to sex offenses”), (7) incest, or (8) an offense defined in Article 263 of the Penal Law (“relating to the use of a child in a sexual performance”). N.Y. CORRECT. LAW § 806(1)(i) (McKinney 2014).

150. N.Y. CORRECT. LAW § 806(1) (McKinney 2014).

151. N.Y. CORRECT. LAW § 806(1)–(2) (McKinney 2014).

152. N.Y. PENAL LAW § 70.40(1)(c) (McKinney 2009). Note that this law is scheduled to expire on September 1, 2021, and after this date, you must check for the new, updated version of this law.

153. New York State Department of Corrections and Community Supervision, Executive Clemency, *available at* <https://www.ny.gov/services/apply-clemency> (last visited Feb. 23, 2020). In thirty-five states, including New York, the governor grants clemency. In other states either the governor and an advisory board, or an advisory board alone, makes the decision. Florida Rules of Executive Clemency, ch. 4, *available at* https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (last visited Feb. 23, 2020).

154. The Mich. Women’s Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers, ch. II-A, *available at* http://umich.edu/~clemency/clemency_mnl/printable.html (last visited Feb. 23, 2020).

155. For further information on clemency for battered women nationwide, contact the National Clearinghouse for the Defense of Battered Women, 990 Spring Garden Street, Suite 703, Philadelphia, PA 19123, (215) 763-1144 or (800) 903-0111 extension 3 (toll free). The Clearinghouse accepts collect calls from incarcerated battered women.

156. Federal law authorizes the courts in some instances to appoint lawyers for prisoners in capital cases facing death sentences who cannot afford lawyers. *See* 18 U.S.C. § 3599. In *Harbison v. Bell*, the Supreme Court held that the statute gives federal courts the power to appoint counsel to prisoners serving their sentences in federal and state prisons who cannot afford lawyers and who seek counsel in federal or state clemency proceedings. *Harbison v. Bell*, 556 U.S. 180, 185–186, 129 S. Ct. 1481, 173 L.Ed.2d 347 (2009).

157. N.Y. State Dept. of Corrections and Community Supervision, New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision, Section 8 (2017), *available at*

1. Pardons

Pardons are different from commutations. A pardon is most commonly available if there is (1) overwhelming and convincing proof of your innocence that was not available at the time of your conviction, (2) a problem with the judgment of conviction in your case, or (3) a chance that you will be deported from the United States.¹⁵⁸ Usually a pardon is not available if you have any other administrative or legal remedy available to you.

2. Commutations

If you are granted a commutation, you can appear before the Board of Parole to be considered for a release on parole earlier than what your initial sentence would allow. When exceptional and compelling circumstances are not present, a commutation of sentence requires all of the following:

- (1) your minimum sentence is more than one year,
- (2) you have already served at least half of your minimum sentence,
- (3) you are ineligible for release on parole within one year of the date you apply for clemency, and
- (4) you are ineligible for release on parole at the discretion of the Board of Parole.¹⁵⁹

In addition, you must be able to prove by clear and convincing evidence that one of the following three circumstances applies:

- (1) You have made “exceptional strides in self-development and improvement;” you have “made responsible use of available rehabilitative programs and [have] addressed identified treatment needs” (for example, by completing a drug program), and commutation of your sentence is “in the interest of justice, consistent with public safety and [with your] rehabilitation;”
- (2) You have a terminal illness or a “severe and chronic disability which would be substantially mitigated by release from prison and such release is in the interest of justice and consistent with public safety” (illnesses such as cancer and multiple sclerosis may qualify); or
- (3) “[F]urther incarceration would constitute gross unfairness because of the basic inequities involved.”¹⁶⁰

3. How to Request a Pardon or Commutation

To be considered for clemency in New York, send a written petition requesting clemency to either of the following addresses:

The Governor of the State of New York
Executive Chamber
State Capitol
Albany, NY 12224

Director, Executive Clemency Bureau
N.Y. State Division of Parole
97 Central Avenue
Albany, NY 12206

https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 23, 2020).

158. N.Y. State Dept. of Corrections and Community Supervision, Executive Clemency, *available at* <https://www.ny.gov/services/apply-clemency> (last visited Feb. 23, 2020).

159. N.Y. State Dept. of Corrections and Community Supervision, Executive Clemency, *available at* <https://www.ny.gov/services/apply-clemency> (last visited Feb. 23, 2020).

160. Criminal Justice Policy Foundation, New York Executive Clemency Fact Page, *available at* <http://www.cjpf.org/clemency-ny> (last visited Feb. 23, 2020).

After the Governor receives a petition requesting clemency, he then gathers the necessary information. The Governor generally grants a formal hearing to those seeking commutation of a death sentence. The Governor will review the information and make a decision. You should send all supporting application materials within thirty days of sending the petition. Petitions are typically considered in the order in which they are received.¹⁶¹

(a) Organization of Your Petition

To organize your petition, you should write an introductory paragraph that explains the strongest reason why you deserve a pardon or commutation. For example, you could include special circumstances about your case or discuss significant things you have accomplished in prison. Make the petition as brief as possible, but make sure not to leave out any important information. Use headings to separate your points. Emphasize how you have spent your time in prison in order to show self-development and character improvement. Write out in detail what you plan to do after you have been released. Be sure to include how you will be moving into a stable environment, how you will support yourself, and who is included in your support network.

If you were the victim of domestic violence and the domestic violence is related to your conviction, consider making a table or list that includes the date of each incident of abuse, the nature of the abuse, and a description of any existing evidence that may help prove the incident(s).¹⁶²

(b) Exhibits

In order to show strong character and good behavior, you should include evidence, such as letters of support from prison administrators, work supervisors, religious leaders, educators, and social workers. You should include this evidence as exhibits to your petition. If you were a victim of abuse, you should also include police and hospital records documenting the abuse.

To obtain police records, you should call or write to the records office in the county where the event happened. Different police departments have different policies, and you may have to fill out a Freedom of Information Act (FOIA) request to get the records.¹⁶³ To obtain hospital records, call or write to the patient records office at the hospital where you went for treatment. A written request should include your name, date of birth, Social Security Number, the specific date or general time range of your hospitalization, and the specific information you are requesting.

If you were a victim of domestic violence abuse, and you were evaluated by an expert regarding battered women's syndrome, you should include that evaluation or testimony, as well as evidence of any violent criminal history of your abuser. Include any orders of protection and photographs showing physical injury from the abuse. You also want to attach affidavits or letters from friends, family members, and domestic violence workers who had first-hand knowledge of the abuse. An affidavit is a written statement made by a person that they then sign and swear to be true in front of someone authorized to administer an oath, such as a notary public. An affidavit can sometimes be used as evidence in court. You should refer to these exhibits in your petition, labeling and attaching them to the end of the petition.

(c) Obtaining Documents

Getting documents related to your case and your prison term will help you write your petition. Because you may have difficulty getting all of these documents while incarcerated, you should try to have a close friend or family member assist you in gathering this information and in developing your petition. For information on the Federal Freedom of Information Act (FOIA), the Federal Privacy Act

161. Criminal Justice Policy Foundation, New York Executive Clemency Fact Page, <http://www.cjpf.org/clemency-ny> (last visited Feb. 23, 2020).

162. The Mich. Women's Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers, ch. VII, *available at* http://umich.edu/~clemency/clemency_mnl/printable.html (last visited Feb. 23, 2020).

163. For more information, see *JLM* Chapter 7, "Freedom of Information."

(PA), and New York's Freedom of Information Law (FOIL), see *JLM*, Chapter 7, "Freedom of Information." *JLM*, Chapter 7 also includes a list of FOIA statutes in other states. You will want to obtain your DOCS records (records pertaining to the time you have spent in prison), your parole file, your case file, documentation of battering (if applicable), and affidavits or letters of support.

Your DOCCS Records

Your DOCCS records include:

- (1) All reports of misbehavior and supplemental sheets,
- (2) Physical force and unusual incident sheets,
- (3) Adjustment committee reports and dispositions,
- (4) Copy of legal dates,
- (5) Crimes of commitment,
- (6) Personal history record,
- (7) Disciplinary record,
- (8) Correctional supervision history,
- (9) Certificates of program completion, and
- (10) Recognition letters.

You have a right to this information under FOIA and New York's Personal Privacy Protection Law (PPPL),¹⁶⁴ but you must authorize release of these records if they are being sent to someone other than you. In order to obtain these documents, you should write to the prisoner records coordinator of your facility with your name, DOCCS number, where you would like the records sent, and a list of the documents you want to receive. If the documents are being sent to someone other than you, you must state that you authorize that person to receive the documents you are requesting.

Your Parole Records

You also have a right to your case record and parole file under FOIL and PPPL. The case record is the most complete set of records maintained by the Board of Parole and can be obtained by writing to the senior parole officer of your facility with your name, ID number, and release interview date, revocation hearing date, or appeal pending date, whichever applies. State that you want to review all the information in the file that will be considered by the Board of Parole to prepare for the upcoming date.

The parole file is a less complete record in the central office, and it can be obtained by writing to the following address:

Chairman of the Board of Parole
97 Central Avenue
Albany, NY 12206.

Be sure to state that you are requesting these records pursuant to FOIA and PPPL.

Your Case File

The case file includes:

- (1) Police reports,
- (2) Grand jury minutes,
- (3) Indictment,
- (4) Pretrial hearings and motions,
- (5) Trial transcripts,
- (6) Summation,
- (7) Jury charge,
- (8) Jury requests/read backs,
- (9) Verdict,

164. N.Y. PUB. OFF. LAW §§ 94–95 (McKinney 2008).

- (10) Sentencing,
- (11) Plea allocutions of co-defendants,
- (12) Direct appeal appellate and response briefs,
- (13) Reply/supplemental brief,
- (14) Decision on appeal, and
- (15) Anything else of interest in the court file.

Ask your attorney for copies of these documents and transcripts. If you do not have an attorney or if your attorney does not have complete transcripts, you may need to call the criminal courthouse to obtain copies.

For your criminal record, send a request to:

Record Review Unit
New York State Division of Criminal Justice Services Civil Identification Bureau
4 Tower Place
Albany, NY 12203.

In your request, you should include your name, date of birth, Social Security Number, and Department Identification Number (D.I.N.). You can also ask them to rush process your request of your file if you need the information quickly. Otherwise, it can take eight weeks or longer to receive your criminal record. You should send the request in a facility envelope, if possible.

You also have a right to obtain pre-sentencing reports, though you may be asked to show a factual need for the reports.¹⁶⁵ To get them, send a written request addressed “To Whom It May Concern” to the Record Review Unit (see above address), with your name, birth date, indictment number, sentencing court, the address where you would like the information to be sent, and a signed release authorizing another person to receive the information, if necessary.

Documentation of Battering

Documentation of battering should include:

- (1) Medical records of injuries from abuse;
- (2) Mental health records showing your diminished capacity at the time of the crime and/or the stress, fear and anxiety caused by living in a violent relationship;
- (3) Orders of protection;
- (4) Police reports related to the abuse; and
- (5) Photographs showing physical injury.

“Diminished capacity” means an unbalanced mental state that would make you less accountable for your actions. Try to obtain copies of any relevant records from hospitals, clinics, private doctors, or mental health clinicians, as well as police reports of incidents of domestic violence.

Affidavits or Letters of Support

You should also include affidavits and letters of support in your petition. You can ask family members, friends, coworkers, doctors, neighbors, therapists, and other people involved in your life to submit an affidavit. You can also ask them to submit letters of support. The affidavit or letter of

165. N.Y. CRIM. PROC. LAW § 390.50(2)(a) (McKinney 2005); *see Gutkaiss v. People*, 49 A.D.3d 979, 979–980, 853 N.Y.S.2d 677, 678 (3d Dept. 2008) (reversing a denial of disclosing a pre-sentence report because an upcoming hearing for the parole board was a sufficient “factual showing” by the incarcerated person); *see also* *In re Blanche v. People*, 193 A.D.2d 991, 991–992, 598 N.Y.S.2d 102 (3d Dept. 1993) (stating that because there was no “factual showing” or statutory authority cited by the incarcerated person the sentencing court was allowed to deny the request for a pre-sentence report).

support should explain that you were battered and/or describe the crime. When you submit the affidavits or letters in your petition, you should state whether these people testified at your criminal trial.

J. Compassionate Release for Persons with Terminal Diseases

Forty-nine states and the District of Columbia have programs that allow for the release of dying or seriously ill incarcerated people.¹⁶⁶ For example, California has a compassionate release procedure that allows the court to re-sentence or recall the sentence.¹⁶⁷ You must have an incurable illness that will cause death within six months or be permanently medically incapacitated (as determined by a physician employed by the Department of Corrections), and you must not pose a threat to public safety.¹⁶⁸ This does not apply if you are sentenced to death or to a term of life without the possibility of parole. If you are incarcerated in California and are interested in receiving a compassionate release, you or someone you designate should contact the chief medical officer of the prison or the Director of Corrections.¹⁶⁹

Every state's rules are different, and many states have recently implemented new programs or are considering new legislation on this issue. For example, in 2008, North Carolina and Wyoming introduced new compassionate release programs.¹⁷⁰ If you have a serious or terminal illness or are elderly, you should check to see if your state has a compassionate release program.

New York State prisons also release some incarcerated people through medical parole.¹⁷¹ To be eligible, you must have a terminal health condition or a significant and permanent non-terminal condition.¹⁷² You must also be so incapacitated or debilitated that there is a reasonable probability that you do not present a danger to society. To prove this, you must have a physician's certification that you are severely restricted in your ability to move around and to care for yourself.¹⁷³ In addition, the Commissioner of DOCS (or someone authorized by the Commissioner) must certify both the doctor's diagnosis and your incapacity. Officials will consider the length of and reason for your incarceration, as well as your criminal record. You are not eligible if you are serving a sentence for first- or second-degree murder, first-degree manslaughter, or any sex offense (defined by Article 130 of the New York Penal Law), or an attempt to commit any of these crimes.¹⁷⁴

166. Chris Feliciano Arnold, *The Dying American Prisoner*, THE ATLANTIC, Dec. 23, 2019 ("Over time, 49 states and the District of Columbia adopted ["compassionate release"] policies"), *available at* <https://www.theatlantic.com/politics/archive/2019/12/compassionate-release-lets-prisoners-die-free/603988/> (last visited Feb. 23, 2020).

167. CAL. PENAL CODE § 1170(e) (LexisNexis 2015).

168. CAL. PENAL CODE § 1170(e)(2) (LexisNexis 2015).

169. CAL. PENAL CODE § 1170(e)(6) (LexisNexis 2015).

170. *See* N.C. GEN. STAT. § 15A-1369 (2014); WYO. STAT. ANN. § 7-13-424 (2015).

171. N.Y. EXEC. LAW § 259-r (McKinney 2018). *See also* N.Y. STATE DIV. OF PAROLE, NEW YORK STATE PAROLE HANDBOOK: QUESTIONS AND ANSWERS CONCERNING PAROLE RELEASE AND SUPERVISION, MEDICAL PAROLE SECTION, *available at* http://www.doccs.ny.gov/CommSup_Handbook.html (last visited Sept. 28, 2019); State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2014), *available at* <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 20, 2020).

172. *See* State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2014), *available at* <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 20, 2020).

173. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2014), *available at* <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 20, 2020).

174. *See* State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2014), *available at* <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 21, 2020); N.Y. EXEC. LAW § 259-r(1)(a) (McKinney 2018). Note that New York Executive Law § 259-r is scheduled to expire on September 1, 2021, and after this date, you must check for the new, updated version of this law.

The New York medical parole process has three steps.¹⁷⁵ First, you need a physician's certification to start the process.¹⁷⁶ To get this, you or someone acting on your behalf must make a request to the Commissioner of DOCS or the Division of Health Services that you be considered for medical parole.¹⁷⁷ If you are eligible, the Commissioner has discretion to order a medical evaluation and discharge plan. A physician employed by DOCS, or by a medical facility used by DOCS, can perform the evaluation. During the evaluation, the physician will make observations on the following: the disease, syndrome, or terminal condition you suffer from; the likelihood of your recovery; the extent of your debilitation or physical incapacity and its possible duration; the medications and dosages you are currently taking; and your ability to administer them to yourself.¹⁷⁸

The second step begins when the medical evaluation report plan is sent to the commissioner or commissioner's designee, who will advise the Commissioner whether you meet the criteria for medical parole. The commissioner's designee will determine whether you are "so debilitated or incapacitated as to create a reasonable probability that [you are] physically incapable of presenting any danger to society."¹⁷⁹ If the Commissioner decides that you meet the conditions for medical parole, the matter is referred to the Board of Parole for consideration. At that time, the Central Health Services staff and the correctional facility will begin to prepare a medical discharge plan. The medical discharge plan includes information on the level of care you will need, a description of special equipment or transportation needs, a description of your participation in the discharge plan, home-care plans if applicable, a description of any support needed by you or your care-giver, a report on the status of applications for Public Assistance or Medicaid, and a report on the status of applications for institutional placement. If it appears that you are in need of Public Assistance, an application will be sent to the Department of Social Services.¹⁸⁰

If you can get both the physician's certification and the Commissioner's certification, and there is no other reason you would be ineligible, you may receive compassionate release, also called medical parole. However, getting through the third phase of formal review by the Board of Parole can be very difficult. The process has many steps and can be time-consuming. The judge who sentenced you, the District Attorney, and the attorney who represented you will all be notified that you might receive parole. They will each have fifteen days to submit comments on your release, and you must wait for this comment period to pass before you can be granted medical parole.¹⁸¹ Additionally, DOCS must provide "an appropriate medical discharge plan" to the Board of Parole.¹⁸² The Board must assess whether, considering your medical condition, it is reasonably possible you will live outside of prison without breaking the law. It must also consider whether letting you out on such a release might be harmful to society, or will go against society's idea of fairness, taking into account the seriousness of your crime. The Board must also consider whether your release will "undermine respect for the law."¹⁸³ The process can take months, so it is very important to start it as soon as you become eligible.

175. See John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 J.L. MED. & ETHICS 216, 217–231 (1999) (explaining the process and problems with compassionate release in New York).

176. Physicians in the prison system can also initiate the request for you. See State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2014), available at <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 21, 2020) (stating that someone acting on the prisoner's behalf or a department employee may also make the request).

177. See State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2014), available at <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 21, 2020).

178. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2014), available at <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 21, 2020); N.Y. EXEC. LAW § 259-r(2)(a) (McKinney 2018).

179. N.Y. EXEC. LAW § 259-r(2)(b) (McKinney 2018).

180. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2014), available at <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 22, 2020).

181. N.Y. EXEC. LAW § 259-r(1)(c) (McKinney 2018).

182. N.Y. EXEC. LAW § 259-r(2)(c) (McKinney 2018).

183. N.Y. EXEC. LAW § 259-r(1)(b) (McKinney 2018).

If parole is ultimately granted, the health services staff will send copies of all appropriate medical records to the physician or facility that will care for you. Once you are released, you must get medical care as appropriate and remain under the care of a physician.¹⁸⁴ Every six months after your release, the Board will review your case, deciding whether to let you stay out of prison by renewing the grant of parole.¹⁸⁵ Each time, you will need to agree to have a medical examination.¹⁸⁶

K. Federal Sentences

This Section outlines the four different ways that you can be released early from your federal sentence.

First, you can earn credit for time you served in prison prior to beginning your sentence. To learn more about what types of time previously served can be used to shorten your sentence, see Section L of this Chapter, which describes this option in more detail.

Second, you may be able to reduce your sentence by helping the government investigate or prosecute other people. There is no guarantee, however, that your sentence will be reduced if you provide such assistance. Even if your sentence is reduced, it is up to the court to decide the level of reduction. To determine if you are eligible for this type of reduction, see Section M of this Chapter, which explains this option in more detail.

Third, the Bureau of Prisons (“BOP”) can shorten your sentence by (1) awarding you “good conduct time credits,” (2) granting you early release for participation in a Residential Drug Abuse Program (RDAP), (3) granting you early release under the Second Chance Act, or (4) granting you compassionate relief. To determine if you are eligible for these programs, learn how to apply for these programs, and understand their potential effect on your sentence, see Section N of this Chapter.

Finally, in very rare cases, the President of the United States can grant you executive clemency, which releases you from your prison sentence and/or your term of supervised release. The President can also forgive your crime after you have finished serving your sentence, and have shown remorse and rehabilitation. Federal executive clemency is discussed in Section P of this Chapter.

This Part also explains federal supervised release. Federal supervised release is an additional sentence that a judge can impose that you must serve after you complete your prison sentence. During a period of federal supervised release your conduct will be monitored by a probation officer to make sure that you do not violate any of the conditions of your supervised release. Federal supervised release and its conditions can be revoked, terminated, or modified at any time. This could result in your being sentenced to an additional term of imprisonment. Section O of this Chapter explains federal supervised release in more detail.

L. Credit for Time Served

You can earn credit both for (1) time spent serving your current federal sentence, and (2) for time spent serving in prison after the date you committed your current federal offense but before you began serving your current sentence. The amount of time that is credited towards your sentence for “time served” is determined by the Attorney General or the BOP after the district court announces your sentence.¹⁸⁷ District courts cannot directly order that time previously served be credited to reduce the length of your current sentence. You can challenge the amount of time credited towards your sentence only after trying all other administrative remedies available with the BOP.¹⁸⁸

184. N.Y. EXEC. LAW § 259-r(4)(b) (McKinney 2018).

185. N.Y. EXEC. LAW § 259-r(4)(a), (e) (McKinney 2018). *See also* N.Y. State Div. of Parole, New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision (2017), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf html (last visited Feb. 23, 2020).

186. N.Y. EXEC. LAW § 259-r(4)(d) (McKinney 2018).

187. *United States v. Wilson*, 503 U.S. 329, 333, 112 S. Ct. 1351, 1353–1354, 117 L. Ed. 2d 593, 599 (1992).

188. *United States v. Whaley*, 148 F.3d 205, 207 (2d Cir. 1998) (holding that a district court does not have jurisdiction to hear an incarcerated person’s appeal to a sentencing determination until the that person has requested review with the BOP and exhausted all of his administrative remedies).

You can only earn credit for time spent in official detention. The Supreme Court has ruled that “official detention” means time spent under federal detention.¹⁸⁹ This does not include time on release, like on bail or under house arrest. The BOP interprets the Supreme Court’s ruling to mean that you are also not entitled to any time credit off an additional sentence if your release was a condition of parole, probation or supervised release, regardless of how severe the restrictions were.¹⁹⁰ You can still receive credit, however, for time spent in a community treatment center or lower security placement if it is ordered as a condition of your presentence detention or because of overcrowding in federal facilities.¹⁹¹

There are three types of credit that can count against your sentence as time served:

- (1) time actually spent serving a federal sentence;
- (2) time previously served; and
- (3) time in non-federal pre-detention custody when you are denied bail under a federal detainer.¹⁹²

The first category—time actually spent serving a federal sentence—refers to the time spent serving your current federal sentence. Your federal sentence does not begin until the date you are “received in custody awaiting transportation to,” *or* until you arrive voluntarily to begin serving your sentence at the official facility where you will serve your federal sentence.¹⁹³ The time you serve can be reduced even further if you obtain good conduct time credits¹⁹⁴ and/or early release under the Residential Drug Abuse Program (RDAP).¹⁹⁵

The second category—time previously served—allows credit to be applied for time previously served in official detention (state, foreign, or federal) before the date when your federal sentence began. In general, credit can apply from the time that you spent in detention for (1) your current offense prior to sentencing, or (2) any other offense for which you were arrested after you committed the current offense, provided that the time has not been credited against another sentence.¹⁹⁶ For example, you can include the time you spent in federal custody after arrest on your federal charge.¹⁹⁷ This includes the time spent in federal custody before sentencing, including time spent in state proceedings.¹⁹⁸

You may also be able to receive credit for a second category of time served: that is, the time (after your federal offense) that you spent in custody serving another sentence that was not and will not be counted towards any sentence. For example, if you were serving time in official detention for a state or foreign sentence that was later vacated and you were not re-sentenced, you can include this time. Likewise, if you were serving a federal, state, or foreign sentence that was vacated and you were re-sentenced to a period shorter than that which you already served, the extra time beyond time already served on that sentence can be applied to your federal sentence.¹⁹⁹

189. *Reno v. Koray*, 515 U.S. 50, 60–61, 115 S. Ct. 2021, 2027, 132 L. Ed. 2d 46, 57 (1995) (holding that the time spent by the plaintiff in a community treatment center while on bail would not be credited against his federal sentence, as he was on release and thus not in official detention).

190. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-14H (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 23, 2020).

191. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-14F (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 23, 2020).

192. *Gross v. Berkbile*, No. 7:CV-00095-KKC, 2011 U.S. Dist. LEXIS 620, at *7 (E.D. Ky. Jan. 4, 2011) (*unpublished*); *Stackpole v. Williamson*, No. 3:CV-07-0396, 2007 U.S. Dist. LEXIS 54992, at *6–7 (M.D. Pa. July 30, 2007) (*unpublished*).

193. 18 U.S.C. § 3585(a).

194. 18 U.S.C. § 3624(b).

195. 18 U.S.C. § 3621(e)(2)(B).

196. 18 U.S.C. § 3585(b).

197. In *Jonah R. v. Carmona*, the Ninth Circuit applied these provisions to grant juveniles credit for time spent in pre-detention custody. See *Jonah R. v. Carmona*, 446 F.3d 1000, 1010 (9th Cir. 2006).

198. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-16 to 1-16A (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2020).

199. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-17 (1997), *available at*

If you were arrested for a different offense *after* you committed the offense for which you were sentenced, and you spent time in official detention for that different offense, you can receive credit for that time you spent in detention prior to receiving the sentence you are now serving.²⁰⁰ You can also receive credit for time in a state facility when a federal court ordered that your federal and state sentences run “concurrently” (at the same time). Only a federal court can officially order that a federal and state sentence run concurrently. A state court may *suggest* that a federal and state sentence run concurrently, but federal courts have held that federal authorities do not need to follow the state’s recommendation. Therefore, any time spent serving the state sentence in a state facility while waiting for transport or transfer to the federal facility will *not* necessarily be credited against your sentence as time already served.²⁰¹ However, if you are first convicted in state court and later convicted in federal court, the federal court can order that your sentences run concurrently starting on the date that the federal sentence is announced or imposed by the court.²⁰² The federal court must specifically state that the federal sentence will run concurrently with your state sentence, or it will automatically run consecutively (one after the other).²⁰³ Only the time that you remained in state prison after the federal sentence was announced can be credited towards your federal sentence.

Note that you cannot “double count” credit for any previous time served in state or federal prison that has already been counted against your state sentence or a different federal sentence.²⁰⁴ This rule includes time spent in detention related to your trial and prosecution for unrelated federal charges,²⁰⁵ as well as time served in federal pre-sentence custody that has been credited to your state sentence.²⁰⁶ A district court cannot apply credits for time previously served to your federal sentence; only the Attorney General of the United States can do this, although the Attorney General may authorize the BOP to do so as well.²⁰⁷

The third category—called “Willis time credits”—covers time served in non-federal pre-detention custody when you were denied bail because you were being detained on separate charges by the federal

http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2020).

200. 18 U.S.C. § 3585(b)(2) (allowing you to receive credit toward a sentence for any time spent in official detention *prior* to the date a new sentence commences, when your original detention time was the result of any other charge for which you were arrested *after* the commission of the offense for which you are now sentenced. So, if you were serving an official sentence for a crime you committed one year ago, and then were sentenced for a crime that you committed 2 years ago, the time you have served for the more recent crime can be applied to the sentence for the older crime for which you are just now being sentenced).

201. *Leal v. Tombone*, 341 F.3d 427, 429 (5th Cir. 2003) (holding that federal authorities are not required to follow state recommendations for state and federal sentences to run concurrently and therefore are under no obligation to credit time served in state prison that could have been served in federal prison if authorities had chosen to commence transfer earlier (citing *Taylor v. Sawyer*, 284 F.3d 1143 (9th Cir. 2002) and *Bloomgren v. Belaski*, 948 F.2d 688, 690–691 (10th Cir. 1991)).

202. 18 U.S.C. § 3584(a); *see Carmona v. Williamson*, 226 F. App’x 240, 241 (3d Cir 2007) (*unpublished*) (holding that the time a plaintiff served in state prison before being given his federal sentence could not be credited against the federal sentence).

203. 18 U.S.C. § 3584(a).

204. *Carmona v. Williamson*, 226 F. App’x 240, 241 (3d Cir 2007) (*unpublished*).

205. *United States v. Mills*, 501 F.3d 9, 11–12 (1st Cir. 2007) (holding that the 365 days that plaintiff served in state prison that had been credited against his state sentence could not also be credited against his federal sentence where the federal detainer was completely unrelated to the reason he was in state custody).

206. *United States v. Storm*, No. 1:01-CR-4 TS 2007 U.S. Dist. LEXIS 57019, at *4 (D. Utah Aug. 2, 2007) (*unpublished*) (finding plaintiff not entitled to credit for time served in official detention prior to commencing his federal sentence when this same pre-custody time was already counted towards his state sentence), *vacated on other grounds in*, *United States v. Storm*, No. 1:01-CR-4 TS, 2008 U.S. App. LEXIS 13024 (10th Cir. June 16, 2008) (*unpublished*).

207. In *United States v. Wilson*, the Supreme Court held that credit for time already served under 18 U.S.C. § 3585(b) cannot be granted by the court, but only by the U.S. Attorney General (or the BOP, acting pursuant to the Attorney General’s orders) and only after the prisoner has begun serving his sentence. *United States v. Wilson*, 503 U.S. 329, 334–335, 112 S. Ct. 1351, 1354–1355, 117 L. Ed. 2d 593, 599–601 (1992); *see also United States v. Peters*, 470 F.3d 907, 909 (9th Cir. 2006) (reaffirming *Wilson*’s holding that only the Attorney General, and not the district court, has the authority to grant prisoners credit for time served).

government.²⁰⁸ You may be eligible for Willis time credits if you are sentenced to concurrent federal and state sentences, and your estimated federal release date is the same or later than your estimated state release date, without any reduction credits applied. In this scenario, you will earn Willis time credits for the time you spent in non-federal pre-sentence custody after the date that the federal offense you are charged with occurred, to the date that your first sentence began (either the federal or state sentence, whichever started earlier).²⁰⁹ You cannot obtain any Willis time credits if you are released from your state sentence before your federal sentence begins and the pre-sentence time was credited against your state sentence.²¹⁰

However, if your estimated federal release date, without any reduction credits applied, is earlier than your state estimated release date, then you may still be eligible for a reduction.²¹¹ A court has held that the BOP's decision to only apply pre-sentence credits to longer non-federal sentences was unreasonable.²¹² When the amount of time in the credit is longer than the amount of time separating the federal and state sentences, the court orders the pre-sentence time to first apply against the state sentence and then to reduce the federal sentence to match the length of the newly calculated state sentence.²¹³

M. Substantial Assistance Prosecuting Others

A second way that you may be released early from prison is by providing substantial help to the government to investigate or prosecute other people. Depending on how much help you provide, the judge can significantly reduce your sentence. The judge can even reduce your sentence below the statutory minimum.²¹⁴ Keep in mind, however, that there is no guarantee that your sentence will be reduced: the court may decide to keep your original sentence.²¹⁵

If you think you might be able to help the government in this way and want to try to reduce your sentence, you should talk to the government about this as soon as possible after your sentencing. For you to be eligible for this reduction, the government must first file a motion with your sentencing judge, asking the judge to reduce your sentence.²¹⁶ If the government files this motion within a year of your sentencing,²¹⁷ the judge will consider whether you gave “substantial assistance in investigating or prosecuting another person.”²¹⁸ But if you wait more than a year after sentencing before you help

208. These credits are named after a case, *Willis v. United States*, 438 F.2d 923, 925 (5th Cir. 1971) (holding that defendant was entitled to credit for time served in state pre-sentence custody because this time was related to his federal offense where defendant was denied release on bail because of the federal detainer lodged against him).

209. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-22 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2020).

210. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-22 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2020).

211. *Kayfez v. Gazele*, 993 F.2d 1288, 1290 (7th Cir. 1993) (finding unreasonable the BOP's decision to only apply credits for pre-sentence time to the longer non-federal sentence even where the amount of time in the credit was longer than the amount of time separating the federal and non-federal sentences, and instead ordering the pre-sentence time be applied against the non-federal sentence and then applied to reduce the federal sentence to match the length of the newly calculated non-federal sentence); *see also* Fed. Bureau of Prisons, Program Statement 5880.28, at 1-22 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2020).

212. *Kayfez v. Gazele*, 993 F.2d 1288, 1290 (7th Cir. 1993).

213. *Kayfez v. Gazele*, 993 F.2d 1288, 1290 (7th Cir. 1993). Fed. Bureau of Prisons, Program Statement 5880.28, at 1-22 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2017).

214. FED. R. CRIM. P. 35(b)(4).

215. FED. R. CRIM. P. 35(b).

216. FED. R. CRIM. P. 35(b)(1) & (2).

217. As used in this rule, “sentencing” means the oral announcement of the sentence. *See* FED. R. CRIM. P. 35(c).

218. FED. R. CRIM. P. 35(b)(1).

the government, it will be harder to get your sentence reduced and you may no longer be eligible. In this situation, the judge can only reduce your sentence if you also meet one of the following three requirements:²¹⁹

- (1) You did not know about the information until a year or more after your sentencing;
- (2) You told the government the information within one year of your sentencing but the information was not useful to the government until more than a year after your sentencing;
or
- (3) You had the information but did not realize it would be useful to the government until more than one year after your sentencing. As soon as you realized it was useful, you told the government the information.

You should be aware that even if you help the government, you are not guaranteed a reduced sentence. It is entirely up to the government whether you are eligible for this reduction. Unless the government files a motion asking the judge to reduce your sentence, the judge cannot reduce your sentence.²²⁰ In addition, you should speak directly with a federal prosecutor about the possibility of obtaining a sentence reduction in exchange for information. Prison wardens and other BOP officials are not government officials and cannot file a motion with the court asking for a sentence reduction.²²¹

N. Additional Ways the BOP Can Shorten a Federal Sentence

In addition to earning credit for time served and substantially helping the government prosecute others, you may receive early release through one of four BOP programs. First, you can earn good conduct time credits that can be used to reduce your sentence. Second, you may be eligible for early release after participation in a Residential Drug Abuse Program (RDAP). Third, you may be eligible for early release under the Second Chance Act. Finally, you may be eligible for compassionate relief. Keep in mind, however, that it is difficult to obtain compassionate relief, which is only awarded in the most extraordinary circumstances. Each of the next subsections discusses these programs in more detail.

1. Good Conduct Time Credits

Federal good conduct time is similar to the state good-time credit discussed above in Parts C(2) and D of this Chapter. If you are serving a sentence of more than one year, but less than life imprisonment, you can earn up to fifty-four days of good conduct time credits for each year served of your sentence. These will be subtracted from your total sentence.²²²

(a) How to Earn Good Conduct Time Credit

Good conduct time credits are awarded for “exemplary compliance with institutional disciplinary regulations,” or successfully following prison rules.²²³ Credits are awarded at the BOP’s discretion at the end of each year.²²⁴ If you have not followed prison rules, you may receive fewer credits or no credits at all in any given year.²²⁵

219. FED. R. CRIM. P. 35(b)(2)(A)–(C).

220. *United States v. Mulero-Algarin*, 535 F.3d 34, 38 (1st Cir. 2008) (holding that only the government—not a judge—has the power to make an incarcerated person eligible for a sentencing reduction for substantial assistance).

221. *United States v. Ellis*, 527 F.3d 203, 207–209 (1st Cir. 2008) (holding that a warden within the BOP was unauthorized to make the motion as the “government” under Rule 35(b)).

222. 18 U.S.C. § 3624(b)(1).

223. 18 U.S.C. § 3624(b)(1).

224. 18 U.S.C. § 3624(b)(1).

225. 18 U.S.C. § 3624(b)(1).

(b) Amount of Good Conduct Time Credit You Can Earn

The amount of good conduct time you can earn depends on the date you committed your offense. If you committed your offense on or after November 1, 1987, but before September 13, 1994, you can earn up to fifty-four days credit for each year of your sentence served.²²⁶ If you committed your offense on or after September 13, 1994, but before April 26, 1996, your good-time credits will be applied towards your sentence if you have a high school diploma, a General Educational Development (GED) credential, or are making satisfactory progress toward your GED.²²⁷

If you are serving a sentence for an offense you committed on or after April 26, 1996, and you do not have a high school diploma or a GED, the amount of days of credit you can earn in a year depends on whether you are making satisfactory progress towards receiving a GED. The education department at your prison will decide whether you are making satisfactory or unsatisfactory progress towards obtaining your GED.²²⁸ If you have a GED or are making satisfactory progress towards obtaining one, then you can earn up to fifty-four credits for each year served.²²⁹ If you do not have a GED and are not making satisfactory progress towards obtaining one, then you can only receive up to forty-two days of credit for each year served.²³⁰ You can change your progress status during the year from unsatisfactory to satisfactory and become eligible for the full fifty-four credits if you begin making satisfactory progress toward receiving a GED.²³¹

If you are serving a sentence longer than 366 days, then after 366 days in prison the BOP will decide how many of the fifty-four possible credits you have earned for that year.²³² Any of the possible credits that you did not earn that year are lost and you cannot earn them back in the following year(s).²³³ One year later, the BOP will review your case again to determine how many credits you have earned for the 365 days you served since the last good conduct time credit assessment. This process will repeat every year until you have less than 365 days left to serve on your sentence. When you are one year away from your estimated release date, after taking into account the amount of good conduct time credits that you have earned, the amount of credits you can earn is prorated.²³⁴ Prorated means proportioned for the remaining days you have left to serve in that year by applying the “GCT

226. 28 C.F.R. § 523.20(a) (2019).

227. 28 C.F.R. § 523.20(b) (2019).

228. Fed. Bureau of Prisons, Program Statement 5884.03, at 3 (2006), *available at* http://www.bop.gov/policy/progstat/5884_003.pdf (last visited Feb. 27, 2020).

229. 28 C.F.R. § 523.20(c)(1) (2019).

230. 28 C.F.R. § 523.20(c)(2) (2019).

231. Fed. Bureau of Prisons, Program Statement 5884.03, at 3 (2006), *available at* http://www.bop.gov/policy/progstat/5884_003.pdf (last visited Feb. 27, 2020).

232. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-78R (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2020).

233. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-78R (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2020).

234. 18 U.S.C. § 3624(b)(1).

formula.”²³⁵ These credits should be credited to you within the last six weeks of your sentence.²³⁶ However, your good-time credits are not secure until you are actually released from prison.²³⁷ Therefore, you can lose your good-time credits for the current year and all previous years up until your actual release from prison,²³⁸ as described in the next Section of this Chapter. If you do, your estimated release date will be recalculated and you will lose the benefit of your good conduct time credits.²³⁹

(c) Loss of Good Conduct Time Credit

If you violate prison regulations or bring an unfounded (or “frivolous”) lawsuit,²⁴⁰ you may lose unvested good conduct time credit as punishment.²⁴¹ Federal statute defines an unfounded claim as a claim (1) that was filed for a malicious (“bad”) purpose; (2) that was filed solely to harass (“annoy”) the party against which it was filed; or (3) where the prisoner testifies falsely or otherwise knowingly presents false evidence or information to the court.²⁴² This Chapter does not discuss the consequences of bringing a frivolous lawsuit, so you *must* read *JLM*, Chapter 14, “The Prison Litigation Reform Act,” for more information about this possibility.

Note, though, that you cannot lose your good conduct time credits if they have already vested; that is, if your offense was committed on or after November 1, 1987 but before September 13, 1994, *or* your offense was committed on or after September 13, 1994, but before April 26, 1996 and you have made satisfactory progress in obtaining your GED. If your offense occurred on or after April 26, 1996, your credits have not already vested (that is, been credited and applied against your sentence) and will not vest until your release. Therefore, you can lose good conduct time credits as a result of committing a prohibited act.²⁴³

Before the BOP can take away your good conduct time credits for alleged misconduct, there are several steps that the staff at your institution must take. First, a staff member who believes that you have violated prison regulations must file an Incident Report with a lieutenant.²⁴⁴ A staff member will

235. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-44 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 27, 2020). The GCT formula is used to ensure that the amount of time served plus the amount of GCT granted exactly equals the number of days in your total sentence. The GCT formula is applied by multiplying the number of days in your sentence by 0.148. For example, if your sentence is one year and one day (the minimum length to be eligible for good conduct time credits), you cannot earn 54 days for that year, because after subtracting 54 GCT days from your sentence, you will not have served 365 days, and therefore could not have earned the full 54 days allowed per year of time served. Instead, the maximum amount of good conduct time days you can earn for a sentence of one year and one day using the GCT formula is 47 days. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-44–1-49 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Sept. 28, 2019). To determine how many days of good conduct time you could earn based on how many days are left to be served on your sentence, see Fed. Bureau of Prisons, Program Statement 5880.28, at 4-1–4-6, (1992), *available at* http://www.bop.gov/policy/progstat/5884_003.pdf (last visited Feb. 27, 2020).

236. 18 U.S.C. § 3624(b)(1).

237. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-78S (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 21, 2020).

238. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-78S (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Feb. 21, 2020).

239. See Prison Litigation Reform Act of 1996, PUB. L. NO. 104-134, § 809, 110 STAT. 1321 (1996); 28 U.S.C. § 1932.

240. 28 U.S.C. § 1932.

241. 28 U.S.C. § 1932.

242. 28 U.S.C. § 1932.

243. 28 C.F.R. § 541.4(b) (2019); *see also* 28 C.F.R. § 541.3 (2019) (listing prohibited actions). Examples of actions that can result in the loss of good-time credits include: assaulting another person, escape from an escort or institution, fighting with another person, possession of a weapon, use of illegal drugs, engaging in sexual acts, stealing, refusing to take a drug or alcohol test, refusing to work or obey an order, gambling, being unsanitary or unclean, and using obscene language. 28 C.F.R. § 541.3 (2019).

244. 28 C.F.R. § 541.5(a) (2019); Fed. Bureau of Prisons, Program Statement 5270.09, at 17 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Feb. 21, 2020). If the charge against

then investigate the incident.²⁴⁵ At the beginning of the investigation, you should be given a copy of the Incident Report.²⁴⁶ After you receive an Incident Report, the investigator will tell you what you are being charged with, provide you with a written copy of the charges, and ask for your statement on the incident. You can choose to give or not give a statement. Your silence can be used as evidence to show that you broke the rule, but it is not enough alone to prove that you broke the rule.²⁴⁷

Next, the United Discipline Committee (UDC) will conduct an initial hearing. After the BOP becomes aware of your involvement, the hearing will normally occur within five business days, not counting the day the incident report was issued, weekends, and holidays.²⁴⁸ You generally have a right to be present at the UDC's hearing unless your presence would threaten the prison's security.²⁴⁹ You also have the right to present evidence and make a statement on your own behalf at this hearing.²⁵⁰ The UDC can find: (1) that you committed the prohibited act charged in the incident report; (2) that you did not commit the prohibited act charged in the incident report; (3) if the act you are charged with is considered very serious, the UDC may refer the incident report to the Discipline Hearing Officer (DHO) for further review; and (4) if the act you are charged with is considered a "Greatest" or "High" severity prohibited act, then the UDC will automatically refer the incident report to the DHO for further review.²⁵¹ The UDC's decision must be based on "some evidence"²⁵² that you either did or did not break the rule. You should receive a written copy of the UDC decision following its review of the incident report.²⁵³

The DHO can take away your good-time credits if you commit a prohibited act.²⁵⁴ Prohibited acts include, killing, rioting, taking hostages, etc..²⁵⁵ At least twenty-four hours before your hearing in front of the DHO, you will receive written notice of the charges against you.²⁵⁶ If your case is referred to the DHO, you have the option of selecting a staff member to represent you at the DHO hearing.²⁵⁷ The staff member cannot have been involved in the incident and cannot have investigated your incident report. If the staff member you select is unable or unwilling to represent you, you can request a different staff member. If several staff members cannot or will not represent you, however, then the Warden will appoint a staff member to be your representative if you want one or if you are not able to represent yourself (for example, if you cannot read and write).²⁵⁸ You and your witnesses can present documents and make statements to prove that you did not break the rules.²⁵⁹ Based on at least some

you is categorized as "low severity" or "moderate severity" and the BOP staff member in charge of your investigation thinks that he or she can informally come up with a solution to the incident with you, then the charge will be dropped and the incident will not be listed in your file. 28 C.F.R. § 541.5(b)(3) (2019).

245. 28 C.F.R. § 541.5(b) (2019).

246. 28 C.F.R. § 541.5(a) (2019).

247. 28 C.F.R. § 541.5(b)(1)(B) (2019).

248. 28 C.F.R. § 541.7(c) (2019).

249. 28 C.F.R. § 541.7(d) (2019).

250. 28 C.F.R. § 541.7(e) (2019).

251. 28 C.F.R. § 541.7(a) (2019).

252. *Luna v. Pico*, 356 F.3d 481, 487–488 (2d Cir. 2004) (citing *Superintendent v. Hill*, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356, 364 (1985) (holding that at least some evidence is required before good conduct time credits can be taken away in a prison disciplinary hearing)).

253. 28 C.F.R. § 541.7(h) (2019).

254. 28 C.F.R. § 541.8(g) (2019); 28 C.F.R. § 541.3, tbl. 1 (2019).

255. 28 C.F.R. § 541.8(g) (2019); 28 C.F.R. § 541.3, tbl. 1 (2019).

256. 28 C.F.R. § 541.8(c) (2019).

257. 28 C.F.R. § 541.8(d) (2019).

258. 28 C.F.R. § 541.8(d)(1) (2019).

259. 28 C.F.R. § 541.8(f) (2019). Please note, you may request that witnesses appear in person at your hearing to testify on your behalf. Such witnesses, however, may not appear if in the DHO's discretion, the witness is not reasonably available, their appearance at your hearing would threaten prison security, or if their testimony would be repetitive. 28 C.F.R. § 541.8(f)(3) (2019).

facts and the weight of the evidence, the DHO will then decide whether or not you committed the prohibited act.²⁶⁰

After the DHO hearing, you will be given a copy of the DHO's decision, which will include: (1) whether you were advised of your rights during the DHO process; (2) the evidence relied on by the DHO; (3) the DHO's decision; (4) the sanction ("penalty") imposed by the DHO; and (5) the reason(s) for the sanction(s) imposed.²⁶¹

When the DHO makes a decision on how much good-time credit to take away as punishment for your act, it will look at how bad your violation was and how often you committed the violation within a recent period of time.²⁶² There are four categories of offenses based on the seriousness of the violation: (1) Greatest Severity, (2) High Severity, (3) Moderate Severity, and (4) Low Severity.²⁶³ The amount of good-time credits that you can lose increases with the level of your offense. The DHO can follow these guidelines, or can take away more or less credits based on aggravating (bad) or mitigating (good) factors in your case.²⁶⁴

If the offense you committed was on or after September 13, 1994 and before April 26, 1996, and you committed an offense that was labeled a "crime of violence" under the Violent Crime Control and Law Enforcement Act (VCCLEA) of 1994, then the amount of good-time credit you can lose in a disciplinary hearing is described below.²⁶⁵

For a Greatest Severity offense, the DHO must deduct at least forty-one days of credit, or if there is less than fifty-four days available for the prorated period, at least 75% of available good time for each act committed.²⁶⁶ For a High Severity offense, the DHO must deduct at least twenty-seven days of credit or at least 50% of the available good conduct time for each act committed if less than fifty-four days are in the period.²⁶⁷ For a Moderate Severity offense, the DHO does not have to deduct time unless you have been found to have committed two or more offenses at this level within the current year of your good conduct sentence credit availability, in which case the minimum deduction is fourteen days or 25% of the available good conduct time if less than fifty-four days are available for the period.²⁶⁸ For a Low Severity offense, the DHO does not have to deduct time unless you committed three or more Low Severity offenses during the current year of your good conduct credit availability, in which case the minimum deduction is seven days or 12.5% of available good time for a period less than fifty-four days.²⁶⁹

Type of Offense	Minimum Credits Deducted by DHO ²⁷⁰
Greatest Severity	Forty-one days of credit 75% of available good time for each act if less than fifty-four days are available
High Severity	Twenty-seven days of credit 50% of available good time for each act if less than fifty-four days are available

260. 28 C.F.R. § 541.8(f) (2019).

261. 28 C.F.R. § 541.8(h) (2019).

262. 28 C.F.R. § 541.3 (2019).

263. 28 C.F.R. § 541.3 (2019). See Table 1 for a list of offenses by category.

264. 28 C.F.R. § 541.3, tbl. 1(1)(b.1), (1)(b.1)(II) (2019).

265. 28 C.F.R. § 541.4 (2019). Please note that other types of incarcerated people may be subject to this good time credit loss rule. Please make sure to read 28 C.F.R. § 541.4 to see if this rule applies to your sentence.

266. Fed. Bureau of Prisons, Program Statement 5270.09, at 11 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Jun. 22, 2020).

267. Fed. Bureau of Prisons, Program Statement 5270.09, at 11 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Jun. 22, 2020).

268. Fed. Bureau of Prisons, Program Statement 5270.09, at 12 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Jun. 22, 2020).

269. Fed. Bureau of Prisons, Program Statement 5270.09, at 12 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Jun. 22, 2020).

270. Fed. Bureau of Prisons, Program Statement 5270.09, at 11-12 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Jun. 22, 2020).

Moderate Severity	Only if you committed two or more offenses at this level within the current year of your good conduct sentence credit availability Fourteen days of credit 25% of available good time for each act if less than fifty-four days are available
Low Severity	Only if you committed three or more offenses at this level within the current year of your good conduct sentence credit availability Seven days of credit 12.5% of available good time for each act if less than fifty-four days are available

(d) Challenging the Loss of Good-Time Credits

You can challenge the loss of good-time credit. Under the Fourteenth Amendment's Due Process Clause, you have a protected liberty interest in your good-time credits.²⁷¹ The BOP must follow certain procedures in order to take your credits without violating your due process rights.²⁷² You should read *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Proceedings," which explains your due process rights and how to raise defenses and challenges to your treatment at disciplinary hearings.

The proper way to bring a lawsuit to challenge the loss of good-time credits is through a petition for a writ of habeas corpus under 28 U.S.C. § 2241.²⁷³ Before filing, you *must* read *JLM*, Chapter 13, "Federal Habeas Corpus," to learn how to file a federal habeas corpus petition. Before you can bring a lawsuit in court to challenge the loss of good-time credits, you *must* exhaust your administrative remedies²⁷⁴ as required under the Prison Litigation Reform Act (PLRA). You should also read *JLM*, Chapter 14, "The Prison Litigation Reform Act," to learn about PLRA requirements and consequences.

This Section includes only a brief description of the federal administrative remedy procedures you will need to follow to challenge the loss of your good-time credits. You have twenty calendar days from the date of the DHO decision to appeal it.²⁷⁵ Your appeal should be sent directly to the Regional Director for your region within twenty days of the decision to take away your good time credits.²⁷⁶ You should include a separate completed, signed, and dated form BP-10 for each incident that is being appealed along with a copy of the DHO report.²⁷⁷ The form can be obtained from the staff at

271. *Henson v. U.S. Bureau of Prisons*, 213 F.3d 897, 898 (5th Cir. 2000) (recognizing a person incarcerated federal prison's due process right to a hearing before removal of good-time credits, but noting not all the rights due in a criminal trial apply).

272. *Wolff v. McDonnell*, 418 U.S. 539, 556–557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974). For a full discussion of this case and these issues, see *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings."

273. *Thomas v. Marberry*, No. 06-CV-13282, 2007 U.S. Dist. LEXIS 25408, at *5 (E.D. Mich. Apr. 5, 2007) (*unpublished*) (holding that a habeas corpus petition is a proper means of challenging the loss of good-time credits in a disciplinary proceeding because it affects the way in which the sentence is being executed); *see also* *Edwards v. Clarke*, No. C07-5057RJB, 2007 U.S. Dist. LEXIS 24271, at *3 (W.D. Wash. Apr. 2, 2007) (*unpublished*) (dismissing a person incarcerated in federal prison's 42 U.S.C. § 1983 claim to recover his lost good conduct time credits because such a claim is challenging the length of confinement and finding that the correct claim for relief is a habeas corpus petition (citing *Edwards v. Baslisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997))).

274. "Administrative remedies" are the internal procedures used within the BOP system to resolve your complaint. A federal court will not accept your case unless you have "exhausted" (used up) all the appeals and procedures within the BOP system. See *JLM*, Chapter 13, "Federal Habeas Corpus," for more information.

275. Fed. Bureau of Prisons, Program Statement 1330.17, at 6–7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Feb. 23, 2020).

276. Fed. Bureau of Prisons, Program Statement 1330.17, at 6–7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Feb. 23, 2020)..

277. Fed. Bureau of Prisons, Program Statement 1330.17, at 7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Feb. 23, 2020).

Community Corrections Centers or from institution staff(usually the correctional counselor).²⁷⁸ The Regional Director should respond to your appeal within thirty days of receiving it.²⁷⁹

If the Regional Director does not remove the charges against you, the final administrative appeal step is to send an appeal to the General Counsel of the Community Corrections Center Central Office within thirty days of the date the Regional Director signed the response.²⁸⁰ Your appeal to the General Counsel should include a completed, signed, and dated form BP-11(which can be obtained from the same staff member, a copy of the DHO report), a copy of your appeal to the Regional Director, and a copy of the Regional Director's response, along with the reason that you are appealing.²⁸¹ The General Counsel should provide you with a response to your appeal within forty days of receiving it.²⁸²

2. Early Release under the Residential Drug Abuse Program

In addition to good-time credits, you can also shorten your federal sentence through participation in a Residential Drug Abuse Program (RDAP). You must meet certain conditions to participate in a RDAP. You must also meet additional requirements to be eligible for early release upon completing a RDAP. If at any stage of application, admission, removal, or denial of early release status you do not agree with the decision in your case, you can appeal by using the same procedures described in the good conduct time section above.²⁸³ Just like good conduct time, you must exhaust your administrative remedies before you can bring a lawsuit to challenge the BOP's decision.

(a) What is RDAP?

The Residential Drug Abuse Program ("RDAP") is a federal program offered in some federal facilities for incarcerated people with substance abuse problems.²⁸⁴ In RDAP, you participate in individual and group activities to learn to overcome your substance abuse problems.²⁸⁵ RDAP is a 500-hour program that takes place over nine to twelve months in a separate housing facility for RDAP participants.²⁸⁶

(b) How do You Get into RDAP?

Entry into RDAP is voluntary, and is determined by the drug abuse treatment coordinator through staff referrals and/or incarcerated people' applications. If you want admission to an RDAP, you can receive a referral from, or make a request to, a staff member in your housing unit or on the drug treatment team.²⁸⁷ If you request admission into an RDAP, the BOP will decide whether you are eligible to participate in the residential portion.

278. Fed. Bureau of Prisons, Program Statement 1330.17, at 5 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Feb. 23, 2020).

279. Fed. Bureau of Prisons, Program Statement 1330.17, at 9 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Feb. 23, 2020).

280. Fed. Bureau of Prisons, Program Statement 1330.17, at 6–7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Feb. 23, 2020).

281. Fed. Bureau of Prisons, Program Statement 1330.17, at 7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Feb. 23, 2020).

282. Fed. Bureau of Prisons, Program Statement 1330.17, at 9 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Feb. 23, 2020).

283. 28 C.F.R. § 550.57 (2019).

284. Fed. Bureau of Prisons, Substance Abuse Treatment, *available at* http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Feb. 23, 2020).

285. Fed. Bureau of Prisons, Substance Abuse Treatment, *available at* http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Feb. 23, 2020).

286. 18 U.S.C. § 3621(e)(5)(A); Fed. Bureau of Prisons, Program Statement 5330.11, at ch. 2, 8–10 (2009), *available at* http://www.bop.gov/policy/progstat/5330_011.pdf (last visited Sept. 29, 2019).

287. 28 C.F.R. §§ 550.53(c)–(d) (2019).

(c) Who is Eligible to Participate in RDAP?

Before you can participate in RDAP, the BOP must decide that you have a substance abuse problem, and you must be willing to participate in a residential substance abuse treatment program.²⁸⁸ To be eligible, you must also sign an agreement form stating that you understand your responsibilities in joining the RDAP.²⁸⁹ Some of your responsibilities include not disrupting the staff, other group members, or activities of RDAP; completing all RDAP activities, including homework and group assignments; and, not sharing information about other incarcerated people in the program.²⁹⁰ In general, you can be admitted to RDAP when you are at least 24 months from your release date.²⁹¹ Prisoners with serious mental impairments that would not allow them to fully participate in the program will not be allowed into RDAP.²⁹²

If you have a physical or medical disability that prevents you from living in an RDAP housing unit, you may still be eligible for early release if you meet all of the eligibility requirements for RDAP and have completed all of the program components of RDAP, including community-based treatment.²⁹³

Even if you cannot participate in RDAP, there are other substance abuse programs you may be able to join. These programs do not, however, have the same early release benefits as RDAP. These other programs include drug abuse education classes²⁹⁴ and non-residential drug abuse treatment.²⁹⁵ Community treatment services (“CTS”) are available for incarcerated people with mental illnesses and sex offenders. Community treatment is also available for some incarcerated people who remain in a Residential Reentry Center and have gotten an incident report related to substance abuse and who are dealing with issues like grief, loss, depression, adjustment issues, or anxiety.²⁹⁶

(d) Who May be Eligible for Early Release under RDAP?

To be eligible for early release under RDAP you must meet all four of the following requirements:

- (1) You were convicted and sentenced for either:
 - a. a federal offense that occurred on or after November 1, 1987,²⁹⁷ or
 - b. a Washington D.C. offense on or after August 5, 2000;²⁹⁸
- (2) You were sentenced for committing a non-violent offense;²⁹⁹
- (3) The BOP categorizes you as having a “verifiable substance use disorder”;³⁰⁰
- (4) You successfully completed all stages of a RDAP.³⁰¹

288. 18 U.S.C. § 3621(e)(5)(B)(i)-(ii).

289. 28 C.F.R. § 550.53(b)(2) (2019).

290. 28 C.F.R. § 550.53 (2019).

291. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 11 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020). (“Upon assignment of a RDAP referral by the DAPC, the DTS will review an inmate’s Central File and other collateral sources of documentation to determine if there is sufficient time remaining on the inmate’s sentence, ordinarily 24 months”).

292. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 9 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Sept. 20, 2020).

293. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 9 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

294. 28 C.F.R. § 550.51 (2019).

295. 28 C.F.R. § 550.52 (2019).

296. Fed. Bureau of Prisons, Substance Abuse Treatment, available at http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp? (last visited Feb. 23, 2020); see also 28 C.F.R. § 550.56 (2019).

297. 28 C.F.R. § 550.55(a)(1)(i) (2019).

298. 28 C.F.R. § 550.55(a)(1)(ii) (2019).

299. 28 C.F.R. § 550.55(a)(1)(i)-(ii) (2019).

300. 28 C.F.R. § 550.53(b)(1) (2019).

301. 28 C.F.R. § 550.55(a)(2) (2019).

Under the second requirement, you are ineligible to receive early release under RDAP if you were sentenced for committing a violent offense.³⁰² The BOP can look at both the actual crime for which you were sentenced as well as the circumstances surrounding that crime to determine eligibility for RDAP. You are also ineligible for RDAP if you are an Immigration and Customs Enforcement (ICE) detainee, if you are a pretrial detainee, if you are being held in federal prison for a state or military crime, or if you have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, aggravated assault, arson, kidnapping, or sexual abuse involving a minor, that occurred within 10 years before the date of sentencing for your current conviction.³⁰³ You can also be ineligible at the Director's discretion if you have a current felony conviction for other sorts of offenses.³⁰⁴ These felony offenses include: a felony that has as an element the actual, attempted, or threatened use of physical force against a person or property; a crime involving the carrying, possession, or use of a firearm, explosive or other dangerous weapon; a crime that presents a serious potential risk of physical force against the person or property of someone else (even if force is not an element of the crime); or a crime involving sexual abuse of children.³⁰⁵ You may also not receive early release if you have been convicted of an attempt, conspiracy, or solicitation to commit one of the offenses in this paragraph.³⁰⁶ Finally, you may not receive early release if you have received early release under 18 U.S.C. § 3621(e) before.³⁰⁷

To meet the third requirement, a drug abuse coordinator must find that you have a “drug use disorder,” which is a “substance abuse or dependence,” as defined in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM). Any written documentation in your Pre-Sentence Investigation (PSI) report or central file showing that you previously used the same substance can also be used to verify your substance abuse problem.³⁰⁸ Specifically, the BOP will consider the following when deciding whether you have a substance abuse problem:

- (1) Documentation that shows that you had a substance abuse problem within one year of your arrest on the offense for which you are now serving;
- (2) Documentation by a probation officer, parole office, social services worker, etc. that you had a substance abuse problem within one year of your arrest on the offense for which you are now serving;
- (3) Documentation by a substance abuse counselor, doctor, or substance abuse treatment provider who diagnosed and treated you within one year of your arrest on the offense for which you are now serving;
- (4) Multiple (two or more) convictions for Driving Under the Influence (DUI) or Driving While Intoxicated (DWI) in the 5 years prior to your arrest on the offense for which you are now serving.³⁰⁹

302. Fed. Bureau of Prisons, Program Statement No. 5162.05, *Categorization of Offenses*, at Ch. 3, 8 (2009), available at http://www.bop.gov/policy/progstat/5162_005.pdf (last visited Feb. 23, 2020) (listing offenses that are considered violent and will prevent you from participating in RDAP).

303. 28 C.F.R. § 550.55(b)(1)–(4) (2019).

304. 28 C.F.R. § 550.55(b)(5) (2019). In *Lopez v. Davis*, the Supreme Court held reasonable the Bureau of Prisons' regulations making certain incarcerated people automatically ineligible for early release under 18 U.S.C. § 3621(e) if there was a firearm involved in their offense, even where the underlying was categorized as a non-violent offense. *Lopez v. Davis*, 531 U.S. 230, 244, 121 S. Ct. 714, 724, 148 L. Ed. 2d 635, 648 (2001).

305. 28 C.F.R. § 550.55(b)(5) (2019); see also Fed. Bureau of Prisons, Program Statement No. 5162.05, *Categorization of Offenses*, at 8–15 (2009), available at http://www.bop.gov/policy/progstat/5162_005.pdf (last visited Feb. 23, 2020) (listing offenses that are included in this category and offenses that may create ineligibility for RDAP at the Director's discretion).

306. 28 C.F.R. § 550.55(b)(6) (2019).

307. 28 C.F.R. § 550.55(b)(7) (2019).

308. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 11–12 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

309. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 16 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

You also may be classified as having a drug abuse problem during your participation in a drug abuse education course or non-residential drug abuse treatment after testing positive during a urine test.

The fourth requirement is that you successfully complete all stages of RDAP. RDAP has three stages, each of which you must finish before you can be considered for early release. The first stage of RDAP is the unit-based program that ordinarily takes no longer than nine months.³¹⁰ The unit-based program has three phases: orientation, core treatment, and transition. To complete the unit-based program, you must attend and participate in group activities and pass a test given at the end of each subject covered in treatment.³¹¹ If you do not pass a test for any given subject, you will typically be allowed to take the test only one more time.³¹²

The second stage of RDAP is follow-up services. If there is time between the completion of your unit-based program and your transfer to a community-based program, you must participate in follow-up treatment services.³¹³ You will enter follow-up treatment within one month after returning to general population. You must remain in follow-up services for at least twelve months or until you undergo transitional drug abuse treatment (“TDAT”).³¹⁴ Follow-up services consist of twelve-monthly group sessions of at least one hour.³¹⁵

The final stage of RDAP is TDAT. After completing follow-up services, you will be transferred to community confinement where you must participate in treatment for at least one hour per month.³¹⁶

(e) How Might RDAP Affect Your Sentence?

If you meet the requirements for RDAP early release, the BOP can reduce your prison sentence by up to one year, in addition to any good conduct time credit reductions you have received.³¹⁷ Your case will be reviewed several times to determine whether you remain eligible for early release under RDAP.³¹⁸ Refusal to participate in follow-up treatment is one way you can lose your early release award.³¹⁹ While the BOP has the ability to reduce your sentence after you successfully complete RDAP, the BOP is not required to do so.³²⁰ If at any time you commit a prohibited act, fail to complete all

310. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 16 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

311. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 16–17 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

312. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 16 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

313. 28 C.F.R. § 550.53(a)(2) (2019).

314. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 22 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

315. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 22 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

316. 28 C.F.R. § 550.56 (2019).

317. Fed. Bureau of Prisons, First Step Act - Frequently Asked Questions Residential Drug Abuse Treatment Program (RDAP), available at https://www.bop.gov/inmates/fsa/faq.jsp#fsa_rdap (last visited Sept. 18 2020).

318. See Fed. Bureau of Prisons, Program Statement No. 5331.02, *Early Release Procedures Under 18 U.S.C. § 3621(e)*, 5–6 (2009), available at <https://www.bop.gov/policy/progstat/5331.02.pdf> (last visited Mar. 1, 2020). Your early release can be delayed or removed if the Regional Drug Abuse Treatment Coordinator certifies that you have not successfully completed your treatment. See Fed. Bureau of Prisons, Program Statement No. 5331.02, *Early Release Procedures Under 18 U.S.C. § 3621(e)*, 12 (2009), available at <https://www.bop.gov/policy/progstat/5331.02.pdf> (last visited Mar. 1, 2020).

319. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 11 (2009), available at <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

320. See *Richardson v. Joslin*, 501 F.3d 415, 420 (5th Cir. 2007) (finding that defendant had no liberty interest in a reduction of his sentence after he successfully completed RDAP since BOP has “the authority, but not the duty” to reduce a term of imprisonment); see also *Lopez v. Davis*, 531 U.S. 230, 241–242, 121 S. Ct. 714, 722, 148 L. Ed. 2d 635, 646–648 (2001) (finding that the BOP has the discretion to not reduce an incarcerated person’s term of imprisonment based on his conduct from before his conviction, and even to categorical exclude

RDAP requirements, or the BOP discovers it made an error in determining your eligibility, the BOP can remove RDAP early release status.³²¹ The denial of early release after you successfully complete RDAP does not violate any contractual rights guaranteeing your release or the Constitution's *Ex Post Facto* Clause.³²² You can appeal your denial of early release under RDAP using the same procedures explained in the loss of good-time credit section.³²³

(f) How Can Your Participation in RDAP End?

Your participation in RDAP can end if you choose to voluntarily end your participation in RDAP, fail to pass your subject tests, fail to participate or attend RDAP activities satisfactorily, or are removed from RDAP by the BOP.³²⁴ Once you are no longer in RDAP, you lose your early release eligibility and return to your previous housing unit or facility. The drug treatment coordinator may remove you from the program for disruptive behavior. If you are in the RDAP program you must be given one formal warning before you are removed from the program, unless your actions are considered so disruptive that you would create a problem for RDAP staff and other incarcerated people in the program.³²⁵ Also, if you do not follow all of the rules and regulations of RDAP you will be expelled from the program.³²⁶

If the warden or the drug abuse treatment program coordinator removes you from RDAP, you may request readmission by submitting an "Inmate Request to Staff Form."³²⁷ You will have to wait ninety days after your removal from the program to submit the Inmate Request to Staff Form.³²⁸ The drug abuse treatment program coordinator will decide whether to readmit you to the program. Even if you are readmitted to RDAP, you will not receive credit for the parts of the program you completed before you were removed from the program.³²⁹

reductions for incarcerated people with certain types of pre-conviction conduct).

321. Fed. Bureau of Prisons, Program Statement No. 5331.02, *Early Release Procedures Under* 18 U.S.C. § 3621(e), 7 (2009), *available at* <https://www.bop.gov/policy/progstat/5331.02.pdf> (last visited Mar. 1, 2020).

322. *See* Seacrest v. Gallegos, 30 F. App'x 755, 756 (10th Cir. 2002) (*unpublished*) (finding the BOP's decision to change an incarcerated person's status from eligible for early release consideration to ineligible did not violate the *Ex Post Facto* Clause because the decision did not affect the legal definition of the crime or increase the incarcerated person's punishment, and finding that no contractual relationship existed between the incarcerated person and the BOP because his eligibility status had only been provisionally changed to eligible due to a court case that was later determined to be incorrect).

323. 28 C.F.R. § 550.57 (2019); 28 CFR § 542.15 (2019); *see* Fristoe v. Thompson, 144 F.3d 627, 630 (10th Cir. 1998) (finding that there is no *Ex Post Facto* Clause violation because the legal consequences and the sentence of the incarcerated person's crime remained the same after the change); *see also* Stiver v. Meko, 130 F.3d 574, 578 (3d Cir. 1997) (finding that there was no *Ex Post Facto* Clause violation because the legal consequences of the incarcerated person's crime remained the same).

324. *See* FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5330.11, PSYCHOLOGY TREATMENT PROGRAMS, at Ch. 2, 17–19 (2009), *available at* <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020). You can be removed from RDAP by BOP for disruptive behavior related to the program or unsatisfactory progress. You will usually be given a formal warning before removal and ordinarily not removed without one treatment intervention session. Treatment intervention includes meeting with staff to create a treatment plan to eliminate the behavior or to improve progress. You will be removed immediately, without formal intervention, if you are found to have committed a prohibited act involving: alcohol or drugs; violence or threats of violence; escape or attempted escape; or any 100-level incident. Some non-violent 100-level incidents include starting a fire or rioting. You can also be removed from the program without intervention if you violate RDAP confidentiality.

325. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 17–18 (2009), *available at* <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

326. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 17–19 (2009), *available at* <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

327. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 19 (2009), *available at* <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

328. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 19 (2009), *available at* <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

329. Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 19 (2009), *available at* <https://www.bop.gov/policy/progstat/5330.11.pdf> (last visited Mar. 1, 2020).

3. Early Release Under the Second Chance Act

The Second Chance Act of 2007 is a federal law designed to improve the system for releasing people incarcerated in federal prisons.³³⁰ This Act authorizes the BOP to grant early release to incarcerated people who meet the following three conditions:³³¹

- (1) Are sixty or over the age of sixty;
- (2) Have never been convicted of a violent crime or sex offense;
- (3) Have never escaped or attempted to escape a prison facility; and
- (4) Have served two-thirds of their sentence.

Very few incarcerated people will be eligible for early release under this program. The Bureau of Prison recently estimated that only about 650 federal incarcerated people (or 0.003% of all people incarcerated in federal prison) will meet the requirements.³³² The BOP began a pilot program, however, to test this new early release system. The program began in October 1, 2008. If you think you are eligible for early release under this program, you should ask your warden whether your prison or jail is participating.

4. Federal Compassionate Release

There are no formal definitions for “extraordinary and compelling” reasons. The U.S. Sentencing Commission, however, provides four examples of what could be considered extraordinary and compelling reasons that might justify compassionate relief:³³³

- (1) You have a medical condition that hampers your ability to provide self-care or to recover within the correctional facility environment;³³⁴
- (2) Your only family member, spouse, or registered partner who can care for your minor child or children is no longer able to do so due to death or incapacitation;³³⁵
- (3) You are at least 65 years old, you are experiencing worsening physical or mental health from getting older, and your medical condition does not allow you to properly care for yourself in prison and your condition is unlikely to improve through treatment, and you have served at least ten years or 75% of your term of imprisonment (whichever is less);³³⁶ or
- (4) The BOP Director has found another reason you should be granted compassionate release, or the BOP Director has found you qualify because of a combination of reasons (1), (2), and (3).³³⁷

In addition to each of these reasons, you also must not be a danger to society or be able to commit a further crime.³³⁸

(a) How Can You Apply for Compassionate Release?

It is important to know that you cannot make a motion directly to a court to reduce your sentence for compassionate release. If you file a motion yourself, the court will not reduce your sentence. The

330. Second Chance Act of 2007, 110 Pub. L. No. 199, § 231, 122 Stat. 657, 683–690 (2008).

331. 34 U.S.C. § 60541(g)(5)(A).

332. Douglas A. Berman, *Another Report from the USSC Alternatives Symposium*, SENTENCING LAW AND POLICY (July 24, 2008), available at https://sentencing.typepad.com/sentencing_law_and_policy/2008/07/another-report.html (last visited Mar. 1, 2020).

333. 28 U.S.C. § 994(t) (stating that the Sentencing Commission has power to describe what should be considered extraordinary and compelling reasons for reducing a prisoner’s sentence).

334. 18 U.S.C. App’x § 1B1.13, Application Note 1(A) (2018).

335. 18 U.S.C. App’x § 1B1.13, Application Note 1(C) (2018).

336. 18 U.S.C. App’x § 1B1.13, Application Note 1(B) (2018).

337. 18 U.S.C. App’x § 1B1.13, Application Note 1(D) (2018).

338. See *Leja v. Sabol*, 487 F. Supp. 2d 1, 3 (D. Mass. 2007) (holding that the BOP’s decision to deny release was not arbitrary or capricious because defendant’s illness was not terminal and defendant was still able to commit crimes).

only way to obtain compassionate release from the court is through a motion made by the Director of the BOP.³³⁹

To receive this, you must first submit a motion to your warden, asking for compassionate release. The request should be in writing. In the motion, you must describe the extraordinary or compelling circumstances that did not exist when you were sentenced.³⁴⁰ You must also describe your plan for release, including where you will live, how you will support yourself, and if your reason is based on your health, where you will get medical care, and how you will pay for it.³⁴¹

If your reason for compassionate release is based on a medical condition, make sure to state that information at the beginning of your motion so that your request can be reviewed more quickly.

If the warden thinks your motion should be granted, he will send it to the Regional Director of the BOP.³⁴² The Regional Director will then review your motion, and if he thinks your motion should be granted, he will send it to the BOP's Office of General Counsel.³⁴³ The General Counsel will then review your motion, and if he decides that you should be given compassionate release, he will ask for an opinion from the Medical Director (if your reason is health-related), or the Assistant Director of the Correctional Programs Division (for all other reasons).³⁴⁴ Finally, the recommendation of the General Counsel, along with the opinion from the Medical or Assistant Director, will be sent to the Director of the BOP to make a final decision on your motion.³⁴⁵

If the Director approves your request, he will contact the U.S. Attorney. The U.S. Attorney will then make a motion to the court to have your sentence reduced.³⁴⁶ The sentencing court will review the Director's motion and decide whether there are extraordinary and compelling reasons to justify your release. If the sentencing court grants the motion, it will order your release. The warden at your facility will then release you.³⁴⁷

(d) Denial

Any of the officials described above may deny your motion. The official who denies your motion will send you written notice stating that your request has been denied and explaining why it was denied. If the warden or the Regional Director denies your request for compassionate relief, you can

339. *See* *United States v. Smartt*, 129 F.3d 539, 541 (10th Cir. 1997) (finding that even though the defendant had a medical condition that could be considered an extraordinary and compelling circumstance, the court could not approve his motion because the request was not made by the BOP Director); *see also* *United States v. Tyler*, 417 F. Supp.2d 80, 84 (D. Me. 2006) (denying relief because no motion was made by the BOP Director).

340. Fed. Bureau of Prisons, Program Statement No. 5050.49(2)(a) (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.61 (2019).

341. Fed. Bureau of Prisons, Program Statement No. 5050.49(2)(a), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.61 (2019).

342. Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(1) (2019).

343. Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(1) (2019).

344. Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a)(2), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(3) (2019).

345. Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a)(2), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(3) (2019).

346. Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a)(3), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(3) (2019).

347. Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(b), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(b) (2019).

appeal the decision.³⁴⁸ If you are denied by the General Counsel or the BOP Director, however, that decision is a *final* administrative decision and cannot be appealed.³⁴⁹

In order to challenge the BOP's decision, you must first go through all of the administrative remedies, as required by the Prison Litigation Reform Act.³⁵⁰ Even if you are sick or believe that the BOP will not approve your motion on appeal, you must still exhaust all levels of the administrative remedy process. Only after you do this can you file a petition for writ of habeas corpus, which asks the court to reverse the warden's decision.³⁵¹ It is important to point out, however, that it is doubtful that the court will grant your appeal. For example, some district courts have ruled that they do not have jurisdiction to hear a habeas corpus petition challenging the denial of compassionate release by the warden or the BOP.³⁵² Some courts of appeals have reached similar decisions by denying review of the BOP's refusal to bring a motion on behalf of incarcerated people under 18 U.S.C. § 4205(g) (the other statute covered by the BOP policy statements on early release).³⁵³ Other courts that have reviewed the BOP's decisions have been unwilling to find these decisions arbitrary and capricious, which is the standard for overturning these decisions.³⁵⁴

348. Fed. Bureau of Prisons, Program Statement No. 5050.49(9)(a), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. § 571.63(a) (2019).

349. Fed. Bureau of Prisons, Program Statement No. 5050.49(9)(d), (2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Feb. 27, 2017); 28 C.F.R. §§ 571.63(b)–(d) (2019).

350. See *JLM*, Chapter 14, “The Prison Litigation Reform Act.”

351. See *Leja v. Sabol*, 487 F. Supp. 2d 1, 2–3 (D. Mass. 2007) (holding that perceived futility of request and/or medical condition do not relieve an incarcerated person of the requirement of exhaustion of administrative remedies).

352. See *United States v. Morales*, 353 F. Supp. 2d 204, 205 (D. Mass. 2005) (dismissing habeas corpus petition by terminally ill incarcerated person who requested compassionate relief and release from prison so he could return to Colombia, live with his family, and obtain a heart transplant, and holding the court lacked statutory authority to reduce his sentence without a motion by the Director of the BOP); *United States v. Etters*, No. 04-20115-13-JWL, 2007 U.S. Dist. LEXIS 75731, at *1 (D. Kan. Sept. 28, 2007) (*unpublished*) (denying plaintiff's motion to modify her sentence to home imprisonment because the court lacked jurisdiction under 18 U.S.C. § 3582(c)(1) when no motion was made by the Director of the BOP). A few district courts have gone a step further, holding that even if you have exhausted your administrative appeals, the court will still not review the final decision made by the BOP under the Administrative Procedures Act because it is barred by the terms of 18 U.S.C. § 3582. See *Pham v. Fed. Bureau of Prisons*, No. 1:07-cv-0025-SEB-JMS, 2007 U.S. Dist. LEXIS 38184, at *1–2 (S.D. Ind. May 23, 2007) (*unpublished*) (dismissing request made by a defendant with a chronic heart condition to overrule the BOP's denial of compassionate release, and holding that the decision was assigned by law to the discretion of the BOP and was therefore unreviewable under the Administrative Procedures Act); *Gutierrez v. Anderson*, No. 06-1714 (JRT/JSM), 2006 U.S. Dist. LEXIS 79580, at *2, 5–6 (D. Minn. Oct. 30, 2006) (*unpublished*) (finding that 18 U.S.C. § 3582 barred the court “from reviewing the Warden's decision not to recommend compassionate release” and therefore denying the terminally-ill plaintiff's motion to compel compassionate release).

353. See *Turner v. U.S. Parole Comm'n*, 810 F.2d 612, 618 (7th Cir. 1987) (finding the Parole and Reorganization Act barred the court from reviewing the warden's rejection of the Parole Commissioner's recommendation to reduce plaintiff's sentence); *Simmons v. Christensen*, 894 F.2d 1041, 1043 (9th Cir. 1990) (same); *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991) (holding that because the BOP had the exclusive authority to make motions under 18 U.S.C. § 4205(g), a court could not review the BOP's refusal to compel compassionate release).

354. *United States v. Maldonado*, 138 F. Supp. 2d 328, 333 (E.D.N.Y. 2001) (holding that BOP's interpretation of “extraordinary and compelling circumstances,” to mean incarcerated people with a generally terminal medical condition that limited life expectancy by a predictable amount, was reasonable because it provided an objective way to limit eligibility while still allowing for truly exceptional circumstances to be taken into account); *Hubbs v. Dewalt*, NO. 05-CV-512-JBC, 2006 U.S. Dist. LEXIS 27950, at *5, 11–12 (D. Ky. May 8, 2006) (*unpublished*) (holding BOP's interpretation of 18 U.S.C. § 3582(c)(1)(A), as applied to an incarcerated person who was a double-leg amputee, was reasonable and not arbitrary and capricious when the BOP staff based its decision on the fact that the sentencing court knew of the incarcerated person's condition at the time of sentencing and its interpretation of “extraordinary and compelling” was limited to terminally-ill incarcerated people who could not complete their sentence). In *Dewalt*, the court did not consider the other group of incarcerated people covered by the BOP's interpretation—those “who suffer from a severely debilitating and

O. Federal Supervised Release

Federal supervised release is different from parole. Federal supervised release is not a way to get out of your sentence early. Instead, it is a period of supervision that you must serve after you are released from prison. Federal parole is not available for anyone who is convicted of committing a crime that took place on or after November 1, 1987. Therefore, anyone who was convicted of a federal felony or misdemeanor that took place on or after November 1, 1987, may have a term of federal supervised release included in his sentence of imprisonment. There are also certain situations in which a judge *must* include a period of supervised release in your sentence. For example, a judge must include a period of supervised release if you received a first-time conviction for a domestic violence offense or an offense for which a law requires a term of supervised release.³⁵⁵

1. How long is a supervised release?

Your sentencing judge will decide how long the supervised release will last. The judge will make this decision based on several factors, including: the nature of your offense; the circumstances surrounding your offense; your personal character; the level of deterrence you require to discourage you from committing crimes again; the need to protect the public from you committing crimes in the future; the need to provide you with training and programs; the sentencing range for your offense; the similarity of your sentence to others convicted of similar offenses; and the need for you to repay the victims of your offense.³⁵⁶

The maximum amount of time that you can be sentenced to supervised release depends on the class of the crime for which you were convicted. For a Class A or Class B felony, the maximum length is five years. For a Class C or Class D felony, the maximum length is three years. For a Class E felony, or a misdemeanor (other than a petty offense), the maximum length is one year.³⁵⁷

Your period of supervised release starts on the day that you are released from prison.³⁵⁸ The time will run at the same time as any other Federal, State, or local period of supervised release, probation, or parole you may be subjected to for another offense.³⁵⁹ Any time spent in prison will not be counted towards your period of supervised release unless it is less than thirty days in a row.³⁶⁰

2. What are the conditions of supervised release?

At the time of your sentencing, the judge will include several conditions that you must follow during your period of supervised release. There are some conditions that the judge *must* include and some conditions that the judge can *choose* to include, depending on the circumstances of your case. Your probation officer must give you a written copy of the terms of your supervised release, explaining the terms in clear, understandable language.³⁶¹

The following conditions *must* be included as part of your supervised release:³⁶²

- (1) You cannot commit another crime under federal, state, or local law;
- (2) You cannot unlawfully possess a controlled substance;
- (3) If you were convicted for the first time of a domestic violence offense, you must complete an approved rehabilitation program if there is one within a 50-mile radius of your legal residence;
- (4) If you are a sex offender, you must:

irreversible mental or physical medical condition and are unable to provide self-care.” 2006 U.S. Dist. LEXIS 27950, at *5, 11–12 (D. Ky. May 8, 2006) (*unpublished*).

355. 18 U.S.C. § 3583(a).

356. 18 U.S.C. § 3553(a)(1), (2)(B)–(D), (4)–(7).

357. 18 U.S.C. § 3583(b).

358. 18 U.S.C. § 3624(e).

359. 18 U.S.C. § 3624(e).

360. 18 U.S.C. § 3624(e).

361. 18 U.S.C. § 3583(f).

362. 18 U.S.C. § 3583(d).

- a. comply with the requirements of the Sex Offender Registration and Notification Act;
- b. cooperate in the collection of your DNA sample under the DNA Analysis Backlog Elimination Act; and
- c. submit to a drug test within fifteen days of release and at least two more times after that.³⁶³

The following conditions *can* be included as part of your supervised release:³⁶⁴

- (1) If you are a sex offender, searches may be done at any time of your person, property, and possessions upon reasonable suspicion and without a search warrant;
- (2) Deportation;
- (3) Any other condition that is related to the factors in 18 U.S.C. § 3553 that does not involve a greater limit on your liberty than is necessary (those factors are listed above in the text to footnote 348;
- (4) Any condition that could be included as a term of probation; or
- (5) Any other condition allowed by a statute.³⁶⁵

3. What happens if you violate a condition of supervised release?

If you violate any of the conditions set out in your sentence, your supervised release can be revoked. Your supervised release *must* be revoked if you are found in possession of a controlled substance or a firearm; in violation of federal law or in violation of a term of your supervised release; if you refuse to comply with the drug testing requirements, or if as a part of drug testing, test positive for illegal controlled substance more than three times over the course of one year.³⁶⁶ If your supervised release is revoked, you may be sentenced to serve in prison either part or all of the time you were sentenced to supervised release, without any credit for the time you spent on supervised release before it was revoked.³⁶⁷ The court may also order you to serve another term of supervised release in addition to your new term of imprisonment.³⁶⁸ The length of the additional term of supervised release can be no longer than the maximum term allowed for under the statute covering your crime, minus the length of imprisonment for violating your supervised release.³⁶⁹ For example, if your original maximum amount of supervised release was six months, and your term of imprisonment following the supervised release being revoked was three months, your new supervised release can be a maximum of three months. Alternatively, instead of sentencing you to more time in prison, the judge can order that you remain in your home during non-working hours and be monitored by telephone or electronic surveillance devices.³⁷⁰

You may participate in up to two stages of hearings before your supervised release can be taken away. When you are accused of violating the terms of your supervised release, you will be brought before a magistrate judge. The magistrate judge must tell you which violation of supervised release you are being charged with, inform you of your right to obtain an attorney or to request that an attorney be appointed for you, and inform you of your right, if you are currently held in custody, to a preliminary hearing to determine whether or not there is enough evidence for the judge to decide that you may have violated a term of your supervised release.³⁷¹ If you decide not to give up (“waive”) the

363. This condition can be removed if your presentence report or other information in your sentencing file indicates that you have a low risk of future substance abuse. 18 U.S.C. § 3563(a)(5).

364. 18 U.S.C. § 3583(d).

365. 18 U.S.C. § 3583(d)(1)–(3). 18 U.S.C. § 3583(d)(1)–(3) states that additional conditions must be “consistent with any pertinent policy statements issued by the Sentencing Commission” *See* 18 U.S.C. § 3563(b) for a list of all discretionary probation conditions that can be included as conditions of your supervised release.

366. 18 U.S.C. § 3583(g).

367. This condition sets a limit on the time that has to be served depending on the defendant’s class felony. 18 U.S.C. § 3583(e)(3).

368. 18 U.S.C. § 3583(h).

369. 18 U.S.C. § 3583(h).

370. 18 U.S.C. § 3583(e)(4).

371. FED. R. CRIM. P. 32.1(a)(3).

preliminary hearing, the magistrate judge will provide you with notice of the hearing, its purpose, the violation you are alleged to have committed, and your right to retain a lawyer or have a lawyer appointed. You have a right to be present at your hearing, to present evidence, and to request the right to question witnesses testifying against you.³⁷² The magistrate judge will either dismiss the case if he finds there is no probable cause to believe that you committed a violation, or the magistrate judge will order a revocation hearing.

To revoke your supervised release, the court must find at the revocation hearing that it is more likely than not that you violated a term of your supervised release.³⁷³ You have the same rights in a revocation hearing that you had in the preliminary hearing, as well as a right to know what evidence will be used against you, the right to question adverse witnesses (you do not need to request to do so ahead of time), the right to present information about mitigating factors in your case, and the right to see the witnesses' prior statements.³⁷⁴ You may waive these rights, but your waiver will only be valid if you knew what the waiver meant and chose to do so voluntarily.³⁷⁵ At a revocation hearing, any evidence may be used against you, even evidence taken without probable cause³⁷⁶—you cannot defend yourself by saying that the government gathered evidence improperly.

4. Can you change the length or conditions of your supervised release?

In addition to being revoked, your period of supervised release can also be ended or modified at your request or the court's request. Usually there will be a hearing before the court terminates or modifies a condition of your supervised release. At the hearing, you will have the right to counsel, to make a statement on your own behalf, and to present evidence showing circumstances why the court should decide in your favor.³⁷⁷ No hearing is required if you waive the right to a hearing, if the change

372. FED. R. CRIM. P. 32.1(b)(1)(B). The 6th Amendment right to confront witnesses whose testimony will be used against you does not exist in supervised release revocation hearings. *United States v. Hall*, 419 F.3d 980, 985–986 (9th Cir. 2005) (holding that the right to confront a testimonial witness does not apply to hearsay evidence used in supervised release revocation hearings because these hearings are not criminal prosecutions (citing *United States v. Aspinall*, 389 F.3d 332, 342 (2d Cir. 2004) and *United States v. Martin*, 382 F.3d 840, 844 n.4 (8th Cir. 2004)). To determine whether you may confront an adverse witness, the judge will balance your due process right against the government's good cause for denying you this right. *United States v. Taveras*, 380 F.3d 532, 536 (1st Cir. 2004) (applying the recommendation in the 2002 Committee Advisory Note to Rule 32.1 that a balancing test be applied to protect the due process right of parolees recognized in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). The government's good cause in not producing the witness will be judged by the reliability of the hearsay evidence and its reason for not presenting the witness. *United States v. Rondeau*, 430 F.3d 44, 48–49 (1st Cir. 2005) (providing a full discussion of the factors considered in judging reliability and the government's reasons for not providing the witness). For a case describing reliability standards, see *United States v. Redd*, 318 F.3d 778, 785 (8th Cir. 2003) (finding that, due to long-established recognition of the reliability of documentary evidence, the releasee had a minimal interest in confronting the lab technician who ran his sweat patch reports showing cocaine use at his supervised release revocation hearing). For a case describing the government's reason for not providing the witness, see *United States v. Williams*, 443 F.3d 35, 45–46 (2d Cir. 2006) (finding that the releasee waived his right to confront the witness where the witness would not come forward to present evidence against him out of fear and intimidation caused by threats made by the releasee's acquaintances). Your interest in confrontation is determined by the circumstances of your individual case including the importance of the evidence to the court's finding, your ability to show the evidence was false, and the consequences of the court's decision on factors other than the revocation of your supervised release. *United States v. Walker*, 117 F.3d 417, 420 (9th Cir. 1997) (stating that the court must use a balancing test in which it "consider[s] the importance of the evidence to the court's finding, the releasee's opportunity to refute the evidence, and the consequences of the court's finding (citing *United States v. Martin*, 984 F.2d 308, 312 (9th Cir. 1993))).

373. 18 U.S.C. § 3583(e)(3).

374. FED. R. CRIM. P. 32.1(b)(2); FED. R. CRIM. P. 26.2(g)(3).

375. *United States v. Correa-Torres*, 326 F.3d 18, 22–23 (1st Cir. 2003) (ordering a new hearing for plaintiff whose supervised release was revoked after waiver of his rights at his first revocation hearing when he did not know what his rights were or what the charges were against him).

376. *United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000) (holding that the exclusionary rule does not apply at supervised release revocation hearings).

377. FED. R. CRIM. P. 32.1(c)(1).

will benefit you and will not extend the length of your supervised release, or if the government attorney does not object to the change you requested after having received notice and having had reasonable time to object.³⁷⁸ You can also apply to the court to clarify the terms of your supervised release if you are unsure what a particular condition means or whether or not you have met the requirements for that condition.³⁷⁹

5. How can you terminate your supervised release?

You can apply to terminate your period of supervised release by either appealing to the court or to the President of the United States through a commutation petition (see Part P below). After you have served one year and one day of your supervised release, you can appeal to the court to have the remaining amount of time on your supervised release sentence discharged.³⁸⁰ If you apply before you have served at least one year and one day of supervised release, the court will dismiss your petition.³⁸¹ In deciding on your request, the court will first look at “many of the same factors” used to determine your original sentence.³⁸² It will then decide whether terminating your supervised release is in the interests of justice and supported by your post-imprisonment conduct.³⁸³ The court is not required to hold a hearing to decide your request for termination because its decision cannot extend the time you will have to spend on supervised release—it can only lower it.³⁸⁴

6. How can you change the terms of your supervised release?

You can petition the district court to modify a condition of your supervised release if your circumstances have changed since the time of your sentencing or if you believe the condition places a heavy limit on your liberty without meeting any goals of your supervised release. If a discretionary condition of supervised release places too much of a burden on a protected liberty interest, without furthering your rehabilitation or protecting the public, a court can order the condition be changed to include no greater limit on your liberty than necessary to meet your supervised release goals.³⁸⁵ The court will first determine whether you have a recognized liberty interest³⁸⁶ affected by the challenged condition and then determine the sentencing goal of that condition and its reasonableness.³⁸⁷ The

378. FED. R. CRIM. P. 32.1(c)(2).

379. *United States v. Lilly*, 206 F.3d 756, 762-763 (7th Cir. 2000) (recognizing plaintiff’s right to have the district court clarify whether or not he had met the repayment ordered as a part of his supervised release).

380. 18 U.S.C. § 3583(e)(1).

381. *United States v. Werber*, No. 90 Cr. 364 (LMM), 1995 U.S. Dist. LEXIS 12307, at *1-2 (S.D.N.Y. Aug. 25, 1995) (*unpublished*) (defendant had not yet served one year of supervised release, and therefore could not move to terminate the term under 18 U.S.C. § 3583(e)(1)).

382. *United States v. Lussier*, 104 F.3d 32, 34-35 (2d Cir. 1997).

383. 18 U.S.C. § 3583(e)(1).

384. *United States v. Lai*, 458 F. Supp. 2d 177, 177 (S.D.N.Y. 2006) (finding that releasee was not entitled to a hearing on his request for termination of the remaining 14 months of his period of supervised release under FED. R. CRIM. P. 32.1(c). This rule states that a hearing is not required if your request does not extend the term of your supervised release and the relief you seek would benefit you).

385. *United States v. Monteiro*, 270 F.3d 465, 472-473 (7th Cir. 2001) (ordering a condition of supervised release allowing law enforcement to conduct warrantless seizures of plaintiff, his car, or his home be rewritten by the court to limit the seizure power “to ensure that it relates reasonably to the ends of rehabilitation and protection of the public.”).

386. *See United States v. Myers*, 426 F.3d 117, 125 (2d Cir. 2005) (stating that the court “must ask first whether the condition at issue ... deprived [the releasee] of any cognizable liberty interest,” and discussing liberty interests in the context of constitutionally-protected interests); *see also United States v. Holman*, 532 F.3d 284, 290 (4th Cir. 2008) (discussing fundamental rights and supervised release in the context of involuntary medication orders).

387. *United States v. Myers*, 426 F.3d 117, 125-130 (2d Cir. 2005) (removing as a condition of supervised release that the plaintiff receive approval from his probation office before he could have contact with his minor son. His original sentence for child pornography involved only females, and there was no record demonstrating that his son would be harmed by contact with him or that any sentencing goal that protected other children would be served by this condition, which interfered with his liberty interest in maintaining his parental relationship).

sentencing goal may relate to the offense for which you are currently in prison or to a past offense.³⁸⁸ The court will not approve your requested change if your reason for the change is outweighed by the government's interest in the condition being maintained.

The court can also modify the conditions of your supervised release on its own or in response to a request by your probation officer at any time before the end of your term of supervised release.³⁸⁹ The court can add additional conditions of supervised release to your sentence and/or correct your sentence to include the conditions of supervised release as long as the court provides you with a hearing as described in the introduction to this section³⁹⁰ and the new conditions relate to a rehabilitation goal and do not unduly (overly) limit your liberty interests.³⁹¹

P. Federal Executive Clemency

The President of the United States has the constitutional power to pardon, commute, or reprieve a sentence, and to forgive fines, for conviction of a federal offense.³⁹² It is important to note that clemency is usually not granted: during the Obama Presidency up to 2017 a total of 212 pardons and 1,715 commutations have been granted, but 1,708 pardon requests and 18,749 commutation requests were denied.³⁹³ During the Trump Presidency, up to 2020 a total of 25 pardons and 10 commutations have been granted, but 82 pardon requests and 98 commutation requests were denied.³⁹⁴ The main forms of relief explained in this section—pardon and commutation—only apply to convictions for federal crimes.³⁹⁵ See Part I of this Chapter for information on how to seek clemency for New York State convictions.

For federal sentences, pardons and commutations are very different. A pardon restores civil rights that were taken away when you were sentenced. A commutation can shorten the amount of time that you must serve in prison or in supervised release. Because a pardon does not reduce your sentence, it will be discussed only briefly. This section does not deal with federal executive clemency for military offenses or for people who are sentenced to death, both of which involve separate petition procedures and considerations.

1. Pardons

A federal pardon does *not* allow you to get out of your sentence early. Instead, a federal pardon allows you to have your federal conviction officially forgiven and your civil rights restored. It does not

with his son).

388. *United States v. Dupes*, 513 F.3d 338, 344 (2d Cir. 2008) (for defendant who was convicted of securities fraud, court upheld the following conditions of supervised release: registration as a sex offender; attending sex offender treatment; staying away from places where children are often located; and not using the internet for child pornography, because—given his past conviction for and history of sexual offenses—such conditions were not overly broad or vague and were appropriate to the sentencing goals of providing defendant with needed treatment and protecting the public from defendant).

389. 18 U.S.C. § 3583(e)(2).

390. *United States v. Navarro-Espinosa*, 30 F.3d 1169, 1171 (9th Cir. 1994) (upholding district court's sentence against releasee, which was amended under 35 U.S.C. § 3583(e)(2) to include the four years of supervised release that the court had inadvertently neglected to mention when first pronouncing sentence).

391. *United States v. Davies*, 380 F.3d 329, 333 (8th Cir. 2004) (holding court's adding a condition of supervised release requiring releasee to participate in an alcohol abuse program was not an abuse of discretion because it met releasee's rehabilitation goals, given his alcoholism and depression history, and did not violate his liberty interests because it was less intrusive than a ban on drinking alcohol).

392. U.S. CONST. art. II, § 2; *see also* 28 C.F.R. § 1.1 (2019). *See also* *Richards v. United States*, 192 F.2d 602, 610 (D.C. Cir. 1951) (finding that the President has the broad constitutional power to pardon in either limited or conditional terms, or "may be made specific as to effect; for example, to restore civil rights, or to remit fines or other penalties.").

393. U.S. Dept. of Justice, *Clemency Statistics*, available at <https://www.justice.gov/pardon/clemency-statistics> (last visited Feb. 22, 2020).

394. U.S. Dept. of Justice, *Clemency Statistics*, available at <https://www.justice.gov/pardon/clemency-statistics> (last visited Jun. 27, 2020).

395. 28 C.F.R. § 1.4 (2019).

mean you are innocent. Because pardons are a showing of forgiveness for your crime and not a declaration of your innocence, you must show remorse and rehabilitation, and good behavior after release from prison. It is important to remember a pardon will not erase your conviction. So, any time you are asked to list your convictions you must still include the pardoned offense.³⁹⁶ But you can also note that you received a federal pardon for the offense.³⁹⁷

You should wait five years after the date of your release from prison before you can seek a presidential pardon.³⁹⁸ You should not request a pardon while you are on supervised release, parole, or probation, and the five year timeline begins with your latest release from prison for any crime, even if you are seeking a pardon for a previous offense.³⁹⁹ If there are exceptional reasons why you need the pardon *now* and cannot wait until the five year period is over, then you can request a waiver. To get a waiver, write a separate letter, stating why you think the waiting period should be waived and submit it with your pardon application. Waivers, however, are very rarely granted.⁴⁰⁰

Even after the five-year waiting period, you need to explain why you are seeking a pardon. Examples include gaining entry into a professional association; obtaining licenses from government authorities; restoration of your civil rights; and accessing benefits provided by administrative agencies. It is important to note that many of your civil rights (for example, your voting rights) are governed by the state where you were convicted and not by the federal government. So, you might want to pursue state clemency procedures instead of, or in addition to, federal procedures to increase your chance of success.⁴⁰¹

To request a federal pardon, you must submit a completed, signed, and dated pardon form to the United States Pardon Attorney at USPARDON.Attorney@usdoj.gov. If you are not able to email the form, you can instead mail it to this address:

Office of the Pardon Attorney

U.S. Department of Justice
950 Pennsylvania Ave.
Washington, DC 20530

Pardon forms are available online at: <https://www.justice.gov/pardon/file/960581/download>.

2. Commutations

A commutation of your sentence is a reduction of your sentence's length. A commutation can change your sentence to time served, shorten your imprisonment period so you can be released early, move up the date of your parole hearing,⁴⁰² or shorten or terminate your sentence of supervised release.⁴⁰³ Commutations are rarely granted. Commutation is purely discretionary, which means that

396. U.S. Dept. of Justice, *Pardon Information and Instructions*, available at <https://www.justice.gov/pardon/pardon-information-and-instructions> (last visited Feb. 22, 2020).

397. U.S. Dept. of Justice, *Pardon Information and Instructions*, available at <https://www.justice.gov/pardon/pardon-information-and-instructions> (last visited Feb. 22, 2020).

398. 28 C.F.R. § 1.2 (2019).

399. 28 C.F.R. § 1.2 (2019) ("No petition for pardon should be filed until the expiration of a waiting period of at least five years after the date of the release of the petitioner from confinement").

400. U.S. Dept. of Justice, *Pardon Information and Instructions*, available at <https://www.justice.gov/pardon/pardon-information-and-instructions> (last visited Feb. 22, 2020).

401. U.S. Dept. of Justice, *Pardon Information and Instructions*, available at <https://www.justice.gov/pardon/pardon-information-and-instructions> (last visited Feb. 22, 2020).

402. U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 9-140.113 (2018), available at <https://www.justice.gov/pardon/about-office-0> (last visited Feb. 23, 2020) (explaining that a commutation can change a sentence to time served, or reduce a sentence); see also *Nicholson-El v. Conley*, No. 5:01-0798, 2001 U.S. Dist. LEXIS 24168, at *2-4, n.1 (S.D.W. Va. Nov. 27, 2001) (*unpublished*) (noting that petitioner's commutation from President Carter made him immediately eligible for a parole hearing for his two consecutive sentences, but that the commutation did not change the sentences to make them run concurrently).

403. If you are requesting that your period of supervised release be terminated, you must state specifically

it is up to the President to decide, and he does not have to issue a commutation if he does not think it is appropriate. The President does not have to state his reasons for granting or denying your petition for commutation. You have no right to appeal the denial of your request for commutation.

(a) Eligibility

In general, your petition for commutation will not be reviewed unless you have started serving your sentence and are not currently appealing or challenging your sentence in court.⁴⁰⁴ You cannot apply for a commutation of sentence, except in exceptional circumstances, if you have any other forms of judicial or administrative relief available, including:⁴⁰⁵

- (1) A motion by the government under Federal Rule of Criminal Procedure 35 (for providing substantial assistance to the government), or
- (2) A petition for compassionate release under 18 U.S.C. § 3582(c)(1).⁴⁰⁶

Examples of exceptional or unusual circumstances include: terminal illness or old age, the severity (harshness) of the sentence, ineligibility for parole, and providing beneficial assistance at the request of the government in the investigation or prosecution of another case.⁴⁰⁷ These are also the reasons commutations are usually granted. If any of these exceptional or unusual circumstances are present in your case, the Pardon Attorney, who assists the President, will consider your application. But the Pardon Attorney will still consider the availability of other means of relief and the amount of time you have already served when reviewing your application.⁴⁰⁸ For example, President George W. Bush granted a commutation of Lewis Libby's sentence of imprisonment, which was at the low end of the Sentencing Guidelines' range, because it was too harsh. The President announced in his Statement on the Executive Clemency for Libby that he considered critics' "arguments and the circumstances surrounding this case," as well as the fact that "the district court rejected the advice of the probation office, which recommended a lesser sentence and the consideration of factors that could have led to a sentence of home confinement or probation."⁴⁰⁹

To be considered for federal commutation, send a written petition requesting a commutation of your sentence, addressed to the President of the United States, to the following address:

Office of the Pardon Attorney
U.S. Department of Justice
950 Pennsylvania Ave.
Washington, DC 20530

on your petition that this is the type of relief you are seeking and why serving it would be an undue hardship on you as well as why you cannot obtain the same benefit through a petition under 18 U.S.C. § 3583(e)(1). U.S. DEPT. OF JUSTICE, COMMUTATION INSTRUCTIONS, *available at* <https://www.justice.gov/pardon/commutation-instructions> (last visited Feb. 23, 2020). See Part O(8) of this Chapter for more information on termination of supervised release.

404. U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 9-140.113 (2018), *available at* <https://www.justice.gov/pardon/about-office-0> (last visited Feb. 23, 2020).

405. 28 C.F.R. § 1.3 (2020); *see also* U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 9-140.113 (2018), *available at* <https://www.justice.gov/pardon/about-office-0> (last visited Feb. 23, 2020).

406. See Part J of this Chapter for information about compassionate release in New York State.

407. U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 9-140.113 (2018), *available at* <https://www.justice.gov/pardon/about-office-0> (last visited Feb. 23, 2020).

408. U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONERS § 9-140.113 (2018), *available at* <https://www.justice.gov/pardon/about-office-0> (last visited Feb. 23, 2020); U.S. Dept. of Justice, Office of the Pardon Attorney, *Frequently Asked Questions*, *available at* <https://www.justice.gov/pardon/frequently-asked-questions> (last visited Feb. 23, 2020).

⁴⁰⁹ The White House: George W. Bush, *Statement by the President on Executive Clemency for Lewis Libby*, *available at* <https://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070702-3.html> (last visited Jun. 27, 2020).

If you would like your petition to be sent faster, you must submit it through your facility's warden. There are several benefits to sending your petition through the warden, including assistance in obtaining documents. Therefore, this is the method described in this Section.

(b) Obtain and Complete the Petition for Commutation Form

You can obtain the petition for commutation form by requesting it from the Pardon Attorney or the warden in your facility.⁴¹⁰ When you complete the form, you must state the truth or you could be fined and/or imprisoned.⁴¹¹ The form should be easy to read and completed in pen or typewritten.

On the form you will need to include the following information:

- (1) The date(s) when you have previously applied for commutation (if any) and the result(s);
- (2) The offense(s) that you are seeking to have commuted (including district of conviction, citation of offense if known, and sentence);
- (3) The date(s) of any criminal appeals you have filed on your case (if any), the result(s), and the citation to the opinion(s);
- (4) The date(s) of any habeas corpus petition(s) you have filed to challenge your conviction (if any), the result(s), and the citation to the opinion(s);
- (5) Your story of the events that took place during the offense you were convicted of and what your involvement was in those events;
- (6) A list of all of your other arrests and convictions, including any juvenile records (the date, the charge, the arresting agency, and the outcome); and
- (7) The reasons you are seeking commutation.

(c) Submit the form to the warden to be sent to the Pardon Attorney

When you send the petition through the warden at your facility, it will be assigned to a case manager who has thirty days to get the required documents together and submit them to the warden for signature.⁴¹² Your case manager must include with your petition a pre-sentence Investigation Report (if available), Judgment in a Criminal Case, and your most recent Progress Report, if one already exists.⁴¹³ Any requests for additional information will be sent directly to the warden.

(d) Review of Your Petition

Once the Pardon Attorney receives your petition, the Pardon Attorney will conduct an investigation of your case. The Pardon Attorney or the Attorney General may contact other government officials (including your sentencing judge, the Director of the BOP, and the U.S. Attorney in the district where you were convicted) to get their opinions about whether or not your request for commutation should be granted by the President.⁴¹⁴ If you are requesting commutation for a felony offense that involved a victim, the Attorney General may send a notice to the victim (or their spouse, adult child, or parent, if the victim is deceased or rendered incompetent as a direct result of the offense for which clemency is sought) to ask if he or she would like to submit an opinion regarding your request. A victim is someone who has "suffered direct or threatened physical, emotional, or pecuniary harm as a result of the commission of the crime for which clemency is sought" and has filed a request with the BOP to be notified upon your release.⁴¹⁵

410. 28 C.F.R. § 1.1 (2020). The form is also available at <https://www.justice.gov/pardon/file/960561/download> (last visited Feb. 23, 2020).

411. 18 U.S.C. § 1001; 18 U.S.C. § 3571; 18 U.S.C. § 3581.

412. Fed. Bureau of Prisons, Program Statement No. 1330.15, (2001) (*as revised* May 2, 2014), *available at* https://www.bop.gov/policy/progstat/1330_015.pdf (last visited Sept. 29, 2019).

413. Fed. Bureau of Prisons, Program Statement No. 1330.15, (2001) (*as revised* May 2, 2014), *available at* https://www.bop.gov/policy/progstat/1330_015.pdf (last visited Sept. 29, 2019).

414. 28 C.F.R. § 1.6(a) (2020).

415. 28 C.F.R. § 1.6(b)(3) (2020).

After the Pardon Attorney has received and reviewed the reports on your case, he will make a recommendation to the President to deny or approve your petition.⁴¹⁶ If the Pardon Attorney recommends that the President deny your application and the President does not take any other action within thirty days of receiving the recommendation, your petition will be denied and your case closed, as long as you are not serving a death sentence.⁴¹⁷ Your case can also be closed if the President denies your application directly after reviewing it.⁴¹⁸ You will receive notice about the denial from the warden at your facility.⁴¹⁹ You are not entitled to any appeal if your application is denied.

If the President approves your petition for commutation, a warrant of commutation is sent to the warden, who will deliver it to you.⁴²⁰ If you are already on parole or supervised release when your petition is granted, the warrant will be sent to you directly.⁴²¹ Your sentence will then be recalculated and, if you are now eligible for a parole hearing, you will be added to the docket.⁴²² It is important to note in this case that even though you have a right to a parole hearing, you are not guaranteed to be granted parole.

Q. Conclusion

If you are in New York State prison and would like to try to get out before serving your maximum sentence, three types of release programs (and parole) exist: (1) conditional, (2) early, and (3) presumptive release. The type of sentence you are serving affects which of these programs you may use. In general, you can decrease the amount of time in prison by showing good behavior, because good behavior can earn you good-time credit. If you have applied unsuccessfully for a release program, have not acquired the required amount of good time, or have not served enough of your underlying sentence to qualify, you can also petition for a pardon or commutation, which allows you to leave prison immediately. Note that you can pursue several options at the same time.

If you are in a federal prison and would like to try to get out before serving your full sentence, you may be able to be released through (1) good conduct time, (2) the Residential Drug Abuse Program ("RDAP"), (3) the Second Chance Act, and (4) compassionate relief. In addition, you can receive credit for time already served and this credit can be used to decrease your sentence. Finally, keep in mind that you can also apply to have your sentence of imprisonment or supervised release reduced by the U.S. President through a commutation petition.

Some of these methods can be used together to reduce your sentence (for example, good-conduct time and early release under RDAP can be combined) while others may be pursued as alternate ways to reduce your sentence (for example, compassionate relief *or* executive clemency). You can pursue several of these options at the same time to try to reduce your federal sentence.

416. 28 C.F.R. § 1.6(c) (2020).

417. 28 C.F.R. § 1.8(b) (2020).

418. 28 C.F.R. § 1.8(a) (2020).

419. Fed. Bureau of Prisons, Program Statement No. 1330.15, at 5 (2001) (*as revised* May 2, 2014), available at https://www.bop.gov/policy/progstat/1330_015.pdf (last visited Feb. 23, 2020).

420. 28 C.F.R. § 1.7 (2020).

421. 28 C.F.R. § 1.7 (2020).

422. Fed. Bureau of Prisons, Program Statement No. 1330.15, at 5 (2001) (*as revised* May 2, 2014), available at https://www.bop.gov/policy/progstat/1330_015.pdf (last visited Feb. 23, 2020).

CHAPTER 36

SPECIAL CONSIDERATIONS FOR SEX OFFENDERS*

A. Introduction

If you have been convicted of or pled guilty to a sex offense, there are special issues you should know about. Sex offenses are defined differently in each state. Common sex offenses include sexually touching or having sex with another person,¹ when that other person is:

- (1) forced to act;
- (2) unable to agree to sexual behavior (“incapacitated”);² or
- (3) under the age of consent (a child or minor).

Most sex offenses are felonies. However, some lower-level sex offenses are characterized as misdemeanors. These lower-level offenses include sexual misconduct,³ forcible touching,⁴ and sexual abuse in the third degree.⁵ In New York State, most sex offenses appear in Article 130 of the Penal Law of the State of New York.⁶

This Chapter will focus mainly on the more serious felony sex offenses and specifically on New York law. However, this Chapter will also discuss laws from other states as examples. Each state has very specific laws on this topic, so you must always check the laws in the state where you were convicted.

Some sex offender laws may apply to people who have committed crimes that are not usually considered sex offenses. For example, the New York Sex Offender Registration Act⁷ applies to people convicted of crimes which are not included in section 130 of the Penal Code and do not necessarily involve any sexual contact with another individual, or are not even sexual in nature. The Act applies

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1. In some states, sending sexual messages to a minor without a plan to have sexual contact with that minor is a crime. While the Supreme Court has not decided on this question, the Seventh Circuit held that sending sexual messages online to a minor, without a plan to actually have sexual contact with that minor, is not a crime under 18 U.S.C. § 2422(b), because that person did not take a “substantial step” towards completing the crime. *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008). The Second Circuit (New York is in the Second Circuit) has held that this crime *only* requires intent to *entice*. *United States v. Brand* 467 F.3d 179, 202 (2d Cir. 2006); *United States v. Douglas*, 626 F.3d 161, 164 (2d Cir. 2010). That is, even if the person fails to go through with the sexual acts, they can still be found guilty of violating the statute if they had an intent to entice someone into engaging in these acts with them. Similarly, the Ninth Circuit has held that sending sexual letters and encouraging a meeting is sufficient to support a conviction for attempting to persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity. *United States v. Goetzke*, 494 F.3d 1231, 1235—1237 (9th Cir. 2007).

2. A person might not be able to agree to engage in sexual behavior because he or she is mentally disabled or mentally incapacitated. N.Y. PENAL LAW § 130.30(2) (McKinney 2009 & Supp. 2019).

3. N.Y. PENAL LAW § 130.20 (McKinney 2009 & Supp. 2019) (sexual misconduct is a class A misdemeanor).

4. N.Y. PENAL LAW § 130.52 (McKinney 2009 & Supp. 2019) (forcible touching is a class A misdemeanor).

5. N.Y. PENAL LAW § 130.55 (McKinney 2009 & Supp. 2019) (sexual abuse in the third degree involves subjecting another to sexual contact without the latter’s consent, and is a class B misdemeanor).

6. *See* N.Y. PENAL LAW § 130.00 (McKinney 2009 & Supp. 2019) (defining terms used in sex offense charges under New York law).

7. N.Y. CORRECT. LAW § 168 (McKinney 2014).

to kidnapping a minor (Article 135)⁸, prostitution offenses (Article 230)⁹, or offenses against the right to privacy (Article 250).¹⁰

Laws about sex offenses are always changing, and you must be careful to read current statutes to see which apply to you. This Chapter covers issues of special importance for sex offenders based upon the laws in effect at the time of publication.

This Chapter begins with topics most important to your everyday life in prison, such as protective custody (if you believe that you are in danger of being harmed by other incarcerated people), counseling and the consequences of not going to counseling, and good time credits.

Next, this Chapter discusses other issues that might come up in legal proceedings in which you're involved. These issues include HIV testing and post-conviction DNA testing. The courts may require these tests based upon your status as a sex offender. These tests might even be required if you have only been accused, but not convicted, of the offense for which you are incarcerated.

Finally, this Chapter discusses issues that may arise during and after your release from prison. Some of these issues include special parole conditions for sex offenders, community registration, the Adam Walsh Act (a federal sex offender law), and civil confinement.

Some of these topics are addressed in more detail in other places in the *JLM*.¹¹

B. Protective Custody

You may become a target for abuse if other incarcerated people know you have been convicted of a sex crime. If this happens, or if you think it could happen, most prisons will let you seek “protective custody.”

In protective custody, you are kept from contact with the general population of incarcerated people. Incarcerated people who may be placed in protective custody include potential victims, witnesses likely to be intimidated, and incarcerated people who, for one reason or another, are unable to live safely in the general population. Protective custody can be required or voluntary.¹² Although protective custody

8. N.Y. PENAL LAW § 135 (McKinney 2009 & Supp. 2019). Kidnapping, which is not a sex offense under normal circumstances, becomes a sex offense for purposes of the Sex Offender Registration Act (and, therefore, the Act will apply to a kidnapper) if the victim is under seventeen years of age and the perpetrator is not the parent. N.Y. CORRECT. LAW § 168-a(2) (McKinney 2014).

9. N.Y. PENAL LAW § 230 (McKinney 2008). Specifically, the New York Sex Offender Registration Act requires registration for persons convicted of §§ 230.04 (patronizing, that is, using, a prostitute) if the person patronized (that is, the prostitute) is under the age of seventeen, 230.05 (patronizing a person below the age of fifteen for prostitution, while being above the age of eighteen), 230.06 (patronizing a person below the age of eleven for prostitution, or patronizing a person below the age of thirteen for prostitution while being above the age of eighteen), 230.30 (promoting prostitution through force or intimidation, profiting from another's promotion of prostitution, or promoting or profiting from the prostitution of a person below the age of eighteen), 230.32 (knowingly promoting or profiting from the prostitution of a person below the age of thirteen, or doing the same for a person below the age of fifteen while being above the age of twenty-one), and 230.33 (compelling prostitution of a person less than eighteen years old while being above the age of eighteen). N.Y. CORRECT. LAW § 168-a(2) (McKinney 2014).

10. Offenses against the right to privacy include unlawful surveillance in the first degree. This usually involves the use of an imaging device to view the intimate or sexual parts of another located in private areas, such as fitting rooms or restrooms, without their knowledge or *consent*. N.Y. PENAL LAW §§ 250, 250.45 (McKinney 2017). You should note that the Sex Offender Registration Act applies *only* to unlawful surveillance in the first degree. *See* N.Y. CORRECT. LAW § 168-a(2) (McKinney 2014) (referencing N.Y. PENAL LAW § 250.50 (McKinney 2017)). In order for you to be charged with this crime, you have to have been convicted within the last ten years of unlawful surveillance either in the first or second degree from a different incident. N.Y. PENAL LAW § 250.50 (McKinney 2017).

11. *See e.g., JLM*, Chapter 11 on using DNA analysis to challenge your conviction and “Rights Upon Release” (*JLM* online chapter).

12. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 330.2 (2019) (defining voluntary and involuntary protective custody incarcerated people as potential victims or witnesses likely to be intimidated, or incarcerated people who cannot live in the general prison community); FLA. ADMIN. CODE ANN. r. 33-602.220(3) (2020) (describing procedure for an incarcerated person to request “protective management” under FLA. ADMIN. CODE ANN. r. 33-602.221 (2020)).

is for the incarcerated person's protection and not punishment, incarcerated people in protective custody may have limited opportunities for some things, such as scheduling out-of-cell time, access to library services, and use of the commissary.¹³ Despite these limitations, you might be better off in protective custody if you feel threatened or in danger.

C. "Recommended" Counseling and the Loss of Good Time Credits

The New York Department of Corrections and Community Supervision ("DOCCS") has an Earned Eligibility Program, which is supposed to give eligible incarcerated people an incentive to work on the issues that may have led to their incarceration.¹⁴ This program recognizes that "many inmates are motivated to achieve a positive change in their lives." It aims to help them "prepare to live law abiding lives in the community," and it "assist[s] and guidel[s] inmates in preparing for their release."¹⁵ In New York, you may be able to earn time off your sentence ("good time credit") for "good behavior and efficient and willing performance of duties" that are assigned to you while in prison and/or for "progress and achievement in an assigned treatment program."¹⁶ Assigned treatment programs can include sex offender counseling.¹⁷ If you do not attend counseling, you risk losing your good time credits.¹⁸

JLM Chapter 35, "Getting Out Early: Conditional & Early Release" explains how each New York State prison has its own Time Allowance Committee ("TAC"). The TAC at your prison looks at your file and tells the superintendent the amount of good time credit or "good behavior allowance" it thinks you should have.¹⁹ The superintendent then looks at the recommendation and forwards it to the Commissioner of Correctional Services, who makes the final decision.²⁰

13. For specific details about conditions of confinement for incarcerated people in New York in protective custody, see N.Y. COMP. CODES R. & REGS. tit. 7, § 330.4 (2019).

14. N.Y. COMP. CODES R. & REGS. tit. 7, § 2100.2 (2019) (describing the policy behind the Earned Eligibility Program).

15. N.Y. COMP. CODES R. & REGS. tit. 7, § 2100.2(a) (2019).

16. N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2014). On September 1, 2021, this law will change the amount of time that can offset your sentence for incarcerated people serving two or more indeterminate sentences. For further information about good time credits, see *JLM* Chapter 35, "Getting Out Early: Conditional & Early Release," for a detailed explanation of the requirements and procedures for earning good time credits.

17. Nineteen facilities in New York State that offer sex offender counseling and treatment programs are currently listed on the New York State Department of Corrections and Community Supervision website. The length of the program will vary depending on the category you will be assigned to. The treatment is divided into three categories: Low Risk, Moderate/High Risk, and High Risk. If you are assigned to the Low Risk category, then treatment will last 6 months. If you are in the Medium/High Risk category, the program will last anywhere from 9 to 12 months. If you are in the High Risk category, the program will last anywhere from 15 to 18 months. Your risk level will be determined at a program site by a sex offender program staff member. State of New York, Department of Corrections and Community Supervision, *Sex Offender Counseling and Treatment Program (SOCTP)*, <https://doccs.ny.gov/sex-offender-counseling-and-treatment-program-soctp> (last visited Feb. 15, 2020). If you are considered a sex offender because you either committed (or attempted to commit) a sex offense, displayed behavior of a sexual nature in committing a non-sex crime, or your need for sex offender counseling is identified, you will be transferred to one of the institutions where counseling is offered when you are eligible to begin the program. If you are in the Low Risk category, you can begin the program 18 months before your release date. If you are in the Moderate/High Risk or High Risk category, you can begin the program 36 months before your release date. State of New York, Department of Corrections and Community Supervision, *Sex Offender Counseling and Treatment Program Guidelines*, N.Y. STATE DOCCS (Apr. 2018), https://doccs.ny.gov/system/files/documents/2019/05/SOCTP_Procedures_and_Guidelines.pdf (last visited Feb. 15, 2020).

18. N.Y. CORR. LAW § 803(1)(a) (McKinney 2014) (stating that good behavior allowances (or good time credits) may be withheld, forfeited or canceled in whole or in part for, among other things, "failure to perform properly in the duties or program assigned.")

19. N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(a) (2019).

20. N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1 (2019).

In New York, you have no right to demand good time credits.²¹ The Commissioner's decision will be final, unless it is not made "in accordance with law."²² Courts explain that when making a recommendation and decision about good time credits, TACs should look at your entire experience in prison and not just apply a simple rule automatically.²³ The law regarding the requirements for good time credit refers only to "assigned" (required) treatment programs, and not "recommended" ones.²⁴ However, DOCCS will not usually give good time credits to sex offenders who do not complete sex offender treatment programs after the programs have been recommended to them.²⁵ Courts have allowed TACs to withhold good time credits for this reason.²⁶ Courts have been strict in upholding such denials of good time credits even where:

- (1) the incarcerated person was on a wait-list for such a program, but had refused treatment twice before;²⁷

21. N.Y. COMP. CODES R. & REGS. tit. 7, § 260.2 (2019). The statute makes clear that the good behavior allowances, or good time credits, are a privilege that need to be earned by an incarcerated person and, therefore, no incarcerated person has the right to demand these allowances/credits.

22. N.Y. CORR. LAW § 803(4) (McKinney 2014).

23. N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(c) (2019). *See also* People ex rel. Gittens v. Coughlin, 143 Misc. 2d 748, 751, 541 N.Y.S.2d 718, 720 (Sup. Ct. Sullivan County 1989) (explaining that, according to N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3 (2019), the TAC should look at the entire prison experience of the incarcerated person and not just a rule when making its decision regarding good behavior allowances); Amato v. Ward, 41 N.Y.2d 469, 473–474, 362 N.E.2d 566, 570, 393 N.Y.S.2d 934, 937 (1977) (citing N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3 (2019)) (holding that the TAC should appraise the entire institutional experience of the incarcerated person in making its decision).

24. N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2014).

25. *See, e.g.*, Matter of Jones v. Goord, 35 A.D.3d 951, 952, 824 N.Y.S.2d 575, 576 (3d Dept. 2006) (upholding the determination to withhold good time credit because of the petitioner's failure to participate in recommended treatment programs); Benjamin v. N.Y. State Dept. of Corr. Serv., 19 A.D.3d 832, 833, 796 N.Y.S.2d 747, 748 (3d Dept. 2005) (citing Matter of McPherson v. Goord, 17 A.D.3d 750, 751, 793 N.Y.S.2d 230, 231 (3d Dept. 2005) (holding that "petitioner's refusal to participate in a recommended [drug] treatment program provide[d] a rational basis for withholding a good behavior allowance"); Matter of Thomas v. Time Allowance Comm., 4 A.D.3d 637, 638–639, 771 N.Y.S.2d 739, 740 (3d Dept. 2004) (upholding the withholding of petitioner's good behavior allowance because of his failure to participate in an alcohol and substance abuse treatment program); Matter of Burke v. Goord, 273 A.D.2d 575, 575, 710 N.Y.S.2d 136, 137 (3d Dept. 2000) (explaining that when an incarcerated person does not participate in a recommended therapeutic program, the TAC can deny him good time credit); Matter of Pfeifer v. Goord, 272 A.D.2d 886, 886, 708 N.Y.S.2d 217, 218 (4th Dept. 2000) (explaining that a TAC can deny good time credit when an incarcerated person fails to participate in "recommended" treatment programs).

26. Matter of Jones v. Goord, 35 A.D.3d 951, 952, 824 N.Y.S.2d 575, 576 (3d Dept. 2006) (upholding the determination to withhold good time credit because of the petitioner's failure to participate in recommended treatment programs); Ferry v. Goord, 268 A.D.2d 720, 721, 704 N.Y.S.2d 315, 316 (3d Dept. 2000) (explaining that failure to participate in "recommended" (rather than "assigned") programs may be a reason for withholding good time credit); Majeed v. Goord, 279 A.D.2d 832, 833, 719 N.Y.S.2d 739, 740 (3d Dept. 2001) (holding that where "an inmate has refused to accept adequate treatment for the behavior that resulted in the incarceration, a decision to withhold good time allowance is not irrational"); *see also* Matter of Martin v. Goord, 45 A.D.3d 992, 994, 845 N.Y.S.2d 524, 526 (3d Dept. 2007) (explaining that a refusal to address the behavior that resulted in the incarcerated person's incarceration by not properly participating in a recommended or required program is an acceptable and rational reason for withholding good time credits). Furthermore, in Coleman v. Boyle, 270 A.D.2d 739, 739–740, 705 N.Y.S.2d 419, 420 (3d Dept. 2000), the court explained that, because the incarcerated person refused to attend several similar programs in the past, the fact that he later requested a transfer "to another correctional facility that offered a ... sex offender therapy program" made it neither unreasonable nor against the law for the TAC to withhold good time credits from him. *See also JLM*, Chapter 18, "Your Right to a Part C, "Due Process in Prisons."

27. Staples v. Goord, 263 A.D.2d 943, 944, 695 N.Y.S.2d 190, 191 (3d Dept. 1999) (upholding the TAC's denial of incarcerated person's request for good time credits because he had not completed sex offender counseling, even though he was on the wait list, because he had twice before refused to participate in a counseling program).

- (2) the incarcerated person had previously participated in a behavior intervention program and some sex offender counseling, but he “refused to sufficiently participate in and complete certain recommended offender and aggression counseling programs”;²⁸ and
- (3) the incarcerated person was told he needed additional counseling but he was not allowed to transfer to a facility with an appropriate sex offender therapy program.²⁹

Courts have also said that these requirements do not violate the Fifth Amendment right against self-incrimination.³⁰

For these reasons, you should make every attempt to get counseling if it is recommended to you.

1. Self-incrimination in counseling

Before October 2008, incarcerated people could be required to essentially admit to crimes in counseling. For example, they could be forced to produce “sexual autobiographies.” This rule has been changed. You can only be required to speak about your past sexual behavior in general terms, without having to mention specific details. You cannot be required to admit to any specific crime in order to participate in treatment and receive good time credits.³¹

D. HIV Testing

HIV is the virus that causes AIDS. HIV can be spread in several ways, including through sexual contact, shared use of drug needles, and other methods that result in an exchange of bodily fluids. Because sexual contact is one way to transmit this virus, almost every state (including New York) has a law allowing or requiring courts to order HIV testing for convicted sex offenders or defendants charged with sex offenses.³² Additionally, the federal government may perform HIV testing on any

28. *Jones v. Coombe*, 269 A.D.2d 632, 632, 703 N.Y.S.2d 554, 554 (3d Dept. 2000). In this case, the court explained that the incarcerated person’s failure to participate in the recommended programs meant that he did not receive “adequate” treatment for “the very thing that resulted in his incarceration.” For this reason, the court concluded that the TAC’s decision to withhold good time credits was not irrational.

29. *Coleman v. Boyle*, 270 A.D.2d 739, 739—740, 705 N.Y.S.2d 419, 420 (3d Dept. 2000) (explaining that if you ask for counseling after refusing it earlier, the TAC can decide to withhold good time credits even if you had requested a transfer to a facility where they had a full program).

30. *Lamberty v. Schriver*, 277 A.D.2d 527, 528, 715 N.Y.S.2d 510, 511 (3d Dept. 2000) (explaining that requiring an incarcerated person to participate in sex offender and aggression therapy programs does not violate his 5th Amendment rights); *Burke v. Goord*, 273 A.D.2d 575, 575, 710 N.Y.S.2d 136, 137 (3d Dept. 2000) (holding that withholding good time credits for failure to participate in sexual offender programs does not violate the 5th Amendment).

31. In *VanGorder v. Lira*, No. 9:08-CV-281 (NAM/ATB), 2010 U.S. Dist. LEXIS 30584, at *3–4 & n.1 (N.D.N.Y. Mar. 30, 2010) (*unpublished*), the court held that incarcerated people could not be required to sign a confession before participating in a treatment program. The settlement terms were said to apply to future claims that an incarcerated person’s 5th Amendment rights were violated. The settlement agreement also says that when any incarcerated person is admitted to a Sex Offender Counseling Program, DOCCS has to provide that incarcerated person with a form titled “Limits of Confidentiality, Partial Waiver of Confidentiality and Acknowledgment.”

32. *See* ALA. CODE § 22-11A-17(a) (LexisNexis 2011); ALASKA STAT. § 18.15.300 (2007); ARIZ. REV. STAT. ANN. § 13-1415 (2010); ARK. CODE ANN. § 16-82-101(B) (2011); CAL. PENAL CODE § 1202.1 (West 2004); CAL. PENAL CODE § 1524.1 (2019); COLO. REV. STAT. § 18-3-415 (2010); CONN. GEN. STAT. ANN. § 54-102a (2018); CONN. GEN. STAT. ANN. § 54-102b (2019); DEL. CODE ANN. tit. 10, § 1077(a) (2011); DEL. CODE ANN. tit. 11, § 3911 (2008); FLA. STAT. ANN. § 960.003 (2013); GA. CODE ANN. § 17-10-15 (2012); HAW. REV. STAT. ANN. § 801D-4(b) (LexisNexis 2007); IDAHO CODE ANN. § 39-601 (2012); IDAHO CODE ANN. § 39-604 (2012); 730 ILL. COMP. STAT. 5/5-5-3(g) (2019); IND. CODE ANN. § 35-38-1-10.5 (2018); IND. CODE ANN. § 35-38-1-10.6 (2009); IOWA CODE ANN. § 915.42 (West 2003); KAN. STAT. ANN. § 65-6009 (2002); KY. REV. STAT. ANN. § 510.320 (LexisNexis 2008); LA. REV. STAT. ANN. § 15:535 (2008); LA. CODE CRIM. PROC. ANN. art. 499 (2008); ME. REV. STAT. ANN. tit. 5, § 19203-F (2007 & Supp. 2009); MD. CODE ANN., CRIM. PROC. § 11-112 (LexisNexis 2011); MICH. COMP. LAWS ANN. § 333.5129 (2011); MINN. STAT. ANN. § 611A.19 (West 2009); MISS. CODE ANN. § 99-19-203 (2007); MO. ANN. STAT. § 191.663 (West 2004); MONT. CODE ANN. § 46-18-256 (2010); NEB. REV. STAT. § 29-2290 (2008); NEV. REV. STAT. ANN. § 441A.320 (LexisNexis 2009); N.H. REV. STAT. ANN. § 632-A:10-b (2012); N.J. STAT. ANN. § 2A:4A-43.1 (1994); N.J. STAT. ANN. § 2C:43-2.2 (2011); N.M. STAT. ANN. § 24-2B-5.1 (2010); N.Y. CRIM. PROC. LAW § 390.15 (McKinney 2012); N.C. GEN. STAT. § 15A-534.3

incarcerated person who has been sentenced to at least six months imprisonment if the health services staff at the prison determines that the incarcerated person is at risk for HIV infection. It may also perform an HIV test on any incarcerated person sentenced to less than six months, who may have transmitted HIV to prison employees or to other non-incarcerated people.³³

Typically, there are two kinds of HIV testing that may be required by law: “informational testing” and “evidentiary testing.”

Informational testing laws require testing criminal defendants so that the state can provide information about the defendant's HIV status to others who may have been exposed to HIV by the incarcerated person.³⁴ This includes telling the defendant's HIV status to either a crime victim or someone who had contact with the defendant's fluids during arrest. Informational HIV test results may sometimes be allowed as evidence in the defendant's trial, but each state has a different rule regarding who may access the test results and how they may be used.

Evidentiary testing laws exist in states where transmission of HIV can be a crime. In these states, a defendant is tested for HIV in order to produce evidence for the prosecution.³⁵

For more detailed information about HIV testing and testing for other infectious disease, see *JLM* Chapter 26 “Infectious Diseases: AIDS, Hepatitis, and Tuberculosis and MRSA in Prison.”

1. Informational Tests

Different states have different regulations for informational HIV testing. States have different rules for when a test should be done, for who is allowed to find out about your test results, and for whether the results can be used in criminal proceedings. Some statutes allow the court to decide if you should be tested for HIV,³⁶ while other statutes require the court to order testing if the victim requests it.³⁷ In some states, testing is automatic.³⁸

Some states do not allow test results to be shown to the court³⁹ or used in criminal or civil proceedings against the defendant,⁴⁰ but other states allow the use of HIV test results by the

(2009); N.D. CENT. CODE § 23-07.7-01 (2007); OHIO REV. CODE ANN. § 2907.27 (2014); OKLA. STAT. ANN. tit. 63, § 1-524 (2011); OKLA. STAT. ANN. tit. 63, § 1-524.1 (2011); OR. REV. STAT. § 135.139 (2009); 35 PA. CONS. STAT. ANN. § 7608 (West 2003); R.I. GEN. LAWS § 11-34.1-12 (2009); R.I. GEN. LAWS § 11-37-17 (2010); S.C. CODE ANN. § 16-3-740 (2010); S.D. CODIFIED LAWS § 23A-35B-3 (2011); TENN. CODE ANN. § 39-13-521 (2010); TEX. CODE CRIM. PROC. ANN. art. 21.31 (West 2009); UTAH CODE ANN. § 76-5-502 (2011); UTAH CODE ANN. § 76-5-504 (2011); VT. STAT. ANN. tit. 13, § 3256 (2009); VA. CODE ANN. § 18.2-62 (2008); WASH. REV. CODE ANN. § 70.24.340 (2011); W. VA. CODE ANN. § 16-3C-2(f) (2016); WIS. STAT. ANN. § 968.38 (2010); WYO. STAT. ANN. § 7-1-109 (2011).

33. 28 C.F.R. § 549.12(a)(2) (2018).

34. See WASH. REV. CODE § 70.02.220 (2018). See also HAW. REV. STAT. § 325-16.5 (2009); LA. REV. STAT. ANN. § 15:535 (2008); WIS. STAT. ANN. § 252.15 (2010).

35. See 730 ILL. COMP. STAT. 5/5-5-3 (2013). See also GA. CODE ANN. § 17-10-15(c) (2012).

36. See, e.g., OR. REV. STAT. § 135.139 (2014) (allowing court to order HIV testing for charges where body fluids may have been transferred from one person to another when the court finds there is probable cause to believe (1) you committed the crime; and (2) the victim was substantially exposed).

37. See, e.g., N.Y. CRIM. PROC. LAW § 210.16(1) (McKinney 2012) (requiring HIV testing when (1) the victim requests it within six months of the date of the alleged felony offense; and (2) the felony offense includes as an essential element an act of “sexual intercourse,” “oral sexual conduct,” or “anal sexual conduct” as defined in section 130.00 of the penal law).

38. See, e.g., Colo. Rev. Stat. Ann. § 18-3-415 (West 2016) (requiring HIV testing upon charging of defendant for any sexual offense).

39. See, e.g., N.Y. CRIM. PROC. LAW § 390.15(6)(a)(ii) (McKinney 2012) (limiting disclosure “to the victim, the victim's immediate family, guardian, physicians, attorneys, medical or mental health providers and to his or her past and future contacts to whom there was or is a reasonable risk of HIV transmission,” and plainly forbidding disclosure “to any other person or the court”).

40. See, e.g., N.Y. CRIM. PROC. LAW § 390.15(8) (McKinney 2012) (information on HIV status obtained by consent, hearing, or a court order may not be used as evidence against you in a criminal or civil proceeding related to the events that you were convicted for); TEX. CODE CRIM. PROC. ANN. art. 21.31(c) (Vernon 2009) (preventing use of test results in any criminal proceeding resulting from the alleged offense).

prosecution.⁴¹ Be sure to read a copy of the statute from your state in order to learn what the law is in relation to your case.

Some defendants have challenged statutes that allow pre- or post-conviction HIV testing against the defendant's wishes. They did so by claiming that these statutes violate the Fourth Amendment's ban on unreasonable searches. Most of the time, the courts have determined that these statutes are constitutional.⁴² Some courts say that some Fourth Amendment protections—warrant and probable cause—do not apply when (1) the reason for the test is a “special need” beyond ordinary law enforcement; and (2) that special need justifies the privacy intrusion.⁴³

(a) New York

New York has its own laws about HIV testing. In New York, the nature of the testing depends on the status of your case. If you have not been convicted but there is an indictment or information filed, then the court must order you to take an HIV test at the victim's request, if it “would provide medical benefit to the victim or a psychological benefit to the victim.” The results will be given to you and the victim, but not to the court.⁴⁴ You may be required to take an HIV test even if there has been no showing that *telling* the victim about your HIV status would benefit the victim. This is because you have made your medical condition an issue and have given up your right to confidentiality.⁴⁵ If you have been convicted of certain sex offenses, a separate law requires that a court order HIV tests at a victim's request.⁴⁶ If you have been tested under a court order, the results of the test cannot be used against you in court.⁴⁷

41. See, e.g., ALASKA STAT. § 18.15.310(e)(2) (2016) (allowing use of HIV test results when necessary for civil proceedings against a defendant); CAL. PENAL CODE § 1202.1(c) (West 2019) (allowing disclosure of HIV test results to the prosecution for use in an additional criminal charge or to increase the defendant's sentence).

42. See, e.g., *Seaton v. Mayberg*, 610 F.3d 530, 534 (9th Cir. 2010) (“A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.” (quoting *Hudson v. Palmer*, 468 U.S. 517, 527–28, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393 (1984))) (*Seaton* found that the 4th Amendment did not prevent disclosure of the incarcerated person's medical records); *Connor v. Foster*, 833 F. Supp. 727, 730–31 (N.D. Ill. 1993) (finding that HIV testing against incarcerated person's wishes did not violate the 4th Amendment when incarcerated person's hypodermic needle pricked the finger of an officer during a frisk search); *Virgin Islands v. Roberts*, 756 F. Supp. 898, 904 (D.V.I. 1991) (holding that the 4th Amendment allowed HIV testing against defendant's wishes), *aff'd*, *Virgin Islands v. Roberts*, 961 F.2d 1567 (3d Cir. 1992); *People v. Adams*, 149 Ill. 2d 331, 352–354, 597 N.E. 2d 574, 584–586 (1992) (finding that an Illinois statute requiring incarcerated people convicted of sex offenses to undergo HIV testing was constitutional, and did not violate the 4th Amendment or the Equal Protection Clause); *In re Juveniles A, B, C, D, E*, 121 Wash. 2d 80, 98, 847 P.2d 455, 463 (1993) (en banc) (holding that statute requiring HIV testing of sexual offenders is reasonable under the 4th Amendment, does not violate the right to privacy, and may be applied to juveniles).

43. See *In re Juveniles A, B, C, D, E*, 121 Wash. 2d 80, 91, 847 P.2d 455, 459 (1993) (en banc) (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639, 661 (1989)). See also *United States v. Ward*, 131 F.3d 335, 342 (3d Cir. 1997) (holding that a convicted rapist had to undergo a mandatory HIV test, because telling the victim about a potential HIV infection and preventing the spread of HIV were “special needs,” which justified the blood test).

44. N.Y. CRIM. PROC. LAW § 210.16(1)(a) (McKinney 2012).

45. *People v. Durham*, 146 Misc. 2d 913, 916, 553 N.Y.S.2d 944, 946–947 (Sup. Ct. Queens Cnty. 1990) (ordering defendant to be tested for HIV after he told his rape victim that he had HIV and thus placed his medical condition at issue); *In re Gribetz*, 159 Misc. 2d 550, 553, 605 N.Y.S.2d 834, 836 (Cnty. Ct. Rockland Cnty. 1993) (holding that HIV test results were needed to prove defendant had acted recklessly and with depraved indifference to human life, and that the defendant had waived her right to privacy since she had already discussed her HIV status).

46. N.Y. Crim. Proc. Law § 390.15(1) (McKinney 2012).

47. N.Y. CRIM. PROC. LAW § 210.16(1)(a) (McKinney 2012); N.Y. CRIM. PROC. LAW § 390.15(8) (McKinney 2012).

(b) Federal

Under federal law, specifically the 1994 Violence Against Women Act (VAWA), a victim of certain sex offenses can ask a federal district court to order a defendant to get tested for HIV. These results are given to the victim (and/or the victim's parent or legal guardian) and the defendant.⁴⁸ "[T]he victim may then disclose the test results only to any medical professional, counselor, family member or sexual partner(s) the victim may have had since the attack."⁴⁹

Unlike New York law, which only authorizes testing the defendant after conviction, VAWA allows a court to order testing of a defendant *before* they have been convicted of certain sex offenses. Although VAWA is a federal law, it applies to accused sex offenders who are being prosecuted in state court under state criminal laws.⁵⁰

This means that no matter what the laws of the state you are in say, you could be required to take an HIV test and to provide the results under VAWA. However, in New York, victims can also request HIV test results under New York State law.⁵¹

Some provisions of VAWA have been challenged in federal courts.⁵² The few courts to consider the question have generally upheld the federal testing provision.⁵³

There is a possibility that a challenge to the HIV testing provisions of VAWA might someday succeed. You should read the most recent case law to determine if the rules have changed at all. Furthermore, VAWA was amended in 2013. Although the amendments do not change the specific laws on HIV testing, be sure to look at the most recent version of VAWA if you believe it applies to your case.

2. Evidentiary Testing Laws

In many states, if you know you are HIV positive, it is a crime for you to have sexual contact with another person without telling the other person your HIV status beforehand.⁵⁴ In states that criminalize HIV transmission, the court must order an HIV test in order for the prosecution to prove one element of the crime (that is, that you are HIV positive). In such situations, the HIV test results may be used against you in your criminal case.⁵⁵

48. N.Y. CRIM. PROC. LAW § 210.16(1)(a) (McKinney 2012); N.Y. CRIM. PROC. LAW § 390.15(8) (McKinney 2012).

Note that VAWA consists of several subtitles, which can be found throughout the United States Code. Only the subtitle relevant to HIV testing of incarcerated people is cited here.

49. 42 U.S.C. § 14011(b)(5), *transferred to* 34 U.S.C. § 12391(b)(5) (transferred 2017).

50. 42 U.S.C. § 14011(b)(2)(a), *transferred to* 34 U.S.C. § 12391(b)(2)(A) (transferred 2017).

51. N.Y. CRIM. PROC. LAW § 210.16 (McKinney 2016).

52. For example, in *United States v. Morrison*, 529 U.S. 598, 627, 120 S.Ct. 1740, 1759, 146 L. Ed. 2d 658 (2000), the Supreme Court invalidated 42 U.S.C. § 13981, the portion of VAWA that provides a civil remedy to victims of gender-motivated violence.

53. *See, e.g.*, *United States v. Ward*, 131 F.3d 335, 339–340 (3d Cir. 1997) (finding that that a blood test for the limited purpose of determining the presence of HIV complied with the Fourth Amendment).

54. *See, e.g.*, FLA. STAT. ANN. § 775.0877(3) (West 2016) (allowing a defendant who was previously convicted of a sexual offense and tested positive for HIV, who then commits a second sexual offense, to be charged with criminal transmission of HIV); GA. CODE ANN. § 16-5-60 (2011) (criminalizing behavior by a person who knows that he is HIV positive, who then exposes another person to HIV through sexual behavior, sharing drug paraphernalia, or donating blood or other bodily fluids); 720 ILL. COMP. STAT. ANN. 5/12-5.01 (West Supp. 2012) (allowing a defendant to be charged with criminal transmission of HIV if defendant knows he is HIV positive and then engages in sexual contact, donates blood or other bodily fluids, or shares intravenous drug paraphernalia with another person); MICH. COMP. LAWS ANN. § 333.5210 (1) (West 2019) (criminalizing "sexual penetration" by a person who knows he is infected with HIV or AIDS, and who does not tell his sexual partner about his infection).

55. *See, e.g.*, *People v. C.S.*, 583 N.E.2d 726, 731, 222 Ill. App. 3d 348, 355, 164 Ill. Dec. 810, 815 (Ill. App. Ct. 1991) (noting that the positive results of the HIV test performed on defendant would be essential to a future prosecution under state statute that prohibits those who know they are infected with AIDS from having certain conduct that has the potential of transmitting the virus).

E. Post-Conviction DNA Testing

Investigations of sex offenses often involve collecting bodily fluids like semen or blood. These fluids can then be submitted for DNA testing to help identify perpetrators. If you have been convicted of a sex offense and you are trying to prove that you are innocent, DNA evidence could be helpful and may be available. See *JLM* Chapter 11, “Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence,” for more detailed information.

F. Special Parole Considerations

1. Parole Generally

You may be paroled—that is, conditionally released from prison—before you have served your entire sentence.⁵⁶ You will be required to follow certain rules from the time of your early release until your full sentence is finished. The state parole division will supervise you and make sure that you do not “violate parole” by breaking these rules.⁵⁷ During this time, the parole division is also required to assist you in reintegrating into the community.⁵⁸ In New York, you are not usually eligible for parole if you have received one or more “determinate” sentences (a sentence where the court specifies a fixed amount of time you will be in prison, as opposed to a range of time).⁵⁹ If you have received a determinate sentence, you will also be subject to a period of “post-release supervision.”⁶⁰ However, the state board of parole supervises incarcerated people released under both parole and post-release supervision.

2. Special Parole Conditions for Sex Offenders

If you are convicted of a sex offense and released on parole, your parole officer will probably impose special conditions or restrictions on you. These conditions may include mandatory address verification and restrictions on how close you can come to school grounds or child care facilities.⁶¹ Courts will not review whether the rules imposed by a parole officer are helpful or fair.⁶² As long as the parole officer’s decision follows the law and makes some sense as a response to your record, the officer’s decision is final.⁶³

56. *Parole*, BLACK’S LAW DICTIONARY (11th ed. 2019). See also N.Y. EXEC. LAW § 259-a–c (McKinney 2018) (describing generally the organization and duties of the New York State Division of Parole).

57. *Parole Board*, BLACK’S LAW DICTIONARY (11th ed. 2019). See also N.Y. EXEC. LAW § 259-a–c (McKinney 2018) (describing generally the organization and duties of the New York State Division of Parole).

58. N.Y. EXEC. LAW § 259-c (McKinney 2018) (describing the reintegration duties of New York State Division of Parole).

59. N.Y. PENAL LAW §§ 70.40–70.45 (McKinney 2009). For example, “5 years” would be a determinate sentence, and you would probably not be eligible for parole. However, if you received “3 to 6 years,” this would be an indeterminate sentence, and you might be eligible for parole after three years. If you received more than one sentence, with one sentence determinate and another indeterminate, you might still be eligible for parole. If you received sentences that can be served concurrently (at the same time) then you may be paroled after you have served the minimum period of the indeterminate sentence or after you have served six-sevenths of the determinate sentences, whichever is later. N.Y. PENAL LAW § 70.41(a)(iii) (McKinney 2009). If you received sentences that have to be served consecutively (one after another), then you may be paroled after you have served the minimum amount of time in the indeterminate sentence plus six-sevenths of the total length of the sentences put together. N.Y. PENAL LAW § 70.41(a)(iv) (McKinney 2009).

60. N.Y. PENAL LAW § 70.45 (McKinney 2009).

61. State of New York, Department of Corrections and Community Supervision, *Community Supervision Handbook: Questions and Answers Concerning Release and Community Supervision* (May 2019), available at https://docs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 14, 2020).

62. See *Ahlers v. N.Y. State Div. of Parole*, 1 A.D.3d 849, 849, 767 N.Y.S.2d 289, 289 (3d Dept. 2003) (holding that a parole officer was allowed to require a convicted sex offender to attend substance and alcohol abuse treatment programs as a condition of the offender’s parole and that this decision was “beyond judicial review”).

63. *M.G. v. Travis*, 236 A.D.2d 163, 167–169, 667 N.Y.S.2d 11, 14–15 (1st Dept. 1997) (citing *Briguglio v.*

G. Incarceration Beyond Your Conditional Release Date

If you are imprisoned in New York State, you will have to tell the Parole Board where you plan to live after prison when your release date is coming up.⁶⁴ The Parole Board can make you change your plans.⁶⁵ If you do not get approval for your living plans after release, you can be held in prison beyond your conditional release date (parole date).⁶⁶ Courts will allow you to be held until you have a living situation the Parole Board approves of. Often, the Board will not let you live near schools or other places that care for children under the age of 18.⁶⁷ Sometimes the state has rules about where you may or may not live after release but other times these rules are local (in a county, city, town, or village).

H. The Importance of Following Parole Rules

If you have been convicted of a sex offense, the Division of Parole will be especially strict in making sure you follow all the rules of your parole, and will send you back to prison if you break those rules.⁶⁸ It is very important that you comply with the requirements and conditions the Parole Board imposes.

I. Community Registration and Notification Laws

1. Generally

In 1989, states began to pass Community Registration and Notification laws, often called “Megan’s Laws.” These are called Megan’s Laws after Megan Kanka, a seven-year-old girl who was murdered in New Jersey in 1994. Her death prompted New Jersey to pass the first Megan’s Law.⁶⁹ Today, all fifty states have these laws.⁷⁰ Although the exact laws are different in each state, the Federal

N.Y. State Bd. of Parole, 24 N.Y.2d 21, 28, 246 N.E.2d 512, 516, 298 N.Y.S.2d 704, 710 (1969) to support the proposition that decisions of the parole board cannot be reviewed by the courts as long as the parole board does not violate any statutory obligations, and the court’s only ability is to review the board’s decision to determine whether it was arbitrary or capricious).

64. N.Y. EXEC. LAW § 259-c (McKinney 2018) (describing generally the functions, powers, and duties of the State Board of Parole).

65. *See* *Monroe v. Travis*, 280 A.D.2d 675, 676, 721 N.Y.S.2d 377, 378 (2d Dept. 2001) (holding that the Parole Board was justified in refusing to grant conditional release to a convicted sex offender until the incarcerated person found housing that was satisfactory to the Parole Board).

66. *See* *Billups v. N.Y. State Div. of Parole*, 18 A.D.3d 1085, 1085–1086, 795 N.Y.S.2d 408, 409 (3rd Dept. 2005) (holding that due to petitioner’s violent history and the fact that he sexually assaulted his daughter, the condition that petitioner reside in an approved residence was rationally based); *Monroe v. Travis*, 280 A.D.2d 675, 676, 721 N.Y.S.2d 377, 378 (2d Dept. 2001) (holding that the Parole Board was justified in refusing to grant conditional release to a convicted sex offender until the incarcerated person found housing that was satisfactory to the Parole Board); *People ex. rel. Wilson v. Keane*, 267 A.D.2d 686, 686, 700 N.Y.S.2d 408, 409 (3d Dept. 1999) (finding that due to petitioner’s history as a sex offender and his failure to participate in available sex offender treatment programs, the condition that petitioner reside in an approved residence was rationally based).

67. State of New York, Department of Corrections and Community Supervision, *Community Supervision Handbook: Questions and Answers Concerning Release and Community Supervision* (May 2019), available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 14, 2020) (“The parolee will not be allowed to live near or enter upon any school grounds or any other facilities or institutions primarily used for the care and treatment of persons under the age of 18, unless they meet certain criteria and have the written permission of their PO.”).

68. *See, e.g., Farrell v. Burke*, 449 F.3d 470, 499 (2d Cir. 2006), (upholding the lower court decision to grant defendants’ motion to dismiss a parolee’s 14th Amendment claim after he was re-arrested and re-incarcerated for violating a special condition of parole prohibiting him from owning pornography).

69. N.J. STAT. ANN. §§ 2C:7-1–2C:7-23.

70. Each state has interpreted its Megan’s Laws differently. Before citing to any of the following statutes, be sure to research how these statutes have been interpreted by the courts in your state. *See, e.g.,* Alabama Sex Offender Registration and Community Notification Act, 2019 CODE OF ALA. tit. 15 Ch. 20A; ALASKA STAT. ANN. §§ 12.63.010–12.63.100; ARIZ. REV. STAT. ANN. §§ 13-3821–13-3829; ARK. CODE ANN. §§ 12-12-901–923; CAL. PENAL CODE §§ 290–290.5; COLO. REV. STAT. ANN. §§ 16-22-101–16-22-115; CONN. GEN. STAT. ANN. §§ 54-250–54-261; DEL. CODE ANN. tit. 11, §§ 4120–4122; FLA. STAT. ANN. §§ 775.21–775.24; GA. CODE ANN. §§ 42-1-12–42-1-19; HAW. REV. STAT. §§ 846E-1–846E-12; IDAHO CODE ANN. §§ 18-8301–18-8331; 730 ILL. COMP. STAT. ANN. 150/1–12,

Government requires that all states collect your name, addresses of where you live and work, information about your physical appearance, fingerprints, a DNA sample, conviction history, a copy of your state issued license/identification card, and license plates of your car if you have one.⁷¹ Additionally, states are required by federal law to tell you about your duty to register, to check your address every year, to tell the police when you move, and to give the public any information about you that it might need to protect itself.⁷²

Challenges to state Megan's Laws have usually failed. States are allowed to impose Megan's Law requirements on sex offenders who were convicted before the laws existed.⁷³ States are also allowed to post a convicted sex offender's picture and information on the internet without giving him a hearing.⁷⁴

In *Connecticut Department of Public Safety*, the Supreme Court suggested that someday, a defendant might show that a Megan's Law violated "substantive due process," a set of rights protected by the Fourteenth Amendment of the United States Constitution.⁷⁵ Under substantive due process, laws have to be fair and reasonable and the government has to have a legitimate reason for creating them.⁷⁶ Even though the Court left this possibility open, it has mostly let states do what they want with Megan's Laws, and a substantive due process challenge to a Megan's Law would probably not succeed right now.⁷⁷

In another case dealing with due process and Megan's Laws, the Sixth Circuit upheld a law that made young sex offenders register even though their records had been sealed because they had pleaded

152/101–152/999; IND. CODE ANN. §§ 11-8-8-1–11-8-22; IOWA CODE ANN. §§ 692A.101–692A.130; KAN. STAT. ANN. §§ 22-4901 to 22-4913; KY. REV. STAT. ANN. §§ 17.500–17.580; LA. REV. STAT. ANN. §§ 15:540–15:553; ME. REV. STAT. ANN. tit. 34-A, §§ 11201–11256, 34-A §§ 11271–11304.; MD. CODE ANN., CRIM. PROC. §§ 11-701–11-726; MASS. GEN. LAWS ch. 6, §§ 178D–178Q; MICH. COMP. LAWS ANN. §§ 28.721–28.736; MINN. STAT. ANN. §§ 243.166–243.167; MISS. CODE ANN. §§ 45-33-21–45-33-59; MO. ANN. STAT. §§ 589.400–589.426; MONT. CODE ANN. §§ 46-23-501 to 46-23-520; NEB. REV. STAT. §§ 29-4001 to 29-4014; NEV. REV. STAT. ANN. §§ 179D.010–179D.850; N.H. REV. STAT. ANN. §§ 651-B:1–651-B:12; N.J. STAT. ANN. §§ 2C:7-1–2C:7-23; N.M. STAT. ANN. §§ 29-11A-1–29-11A-10; N.Y. CORRECT. LAW §§ 168–168-w; N.C. GEN. STAT. §§ 14-208.5–14-208.45; N.D. CENT. CODE ANN. § 12.1-32-15; OHIO REV. CODE ANN. §§ 2950.01–2950.99; OKLA. STAT. ANN. tit. 57, §§ 581–590.2; OR. REV. STAT. §§ 181.592–181.606, 181.820–181.833; 42 PA. CONS. STAT. ANN. §§ 9791–9799.41; R.I. GEN. LAWS ANN. §§ 11-37.1-1–20; S.C. CODE ANN. §§ 23-3-400–555; S.D. CODIFIED LAWS §§ 22-24B-1–22-24B-34; TENN. CODE ANN. §§ 40-39-201 to 40-39-215; TEX. CODE CRIM. PROC. ANN. arts. 62.001–62.408; UTAH CODE ANN. § 77-41-101 to 77-41-112; VT. STAT. ANN. tit. 13, §§ 5401–5415; VA. CODE ANN. §§ 9.1-900 to 9.1-922; WASH. REV. CODE ANN. §§ 9A.44.130–9A.44.145; W. VA. CODE ANN. §§ 15-12-1 to 15-12-10; WIS. STAT. ANN. §§ 301.45–301.48; WYO. STAT. ANN. §§ 7-19-301–7-19-308; D.C. CODE §§ 22-4001–22-4017.

71. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 § 114, 120 Stat 587 (2006).

72. 42 U.S.C. § 14071; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 § 117, 120 Stat 587 (2006).

73. 42 U.S.C. § 14071; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 § 117, 120 Stat 587 (2006) (stating that the sex offender registration law had a legitimate civil purpose to increase public safety, and was not an additional, after-the-fact criminal sanction on convicted sex offenders). *See also* United States v. Kebodeaux, 570 U.S. 387, 394, 133 S. Ct. 2496, 2503, 186 L. Ed. 2d 540, 549 (2013) (holding that a federal statute could apply to sex offenders convicted before the statute's enactment because of the statute's public safety purpose).

74. Conn. Dept. of Pub. Safety v. Doe, 538 U.S. 1, 4, 123 S. Ct. 1160, 1162–1163, 155 L. Ed. 2d 98, 103 (2003).

75. Conn. Dept. of Pub. Safety v. Doe, 538 U.S. 1, 7–8, 123 S. Ct. 1160, 1164, 155 L. Ed. 2d 98, 105 (2003); *See* U.S. CONST. amend. XIV, § 1 (prohibiting any state from depriving "any person of life, liberty, or property, without due process of law"). In contrast with procedural due process, which may require that a state provide you with a hearing and/or notice before the state can take some action against you, substantive due process protects certain fundamental rights that are more difficult for the state to interfere with, such as privacy within the home.

76. *Due Process (Substantive Due Process)*, BLACK'S LAW DICTIONARY (11th ed. 2019).

77. *See, e.g.,* Paul P. by Laura L. v. Verniero, 170 F.3d 396, 405 (3d Cir. 1999) (holding that New Jersey's version of Megan's Law did not violate a sex offender's constitutionally protected privacy interest); Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997) (holding that Washington's Megan's Law did not violate a sex offender's substantive due process right to privacy).

guilty to a sexual offense and completed a “diversion program.”⁷⁸ The Court said that there was no substantive due process violation.⁷⁹

2. Residency Restrictions

Most states have laws that forbid certain convicted sex offenders from living near any sort of childcare center, but courts have required that these laws make an exception and allow an offender to stay where he is *if* a daycare center moves nearby *after* he has purchased a home. In *Mann v. Georgia Department of Corrections*, the Supreme Court of Georgia said that the state could not make a convicted sex offender move from a home he owned near a daycare, even though there was a Georgia law forbidding him from living within 1000 feet of a daycare.⁸⁰ The court explained that because he owned the home (instead of renting it, or living in it for free) it was unfair for the state to make him move without paying him for the house.⁸¹ The court also said that Georgia was still allowed to forbid a convicted sex offender from working near any childcare facility.⁸²

Another case addressing similar restrictions is *Doe v. Pennsylvania Board of Probation and Parole*, where the court ruled that if a state law treats convicted sex offenders who were *convicted in* that state differently from convicted sex offenders who were *convicted out of that state and moved there after release*, that law may be unconstitutional.⁸³ This case only applies to the Third Circuit (Pennsylvania, New Jersey, and Delaware), so you should check what laws apply in your area.

3. New York

(a) Overview

New York's version of Megan's Law is called the Sex Offender Registration Act of 1996 (or “SORA”), which requires convicted sex offenders to register with the New York Division of Criminal Justice Services. The Division will keep a file on you which will include your:

- (1) name;
- (2) aliases (other names) used;
- (3) date of birth;
- (4) sex;
- (5) race;
- (6) height;
- (7) weight;
- (8) eye color;
- (9) driver's license number;
- (10) home address, or the address of the place you expect to live;
- (11) Internet account information and any screen names you use;
- (12) photograph;
- (13) fingerprints;
- (14) a description of the crime of which you were convicted;

78. *Doe v. Mich. Dept. of State Police*, 490 F.3d 491, 494–497, 506 (6th Cir. 2007). The appellants had been charged under Michigan's Holmes Youthful Trainee Act (HYTA), which is only available for certain sex crimes and which seals their criminal records once they plead guilty and complete the diversion program. They were then required to register as convicted sex offenders under Michigan's Sex Offender Registration Act, which makes information about the charges publicly available. The court held that individuals' substantive due process rights do not entitle them to individual hearings on whether they should be required to register if the statute requires all sex offenders to register. Offenders charged after October 31, 2004 are only required to register if youthful trainee status is revoked and they are found guilty.

79. *Doe v. Mich. Dept. of State Police*, 490 F.3d 491, 499–502 (6th Cir. 2007).

80. *Mann v. Ga. Dept. of Corr.*, 653 S.E.2d 740, 745, 282 Ga. 754, 760 (2007).

81. *Mann v. Ga. Dept. of Corr.*, 653 S.E.2d 754, 761, 282 Ga. 740, 745 (2007).

82. *Mann v. Ga. Dept. of Corr.*, 653 S.E.2d 754, 755, 282 Ga. 740, 742 (2007).

83. *Doe v. Pa. Bd. of Prob. and Parole*, 513 F.3d 95 (3d Cir. 2008).

- (15) the name and address of any higher education institution where you are or expect to be enrolled, attending, or employed, and whether you will live in housing provided by that institution;
- (16) if you are a high risk offender (discussed below), the address where you either work or expect to work; and
- (17) any other information deemed pertinent by the division.⁸⁴

If you were convicted of (not just charged with) any of the offenses in the paragraph below, you are a “sex offender” under SORA and you *must* register with the Division of Criminal Justice Services before you leave prison.⁸⁵ You must register if you were convicted on or after January 21, 1996, *or* if you were in prison on parole for a sex offense on January 21, 1996.

You **MUST** register as a sex offender if you have been *convicted* of committing or attempting to commit one or more offenses under any of the following sections:

- New York Penal Law Sections 120.70 (luring a child), 130.20 (sexual misconduct), 130.25, 130.30, 130.40, 130.45, or 130.60 (certain offenses involving rape, criminal sexual acts, or sexual abuse)
- New York Penal Law Sections 230.34 (sex trafficking), 250.50 (unlawful surveillance), 255.25, 255.26, or 255.27 (offenses involving incest) or any provision of Article 263 of the penal law (offenses involving sexual performance by a child);
- New York Penal Law Sections 130.52 or 130.55 (forcible touching or sexual assault). If you have previously been convicted of another listed sex offense, then the age of the victim of the offense under 130.52 or 130.55 does not matter; otherwise, you must register as a sex offender only where the victim of the offense was under 18 years old;
- New York Penal Law Sections 135.05, 135.10, 135.20, or 135.25 (offenses involving imprisonment or kidnapping if the victim of the kidnapping is less than 17 years old and you are not the parent of the victim);
- New York Penal Law Section 230.04 (when you are convicted of patronizing a prostitute who is actually younger than seventeen);
- New York Penal Law Sections 230.05, 230.06, 230.30(2), 230.32, 230.33 (offenses involving patronizing prostitutes or promoting prostitution);
- New York Penal Law Section 250.45 (2), (3), or (4) (offenses involving unlawful surveillance) *Unless* you petition the trial court, and the court holds that registration would be too harsh.;
- the following federal laws: 8 U.S.C. § 2251, 18 U.S.C. § 2251A, 18 U.S.C. § 2252, 18 U.S.C. § 2252A, or 18 U.S.C. § 2260 (various offenses involving sexual exploitation of minors), 18 U.S.C. § 2422(b), 18 U.S.C. § 2423, or 18 U.S.C. § 2425 (offenses involving the use of interstate channels to solicit, transport, or transport information about, minors); or
- any offense in any jurisdiction which has the same elements as any of the crimes listed above.

If you were convicted of a sex offense in another state, you still have to register under SORA, as long as the crime you were convicted of is the same sort of crime as those listed above, *or* if the state you were convicted in would have required you to register.⁸⁶

You will have to re-register with the Division of Criminal Justice every year for at least twenty years. If you are a “high risk offender” (discussed below), you will have to register every year for the rest of your life, and you will have to give your address to the local police every 90 days.⁸⁷

84. N.Y. CORRECT. LAW § 168-b (McKinney 2014).

85. N.Y. CORRECT. LAW § 168-f (McKinney 2014).

86. N.Y. CORRECT. LAW §§ 168-a(2)(d), 168-a(3)(b) (McKinney 2014).

87. N.Y. CORRECT. LAW § 168-h (McKinney 2014).

(b) Risk Assessment Hearing and Right to Appointed Counsel

Under SORA, the sentencing court will put you in one of three categories depending on your “risk level.”⁸⁸ Your “risk level” is the court’s decision about how likely it is that you will commit other sex offenses. The court makes this decision after a Board of Examiners of Sex Offenders looks at your case and makes a recommendation to the court.⁸⁹

The Board uses a Sex Offender Registration Act Risk Assessment Instrument worksheet to decide what your risk level should be.⁹⁰ This worksheet lists different factors and gives a number value to each factor. The Board sees which factors you have and then adds up the number for all of those, which corresponds to your risk level.⁹¹ The factors are related to your crime, criminal history, personal background, and future plans.

If any of the following four factors are present, you are automatically a category 3 (high risk) offender:

- (1) you have a prior felony conviction for a sex crime;
- (2) you inflicted serious physical injury or caused death;
- (3) you have made a recent threat that you will re-offend by committing a sexual or violent crime; or
- (4) there is a clinical assessment that you have a psychological, physical, or biological problem making you unable to control your sexual behavior.⁹²

According to 1999 amendments to SORA, you have a right to a lawyer at your risk level hearing, which occurs about a month before your release.⁹³ The court can appoint a lawyer for you if you cannot afford one.⁹⁴ If you had a court-appointed lawyer at your trial, the court should appoint one for you automatically.⁹⁵ If you paid for your lawyer at trial, but cannot afford one now, you must apply to have one appointed before your hearing.

You should attend your risk assessment hearing. The hearing is the one opportunity to challenge your risk level by giving the lawyer information about the case or your history that the court otherwise would not have. Many convicted offenders have chosen not to attend, either to avoid the hassle of transportation or the embarrassment of the subject, only to realize later the harsh lifetime consequences of receiving a level three risk classification.⁹⁶

88. See N.Y. Bd. of Examiners of Sex Offenders, *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* (2006), available at http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf (last visited Feb. 14, 2020).

89. N.Y. CORRECT. LAW § 168-1 (McKinney 2014) (describing generally the organization and duties of the Board of Examiners of Sex Offenders).

90. See N.Y. Bd. of Examiners of Sex Offenders, *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* (2006), available at http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf (last visited Feb. 14, 2020).

91. See N.Y. Bd. of Examiners of Sex Offenders, *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* (2006), available at http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf (last visited Feb. 14, 2020).

92. N.Y. Bd. of Examiners of Sex Offenders, *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* (2006), available at http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf (last visited Feb. 14, 2020).

93. N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

94. N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

95. N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

96. See Alan Rosenthal, DEFENDING AGAINST THE NEW SCARLET LETTER: A DEFENSE ATTORNEY'S GUIDE TO SORA PROCEEDINGS 171–172 (2019), available at <https://www.ils.ny.gov/files/Appellate/Resources/SORA%20Manual%202019.pdf> (last visited Aug. 16, 2020).

Before your hearing, the district attorney must give you the evidence used to decide your proposed risk. If he wants you to have a different risk level than the Board recommended, he has to tell you and explain why at least ten days before your hearing.⁹⁷

Any information the Board used to determine your risk level should be available to you and your lawyer. This information may include records from state or local correctional facilities, hospitals, institutions, District Attorneys, law enforcement agencies, probation departments, the Division of Parole, courts, and child protective agencies.⁹⁸

The court is allowed to delay your hearing until after your release if they need to do that in order to decide your case properly.⁹⁹

(c) Registration and Notification

Your risk level says how much information about you and your crime can be given to the public.¹⁰⁰

If you are classified as level 1 (low risk), local law enforcement is notified of your presence in the community and may release any information about you to the community generally or to specific institutions at its discretion.¹⁰¹ Information it may release includes a photograph, your zip code, background information (including the crime you were convicted of), the method of the crime, the type of victim, the name and address of any institution of higher education at which you are enrolled, work, attend, or reside, and any special conditions imposed on you (such as a condition that says you are not allowed to be around children).

If you are classified as level 2 (moderate risk), law enforcement is notified and may release the information above as well as your exact name and any aliases.¹⁰² Furthermore, law enforcement will keep a list of schools, parks, libraries, and other vulnerable areas and organizations, and will notify these organizations of your identity automatically.

If you receive a level 3 (high risk) designation, all of the information above, as well as your exact address and place of employment, can be given both to vulnerable institutions and to the public at large.¹⁰³

There are also phone numbers (1-800-262-3257), which the general public can call to find out whether someone is a registered sex offender.¹⁰⁴ These phone numbers include all registered sex offenders in New York (levels 1–3). A person calling this number will learn only that a level 1 offender is listed in the registry; far more detailed information is available about level 3 offenders. Callers must identify themselves and must also provide identifying information about the sex offender in order to secure information by telephone. They must know information about the sex offender such as his social security number, address, license number, and date of birth.¹⁰⁵

In addition, each police department in New York is required to have a publicly accessible record, the “Subdirectory of High-Risk (Level 3) Sex Offenders,” that people can look at online. The subdirectory provides detailed information about level 3 sex offenders residing in New York, including the offender’s address, photograph, and a description of the crimes he committed and how he committed them.¹⁰⁶

97. N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

98. N.Y. CORRECT. LAW § 168-m (McKinney 2014).

99. N.Y. CORRECT. LAW §§ 168-l(8) (McKinney 2014).

100. N.Y. CORRECT. LAW § 168-l(6) (McKinney 2014).

101. N.Y. CORRECT. LAW § 168-l(6)(a) (McKinney 2014).

102. N.Y. CORRECT. LAW § 168-l(6)(b) (McKinney 2014).

103. N.Y. CORRECT. LAW § 168-l(6)(c) (McKinney 2014).

104. N.Y. CORRECT. LAW § 168-p (McKinney 2014). Division of Criminal Justice Services, *available at* <https://www.criminaljustice.ny.gov/nsor/800info.htm> (last visited Oct. 10, 2020).

105. N.Y. CORRECT. LAW § 168-p(1) (McKinney 2014).

106. N.Y. CORRECT. LAW § 168-q (McKinney 2014). The information of level 2 and 3 sex offenders is available online, and people may subscribe to email updates whenever a new or updated registration occurs in their geographic area.

The New York state sex offender registry is available online at <http://www.criminaljustice.ny.gov/nsor/>. Beyond the information law enforcement makes available, parent volunteers, from at least one private organization, compile additional information and have made it available in an online database.¹⁰⁷

(d) Amendments to SORA

Amendments that went into effect in March 2002 changed the definition of “sexually violent offender” and “sexual predator.” Currently, you are considered a “sexually violent offender” if you were convicted of a “sexually violent offense.”¹⁰⁸ Sexually violent offenses include crimes such as rape, criminal sexual acts (meaning forced anal or oral sexual contact), sexual abuse, aggravated sexual abuse, sexual abuse of a child, and predatory sexual assault against an adult or a child (meaning sexual assault involving physical injury, threat of injury, or repeated assaults).¹⁰⁹ You are considered a “sexual predator” if you were convicted of a sexually violent offense *and* you have a mental or personality disorder that makes you likely to commit predatory sexually violent offenses.¹¹⁰ If you are found to be a “sexually violent offender” or “sexual predator” you will automatically get a level 3 risk (high risk) classification. While the court has to look at each case individually, you can be classified as level 3 even if the crime you were convicted of is a misdemeanor, because risk level classification is based on how likely you are to repeat your offense.¹¹¹

Other amendments to SORA give sex offenders the right to a civil appeal after the court assigns them a risk level and a right to a lawyer in that appeal.¹¹² You also have the right to appointed counsel if you file a motion to have your sex offender classification changed, which you may do if your circumstances change.¹¹³

4. The Adam Walsh Act

(a) Generally

In July 2006, Congress passed The Adam Walsh Child Protection and Safety Act. Title I of the Act set out a national system for the registration of sex offenders called the Sex Offender Registration and Notification Act (“SORNA”).¹¹⁴ SORNA is a very complicated law, and states have had difficulty implementing it. Therefore, this Chapter will only discuss some key provisions, as it is unlikely your state has adopted all of SORNA. You must check your own state’s law carefully and see what, if any, parts of SORNA it has adopted.¹¹⁵

New York has not adopted SORNA (which sounds similar to, but is different from SORA, the New York State law). If you live in New York, you must register with the New York state registration system, SORA, described in Section G(2) of this Chapter. You may nonetheless have to register with SORNA if you travelled between states.¹¹⁶

107. The online data is available at <https://www.parentsformeganslaw.org/sex-offender-search/> (last visited Aug. 16, 2020).

108. N.Y. CORRECT. LAW § 168-a(7)(b) (McKinney 2014).

109. N.Y. CORRECT. LAW § 168-a(3) (McKinney 2014).

110. N.Y. CORRECT. LAW § 168-a(7)(a) (McKinney 2014).

111. New York State Division of Criminal Justice Services, *Risk Level & Designation Determination*, available at http://www.criminaljustice.ny.gov/nsor/risk_levels.htm (last visited Feb. 16, 2020).

112. N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

113. N.Y. CORRECT. LAW § 168-o(4) (McKinney 2014).

114. The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (codified as amended in scattered sections of 18, 28, 42 U.S.C.). SORNA created a new sex offender registry law at 34 U.S.C. §§ 20901–20962 and created new criminal offenses and penalties for failure to register at 18 U.S.C. § 2250.

115. For a list of state laws, see Part G(7), footnote 70, of this Chapter.

116. *United States v. Guzman*, 591 F.3d 83, 94 (2d Cir. 2010) (applying SORNA registration requirements to defendants, even though their state had not implemented the requirements).

If your state has adopted the SORNA system, SORNA applies to you if you have been convicted of a “sex offense” in your state.¹¹⁷ SORNA requires that certain juvenile offenders register as well. If you were fourteen years old or older at the time of the offense and were convicted or adjudicated “delinquent” for “aggravated sexual abuse” or a similar crime, or for an attempt or conspiracy to commit these crimes, you have to register.¹¹⁸

You need not register if you were *convicted* of a crime listed in SORNA before it existed. The Supreme Court recently reversed a Department of Justice rule to the contrary.¹¹⁹

Under the Attorney General’s guidelines for SORNA, some definitions of offenses may be broader than they are under other laws and may apply to you even if they had not before SORNA.¹²⁰

States have been resistant to SORNA because of how difficult and expensive it is to put into practice, and because parts of the law are different than states’ own laws.¹²¹

Just like under New York law (SORA), SORNA requires sex offenders to register either just before release, or right after sentencing if you are not in custody.¹²² SORNA, like SORA, divides sex offenders into three tiers based on the seriousness of their crime and places different restrictions on each. Tiers are assigned according to the length of imprisonment, the age of the victim of the offense, and the nature of the offense committed.¹²³

How long you have to register as a sex offender depends on what SORNA Tier you are in. Tier I offenders must register for fifteen years; Tier II offenders must register for twenty-five years; and Tier III offenders must register for their entire lives.¹²⁴

Under SORNA, you will also have to personally appear before the government to verify your registration information.¹²⁵ How often you have to appear before the government is determined by which Tier offender you are. Tier I offenders must appear in person at least once a year; Tier II offenders have to appear at least every six months; and Tier III offenders must appear at least every three months.¹²⁶

If anything changes during the period of time in which you are required to register, you must notify the government within three days of any changes to your name, address, employment, and student status.¹²⁷

Your state may adopt SORNA and use *more* strict classifications than those required by the Act, but it cannot adopt less strict classifications.¹²⁸

117. 34 U.S.C. § 20911.

118. 34 U.S.C. § 20911(8); 18 U.S.C. § 2241 (defining aggravated sexual assault).

119. *Reynolds v. United States*, 565 U.S. 432, 439, 132 S. Ct. 975, 980, 181 L. Ed. 2d 935, 942 (2012) (interpreting 28 C.F.R. § 72.3).

120. *See* 34 U.S.C. § 20914(a)(8), (b)(8); The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30210-01, 30217–30218 (May 30, 2007). *See* Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance*, N.Y. TIMES, February 8, 2009, at A1, *available at* <https://www.nytimes.com/2009/02/09/us/09offender.html> (last visited Oct. 10, 2020).

121. *See* Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance*, N.Y. TIMES, February 8, 2009, at A1, *available at* <https://www.nytimes.com/2009/02/09/us/09offender.html> (last visited Oct. 10, 2020).

122. 34 U.S.C. § 20913(b). If you are not in custody, you have three business days to register after being sentenced.

123. 34 U.S.C. § 2091.

124. 34 U.S.C. § 20915(a).

125. 34 U.S.C. § 20918.

126. 34 U.S.C. § 20918.

127. 34 U.S.C. § 20913(c). Within three business days of each change, you must appear in person in at least one jurisdiction where you are registered to inform that jurisdiction of any changes. 34 U.S.C. § 20913(c); *see also* *United States v. Guzman*, 591 F.3d 83, 86 (2d Cir. 2010) (upholding SORNA’s registration requirements for sex offenders).

128. 34 U.S.C. § 20912; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,033–38,034 (July 2, 2008).

Keep in mind that even in states that have adopted SORNA, implementation and effectiveness can vary. For this reason, your state's regulations will probably influence your situation more than SORNA.

(b) Who can access this information and how?

Through local registries and law enforcement notification

All information you provide under SORNA will be put in your jurisdiction's registry. Most of the information contained in the registry will be available to the public.¹²⁹ In addition, law enforcement in your jurisdiction will have to provide your information to certain parties, including the federal Attorney General, and schools, public housing agencies and other vulnerable communities in your area.¹³⁰

There are some exceptions, however.¹³¹ States *cannot* post information about:

- (1) any victim's identity;
- (2) your social security number;
- (3) arrests that did not result in conviction; and
- (4) any other information that the Attorney General decides should not be released.¹³²

States can *choose* whether or not they want to include:

- (1) any information about a Tier I offender convicted of an offense other than a "specified offense against a minor;"
- (2) the name of your employer;
- (3) the name of any school where you are a student; and
- (4) any other information that the Attorney General decides should not be released.¹³³

Each state offender registry website must include directions on how to change information that you believe is incorrect.¹³⁴ Each website must also include a warning that any use of the site's information to "unlawfully injure, harass, or commit a crime" against any person named on the registry "could result in civil or criminal penalties."¹³⁵

Through the National Registry

Each convicted sex offender and any other person required to register will also be included on the National Sex Offender Registry maintained by the FBI.¹³⁶

The National Sex Offender Public Website is maintained by the Attorney General and includes "relevant information for each sex offender and other person listed on a jurisdiction's internet site," making "relevant information" publicly accessible.¹³⁷ The website can be found online at <http://www.nsopw.gov/>.

(c) Sentence Increases under The Adam Walsh Act

(i) Mandatory Minimums

A mandatory minimum sentence is the shortest, or least severe, sentence a court can give you if you are convicted of a certain crime. Title II of the Adam Walsh Child Protection and Safety Act established new mandatory minimums for a number of sexual crimes. These include:

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129. 34 U.S.C. § 20920(a).
 130. 34 U.S.C. § 20923(b).
 131. 34 U.S.C. § 20920(b), (c).
 132. 34 U.S.C. § 20920(b).
 133. 34 U.S.C. § 20920(c).
 134. 34 U.S.C. § 20920(e).
 135. 34 U.S.C. § 20920(f).
 136. 34 U.S.C. § 20921.
 137. 34 U.S.C. § 20922.

- (1) New mandatory minimums for a “crime of violence against the person of an individual who has not attained the age of 18,” including murder, kidnapping, acts that result in serious bodily injury, and others;¹³⁸ and
- (2) New mandatory minimum of 15 years for sex trafficking accomplished through force, fraud, or coercion involving a minor under 14.¹³⁹

Mandatory Maximums

A statutory maximum is the longest, or most severe, sentence a court is allowed to give you if you are convicted of a certain crime. In addition to the mandatory minimums discussed above, Title II of the Adam Walsh Child Protection and Safety Act also established new statutory maximums (increasing the previous statutory maximums) for a number of sexual crimes.¹⁴⁰

(d) Statute of Limitations

The Act has gotten rid of the statute of limitations for certain crimes, which means that if you are accused of one of these crimes, you can be prosecuted at any time, no matter how long ago the crime was committed.

Under the Act, there is no longer a statute of limitations for any felony listed in Chapter 109A (Sexual Abuse), Chapter 110 (Sexual Exploitation and Other Abuse of Children),¹⁴¹ and Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), or for charges under Sections 1201 (kidnapping of a minor) or 1591 (sex trafficking).¹⁴²

(e) Bail

The Act adds certain sex offenses to the list of those for which a court must hold a bail hearing (if the government moves for one). The offenses that require one of these bail hearings now include “any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or any dangerous weapon, or involves the failure to register [as a sex offender].”¹⁴³

(f) DNA Collection

The Adam Walsh Act lets the government collect the DNA of certain people, even if those people do not consent. Individuals who are facing charges may be compelled by the Attorney General to give a DNA sample. The category of people “facing charges” includes those who are currently charged by indictment, information, or complaint, but are not currently under arrest.¹⁴⁴ Individuals who are convicted also *must* give samples to the Attorney General. This category includes persons who are convicted of any offense—not only felonies or crimes of violence—but they must at least be “in custody.”¹⁴⁵

138. 18 U.S.C. § 3559(f)(1)–(3).

139. 18 U.S.C. § 1591(a), (b)(1)–(2).

140. *See, e.g.*, 18 U.S.C. § 2422(b) (stating that the maximum term of imprisonment for coercion and enticement is life imprisonment and the minimum term is ten years); 18 U.S.C. § 2423(a) (indicating that the maximum term of imprisonment for conduct relating to transportation of minors for prostitution is life imprisonment and the minimum term is ten years); 18 U.S.C. § 2242 (2019) (asserting that the maximum term of imprisonment for sexual abuse in prison can be up to life. There is no mandatory minimum term under this statute).

141. Except for violations of the record-keeping requirements set forth in sections 2257 and 2257A of Chapter 110, for which the statute of limitations still applies. 18 U.S.C. § 3299.

142. 18 U.S.C. § 3299.

143. 18 U.S.C. § 3142(f)(1)(E).

144. 34 U.S.C. § 40702(a)(1)(A); *see also* DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,936–74,937 (Dec. 10, 2008) (to be codified at 28 C.F.R. pt. 28) (“[T]he rule reflects a judgment that the implication of individuals in criminal activity to the extent of being arrested sufficiently supports the taking of certain identification information from such individuals.”).

145. 34 U.S.C. § 40702 (a)(1)(A)–(B), (a)(5), (d).

(g) Probation/Supervised Release

The Act creates a discretionary condition of probation or supervised release (meaning that the judge can choose to impose this condition but does not have to impose it).¹⁴⁶ If the judge does impose such a condition, you must submit yourself and your property, including your house, vehicle, computer, and electronic devices to a search any time a law enforcement officer has a “reasonable suspicion” that you have violated a condition of probation.¹⁴⁷ In this case, the officer does not need a warrant to search you or your property as long as the he is acting within his law enforcement duties.¹⁴⁸

(h) Sex Offender Management and Treatment Programs

The statute requires the Bureau of Prisons to make appropriate treatment available to sex offenders who need treatment and who are suitable for it.¹⁴⁹ Such programs include sex offender management programs¹⁵⁰ and residential sex offender treatment programs.¹⁵¹ Participation in this type of program can be very important for determining whether you are eligible for parole. Programs in New York State are discussed in Part C of this Chapter, which gives you an overview of the kinds of services available.

(i) Victim Rights

The Act now permits minor victims of sex crimes to initiate *civil actions* against the person who violated them, regardless of whether the victim actually suffered a *physical* injury while a minor.¹⁵² Furthermore, the Act raised the amount of money available to the victim from \$50,000 to \$150,000.¹⁵³

The Act also gives specific rights to victims in habeas corpus proceedings (see *JLM*, Chapters 13 and 21 for more information about habeas corpus): the right not to be excluded, the right to be reasonably heard, the right to proceedings free from unreasonable delay, and the right to be treated with fairness and respect for the dignity and privacy of the victim.¹⁵⁴

J. Civil Commitment

Civil commitment is the practice of confining someone without a criminal conviction because the person is determined to be dangerous. This confinement may be involuntary and indefinite. It may be imposed instead of a criminal sentence, or after a criminal sentence is completed. However, civil commitment requires a determination that you are likely to commit future sexually violent acts. Many states have a general civil commitment statute, which allows for the commitment of persons who fall into various categories of mental illness or dangerousness.

While some sexually violent individuals can be committed under more general civil commitment statutes, many cannot because their behavior often does not fit within the narrow definitions of “mental illness” used in these statutes. In response to these narrow definitions in general civil commitment statutes, many states have passed laws providing for the involuntary civil commitment of sex offenders.¹⁵⁵ The Supreme Court has said that involuntary civil commitment does not violate a person’s due process rights as long as the State can show that the person has a mental illness and

146. 18 U.S.C. § 3563(b)(23).

147. 18 U.S.C. § 3563(b)(23).

148. 18 U.S.C. § 3563(b)(23).

149. 18 U.S.C. § 3621(f)(1).

150. 18 U.S.C. § 3621(f)(1)(A).

151. 18 U.S.C. § 3621(f)(1)(B).

152. 18 U.S.C. § 2255(a).

153. 18 U.S.C. § 2255(a); The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 707(b)(2), 120 Stat. 587, 650 (codified as amended in scattered sections of 18, 28, 42 U.S.C.).

154. 18 U.S.C. § 3771(b)(2)(A).

155. See, e.g., N.Y. MENTAL HYG. § 10.01 (McKinney 2020) (establishing standards and procedures for the involuntary commitment of dangerous sex offenders).

presents a risk of future danger to himself or to others.¹⁵⁶ In *United States v. Comstock*, the Supreme Court said that a federal law allowing district courts to commit an incarcerated person in civil commitment beyond the date that the incarcerated person would otherwise be released was constitutional (legal) under the Necessary and Proper clause.¹⁵⁷ In addition to these state laws, Congress, through the Adam Walsh Act, created the Jimmy Ryce Civil Commitment Program for Dangerous Sex Offenders, a federal civil commitment law discussed in detail in Part I(2)(b) below.

It is difficult to challenge civil commitment statutes, as courts have generally upheld them when the state can show that the person the state wants to confine is a danger to himself or to others. In *Kansas v. Hendricks*, the Supreme Court explained that civil confinement of a sex offender does not violate substantive due process, equal protection, or the double jeopardy provisions of the Constitution.¹⁵⁸ The Court determined that the Kansas statute was a civil remedy, which only applied to the “dangerously mentally ill,” and that the statute was not an additional criminal punishment for sex offenders.¹⁵⁹ Later, in *Seling v. Young*, the Court said that, if a commitment statute is civil (as opposed to criminal) in nature, it cannot be considered a punishment, and therefore it does not violate the Constitution.¹⁶⁰

It is important for you to know that the Supreme Court refined its decision in *Kansas v. Hendricks*, later setting a limit on the conditions under which states can keep convicted sexual predators in civil confinement after their criminal sentences have expired.¹⁶¹ In *Kansas v. Crane*, the Court said that states must prove not only that an offender remained dangerous and was likely to repeat a crime, but also that the offender had a psychiatric diagnosis which included a “serious difficulty in controlling behavior.”¹⁶² Therefore, each civil commitment case must be evaluated individually to see if it meets this standard. The Court decided to require this additional finding to make certain that a civilly confined offender was actually mentally ill and dangerous, not simply a “typical recidivist convicted in an ordinary criminal case.”¹⁶³ A *recidivist*, commonly called a “repeat offender,” is “someone who has been convicted of multiple criminal offenses, usually similar in nature.”¹⁶⁴

After *Crane*, civil commitment requires a psychiatric evaluation that an offender lacks control over his actions. Without such a determination, the practice would not be sufficiently different from criminal punishment. This reflects a shift towards using civil commitment statutes for treatment and not merely for detention of sex offenders. Those offenders who are civilly confined are now usually held in mental health facilities—either separate from a correctional facility or part of a larger correctional facility. Under New York law, these facilities must have staff from “the office of mental health or the office for people with developmental disabilities for the purposes of providing care and treatment to persons confined. . . .”¹⁶⁵

156. *Kansas v. Hendricks*, 521 U.S. 346, 357, 370, 117 S. Ct. 2072, 2079–2080, 2086, 138 L. Ed. 2d 501, 512, 520 (1997) (finding that the Kansas civil commitment act satisfied due process requirements because it unambiguously required a finding of dangerousness either to one’s self or to others as a prerequisite to involuntary confinement).

157. *United States v. Comstock*, 560 U.S. 126, 133–135, 130 S. Ct. 1949, 1956–1958, 176 L. Ed. 2d 878, 888–891 (2010).

158. *Kansas v. Hendricks*, 521 U.S. 346, 371, 117 S. Ct. 2072, 2086, 138 L. Ed. 2d 501, 521 (1997).

159. *Kansas v. Hendricks*, 521 U.S. 346, 363, 117 S. Ct. 2072, 2083, 138 L. Ed. 2d 501, 516 (1997).

160. *Seling v. Young*, 531 U.S. 250, 262–263, 121 S. Ct. 727, 734–735, 148 L. Ed. 2d 734, 746–747 (2001) (“For those individuals with untreatable conditions, however, we explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.”).

161. *Kansas v. Crane*, 534 U.S. 407, 411, 413, 122 S. Ct. 867, 869–870, 151 L. Ed. 2d 856, 861–862 (2002) (finding that where a sexual offender suffered from both exhibitionism and anti-social personality disorder, the state was required to prove a serious difficulty in controlling behavior in order to commit sexual offender).

162. *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 870, 151 L. Ed. 2d 856, 862 (2002).

163. *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 870, 151 L. Ed. 2d 856, 863 (2002).

164. *Recidivist*, BLACK’S LAW DICTIONARY (11th ed. 2019).

165. N.Y. MENTAL HYG. LAW § 10.03(o) (McKinney 2020).

Civil commitment will affect your life in many ways. As an example, sex offenders in civil commitment facilities are now no longer able to receive federal Pell grants to pay for their education.¹⁶⁶ You should do further research to determine how else civil commitment will change your rights and options.

1. Procedures

Civil commitment procedures vary by state, so be certain to check what statutes apply to you. Civil commitment of sex offenders typically occurs after you have completed your criminal sentence. Generally, the state attorney general's office and various other agencies will be notified when you are nearing release from prison. One or more state committees, usually composed of mental health experts, will review your records and will recommend confinement if they determine that you are a sexually violent predator.¹⁶⁷

After getting a recommendation for civil commitment, the state Attorney General, state prosecutors, or other state officials will file a petition alleging that you are a sexually violent predator. You will then have a trial in front of a judge or jury. In most states, you are entitled to assistance of counsel at all stages of these proceedings.¹⁶⁸ You may also be entitled to have a psychological expert of your choice examine you, at the state's expense.¹⁶⁹

If you are found to be a sexually violent predator, in most states you have the right to appeal that determination.¹⁷⁰ If you lose the appeal and are committed, you will likely be committed to a facility especially dedicated to the detention and treatment of sex offenders. You will be detained there indefinitely. Usually, your psychological health and danger to the community will be re-evaluated once a year in order to determine whether you should be released.¹⁷¹

Because of the wide variations in state civil commitment schemes, it is important that you consult your own state's criminal code to determine whether your state has a civil commitment statute, and to learn its specific details.

2. Statutes

(a) States generally

Following *Hendricks* and *Crane*, many states have adopted laws like the Kansas statute. The statutes have three main requirements that they share. To be committed, you must:

- (1) have engaged in some criminal sexual conduct;
- (2) have a specified mental condition; and
- (3) because of your mental disease or defect, be likely to engage in criminal sexual conduct in the future.¹⁷²

166. Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, 122 Stat. 3078 (2008) (amending 20 U.S.C. 1070a(b)(2)(A)), *available at* <https://www.govinfo.gov/content/pkg/PLAW-110publ315/pdf/PLAW-110publ315.pdf> (last visited Aug. 16, 2020).

167. *See, e.g.*, FLA. STAT. ANN. § 394.913 (2014) (describing the multidisciplinary team that evaluates your record); VA. CODE ANN. § 37.2-902 (2011) (stating that records are reviewed by committee); CAL. WELFARE & INST. CODE § 6601 (2013); TEX. HEALTH & SAFETY CODE ANN. §§ 841.022 to .023 (2013).

168. *See, e.g.*, FLA. STAT. ANN. § 394.916 (2014) (stating person is entitled to counsel); VA. CODE ANN. § 37.2-901 (2013) (specifying person's right to counsel); N.J. STAT. ANN. § 30:4-27.29 (2013); 725 ILL. COMP. STAT. ANN. 207/25 (2013); IOWA CODE ANN. § 229A.5(2)(d) (2013); TEX. HEALTH & SAFETY CODE ANN. § 841.005 (2013).

169. *See, e.g.*, FLA. STAT. ANN. § 394.916 (2014) (stating that person may retain own professional); 725 ILL. COMP. STAT. ANN. 207/25 (2013) (stating that person may appoint their own expert); N.Y. MENTAL HYG. LAW § 10.06 (McKinney 2020); VA. CODE ANN. § 37.2-907 (2013).

170. *See, e.g.*, FLA. STAT. ANN. § 394.917 (2014) (specifying right to appeal determination); WASH. REV. CODE ANN. § 71.09.080 (2013) (providing that nothing in the chapter prohibits a person from exercising a right available elsewhere); 725 ILL. COMP. STAT. ANN. 207/35 (2013); WASH. REV. CODE ANN. § 71.09.060 (2013).

171. *See, e.g.*, FLA. STAT. ANN. § 394.918 (2014) (providing that individual will be evaluated yearly); ARIZ. REV. STAT. ANN. § 36-3708 (2013) (same); 725 ILL. COMP. STAT. ANN. 207/55 (2014); VA. CODE ANN. §§ 37.2-910-912 (2013).

172. *See, e.g.*, CAL. WELFARE & INST. CODE § 6600(a)(1) (2013).

Although state statutes follow this general pattern, they differ in a number of ways. In finding “criminal sexual conduct” for the purposes of the first requirement, some states require a sex offense conviction, while others require only that a person be *charged* with a sex offense, and a few simply require that the person have “committed” an illegal sexual act.¹⁷³ States also vary on whether the case must be heard in front of a judge or jury and how much proof the state must provide of your condition and the danger you pose.¹⁷⁴ The statutes either require proof “beyond a reasonable doubt” or by “clear and convincing evidence.” “Beyond a reasonable doubt” is a high standard of proof and is used at criminal trials. “Clear and convincing evidence” is a slightly easier standard for the state to meet. If you are facing civil commitment, you must research your state’s laws and determine what sort of assistance you are entitled to.

(b) New York

Until April 2007, New York State did not have a civil commitment statute for sex offenders. Even without specific civil commitment legislation aimed at sex offenders, in some cases state officials had succeeded in civilly committing sex offenders under the regular civil commitment scheme. Some individuals who were civilly committed under the general scheme are entitled to have the issue adjudicated under the procedure set forth in New York’s Sex Offender Management and Treatment Act.¹⁷⁵ The civil commitment scheme is mainly used for the mentally ill.¹⁷⁶

In 2007, the New York Legislature passed The Sex Offender Management and Treatment Act, which can be found in Article 10 of the N.Y. Mental Hygiene Law. The Act lays out a procedure for the civil commitment of dangerous sex offenders, discussed below. The Court of Appeals of New York upheld the Act as applied to people charged with sex offenses, convicted of sex offenses, or people who were patients of a state mental hospital since September 1, 2005.¹⁷⁷

New York State’s civil commitment statute is similar to other states’ statutes. About 120 days before you are released from prison, the parole board will give notice to the commissioner on health, who will determine if you are a sex offender who requires civil commitment.¹⁷⁸ Then, the Attorney General may file a petition seeking commitment, which you can contest in a hearing.¹⁷⁹ If, after the hearing, the court decides that you are probably a sex offender requiring civil commitment, the court

173. See, e.g., KAN. STAT. ANN. § 59-29a02(a) (2013) (defining sexually violent predator as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.”).

174. See, e.g., KAN. STAT. ANN. § 59-29a06(d) (2013) (providing that a jury trial may be requested by one of the parties or the court, but if no jury is requested the trial will be before the court.).

175. State of N.Y. *ex rel.* Harkavy v. Consilvio, 8 N.Y.3d 645, 651, 870 N.E.2d 128, 131, 838 N.Y.S.2d 810, 813 (2007) (finding that certain individuals who were transferred without precommitment hearings, and thus were improperly committed under N.Y. MENTAL HYG. LAW § 9, were entitled to adjudication under the new N.Y. MENTAL HYG. LAW § 10 procedures.)

176. See, e.g., Doe v. Pataki, 120 F.3d 1263, 1281, 1285 (2d Cir. 1997) (holding that a statute requiring the involuntary commitment of “mentally abnormal” sex offenders pursuant to a civil commitment statute is valid). See generally N.Y. MENTAL HYG. LAW §§ 9.27–9.37 (McKinney 2020) (describing the procedure for involuntary hospital admissions for mental illness).

177. State of N.Y. *ex rel.* Joseph v. Superintendent of Southport Corr. Facility, 15 N.Y.3d 126, 132, 135 931 N.E.2d 76, 79, 81, 2010 N.Y.S.2d 107, 110, 112 (2010) (affirming that Article 10’s procedure is the appropriate standard for future civil commitment proceedings); State of N.Y. *ex rel.* Harkavy v. Consilvio, 8 N.Y.3d 645, 652, 870 N.E.2d 128, 132, 838 N.Y.S.2d 810, 814 (2007) (holding that the state must adhere to the procedural protections set forth in Article 10 of the N.Y. Mental Hygiene Law).

178. N.Y. MENTAL HYG. LAW § 10.05 (McKinney 2020).

179. N.Y. MENTAL HYG. LAW § 10.06 (McKinney 2020).

will conduct a trial to figure out if this is really the case.¹⁸⁰ If you are found to be a danger in this trial, you will be committed.¹⁸¹

(c) Federal Civil Commitment: The Adam Walsh Act

Under the Federal Jimmy Ryce Civil Commitment Program for Dangerous Sex Offenders, codified at 18 U.S.C. §§ 4247, 4248, the Attorney General, the Director of the Bureau of Prisons, or anyone authorized by the Attorney General, can seek to civilly commit anyone in Bureau of Prisons custody (in federal prison) by “certifying” the offender as “sexually dangerous.” This is a very serious designation because, practically speaking, civil commitment may turn into a life sentence for those in custody.

(i) Under the Adam Walsh Act, who can be civilly committed?

Anyone in Bureau of Prisons custody (in federal prison) may be civilly committed—even if you were not incarcerated for a sexual offense. It is, however, most common for an incarcerated person convicted of a sexual crime to be considered for civil commitment. There is no competency or insanity requirement.

(ii) What is the definition of a “sexually dangerous person?”

According to the statute, a “sexually dangerous person” is “a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.”¹⁸² A person is “sexually dangerous to others” if he “suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”¹⁸³ Some of the key terms are not defined within the statute, such as “sexually violent conduct,” “child molestation,” and “serious difficulty.” The definition of “sexually dangerous person” has been criticized for being overly broad and overly inclusive.

(iii) What is the procedure for determining whether an incarcerated person is “sexually dangerous?”

The Bureau of Prisons (“BOP”) reviews all incarcerated people, and when they identify an incarcerated person they believe may be “sexually dangerous,” BOP staff members then conduct a full evaluation of that incarcerated person. An incarcerated person is not provided with an attorney at this point, and no *Miranda* warnings are given.¹⁸⁴

The incarcerated person is given a form to sign which states that (1) there will be an evaluation consisting of interviews, review of records, and testing; (2) he understands that it will be used to determine his eligibility for civil commitment as a sexually dangerous person after he serves his sentence; (3) he understands that the results will be related to BOP officials and “others with a need to know” including the court, the government, and his lawyer; and (4) the evaluation will be completed whether or not he

180. N.Y. MENTAL HYG. LAW § 10.07(f) (McKinney 2020) (“If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court shall find the respondent to be a dangerous sex offender requiring confinement.”).

181. N.Y. MENTAL HYG. LAW § 10.07(f) (McKinney 2020).

182. 18 U.S.C. § 4247(a)(5).

183. 18 U.S.C. § 4247(a)(6).

184. See Memorandum from Amy Baron-Evans & Sara Noonan to Defenders & CJA Counsel 4 (Sept. 10, 2007, as revised Sept. 25, 2007), available at <https://www.prisonlegalnews.org/news/publications/memo-to-cja-counsel-civil-commitment-report-2007/> (last visited Oct. 10, 2020).

participates. Incarcerated people have made statements during this process that were used to support a sexually dangerous certification.¹⁸⁵

- (iv) What happens after an incarcerated person is found to be “sexually dangerous?”

If the BOP certifies an incarcerated person as sexually dangerous, the certificate is filed with the court in the district in which the incarcerated person was confined.¹⁸⁶ The filing of the certificate “stays” the incarcerated person’s release (meaning that the release is delayed) until a decision is reached about the incarcerated person possibly being civilly committed. This is a particular concern because these certificates are often filed immediately before an incarcerated person is due to be released—often within days or even hours.

- (v) Can you challenge Federal civil commitment?

In *United States v. Comstock*, the United States Supreme Court overruled the North Carolina court and settled the issue for now. The Court concluded that it was within Congress’ power to enact 18 U.S.C. § 4248, and it was not an unconstitutional use of the Necessary and Proper clause.¹⁸⁷ The Court’s reasoning rested on the idea that the federal government had a special interest in protecting society from the incarcerated people who are committed and that the law only affected a small portion of the population of incarcerated people.¹⁸⁸

K. Conclusion

Sex offenders face special concerns both while they are in prison and after they are released. In prison, these issues include HIV testing, post-conviction DNA testing, protective custody, and the importance of attending sex offender counseling programs to receive good time credit. Upon release from prison, incarcerated people should be aware of special parole conditions, community registration laws, and the possibility of civil commitment to psychiatric hospitals.

185. See Memorandum from Amy Baron-Evans & Sara Noonan to Defenders, CJA Counsel 4 (Sept. 10, 2007, as revised Sept. 25, 2007), available at <https://www.prisonlegalnews.org/news/publications/memo-to-cja-counsel-civil-commitment-report-2007/> (last visited Oct. 10, 2020). Referenced evaluation form can be found in Appendix A below.

186. 18 U.S.C. § 4248(a).

187. *United States v. Comstock*, 560 U.S. 126, 149, 130 S. Ct. 1949, 1965, 176 L. Ed. 2d 878, 899 (2010) (holding that “the statute is a ‘necessary and proper’ means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others”).

188. *United States v. Comstock*, 560 U.S. 126, 148, 130 S. Ct. 1949, 1964, 176 L. Ed. 2d 878, 898 (2010).

APPENDIX A

BP-A1044

NOTICE OF PSYCHOLOGICAL EVALUATION

FEB 16

**U.S. DEPARTMENT OF JUSTICE
BUREAU OF PRISONS**

FEDERAL

I, _____, understand that I am the subject of a psychological evaluation to be conducted by forensic psychology services staff to determine the existence of a diagnosis and perform a risk assessment prior to my release.

I understand that the forensic psychologist named below will perform this evaluation, and will conduct it in an impartial and objective manner.

I understand that this evaluation may be considered by the Bureau of Prisons when reviewing my case for possible civil commitment pursuant to Title 18 U.S.C. § 4248, whereby I may be committed to a suitable facility after the expiration of my criminal sentence.

I understand that this psychological evaluation may consist of individual clinical interviews, a review of official records, contact with persons involved in my case, and psychological testing.

I understand that the results of this evaluation may be documented in a written report that may be communicated to the Court, my legal counsel, and counsel for the Government. It is possible that this information may be revealed in open court proceedings.

I understand that I may agree to participate or refuse to participate, in whole or in part, in the interview or testing components of this evaluation, and that the evaluation will be completed whether or not I choose to participate in the evaluation process.

Examinee Name (printed & signed)

BOP Register Number

Evaluation Name (printed & signed)

Date

CHAPTER 37

RIGHTS UPON RELEASE*

This Chapter discusses many of the legal issues you may face after your release from prison. Part A discusses housing rights and registration laws. Part B discusses your eligibility for public benefits, Part C addresses employment, and Part D discusses child custody issues. Part E addresses your eligibility for military service when you have a criminal conviction, and Part F describes the effects of criminal convictions on your right to vote and other political rights. For the most part, these sections will discuss relevant federal and New York State law. The sections dealing with federal law will apply to you even if you do not live in New York State. However, if you do not live in New York, you should consult the appropriate state laws to learn your rights in the state in which you live. For more details about how your conviction may affect you in your state, visit the National Inventory of Collateral Consequences of Conviction website, at <https://niccc.nationalreentryresourcecenter.org/>.¹

A. Housing Rights and Registration

1. Private Housing

(a) Buying or Renting

If you are trying to buy or rent housing from a private party, your criminal conviction will probably make things more difficult for you. (If you want public housing assistance, see Section 2(a) below.) The federal Fair Housing Act² prevents public and private parties from discriminating against potential buyers or renters on the basis of race, color, religion, sex, handicap, familial status, or national origin. However, there is no law that prevents private parties from deciding not to sell or rent to you because of your criminal history. Although there is no law requiring you to report your criminal history when you fill out a rental application, the landlord may ask you to provide this information on the application. Further, your criminal record may show up if your landlord checks your credit history. In addition, a lender will also likely check your credit history before agreeing to give you a mortgage.

The Fair Housing Act also allows landlords to refuse to rent or sell “to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”³ Under this provision, as well as under some state laws, a landlord may decide that your criminal history poses a threat to others and their property, and refuse to sell or rent to you on that basis.⁴ The landlord or seller may refuse to rent or sell to you on these grounds even if you would otherwise be protected under the Fair Housing Act. For example, if you have a disability but your criminal history indicates that you would pose a threat to others, the landlord may choose not to rent to you. Since the exclusion is based on the landlord’s belief that you pose a threat because of your criminal history, not because of your actual disability, the exclusion does not violate the Fair Housing Act. If brought to court, a landlord who wants to exclude you on the basis of your criminal history will have to show “objective evidence that is sufficiently recent

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1. Collateral Consequences Inventory, NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, *available at* <https://niccc.nationalreentryresourcecenter.org/> (last visited Nov. 27, 2020).

2. Discrimination in the sale or rental of housing and other prohibited practices, 42 U.S.C. § 3604.

3. 42 U.S.C. § 3604(f)(9).

4. *See* Talley v. Lane, 13 F.3d 1031, 1034 (7th Cir. 1994) (finding under the Fair Housing Act that the landlord has the “discretion to find that individuals with a history of convictions for property and assaultative crimes would be a direct threat to other tenants and to deny their applications.”); *see also* Collins v. AAA Homebuilders, 175 W. Va. 427, 428, 333 S.E.2d 792, 793 (W. Va. 1985) (finding under West Virginia state law, “that a private landlord may consider all factors, including criminal convictions, which may affect the health, safety, or welfare of other tenants . . .”).

as to be credible, and not from unsubstantiated inferences, that [you] will pose a direct threat to the health and safety of others.”⁵

(b) Exception for Participants in Drug Rehabilitation Programs

There is a possible exception to the landlord's ability to reject your application based on your criminal history. If your conviction was for possession of drugs, and you no longer use drugs *and* you are in a drug rehabilitation program, then the landlord may not reject your application based on your criminal conviction. The Fair Housing Act outlaws discrimination against someone based on his handicap.⁶ In the Fair Housing Act, the term “handicap” is defined as “(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such impairment.”⁷ “Handicap” does not include “current, illegal use of or addiction to a controlled substance.”⁸ However, a person's past drug dependency, together with his participation in a drug rehabilitation program *is* considered a handicap.⁹ If you are handicapped by your former addiction and are in a rehabilitation program, the landlord may not reject your application based only on your past drug possession conviction.

2. Subsidized Housing: Public Housing & Section 8

The federal government, through the Department of Housing and Urban Development (HUD), regulates and helps fund state and local agencies that provide housing assistance to those in need. This assistance comes in various forms, including low-cost housing in public housing projects, subsidized rents for certain private rental units, Section 8 housing,¹⁰ and help with mortgages and down payments on homes.¹¹

5. *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 27 (D. Mass. 1996) (finding that the “direct threat” exemption from the Fair Housing Act should be narrowly construed, so that mere inferences of a threat are not sufficient for the landlord to refuse to sell or rent to you if you are otherwise protected under the Fair Housing Act); *see also Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991) (finding that speculative conclusions about the tenant (such as a speculation that increased vandalism was caused by the tenant) are not enough to show that the tenant poses a direct threat).

6. 42 U.S.C. § 3604(f)(2).

7. 42 U.S.C. § 3602(h).

8. 42 U.S.C. § 3602(h).

9. *See Peabody Prop. v. Sherman*, 418 Mass. 603, 605–606, 638 N.E.2d 906, 908 (Mass. 1994) (holding that, although defendant's drug dependency coupled with his later participation in a drug rehabilitation program was considered a handicap, the term “handicap” did not include current, illegal use of drugs); *see also United States v. S. Mgmt. Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (holding that recovering addicts came within the definition of “handicap” because they had an impairment that substantially limited a major life activity as a result of the attitudes of others toward such impairment). *But see Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1185–1186 (10th Cir. 2011) (finding 30 days of sobriety to be insufficient under the safe harbor provision); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1186 (9th Cir. 2001) (finding that “the ‘safe harbor’ provision applies only to employees who have refrained from using drugs for a significant period of time”); *Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274, 277 n.4 (4th Cir. 1997) (suggesting that a person who had been drug-free for less than one year may not have a “handicap” under the Fair Housing Act, unlike the recovering addicts in *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 919 (4th Cir. 1992)).

10. Section 8 is the common name for the federal program that lets you find your own place to rent, and gives you vouchers to pay for all or part of the rent. You may also see the Section 8 program referred to as “Housing Choice Vouchers.” There are certain income limits set for Section 8 Housing. *See* 24 C.F.R. § 982.201(b) (2018); Rental Assistance – HUD, http://portal.hud.gov:80/hudportal/HUD?src=/topics/rental_assistance (last visited Sept. 29, 2019).

11. *See Buying a Home*, U.S. Dept. of Housing and Urban Development (HUD), https://www.hud.gov/topics/buying_a_home (last visited Sept. 29, 2019); *see also* Appendix A of this Chapter to find out how to contact HUD by mail or phone.

(a) Federal Housing Restrictions

People with criminal convictions may be eligible to receive housing assistance. However, there are a number of public housing laws that will affect your eligibility. First, federal laws *require that some individuals be denied* housing assistance:

- (1) If you have been evicted from public, federally assisted, or Section 8 housing because of drug-related criminal activity, you are ineligible for public or federally assisted housing for three years.¹² However, the housing provider has the discretion to shorten the three-year period if you successfully complete a rehabilitation program approved by the local housing provider.¹³ The three-year period begins to run from the date of the eviction.¹⁴
- (2) If you are subject to a lifetime registration requirement under a sex offender registration program, you are permanently ineligible for public, Section 8, and other federally assisted housing. For more information on registration programs, see Section 3 below.¹⁵
- (3) If you have been convicted of methamphetamine production while living on public housing premises, you are permanently ineligible for public, Section 8, and other federally assisted housing.¹⁶
- (4) If you or a member of your household is currently abusing alcohol in a manner that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents, or if you or a member of your household is illegally using drugs, you are ineligible for public, Section 8 or other federally assisted housing.¹⁷ The housing provider may decide to admit you to housing or allow you to remain in your residence if you (or a member of your household, where applicable) demonstrate that you are not currently abusing alcohol or illegally using drugs and have been rehabilitated in any one of three ways: (1) completion of a supervised alcohol or drug rehabilitation program, (2) successful rehabilitation in some other manner, or (3) participation in a supervised alcohol or drug rehabilitation program.¹⁸
- (5) Finally, public housing assistance will be denied or revoked if you are fleeing to avoid prosecution, custody, or confinement on a felony charge or conviction,¹⁹ or if you are in violation of the conditions of your probation or parole under state or federal law.²⁰

The federal public housing law permits housing assistance to be denied to you if you have certain other kinds of criminal records.²¹ If you have engaged in (1) any drug-related criminal activity; (2) any violent criminal activity; or (3) any other criminal activity that would adversely affect the health, safety, or someone else's right to peaceful enjoyment of the premises, you may be denied public, Section 8, and other federally assisted housing.²² The public housing agency or owner of the housing can only deny you for these crimes if the crime occurred "reasonably" recently.²³ However, even if the criminal

12. 42 U.S.C. § 13661(a). "Drug-related criminal activity" means "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance." 42 U.S.C. § 1437a(b)(9).

13. 42 U.S.C. § 13661(a).

14. 42 U.S.C. § 13661(a).

15. 24 C.F.R. § 5.856 (2018).

16. 42 U.S.C. § 1437n(f).

17. 42 U.S.C. § 13661(b)(1).

18. 42 U.S.C. § 13661(b)(2).

19. 42 U.S.C. § 1437f(d)(1)(B)(v)(I). (There is an exception for New Jersey "high misdemeanors." High misdemeanors refer to crimes of the first, second, or third degree and reference to the term "misdemeanor" shall mean all crimes).

20. 42 U.S.C. § 1437f(d)(1)(B)(v)(II).

21. 42 U.S.C. § 13661(c)(1). The unfortunate reality is that most public housing agencies will exclude individuals on the basis of most criminal records.

22. 42 U.S.C. § 13661(c).

23. There is no specific time period which is defined as "reasonable" in this context. The individual owner

activity was not reasonably recent, the housing agency or owner may require you to show evidence that you have not engaged in any other criminal activity recently.²⁴

If you have engaged in any of the three categories of criminal activities listed in the above paragraph, the housing authorities may also choose to terminate your existing lease. In determining whether to end a lease for the above reasons, HUD encourages housing authorities to take into account individual circumstances such as the seriousness of the offending action²⁵, the extent of the involvement of the leaseholder²⁶, and whether the leaseholder took all possible steps to prevent the action from occurring, or has otherwise removed the offending person from the lease or banned him from the premises.²⁷

(b) Housing Restrictions Specific to New York City

The New York City Housing Authority (NYCHA) is one of the local agencies that provides housing assistance in New York City. NYCHA has a specific set of rules regarding whether and for how long someone with a criminal conviction is ineligible for public housing assistance. The following chart²⁸ shows how NYCHA applies the public housing laws to people with past convictions. The first column represents the conviction and the second column represents how long someone with that conviction remains ineligible for public housing assistance.

NYCHA Public Housing	
Criminal Conviction	Years After Serving Sentence*
Subject to a lifetime registration requirement under a state sex offender registration program	Until the convicted person is no longer subject to a lifetime registration requirement
<u>Felonies</u> Class A, B, and C Class D and E	6 years 5 years
<u>Misdemeanors</u> Class A Class B or unclassified	4 years (5 years if 3+ convictions for Class A misdemeanors or felonies within last 10 years) 3 years (4 years if 3+ convictions for misdemeanors or felonies within last 10 years)
<u>Violations or Infractions</u> Violations or DWI	2 years (3 years if 3+ convictions for felonies, misdemeanors, violations, or DWI infractions within last 10 years)
Multiple Convictions	Ineligible for longest applicable period

* Sentence is served after completion of any probation or parole time and the payment of any fines.

of the housing, or the public housing authority, is allowed to make his own determination about what a reasonable amount of time is. 24 C.F.R. § 5.855 (2018). *See also* Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776 (May 24, 2001) (stating that HUD “believes it would be too rigid for it to define a reasonable time period in a manner that covers every circumstance nationally”).

24. 42 U.S.C. § 13661(c)(2).

25. 24 C.F.R. § 5.852(a)(1) (2018).

26. 24 C.F.R. § 5.861 (2018).

27. *See* 24 C.F.R. § 5.852(e) (2018).

28. The chart was prepared by The Bronx Defenders. For more information about NYCHA, see <http://www1.nyc.gov/site/nycha/index.page> (last visited Sept. 29, 2019).

When you are applying for housing assistance, the housing assistance agency has the right to get your criminal record from the National Crime Information Center, police departments, and other law enforcement agencies.²⁹ If you are applying for Section 8 housing, the housing assistance agency can also get your criminal record and provide it to the building owner.³⁰ If the agency or owner decides to deny your application based on your criminal record, they must give you a copy of the criminal record that they got from the police and give you an opportunity to dispute the accuracy or relevance of the record.³¹ You also have a right to confidentiality. This means that the housing agency or owner who gets your criminal record for the purpose of your housing application cannot disclose the information in your record to anyone else not involved in the agency process, except if necessary during eviction proceedings.³²

Another agency that provides housing assistance is the New York City Department of Housing Preservation (HPD). The HPD only offers Section 8 vouchers to a targeted group of New Yorkers in need. To qualify, you must fall under the category of a “homeless household.” HPD defines a homeless household as (1) one in which your primary nighttime residence is either at a publicly or privately operated short-term living shelter, or (2) a household in which the person temporarily lives with another person in HPD’s jurisdiction AND has been classified as homeless by HPD’s Emergency Housing Services Bureau.³³

The New York State Division of Housing and Community Renewal (DHCR) also offers Section 8 vouchers on a statewide level (including New York City) through its Housing Choice Voucher (HCV) program.³⁴

Both the New York City Department of Housing Preservation & Development and the New York State Division of Housing and Community Renewal have restrictions for individuals with criminal convictions, but they are not as specific and detailed as the NYCHA’s restrictions. Instead, these organizations use their discretion in deciding whether to give benefits to someone with a criminal record.³⁵ They also follow the federal regulations on housing mentioned in Section 2.

(c) Appealing Ineligibility for Housing Assistance

If the housing authority considers you ineligible for public housing or Section 8 assistance, you may ask for an informal hearing before an administrative hearing officer to appeal the housing authority’s decision.³⁶ At the informal hearing, the hearing officer will consider evidence of rehabilitation to determine if a person with a criminal conviction should be eligible for housing assistance. Evidence of rehabilitation can include evidence of participation in counseling programs, work records, job-training programs, and, for arrests involving drugs or alcohol, drug and/or alcohol treatment. However, level 2 (tier II) or level 3 (tier III) sex offenders are not eligible for housing

29. 42 U.S.C. § 1437d(q)(1)(A).

30. 42 U.S.C. § 1437d(q)(1)(B).

31. 42 U.S.C. § 1437d(q)(2).

32. 42 U.S.C. § 1437d(q)(5). If the agency does breach your confidentiality with regard to your criminal record, you have the right to bring a civil action for damages and other relief. 42 U.S.C. § 1437d(q)(7).

33. See *Section 8 Eligibility*, NYC Housing Preservation and Development, available at <http://www1.nyc.gov/site/hpd/section-8/applicants-eligibility.page> (last visited Sept. 29, 2019).

34. See *Section 8 - Housing Choice Voucher (HCV) Program*, New York State Homes & Community Renewal, available at <https://hcr.ny.gov/section-8-housing-choice-voucher-hcv-program> (last visited Sept. 29, 2019).

35. See New York State Homes and Community Renewal, *Know Your Rights: New Anti-Discrimination Guidance Affecting People with Criminal Histories* (June 2016), available at <https://hcr.ny.gov/system/files/documents/2018/11/info-housing-applicants.pdf> (last visited Sept. 29, 2019) for more information on what housing operators should consider when deciding whether or not to grant you access to state-funded housing.

36. See *Section 8 Eligibility*, NYC Housing Preservation and Development, available at <http://www1.nyc.gov/site/hpd/section-8/applicants-eligibility.page> (last visited Sept. 29, 2019).

assistance.³⁷ The next section explains the tier ratings for sex offenses. For NYCHA, if the hearing officer finds in favor of the applicant, the original application will be returned to the Department of Housing Applications for processing. The hearing officer's decision is final upon written notification to the applicant.³⁸ Both HPD and DHCR also have informal reviews available to challenge ineligibility determinations.³⁹

There is often a long waiting list for public housing assistance, so you will probably want to begin the application process as soon as possible. Begin by contacting your state or local housing authority to find out how to apply. A partial list of agencies that you can contact is included in Appendix A of this Chapter.

3. Registration Laws for Sexually Violent Offenses⁴⁰

If you are a registered sex offender, basically every state restricts your ability to live near schools, daycare centers, and/or other places children often go, such as playgrounds. Under New York State law, for example, level III sex offenders or sex offenders whose victims were under 18 at the time of the offense cannot live within 1000 feet of a school.⁴¹ School is defined broadly to include any part of the grounds of any public or private elementary, middle, or high school.⁴² Most states have similar laws that restrict where sex offenders can live. Cities and towns may also have their own laws concerning sex offenders. For New York State, however, state law controls where sex offenders can live, not city laws.⁴³ Other states may be different and it is your responsibility to make sure you do not live in a location that is illegal for you as a registered sex offender.

4. Registration and Public Access to Your Record

If you were convicted of a sex offense, you must register with the sex offender registry,⁴⁴ and you will have to comply with federal and local sex offender registry laws. The federal sex offender registry laws create three tiers of sex offenders: tier I, tier II, and tier III.⁴⁵ Factors relevant to your conviction and the potential sentence for that conviction determine which “tier” you fall into. You fall into tier III if your offense is punishable by more than one year, and is considered comparable or more severe than, for example, aggravated sexual abuse,⁴⁶ involves kidnapping a minor that is not your child, or occurs after you were already convicted of a tier II offense.⁴⁷ You fall into tier II if your offense is punishable by more than one year, your offense is not a tier III offense, and is considered severe.⁴⁸ You fall into tier I if you were convicted of a sex offense, but do not fall into the other two tiers (tier II and tier III).⁴⁹

37. See “Denial or Termination of Assistance,” *Housing Choice Voucher (Section 8) Administrative Plan*, Feb. 1, 2019, NYC Dept. of Housing Preservation and Development, available at <http://www1.nyc.gov/assets/hpd/downloads/pdf/administrative-plan.pdf> (last visited Sept. 29, 2019).

38. See *Grievance Procedures*, New York City Housing Authority at 7, available at https://www1.nyc.gov/assets/nycha/downloads/pdf/grievance-procedure_040302.pdf (last visited Sept. 29, 2019).

39. See “Informal Reviews, Conferences, and Informal Hearings,” *Housing Choice Voucher (Section 8) Administrative Plan, Feb. 1, 2019*, NYC Dept. of Housing Preservation and Development, available at <http://www1.nyc.gov/assets/hpd/downloads/pdf/administrative-plan.pdf> (last visited Sept. 29, 2019); “Statewide Section 8 Voucher Program,” *Section 8 Housing Choice Administrative Plan, Apr. 17, 2019*, NYS Homes and Community Renewal, available at https://hcr.ny.gov/system/files/documents/2019/05/admin-plan-version-20191_1.pdf.

40. If you were convicted of a sex offense, you may want to read *JLM* Chapter 36, “Special Considerations for Sex Offenders.”

41. *People v. Diack*, 24 N.Y.3d 674, 681–682, 26 N.E.3d 1151, 1155–1156, 3 N.Y.S.3d 296, 301–302 (2015).

42. *People v. Diack*, 24 N.Y.3d 674, 681–682, 26 N.E.3d 1151, 1155–1156, 3 N.Y.S.3d 296, 301–302 (2015).

43. *People v. Diack*, 24 N.Y.3d 674, 681–682, 26 N.E.3d 1151, 1155–1156, 3 N.Y.S.3d 296, 301–302 (2015).

44. 34 U.S.C. § 20913(a).

45. 34 U.S.C. § 20911(1)–(4).

46. The full list of offenses includes an act, attempt, or conspiracy to commit aggravated sexual abuse, sex abuse, or abusive sexual contact against a minor under 13 years old. 34 U.S.C. § 20911(4).

47. See 34 U.S.C. § 20911(4) (stating all of the criteria to be considered a tier III sex offender).

48. See 34 U.S.C. § 20911(3) (stating all of the criteria to be considered a tier II sex offender).

49. 34 U.S.C. § 20911(2).

The length of time you are in the registry depends on the tier of your sex offense. The full registration for tier I, tier II, and tier III sex offenders are fifteen years, twenty-five years, and the rest of your life, respectively.⁵⁰

The federal sex offender registry laws require that each state have its own state-wide sex offender registry.⁵¹ If you were convicted of a sex offense, you are required to register in each state where you reside, are employed, or are a student.⁵² After you are released, you must keep your information current and updated. For example, if you change your name, residence, employment, or student status, you must update your registration information in person within three business days.⁵³ Each state has its own criminal sanctions for sex offenders who fail to comply with registry requirements.⁵⁴ You should make sure to check your state's specific penalties and registry requirements.

Federal law requires that both you and the state in which you register provide certain information to the registry. For example, you, as the offender, must include information such as your name and any aliases you may have, your Social Security number, and the addresses of all your residences.⁵⁵ Depending on the state, you may also need to provide more information. The state must provide information including, but not limited to, a current photograph of you, your criminal history, and your fingerprints.⁵⁶

You may have your registration period reduced if you have a clean record.⁵⁷ Different states have different criteria for what you must do to have a clean record. While you are in the registry, you must periodically meet with a state official, allow the state to take an updated photograph of you, and verify your registry information.⁵⁸ The frequency that you must meet with a state official depends on the tier of your sex-offense conviction. Tier I offenders must meet with a state official every year, tier II offenders must meet with a state official every six months, and tier III offenders must meet every three months.⁵⁹

Every state is required by federal law to make certain information about people convicted of sex offenses available on the internet to the public.⁶⁰ As a person convicted of a sex offense, this includes, but is not limited to, information such as your name, address, and offense. However, the state cannot disclose the identity of the victim of your crime, your Social Security number, and information about arrests that did not result in convictions.⁶¹ Each state's website will have information about how to correct errors on your public page.⁶² For example, if you seek to correct an error on the New York sex

50. 34 U.S.C. § 20915(a)(1)–(3).

51. 34 U.S.C. § 20912(a).

52. 34 U.S.C. § 20913(a).

53. 34 U.S.C. § 20913(c).

54. 34 U.S.C. § 20913(e).

55. 34 U.S.C. § 20914(a)(1)–(8). Other information includes “[t]he name and address of any place where the sex offender is an employee or will be an employee,” “[t]he name and address of any place where the sex offender is or will be a student,” “[t]he license plate number and description of any vehicle owned or operated by the sex offender,” “[i]nformation relating to intended travel of the sex offender outside the United States,” and “[a]ny other information required by the Attorney General.”

56. 34 U.S.C. § 20914(b). Other information includes “[a] physical description of the sex offender,” “[a] DNA sample of the sex offender,” “[a] photocopy of a valid driver’s license or identification card issued to the sex offender by a jurisdiction,” and “[a]ny other information required by the Attorney General.” 34 U.S.C. § 20914(b)(1)–(8).

57. 34 U.S.C. § 20915(b) (explaining how and for how long your registration period may be reduced).

58. 34 U.S.C. § 20918.

59. 34 U.S.C. § 20918(1)–(3).

60. 34 U.S.C. § 20920(a). New York’s sex offender registry can be accessed at <http://www.criminaljustice.ny.gov/nsor/>. To find your state’s sex offender registry, type in your state’s name and “sex offender registry” into a search engine, such as <http://www.google.com>.

61. 34 U.S.C. § 20920(b).

62. 34 U.S.C. § 20920(e).

offender registry, you must contact the New York Division of Criminal Justice Services via either mail or email.⁶³

Finally, the federal sex offender laws have created a notification program, whereby certain individuals will be notified when a sex offender registers in the registry or updates their information.⁶⁴ Updates are disclosed to individuals and organizations including, but not limited to, certain law enforcement agencies, volunteer organizations that work with minors or other vulnerable individuals, and social service organizations that protect minors in the child welfare system.⁶⁵ Because each state's specific requirements are different, you should consult your state's sex offender registration laws.

B. Eligibility for Public Benefits and Entitlements

Federal, state, and local governmental agencies provide a wide range of benefits to the people within their borders. Some benefits, such as having police officers or public parks, are available to everyone. Other benefits—including health care, educational assistance, housing, and cash assistance—are only available to those who meet certain requirements set by the government, such as lack of income, or age. Some public benefits may be unavailable to you because of your criminal history. However, for the most part, a criminal record is not enough to disqualify you from receiving benefits. One important exception is drug-related felonies. As the following section will explain, drug felonies may keep you from receiving benefits. The other main exception is that you may not be able to receive benefits if your criminal record involves public assistance fraud.⁶⁶ This section discusses the law governing the eligibility of people with criminal records for different categories of public benefits.

Be aware that, no matter what your conviction was for, if you were receiving certain types of public benefits before your conviction, you may have to reapply to start receiving them again. This is because the government probably stopped sending you benefits after your conviction. If you want or need public benefits, you can find more information at <https://www.usa.gov/benefits>.

1. Federal and State Financial Assistance

(a) Federal Programs

Various federal programs provide direct assistance to the poor, the disabled, and the elderly in the form of cash and food stamps. However, there are some restrictions on these programs that may affect you. These programs and restrictions that may affect you are described below.

(i) Welfare and Food Stamps

One important federal program, called Temporary Assistance for Needy Families (TANF), provides aid to families with children. This program may be helpful to you if you have children, and you either have not yet been able to find work, or you have a job that pays you a very low income. TANF works by giving federal funds to the states and giving the states flexibility to develop their own welfare programs. Since each state's program is different, you should contact your local TANF office for information on eligibility and how to apply. You should be aware that different states call their TANF program by different names, so you may not be able to find "the TANF office." However, all states have some form of TANF program. You should consult Appendix B for a partial listing of contacts for state human services agencies that will be able to give you information about your local TANF program. You can also get more information from the website of the American Public Human Services

63. More information on how to correct an error can be found at <https://www.criminaljustice.ny.gov/nsor/disclaimer.html>.

64. 34 U.S.C. §20923(b)(1)–(7).

65. See 34 U.S.C. §20923(b)(1)–(7) (listing more parties who may be notified when a sex offender registers in the state registry or updates his information).

66. For example, under New York state law, you will be prohibited from receiving public assistance or food stamps for ten years after being convicted in federal or state court for having made a false statement or representation with respect to your place of residence in order to receive public assistance, medical assistance, or food stamps simultaneously from two or more states, or supplemental security income in two or more states. N.Y. SOC. SERV. LAW § 131(12) (McKinney 2003).

Association at <https://aphsa.org/>, and from the TANF website at <http://www.acf.hhs.gov/programs/ofa/programs/tanf>.

TANF is not an “entitlement.” That is, you do not have the *right* to receive assistance. As such, the federal government puts some restrictions and conditions on the money it gives to states. For example, states must often make sure that people who receive TANF benefits are working, looking for work, or being trained to work.⁶⁷ There is also a maximum time period during which you can receive assistance during your lifetime (usually five years).⁶⁸ In addition, federal law makes many non-citizens ineligible for benefits.⁶⁹ Some states, such as New York, have state funded programs that provide benefits beyond the time limits or to people who would not qualify for TANF under federal law.

There are three circumstances in which criminal activity may result in restrictions to your access to TANF funds: (1) if you are a fugitive from justice on a felony charge or conviction, (2) if you have violated parole or probation conditions, or (3) if you have a drug-related felony conviction. States may not give assistance to anyone who is a fugitive from justice on a felony charge or conviction, or who has violated parole or probation conditions.⁷⁰ Federal law does not define what “violation of probation or parole” means, or when ineligibility begins and ends. Each state has created its own specific policies dealing with these issues. If you think there might be something on your record that would prevent you from getting assistance, such as a violation of probation, you should check with your local TANF office to find out whether you are eligible. New York’s policies on this issue are discussed below in Section B(1)(b).

A drug-related felony conviction may also prevent you from getting cash assistance or food stamps through federal programs.⁷¹ Drug-related felonies are those involving the use, possession or distribution of illegal substances. The law—state or federal—under which you were convicted determines whether the offense was a felony.⁷² The ban only applies from the date when the law was passed. That is, if you have a drug-related felony conviction from before August 22, 1996, you may still be eligible for assistance under this section.⁷³

States are allowed to change this restriction against people with drug felony convictions by passing legislation making it clear that the state is choosing not to adopt the federal restriction. The state may also choose to modify the restriction.⁷⁴ The drug felon restriction does not apply to Medicaid or to non-federal assistance that the state provides on its own, such as public assistance for single adults.⁷⁵ The restriction also does not prevent you from receiving emergency Social Security medical services, emergency disaster relief, certain public health assistance, prenatal care, job training programs, or drug treatment programs.⁷⁶

67. 42 U.S.C. § 602(a)(1)(A)(i)–(iii); 42 U.S.C. § 607(d).

68. 42 U.S.C. § 608 (a)(7).

69. 8 U.S.C. § 1611; 7 U.S.C. § 2015(f); *see* 8 U.S.C. § 1641 (providing a definition of non-citizens who are not prohibited from receiving public assistance).

70. 42 U.S.C. § 608(a)(9) (TANF); 7 U.S.C. § 2015 (food stamps).

71. 21 U.S.C. §§ 862a(a)–(b).

72. 21 U.S.C. § 862a(a).

73. 21 U.S.C. § 862a(d)(2). Some federal courts have held that judges must warn defendants that a guilty plea to a drug felony may permanently prevent them from receiving federal benefits as a result of this provision. *See, e.g.,* *United States v. Littlejohn*, 224 F.3d 960, 967 (9th Cir. 2000) (finding that when a defendant is pleading guilty, he should be informed that he is becoming ineligible for certain food stamps and public assistance for the plea to be considered voluntary). However, even if the court fails to warn you of the consequences of a guilty plea in this situation, it is unlikely that your conviction could be overturned on this ground. *See United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000).

74. 21 U.S.C. § 862a(d)(1)(A). To learn more about the policy in each state, *see SNAP Ban of Persons with Drug Felony Convictions*, THE NETWORK FOR PUBLIC HEALTH LAW (Apr. 2020), *available at* <https://www.networkforphl.org/wp-content/uploads/2020/04/50-State-Survey-SNAP-Felony-Ban-Updated-1.pdf> (last visited Nov. 23, 2020).

75. For more information on health assistance, *see* “Medical and Mental Health Assistance,” Part B(2) below.

76. 21 U.S.C. § 862a(f).

(ii) Other Federal Programs

Supplemental Security Income (“SSI”) is a means-tested program for people who are blind, disabled, or elderly (over 65). If you were on SSI when you were arrested, benefits will be suspended for the month(s) in which you were incarcerated. Suspension of your SSI benefits will continue on a monthly basis for the duration of your incarceration, meaning that they may remain suspended for up to a month after your release. This is because you are a “resident of a public institution,” not because of the conviction. If the benefits stay suspended for 12 months, they end - meaning that you have to go through the application process again to get them back. Technically speaking, you are supposed to report your incarceration to Social Security Administration (SSA). For more information on Supplemental Security Income, go to <http://www.socialsecurity.gov/pgm/ssi.htm>.

There are a variety of other Social Security benefits. Social Security Disability Insurance (SSDI) benefits are an insurance-based program for workers who become blind or disabled, or for their disabled adult children. Social Security Survivors’ benefits are for family members of workers who die or become disabled. Social Security Retirement benefits are for people who are of retirement age. You can get Social Security Retirement benefits when you are 62, but your benefits will be lower than if you waited until reaching “full retirement age,” which depends upon your year of birth. If you are on Social Security Disability Insurance benefits, Social Security Retirement benefits, or other “Title II” benefits when you are arrested, your benefits should get suspended after you are both a) convicted of a criminal offense (or had your parole revoked), and b) confined to a penal institution for more than 30 continuous days.⁷⁷ (This may vary if you were incarcerated prior to April 1, 2000.) These benefits will remain suspended (rather than terminated) until you are released. So, all you need to do to get them back is visit an SSA office with copies of your release papers. If you have a wife or child who is getting benefits based on your work history, your family benefits should remain unchanged while you are incarcerated and after you are released.

You should be able to apply for SSI prior to your expected date of release from a correctional facility. Some facilities have agreements with SSA under which staff are expected to provide help with these applications, and particularly with SSI. In New York, for example, there is an agreement under which incarcerated people should be able to get help from facility Parole staff and/or from Office of Mental Health pre-release coordinators, depending on the nature of the individual’s application/disability.⁷⁸ You should be able to apply on your own as well by writing to your local SSA office with a note that gives your expected release date. Even though you should be able to apply on your own, you may need help for practical reasons. For example, if you are having issues contacting your local SSA office because of restrictions on the phone and mail in your prison. Also, sometimes your local SSA office might not know all the answers to your questions, so you may need to get help from someone at your facility.

Criminal convictions do not affect your eligibility for these benefits, although you generally cannot receive them while you are incarcerated. Federal law states that the fact that a disability stems from conduct that led to your conviction or was caused during a period of incarceration cannot be used in deciding whether you are eligible to receive federal disability benefits.⁷⁹

Your eligibility for assistance under these programs is not affected by a criminal conviction, but, as with TANF and food stamps, you cannot receive benefits under these programs if you are a fleeing felon or are in violation of probation or parole.⁸⁰

If you want to apply for Social Security, you should go to the Social Security webpage online, at <http://www.socialsecurity.gov>, or contact Social Security at their toll-free phone number, (800) 772-

77. See United States Social Security Administration, What Prisoners Need to Know, <https://www.ssa.gov/pubs/EN-05-10133.pdf> (last accessed Nov. 23, 2020).

78. Reentry Services, NYS DIVISION OF PAROLE, available at https://www.health.ny.gov/professionals/patients/discharge_planning/docs/2008-0508_efraley_parole_reentry.pdf (last accessed Sept. 27, 2019).

79. 42 U.S.C. § 423(d)(6).

80. 42 U.S.C. § 1382(e)(4). Eligibility is not terminated, but only suspended, under this provision; benefits are only withheld for the month or months during which the flight or violation takes place. 42 U.S.C. § 1382(e)(4).

1213. Use this number as well if you want to apply for SSI. The toll-free phone number is available from 8 A.M. to 7 P.M. Monday through Friday.

(b) New York State Programs

New York's two main forms of welfare are Family Assistance (FA) and Safety Net Assistance (SNA). FA is New York's version of the federal TANF program, and is subject to federal restrictions and conditions. SNA is a separate program administered by the state of New York and not subject to federal controls.

Families with children under eighteen (or under nineteen if the child is attending school regularly) and pregnant women are eligible for cash benefits under FA. Most of the federal restrictions on TANF apply to these benefits. You should note that New York has opted out of the federal restriction that denies welfare and food stamps to people with drug felony convictions. That means **you can get FA even if you have a drug-felony conviction.**

However, other restrictions remain on New York's FA program. As required by federal law, New York does not give cash assistance and food stamps to people evading prosecution, custody, or confinement for a felony charge or conviction, or to probation or parole violators.⁸¹ In New York, you are considered a probation or parole violator *only if* (1) you have a warrant issued for your arrest because of a violation of your probation or parole, (2) you have been found by judicial determination to have violated probation, or (3) you have been found by administrative adjudication by the division of parole to have violated parole.⁸² If you are considered a probation or parole violator, New York denies you FA benefits only until (1) you are restored to probation or parole supervision or released from custody, or (2) the end of your maximum period of imprisonment or supervision, whichever occurs first.⁸³ Finally, probation or parole violations include violations of conditions imposed under federal law, as well as violations of conditional release.⁸⁴

If you want to apply for FA, you should go to a welfare or job center.⁸⁵ The application may take thirty days to be processed, so you should apply as soon as possible.⁸⁶

Adults with no children, children not living with an adult relative, and certain categories of immigrants can receive cash benefits under SNA. People who have reached the federal time-limit for FA may also receive SNA. The amount you can receive in SNA benefits depends on the size of your household, the social services district in which you live, the amount you pay for housing, and whether or not heat is included in your rent. For this program, you must have lived in New York for at least one year.⁸⁷ If you came to New York from another state less than a year ago and are in need of public assistance you will only be able to receive half of the New York state benefit, or the benefit level of the state you came from, whichever is higher.⁸⁸

Non-cash benefits (in the form of vouchers for shelter and utilities) are available to families when the head of the household has reached the end of the SNA five-year limit, to individuals receiving drug or alcohol treatment and their families, and to families of those refusing the drug screening,

81. N.Y. SOC. SERV. LAW§ 131(14)(a).

82. N.Y. SOC. SERV. LAW§ 131(14)(b).

83. N.Y. SOC. SERV. LAW§ 131(14)(b).

84. N.Y. SOC. SERV. LAW§ 131(14) (a), (c)–(d).

85. For a list of job centers in New York City, see *Free Job Placement and Education Training*, NEW YORK CITY DEPT. OF HOMELESS SERVICES, available at <http://www1.nyc.gov/site/hra/locations/job-locations.page> (last visited Sept. 27, 2019), or look in your phone book under the governmental listings, or “blue pages.”

86. See *Temporary Assistance*, NEW YORK OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, available at <http://otda.ny.gov/programs/temporary-assistance/> (last visited Sept. 27, 2019).

87. See *Section 159 – Safety Net Assistance*, THE NEW YORK STATE SENATE, available at <https://www.nysenate.gov/legislation/laws/SOS/159> (last visited Sept. 28, 2019).

88. See *Section 159 – Safety Net Assistance*, TEMPORARY ASSISTANCE, available at <https://www.nysenate.gov/legislation/laws/SOS/159> (last visited Sept. 28, 2019).

assessment, or treatment required to receive cash benefits under SNA.⁸⁹ There is no time limit on non-cash benefits as long as you continue to qualify.⁹⁰

If you want to apply for SNA, you must file an application in person at your local Department of Social Services center.⁹¹ In order to qualify, you will have to:

- (1) Complete and submit the application form,
- (2) Appear for the scheduled interview,
- (3) Provide proof of the statements made on the application/recertification form,
- (4) Comply with other eligibility requirements, which may include:
 - (a) Drug screening
 - (b) Fingerprinting
 - (c) Cooperation with child support requirements
 - (d) Looking for work and accepting a job when offered, and
 - (e) Complying with other employment requirements.

It usually takes forty-five days to process your application, so you should apply as soon as possible. If you need assistance more quickly than that, you should ask about receiving emergency assistance.⁹² You should be as specific as possible about your needs, especially if they are related to health or safety. For example, if you need a winter coat, rain boots, toiletries, underwear or other items, be sure to list them or even write them out for the case-worker. For more information about the New York state assistance programs, you can visit <http://otda.ny.gov/programs/>.

2. Medical and Mental Health Assistance

The federal government provides money for medical assistance through Medicaid and Medicare. Medicaid funds medical and mental health care for those who cannot afford to pay for it.⁹³ Medicaid, like TANF (discussed in Part B(1)(a)(i) above), is partly funded by the federal government, but is administered by state governments. Medicare is a program that covers medical and mental health care for people over the age of sixty-five, and some people with disabilities.⁹⁴ Medicare, like Social Security and SSI benefits (discussed in Part B(1)(a)(ii) above), is funded and administered by the federal government.

Medicaid eligibility in nearly every state is limited to children, pregnant women, families with dependent children, persons who are blind or disabled, and persons sixty-five or older. A few states cover single healthy adults within certain income guidelines.⁹⁵ Each state may have its own requirements for who can receive Medicaid, so you should check with your local Medicaid office to see if you are eligible.

You cannot receive Medicare or Medicaid benefits while you are in prison. However, you *can* receive them while on probation or parole. If you otherwise meet all of the requirements for Medicare

89. See Temporary Assistance, NEW YORK OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, *available at* <http://otda.ny.gov/programs/temporary-assistance/> (last visited Sept. 27, 2019).

90. See Temporary Assistance, NEW YORK OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, *available at* <http://otda.ny.gov/programs/temporary-assistance/> (last visited Sept. 27, 2019).

91. You can find a list of New York state Departments of Social Services online at <http://otda.ny.gov/workingfamilies/dss.asp> (last visited Nov. 22, 2020), or at <http://www.health.state.ny.us/nysdoh/medicaid/dss.htm> (last visited Nov. 22, 2020).

92. See *Cash Assistance*, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, *available at* <http://www.nyc.gov/html/hra/html/services/cash.shtml> (last visited Sept. 28, 2019).

93. 42 U.S.C. § 1396-1396v.

94. 42 U.S.C. §§ 1395b-2 *et. seq.*

95. For example, in New York, a single person may be eligible for Medicaid if he makes less than \$750 a month. For every additional person in your family, the maximum income level goes up. If you are blind, disabled, or over the age of 65, your Medicaid eligibility is determined based on the amount of financial resources you have available. For example, a single person in New York is eligible for Medicaid if he has less than \$14,400 in available resources. You can also own a home, a car, and other personal property and still qualify. These numbers may change, so check with your local Medicaid office to see if you qualify, or see New York Department of Health, Medicaid in New York State, *available at* http://www.health.ny.gov/health_care/medicaid/ (last visited Sept. 28, 2019).

or Medicaid eligibility, your criminal record will not disqualify you from receiving these benefits, even if you have a drug felony conviction. A violation of the conditions of your probation or parole will also not disqualify you.

If you want to apply for Medicare or Medicaid, you can get and submit an application at your local Medicaid or Medicare office, or through most hospitals, medical providers, and drug and alcohol treatment providers. Some states also let you apply on the Internet, by telephone, or at locations in the community, such as community health centers. You can find your state's contact information and more information about these benefit programs online, by using the "Find Local Help" tool at <https://localhelp.healthcare.gov/#/>. You can also look in your phone book in the governmental listings, sometimes known as "blue pages."

Some states provide additional help for people who enter prison with active Medicaid benefits, or for people with particular conditions such as mental illness. In New York, for example, people who are arrested after April 1, 2008, are held in state or local custody, and have active Medicaid when they are incarcerated will now have their Medicaid suspended (rather than terminated) so that it can be restarted as soon as they are released. In New York State there is also a Medication Grant Program for people with mental illnesses: this program provides a temporary benefit card that will pay for psychiatric medication and some medical appointments needed to prescribe medication upon release from prison.⁹⁶ Incarcerated people who enroll in the Medication Grant Program will also submit an application for Medicaid prior to their release.

3. Higher Education Assistance

The federal government provides financial aid in the form of grants and loans to people that attend an approved institution of higher education that awards degrees, certificates, or credentials.⁹⁷ However, if you were convicted under state or federal law for the sale or possession of controlled substances while you were receiving student financial aid, you are not eligible for student financial aid for a certain period of time.⁹⁸ This is only if the conviction is *on your record*. A conviction that was reversed, set aside, removed from your record, or a juvenile proceeding does not count.⁹⁹ If you have been convicted of selling or possessing drugs, the amount of time you are ineligible for educational aid depends on how many previous convictions for those offenses you have.¹⁰⁰ The law says the amount of time of ineligibility after the date of conviction is:

Duration of Ineligibility for Financial Aid		
	Conviction for possession of a controlled substance	Conviction for sale of a controlled substance
First offense	One year	Two years
Second offense	Two years	Indefinite
Third offense	Indefinite	Indefinite

96. See *Medication Grant Program Frequently Asked Questions*, NEW YORK STATE OFFICE OF MENTAL HEALTH, available at https://www.omh.ny.gov/omhweb/med_grant/faq.htm (last visited Sept. 28, 2019).

97. The federal government outlines its specifications for approved institutions at 20 U.S.C. § 1094. Comprehensive rules for students' eligibility are contained in 20 U.S.C. § 1091.

98. 20 U.S.C. § 1091(r).

99. 34 C.F.R. § 668.40(a)(2).

100. Conviction of multiple counts of sale or possession count as a single conviction. 64 Fed. Reg. 57356 (Oct. 22, 1999).

The amount of time you are ineligible is not set in stone. You may be able to restore your eligibility before the stated period passes if you complete an approved drug rehabilitation program and pass two surprise drug tests.¹⁰¹ Approved rehabilitation programs are ones that are:

- (1) Funded (or are qualified to be funded) by federal, state, or local government programs;
- (2) Funded (or are qualified to be funded) by a federally or state-licensed insurance company;
- (3) Administered or recognized by a federal, state, or local government agency or court; or
- (4) Administered or recognized by a federally or state-licensed hospital, health clinic or medical doctor.¹⁰²

If you want to receive federal education assistance, you have to first apply and be accepted to the institution of higher education that you want to attend.¹⁰³ Once you are accepted, you should contact the financial aid office of that institution for more information on how to apply for federal education assistance.

C. Employment

One of the hardest parts of life after your release can be looking for a job with a conviction on your record. Getting a job after your release from prison is often difficult because some employers may not trust or fear individuals convicted of crimes. Many employers believe that ex-convicts will not be reliable employees. There is no federal or state law that stops employers from asking you in an interview or on a job application if you have ever been convicted of an offense. Also, there are some laws that do not allow people with certain kinds of criminal convictions from working in particular jobs or professions.¹⁰⁴ Please visit <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/> to see whether your state follows a law that prevents you from obtaining the type of job you want.¹⁰⁵

However, while a criminal record may make your job search more difficult, it will not prevent you from finding work in many areas of employment. Federal and state laws contain some protections against employment discrimination for people with criminal records. Also, many states provide ways for you to remove or overcome barriers to certain jobs. This is because states want you to join the workforce and become financially self-sufficient.

The following sections describe the laws protecting you against discrimination and explain ways to defend yourself against discriminatory employment practices in New York State. If you are finding it difficult to obtain employment, you should strongly consider getting help from free civil legal aid providers, such as the Legal Aid Society. They can tell you whether certain crimes can be expunged from your records and which crimes you don't have to disclose when you apply for a job.

1. Federal Law

(a) Federal Laws Restricting Particular Jobs

There are many federal laws that restrict people with criminal records from holding particular jobs. Several federal laws bar people convicted of certain crimes from working for the federal government. However, a felony conviction does not necessarily disqualify a person from all federal

101. 20 U.S.C. § 1091(r)(2).

102. 34 C.F.R. § 668.40(d)(2)(i)–(iv) (2016).

103. 20 U.S.C. § 1091(a)(1).

104. For example, Congress has required a criminal-history investigation of any airport employee with access to airplanes or secure areas. 49 U.S.C. § 44936(a)(1)(A)(i)–(ii). Occasionally, the courts have struck down such laws. For example, in *Nixon v. Commonwealth*, 789 A.2d 376, 382 (2001), a Pennsylvania trial court struck down a state statute that disqualified people with criminal records from working in nursing homes. The court found that the law was “arbitrary and irrational,” which meant that it was not “rationally related” to a legitimate government purpose and was therefore unconstitutional. However, courts very rarely find that laws fail the “rational basis” test, so it is uncommon that these types of laws are declared unconstitutional.

105. *50-State Comparison: Criminal Record in Employment & Licensing*, RESTORATION OF RIGHTS PROJECT, available at <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/> (last visited Nov. 25, 2020).

jobs. But it is likely that an employer will consider your previous criminal convictions in deciding whether you are fit to work for the federal government.¹⁰⁶

If you are convicted of a criminal offense involving dishonesty, a breach of trust, or money laundering, you will be disqualified from working for banks or other financial institutions that are insured by the Federal Deposit Insurance Corporation.¹⁰⁷ Also, federal law forbids people with certain felony convictions from working in the insurance industry without first getting permission from an insurance regulator.¹⁰⁸ Some felony convictions may bar you from holding certain positions in unions or other organizations that manage employee benefit plans.¹⁰⁹ You may be barred for up to thirteen years after your conviction or the end of your imprisonment, whichever is later. Some of these barred positions include union officers and the director of the union's governing board.¹¹⁰ Federal law also forbids people convicted of certain crimes from providing healthcare services for which they will receive payment from Medicare,¹¹¹ or from working for the pharmaceutical industry.¹¹²

(b) Title VII Employment Discrimination

Title VII of the Civil Rights Act of 1964 forbids private employers and state and local governments from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin.¹¹³ The Supreme Court has interpreted Title VII to prohibit employment practices that have a "disparate impact."¹¹⁴ An employment practice has a "disparate impact" when it appears to be neutral to all groups, but it affects one group more harshly than another and it cannot be justified by business necessity.¹¹⁵

Although people with criminal convictions are not a protected class under federal law, the Equal Employment Opportunity Commission (EEOC) has interpreted Title VII to forbid employment policies that completely bar people just because they have a conviction record.¹¹⁶ This is because denying people jobs based on conviction records has a disparate impact on racial minorities.¹¹⁷ However, an employer has the right to deny you a job based on your criminal record if there is a "business necessity" for doing so. To show a "business necessity," the employer must show that the conviction on which they based

106. *Federal Statutes Imposing Collateral Consequences Upon Conviction*, U.S. DEPT. OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, (2000), available at http://www.usdoj.gov/pardon/collateral_consequences.pdf (last visited Sept. 28, 2019).

107. 12 U.S.C. § 1829.

108. 18 U.S.C. § 1033(e).

109. 29 U.S.C. §§ 504, 1111.

110. 29 U.S.C. §§ 504, 1111.

111. 42 U.S.C. § 1320a-7.

112. 21 U.S.C. § 335a.

113. 42 U.S.C. § 2000e-2.

114. *Griggs v. Duke Power Company*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158, 164 (1971).

115. 42 U.S.C. § 2000e-2(k)(1)(A); see also *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52, 124 S. Ct. 513, 519, 157 L. Ed. 2d 357, 365 (2003) (explaining what a disparate impact claim is); *Griggs v. Duke Power Company*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158, 164 (1971) (finding that Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation" when there is no business necessity for the practice).

116. *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1294 (1975) (finding that a railroad's policy of excluding from consideration any job applicant with a conviction other than for a minor traffic offense discriminated against blacks and was not justified by business necessity).

117. The EEOC found that racial minorities are convicted at a rate disproportionately greater than their representation in the population, in part because they are arrested more frequently. Thus, a policy that excludes potential employees who have conviction records would unfairly affect racial minorities to a greater degree than non-minorities. EEOC Dec. No. 78-35, 2, 26 Fair Empl. Prac. Cas. (BNA) 1755 (Jun. 8, 1978) (deciding that a civic center's choice to withdraw a job offer from a candidate on account of his rape, assault and battery, drunkenness, and firearm offense convictions was not a Title VII violation because it was justified by a business necessity); see also *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1294-1295 (1975) (finding that a railroad's policy of excluding from consideration any job applicant with a conviction other than for a minor traffic offense discriminated against blacks and was not justified by business necessity).

their decision to reject you involves conduct related to your ability to do the job competently and safely.¹¹⁸

Employers cannot reject you simply because you have any conviction. An employer must consider the following factors to determine whether there is a business necessity in denying you the job:

- (1) Nature and gravity of the offense or offenses,
- (2) Time that has passed since the conviction or completion of the sentence, and
- (3) Nature of the job.¹¹⁹

The first two factors listed above mean that, if you have committed a recent, serious offense, it is more “reasonable” for an employer to deny you the job. The third requirement means that if your offense is somehow related to the job you are applying for, the employer has more reason not to hire you. For example, a conviction for driving while intoxicated would be relevant to a job that involves driving a car, but would probably not be relevant to a job that does not require driving. Convictions for property crimes, such as theft, and violent offenses, such as assault, will often prevent you from getting a job where you handle valuable property or where you are put in a position of trust. This is because an employer can argue that these convictions show that you are not trustworthy or that you pose a danger to fellow employees or customers, and so denying you the position because of your conviction record is a matter of “business necessity”.¹²⁰

If the employer demonstrates a business necessity for denying your application, you can still win if you show that the employer could use a different practice (other than excluding all people with criminal convictions) to achieve its business and employment goals that will work just as well. However, if you try to show that the employer could use a different practice, you must consider the burdens on the employer, like the costs of the alternative practice.¹²¹

Additionally, even if you have a criminal conviction, federal law forbids employers from using a lie detector test as a basis for employment.¹²² You should also know that the federal law allows employers to have a policy of not hiring anyone who uses or possesses drugs. Employers are allowed to do this as long as the employer did not adopt this policy because they wanted to discriminate against someone based on their race, color, religion, sex, or national origin.¹²³

118. Courts have defined “business necessity” in different ways. *See* Andrew C. Spiropoulos, *Defining The Business Necessity Defense To The Disparate Impact Cause Of Action: Finding The Golden Mean*, 74 N.C. L. Rev. 1479, 1486–1503 (1996) (reviewing the change in the definition of “business necessity” by the courts). The Civil Rights Act of 1991 says that an employer must demonstrate that an employment practice is job-related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k). Lower courts have interpreted this to require that the practice be “reasonably necessary” to achieve important business objectives. Therefore, while the practice does not have to be essential to business operations, the employer must show that it serves more than merely a legitimate business purpose. *See* Donnelly v. Rhode Island Bd. of Governors for Higher Ed., 929 F. Supp. 583, 593–594 (1996) (finding that a university’s payment of different minimum salary to professors of different subjects, which had a disparate impact on women, was a business necessity because of the market differential in professors’ salaries in those subjects).

119. U.S. EQUAL EMP. OPPORTUNITY COMM’N., 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (2012), *available at* <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions#IIIB> (last visited Nov. 25, 2020).

120. *See, e.g.,* Richardson v. Hotel Corp. of America, 332 F. Supp. 519, 521 (E.D. La. 1971) (upholding hotel’s policy requiring bellmen to be free from convictions of serious crimes, because the job would give them access to hotel guests’ rooms and luggage).

121. 42 U.S.C. § 2000e-2(k).

122. *See* Employee Polygraph Protection Act of 1988 (EPPA), 29 U.S.C. § 2001-09; *see also* Veazey v. Commc’ns & Cable of Chi., Inc., 194 F.3d 850, 859 (7th Cir. 1999) (holding that voice recordings could fall within the statutory definition of “lie detector” if used to determine truthfulness); Rubin v. Tournneau, Inc., 797 F. Supp. 247, 253 (1992) (holding that “employer” for purposes of the EPPA is any person or entity that exerts some degree of control over aspects of employment relating to compliance with the EPPA). Note that polygraph tests can, in rare circumstances, be given after you are already employed. Polygraphs can only be given if a specific incident has taken place, and if the employee receives written notice of the incident and the date, time, and location of the polygraph test at least 48 hours prior to being tested. 29 C.F.R. § 801.23 (2016).

123. 42 U.S.C. § 2000e-2(k)(3).

2. New York State Law¹²⁴

Article 23-A of the New York Correction Law says that you cannot be denied any public or private employment or be denied a job license just because of your past criminal convictions.¹²⁵ Under this law, you may only be denied a job or license due to your criminal history if the conviction:

- (1) Is directly job-related,¹²⁶ or
- (2) Indicates that you pose an unreasonable threat to people or property.¹²⁷

The law includes a set of factors that employers should consider in making this determination, including:

- (1) New York State's public policy of encouraging the hiring of people previously convicted;
- (2) The duties of the job you are applying for;
- (3) The relation of the crime(s) you were convicted of to those duties;
- (4) The length of time that has passed since the offense(s);
- (5) Your age at the time of the offense(s);
- (6) The seriousness of your offense(s);
- (7) The employer's legitimate interest in protecting property, employees, and the public; and
- (8) Any evidence of rehabilitation that you or someone else presents on your behalf.¹²⁸

The law also instructs employers to take into account whether you have a certificate of relief from disabilities or certificates of good conduct, which are discussed in section (a) below.

Under New York State Law, employers are allowed to ask you in an interview or on a job application if you have ever been convicted of an offense. Therefore, employers may legally take your conviction(s) into account when they make hiring decisions, as long as they follow the rules stated above. If you try to hide your conviction or misrepresent it, and the employer discovers your deceptions, the employer may fire you or decide not to hire you. In such a case, since the employer's decision would be based directly on your deceptive behavior and not on your criminal record, that decision would probably not be considered unlawful discrimination.¹²⁹

124. If you live in New York City, you should visit the NYC Commission on Human Rights website to learn more about city-specific protections from employment discrimination. For information on city-specific employment policies, see NYC Commission on Human Rights, Law, *available at* <https://www1.nyc.gov/site/cchr/law/the-law.page> (last visited Nov. 22, 2020). Additionally, you should read the City's Fair Chance Act Factsheet for Employees. See NYC Commission on Human Rights, Fair Chance Act Factsheet for Employees (10 July 2019), *available at* <https://www1.nyc.gov/site/cchr/media/fair-chance-act-factsheet-for-employees.page> (last visited Nov. 22, 2020). For information about how to file a complaint if you feel you have been discriminated against based on your criminal record or other protected status, see NYC Commission on Human Rights, Complaint Process, *available at* <https://www1.nyc.gov/site/cchr/enforcement/complaint-process.page> (last visited Nov. 22, 2020).

125. Art. 23-A is named "Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses." N.Y. CORRECT. LAW §§ 750–755 (Consol. 2015).

126. N.Y. CORRECT. LAW § 752(1) (Consol. 2015). "Direct relationship" means that the criminal conduct for which you are convicted of has a direct effect on your "fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question." N.Y. CORRECT. LAW § 750(3) (Consol. 2015).

127. N.Y. CORRECT. LAW § 752(2) (Consol. 2015).

128. N.Y. CORRECT. LAW § 753(1) (Consol. 2015); *see, e.g.*, *La Cloche v. Daniels*, 195 Misc. 2d 329, 333, 755 N.Y.S.2d 827, 830 (Sup. Ct. N.Y. County 2003) (holding that the statutory factors must be taken into account before an applicant can be denied a license on the basis of his criminal record, and finding that it would violate state public policy to deny a license applicant who had taken a barbering vocational program while incarcerated). But, when an administrative agency makes a decision to deny a job license based on these factors, the courts will not overrule that decision unless it is arbitrary and capricious. *See Klein v. Levin*, 305 A.D.2d 316, 317–320, 760 N.Y.S.2d 462, 465–467 (1st Dept. 2003) (holding that when an administrative agency denies a job license based on an applicant's criminal history, but it is shown that the same agency previously *granted* a license to an applicant with almost the same history, it is an arbitrary and capricious decision that should be annulled).

129. *See, e.g.*, *Kravit v. Delta Air Lines, Inc.*, No. CV-92-0038, 1992 U.S. Dist. LEXIS 19087 at *8 (E.D.N.Y. Dec. 4, 1992) (*unpublished*) ("It is well settled that a misstatement of a material fact on an employment application is a sufficient non-discriminatory ground for an employer's refusal to hire.") (citations omitted).

In New York City, however, *most employers may not ask about your criminal record before making a job offer*. This means that employers who do not need employees to pass a background check by law may not ask about your criminal history during the interview process or on job applications. However, employers may conduct a background check after they give you an offer, and may condition that offer on you passing a background check.¹³⁰ (See Subsection 3 below on Rap Sheets.) If your offer is revoked after an employer runs a background check, the employer must give you a copy of the criminal record that they relied on in deciding to revoke your offer and file a “fair chance act notice” with the city, explaining why they chose to revoke your offer.¹³¹ The city of Buffalo, New York also has a similar rule banning most employers from asking about criminal records in job applications or during interviews.¹³²

While employers are allowed to ask about your criminal convictions, under Article 23-A of New York State’s Correction Law, it is illegal for most public and private employers, job licensing agencies, employment agencies, and labor organizations to ask about arrests that did not result in a conviction.¹³³ If an employer does ask about arrests, the law of New York allows you to not tell them about your arrests that did not result in conviction.¹³⁴ Law enforcement agency employers are granted an exception to this rule. If you are applying for a police or peace officer job, the law enforcement agency employers can ask you about all arrests, and you must report all arrests if they ask about them.¹³⁵

There are some state and local laws and rules that *prohibit* employers from hiring people with criminal records. For a list of New York State laws that bar or restrict the employment of people with criminal records in certain occupations or professions, see Appendix C at the end of this Chapter. Some employers are not allowed to hire people with criminal convictions for certain jobs and are required to perform background checks before hiring a job applicant to make sure that they do not have a criminal conviction.¹³⁶ There are also laws that deny eligibility for certain licenses to people who have been convicted of certain crimes. These include licenses to sell liquor wholesale or retail,¹³⁷ licenses for real estate brokers and salespeople,¹³⁸ and positions as security guards¹³⁹ or private investigators.¹⁴⁰

These restrictions are some of a few exceptions made to the protections in Article 23-A of the Correction Law (discussed above). In some cases, the restrictions on licenses or employment can be removed if you can provide evidence that you have been rehabilitated. You can often supply this proof by obtaining a Certificate of Relief from Disabilities or a Certificate of Good Conduct, described in the next section.

(a) Certificates of Relief from Disabilities and Certificates of Good Conduct¹⁴¹

Certificates of Relief from Disabilities and Certificates of Good Conduct, commonly known as “certificates of rehabilitation,” are documents issued by the New York State Parole Board after your release from custody. These certificates can be evidence that you have been rehabilitated. These certificates do not prove that you have been reformed and do not guarantee that you will be free of all difficulties related to your criminal record. However, the certificates may restore some of your rights,

130. NYC Commission on Human Rights, Fair Chance Act, *available at* <http://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page> (last visited Sept. 19, 2019).

131. NYC Commission on Human Rights, Fair Chance Act, *available at* <http://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page> (last visited Sept. 29, 2019).

132. Buffalo, New York, CITY CODE § 154-25–29 (2014).

133. N.Y. EXEC. LAW § 296(16) (Consol. 2015).

134. N.Y. CRIM. PROC. LAW § 160.60 (Consol. 2015).

135. N.Y. EXEC. LAW § 296(16) (Consol. 2015).

136. *See, e.g.*, N.Y. COMP. OF CODES R. & REGS. tit. 9, § 6654.17(k) (regulating in-home elder care); N.Y. COMP. CODES R. & REGS. tit. 10, § 405.3(e)(iii) (regulating the reporting of information by health care providers about the criminal histories of their employees).

137. N.Y. ALCO. BEV. CONT. §§ 102(2), 126 (Consol. 2015).

138. N.Y. REAL PROP. § 440-a (Consol. 2015).

139. N.Y. GEN. BUS. §§ 89-g(3)(a), 89-h(5) (Consol. 2015).

140. N.Y. GEN. BUS. § 74(2) (Consol. 2015).

141. *See* N.Y. CORRECT. LAW §§ 700–706 (Consol. 2015).

such as the right to serve on a jury (see Part F of this Chapter). Additionally, the certificates can be helpful tools in your employment search because they can make you eligible for employment in professions and industries from which you would otherwise be barred. The purpose of these certificates “is to permit an individual who has made mistakes but has been rehabilitated to begin afresh and become a productive member of society.”¹⁴²

You should apply for either a Certificate of Relief from Disabilities or a Certificate of Good Conduct, *but not both*. Which one you apply for depends mainly on your criminal record. Certificates of Relief from Disabilities are only available to those with a single felony conviction at most. You may have any number of misdemeanors and still be eligible.¹⁴³ Note that for the purposes of the Certificate of Relief from Disabilities, a plea to a felony that results in probation, a suspended sentence, conditional release, or unconditional release counts as a conviction.¹⁴⁴

(i) Certificate of Relief from Disabilities: Ex-Offenders with a Single Conviction

If you are eligible for a Certificate of Relief from Disabilities, you will need to apply for a separate Certificate for every offense that may bar you from employment or licensing. While some professions or licenses may only bar individuals with felony convictions, others bar misdemeanants as well. Because the certificate provides more evidence that you have made efforts to be rehabilitated, applying for certificates for any misdemeanors on your record may be helpful even if the job you are trying to get doesn't bar people with misdemeanors.

Either the court in which you were convicted or the New York Division of Parole can issue a Certificate of Relief from Disabilities, depending on where you were sentenced and what kind of sentence you received. If you were given a sentence of probation or conditional discharge, or if you were given a sentence that didn't include incarceration in any New York State prison, you can apply to the court in which you were convicted for your certificate.¹⁴⁵ The court may issue the certificate at the time the sentence is pronounced or at any time thereafter.¹⁴⁶ You should contact the court clerk for information on how to apply and information on the court's procedures for processing applications.

If you (1) served state time for a felony conviction, or (2) were convicted in a federal or out-of-state court, you may apply to the New York Division of Parole any time after your release.¹⁴⁷ The Division of Parole will usually consider issuing you a Certificate of Relief from Disabilities automatically when it considers you for early release. The certificate may be issued to you upon release from prison or after you have been out for several months, whether or not you served your maximum sentence. The certificate remains temporary while you are still under parole supervision, probation, or conditional release. Unless you receive another felony conviction or violate the conditions of your release, the certificate will become permanent upon your discharge from supervision.¹⁴⁸ To request an application from the Division of Parole, you should send a letter to the address at the end of this Section.

There is an important exception to the rule that a Certificate of Relief from Disabilities is appropriate for one-time felons and misdemeanants. In New York, jobs and licensures designated as “public offices,” including not only political officials, but also police officers, notaries public, and firefighters, have statutory bars against all people with felony records who have not been issued a

142. *Rodgers v. N.Y.C. Human Res.*, 154 A.D.2d 233, 235, 546 N.Y.S. 2d 581, 582 (N.Y. App. Div. 1989) (holding that summary judgment was improper for an employer that had fired an employee because of an alleged good-faith failure to list his two misdemeanor convictions for which he had a certificate of relief from disability on his job application, because the certificates amounted to “badge[s] of rehabilitation”).

143. N.Y. CORRECT. LAW § 700(1)(a) (Consol. 2015). Technically, two or more felonies resulting from the same indictment count as one felony. Also, two or more convictions stemming from two or more separate indictments filed against you in the same court before you are convicted under any of them count as one felony. N.Y. CORRECT. LAW § 700(2) (Consol. 2015).

144. N.Y. CORRECT. LAW § 700(2)(c) (Consol. 2015).

145. N.Y. CORRECT. LAW §§ 700(1)(c), 702(1) (Consol. 2015).

146. N.Y. CORRECT. LAW § 702(1) (Consol. 2015).

147. N.Y. CORRECT. LAW § 703(1) (Consol. 2015).

148. N.Y. CORRECT. LAW § 703(4) (Consol. 2015).

Certificate of Good Conduct, and some even bar people with misdemeanor convictions.¹⁴⁹ Even if you have only one felony conviction on your record, or even if you have only misdemeanors, you may need to apply for a Certificate of Good Conduct if the job or license you are interested in is considered a public office. If you are not sure, you should ask the employer or licensing authority whether the job or license is a public office, and what bars exist for certain kinds of convictions.

(ii) Certificate of Good Conduct: Ex-Offenders with More than One Conviction

A Certificate of Good Conduct serves the same basic function as a Certificate of Relief from Disabilities. The Certificate of Good Conduct can be limited to one or more specific bars, or it may remove all the bars created by all of the offenses on your record.¹⁵⁰ You are able to apply for a Certificate of Good Conduct if you have been convicted of more than one felony or any number of misdemeanors. However, you will have to wait for a period of time (the “period of good conduct”) after your release before applying.¹⁵¹ When the most serious crime on your record is a misdemeanor, you have to wait one year. When the most serious crime on your record is a class C, D or E felony, you must wait three years. When the most serious crime on your records is a class B or A felony, you must wait five years.¹⁵²

To get an application for a Certificate of Relief from Disabilities or a Certificate of Good Conduct, visit <https://doccs.ny.gov/certificate-relief-good-conduct-restoration-rights>, or send a letter to:

New York State Division of Parole
97 Central Avenue
Albany, New York 12206
(518) 485-8953
Email: nyparole@nysnet.net

3. Rap Sheets¹⁵³

Getting a certificate of rehabilitation can be an important and valuable step toward restoring your rights and improving your employment prospects. However, these certificates do not seal or erase any part of your criminal record. Anyone who has ever been arrested and fingerprinted in New York State—even if no finding of guilt ever resulted from any arrest—has a permanent arrest record, or “rap sheet,” on file with the Division of Criminal Justice Services (DCJS). Many states have similar record-keeping systems. The rap sheet contains detailed information about arrests, outstanding warrants, criminal charges filed, the disposition of those charges (whether you were convicted, pleaded guilty, were acquitted, or had the charges dismissed), the sentence you received, any supervised release time, and whether you were issued a certificate of rehabilitation. Information about juvenile delinquency and youthful offender adjudications will not appear on any rap sheet that an employer will see. However, juvenile offender adjudications (meaning prosecutions and dispositions of serious crimes committed by minors) will appear on your sheet. Only information about your New York criminal history is included on your DCJS rap sheet. The FBI has its own record-keeping system that contains information about arrests in all states.

As explained in the previous subsection, laws that regulate certain areas of employment and professional activities may require that employers and agencies research your criminal history before giving you a job or a license. As a result, the information contained on your rap sheet is available, subject to important exceptions to be discussed below, to many employers and licensing agencies. In

149. See N.Y. CORRECT. LAW § 701(1) (Consol. 2015) (specifying that Certificates of Relief from Disabilities do not remove bars to eligibility for public office).

150. N.Y. CORRECT. LAW § 703-a(1) (Consol. 2015).

151. N.Y. CORRECT. LAW § 703-b(1)(a) (Consol. 2015).

152. N.Y. CORRECT. LAW § 703-b(3) (Consol. 2015).

153. See Legal Action Center of the City of New York, Inc., *Your New York State Rap Sheet: A Guide to Getting, Understanding & Correcting Your Criminal Record* (2013), available at http://lac.org/wp-content/uploads/2014/12/Your_New_York_State_Rap_Sheet_2013.pdf (last visited Sept. 29, 2019).

New York, private employers including child care agencies,¹⁵⁴ hospitals,¹⁵⁵ museums, some private transportation companies, financial institutions, and home health care agencies all have the right to get copies of your rap sheet.¹⁵⁶ Public employers—including police and fire departments, the United States Postal Service, the New York City Transit Authority, the New York State Department of Corrections and Community Supervision, school districts, and the Department of Sanitation¹⁵⁷—can also obtain your record. Furthermore, state and local agencies that issue occupational licenses—for anything ranging from driving a taxi, to cutting hair, to selling real estate, to practicing medicine—may also get access to your criminal record, as can bonding agencies.¹⁵⁸ Foster care and adoption agencies are also required to inquire into the criminal history of anyone who is or wants to be a foster or adoptive parent, as well as anyone who lives with a present or prospective foster or adoptive parent (*see* Section 2 of Part D below).

Before applying for a license or a job, it is a good idea to get your own copy of your rap sheet so that you know what it says. Doing so will help you prepare for questions an employer may ask you about your rap sheet. You may want to contact a free civil legal aid provider to review your rap sheet and determine if any offenses can be erased.

You may also find it useful to review a copy of your rap sheet so that you can answer any questions on an application thoroughly, accurately, and honestly. Your rap sheet will be a valuable source of information if you have a lengthy criminal history, have forgotten the resolution of one or more of the crimes with which you were charged, or do not remember whether an offense you were convicted of was a felony or a misdemeanor. This is important since employers and agencies may reject your application if it contains any statements they discover to be false.

A final reason for getting a copy of your rap sheet—and a good reason to take steps to get it well before you begin seeking employment—is that mistakes and incomplete entries are common. They can even make your criminal record look worse than it actually is. Getting a copy of your rap sheet can help you correct these mistakes. You can begin the process of correcting your rap sheet before you are released. For example, a missing entry under the disposition of a particular charge may not correctly show the fact that that charge was dismissed, that you were acquitted, or that you were convicted of a less serious offense. A clerk's error could make it appear that you were convicted of a more serious offense than you actually were. Multiple entries for the same charge could falsely suggest that you were convicted more than once of the same crime. Finally, parts of your record that should legally be sealed may not have been.

The following Subsections briefly describe how to obtain your rap sheet, how to correct mistakes or fill in gaps in your record, and how to seal certain kinds of information. The following information applies only to New York State criminal records. Other states may follow different procedures for recording and making available your criminal record. You can also obtain and clean up your FBI rap sheet, which is a good idea if you have ever been arrested in another state. That process is explained in Section (d) of Part C of this Chapter.

154. N.Y. EXEC. LAW § 837-n(2)(a) (Consol. 2015).

155. N.Y. PUB. HEALTH LAW § 230 (10)(a)(vi) (Consol. 2015).

156. *See* Legal Action Center of the City of New York, Inc., *Your New York State Rap Sheet: A Guide to Getting, Understanding & Correcting Your Criminal Record* (2013), *available at* http://lac.org/wp-content/uploads/2014/12/Your_New_York_State_Rap_Sheet_2013.pdf (last visited Sept. 29, 2019).

157. N.Y. EDUC. LAW § 305 (30)(b), 3004-b (Consol. 2015); *see also* Legal Action Center of the City of New York, Inc., *Your New York State Rap Sheet: A Guide to Getting, Understanding & Correcting Your Criminal Record* (2013), *available at* http://lac.org/wp-content/uploads/2014/12/Your_New_York_State_Rap_Sheet_2013.pdf (last visited Sept. 29, 2019).

158. *See* Legal Action Center of the City of New York, Inc., *Your New York State Rap Sheet: A Guide to Getting, Understanding & Correcting Your Criminal Record* (2013), *available at* http://lac.org/wp-content/uploads/2014/12/Your_New_York_State_Rap_Sheet_2013.pdf (last visited Sept. 29, 2019).

(a) Obtaining Your Rap Sheet

(i) Obtaining Your Own Physical Copy of Your Rap Sheet

The process for getting your New York rap sheet depends on whether or not you are still incarcerated. If you are no longer incarcerated and you are *not* living in New York City or Erie County, there are two steps. These two steps are also the ones you should follow if you are incarcerated for fewer than forty-five days. First, you have to either call or write a letter to the Division of Criminal Justice Services and ask for a form called a "Request for Record Review." If you choose to call the Record Review Unit, their phone number is (518) 485-7675. If you choose to e-mail, send it to RecordReview@dcjs.ny.gov. If you choose to write, the letter should include your name and the address where you want the form sent. Send this letter to:

Record Review Unit
New York State Division of Criminal Justice Services
Alfred E. Smith Building
80 South Swan Street
Albany, NY 12210

Once you receive the form, fill it out and return it to the same address, along with a copy of your fingerprints (available from most law enforcement agencies, often for a fee) and a money order (from the U.S. Postal Service, American Express, or Traveler's Express only) in the amount of \$25. The DCJS will waive the fee if you can prove that you cannot afford to pay it. A photocopy of your public assistance or Medicaid card will be considered proof that you cannot pay the fees.

(ii) Viewing Your Rap Sheet Only

If you are no longer incarcerated and you live in New York City, you can choose instead to view your rap sheet at One Police Plaza in Manhattan. After you submit your request to view your rap sheet and get fingerprinted, there is roughly a two-week waiting period before you can view your rap sheet. When you return to review your record you can take notes, but you cannot make photocopies of your record. If you prefer to have the printed record and can afford the extra time it may take, you can choose to request your rap sheet by following the steps described above in Section (i).

(iii) Living in Erie County

If you currently live in Erie County, the process is similar: you can call (716) 858-6760 to arrange an appointment at the Erie County Central Police Services, where you will fill out forms and wait for a follow-up appointment to view (but not receive a copy of) your rap sheet.

(iv) Currently Incarcerated

If you are incarcerated in a state or local facility in New York and will be there for at least forty-five days, you can obtain your rap sheet by sending a request letter directly to DCJS (at the address stated above). There is no fee to request your rap sheet if you are currently incarcerated. The letter you write should include any and all personal information that will help the DCJS track down your record, including your name, any aliases you may have used, date of birth, race, sex, and Social Security number. If you have a Department Identification Number (DIN) from the Department of Corrections, or a New York State Identification number (NYSID), you should include them as well. The letter should also state how long you will be incarcerated and the name and address of the facility in which you are incarcerated.

(b) Correcting Mistakes on Your Rap Sheet

Once you have your rap sheet, you can review it for errors. If you discover that your rap sheet contains errors or incomplete entries, you can correct them. The process of having your rap sheet corrected may take a long time. Thus, to avoid having errors on your rap sheet affect your job search, you should begin the correction process earlier rather than later.

For every mistake you find on your record, you need to obtain a “disposition slip,” or Certificate of Disposition, from the clerk of the court in which that case was heard. The disposition slip is far more likely to be accurate than the rap sheet (if the disposition slip is also inaccurate, you will need an attorney to help you sort this problem out). To obtain one or more disposition slips, write to the clerk or visit in person and provide the following information: your name, any aliases, the date of your arrest(s), and the docket or index number of the case(s) (which will ordinarily be included on the rap sheet). If you request a slip in writing, be prepared to wait several months for the clerk to process your request. While the court ordinarily charges a small fee for each disposition slip requested, the fee may be waived at your request if you are incarcerated, are on public assistance, or were represented by a Legal Aid Society lawyer or public defender.

Once you have received all the disposition slips relating to the mistakes you found on your rap sheet, you can send them to the DCJS (at the address stated above) along with a letter that explains that you want to correct your rap sheet and clearly explains how the information on the rap sheet differs from that on each disposition slip you submit. *It is essential that you send the original, certified disposition slip*, including the clerk’s or judge’s signature or seal, since the DCJS will not honor a photocopy. In your letter, you should also explain where you saw a copy of your criminal record and provide your New York State Identification Number (NYSID) if you know it. Instead of a letter, you may be able to fill out a form called a “Statement of Challenge” that the DCJS usually encloses when it sends you a copy of your rap sheet. It does not matter whether you send a letter or a statement of challenge as long as you provide all the necessary information and original disposition slips.

When your record has been corrected—usually within a few weeks—DCJS will notify you in writing. However, if you want to view your rap sheet again to make sure that all the corrections have been made, you must go through the same procedures described above to request another copy from DCJS.

(c) Sealing Cases

When you get a copy of your rap sheet, there may be information on it that not everyone who requests a copy of your rap sheet is entitled to see. Information about arrests that did not lead to conviction and arrests leading to convictions for most noncriminal offenses is sealable. That means most employers do not have access to it even though it has not been and cannot be permanently removed from your record. Only certain parties can view your entire record, including sealed cases. These include:

- (1) Agencies that issue weapon licenses or permits; any employer or potential employer for a job that requires you to carry a gun;
- (2) Your parole or probation officer, if you are arrested while still under supervision;
- (3) A prosecutor or other law enforcement official, if he can show that “justice requires” it;
- (4) Any prospective employer of a police officer or peace officer; and
- (5) Yourself.¹⁵⁹

When you see your own rap sheet, the portions of it that are sealed from most employers are marked “sealed.” If you see something on your rap sheet that you believe should be sealed but is not marked “sealed,” it probably has not been sealed. You can have those cases sealed, though the process is complicated. The process will also be different depending on when the case was decided, the court in which it was decided, and the reason why it should be sealed.

There are two New York State laws that govern which types of cases may be sealed. Section 160.50 of the New York Criminal Procedure Law provides that most dispositions other than a guilty plea or a conviction at trial are sealable.¹⁶⁰ In addition, a conviction for possession of a small amount of

159. N.Y. CRIM. PROC. LAW §§ 160.50(1)(d), 160.55(1)(d) (Consol. 2019).

160. The dispositions that may be sealed under § 160.50 include the following: dismissal, acquittal, dismissal by grand jury, declined prosecution (also called “*nolle prosequi*”), and adjournment in contemplation of dismissal (“ACD”). N.Y. CRIM. PROC. LAW § 160.50(3) (Consol. 2019). Note that the above list does not include conditional or unconditional discharges. These dispositions do not make a case sealable under § 160.50, even if you never received a punishment. However, if the conviction was for certain violations, the case may be sealed under § 160.55. N.Y. CRIM. PROC. LAW § 160.55(1) (Consol. 2008).

marijuana can be sealed. Section 160.55 of the New York Criminal Procedure Law provides that several violations (noncriminal offenses) and traffic infractions may also be sealed.¹⁶¹

If your record contains any dispositions or convictions of the kinds described here, and they appear not to have been sealed, you can apply to the court to have them sealed. If the case was decided after November 1991, it should have been sealed automatically. If it was not, you simply need to go to the court where the case was decided, get an official, original disposition slip from the court clerk, and send it to the DCJS Sealed Records Unit at the above address with a letter that explains that you want the case sealed based on either Section 160.50 or Section 160.55 of the Criminal Procedure Law.

If your case was decided before November 1991, the process is more complicated. In most cases, the clerk of the court where your case was heard needs to send a sealing order on your behalf to DCJS. Before the clerk can do this, you have to either write a letter or file sealing motion papers with the court. To find out what to do, call the court and ask the clerk how to go about getting a case sealed. If the clerk says you only need to write a letter, make sure you find out the office and address to which you should send the letter, the information you need to provide in it,¹⁶² and whether you need to send a copy of the letter to the district attorney (D.A.).

If the clerk tells you to file a sealing motion, you will need to prepare and file a Notice of Motion and an Affidavit.¹⁶³ After you prepare these papers, you should make two photocopies of each. Send or bring both the original and one copy of each to the D.A.'s office. The D.A. will keep the copy and mark the original "received" so that the clerk will know that you gave the D.A. a copy. If you are still incarcerated, you should send copies of the papers via certified mail and request a return receipt.

To file a sealing motion, you will have to submit the sealing papers to the court. The law imposes a five-day waiting period that must elapse after you give the papers to the D.A. before you submit the papers to the court. After the period has passed, you can present your papers to the court. This process is often something of a formality, but you may have to appear before a judge. You can ask the court clerk if this is the procedure. If it is, the clerk will tell you what the procedure is for getting assigned a date to appear in court. If you are still incarcerated and cannot appear in person, you should send your motion papers to the clerk via certified mail, return receipt requested. You should include an explanation to the clerk of why you cannot appear and also state that you have sent copies to the D.A.

If your case was heard in Manhattan Criminal Court, the process is easier: go to court, present identification and the docket number(s) to the clerk, and the clerk will file the necessary paperwork for you.

If the disposition of your case was "decline prosecution" or "*nolle prosequi*"—meaning that the prosecutor refused to bring charges after the arrest and before you saw a judge—you will have to go through the D.A.'s office to seal the record. Ask the D.A. to provide a letter or form (a "343 dismissal form") stating that the prosecutor did not pursue the case, and send it to the DCJS Sealed Records Unit at the above address along with a letter asking for the case to be sealed. Include in this letter your name, address, NYSID, and Social Security number.

161. The convictions that may be sealed under § 160.55 include the following: criminal solicitation in the fifth degree (N.Y. PENAL LAW § 100.00 (Consol. 2008)); trespass (N.Y. PENAL LAW § 140.05 (Consol. 2008)); unlawfully posting advertisements (N.Y. PENAL LAW § 145.30 (Consol. 2008)); failing to respond to an appearance ticket (N.Y. PENAL LAW § 215.58 (Consol. 2008)); unlawful possession of marijuana (N.Y. PENAL LAW § 221.05 (Consol. 2008)); disorderly conduct (N.Y. PENAL LAW § 240.20 (Consol. 2008)); harassment in the second degree (N.Y. PENAL LAW § 240.26 (Consol. 2008)); appearance in public under influence of narcotics or a drug other than alcohol (N.Y. PENAL LAW § 240.40 (Consol. 2008)); exposure of a person (N.Y. PENAL LAW § 245.01 (Consol. 2008)); promoting the exposure of a person (N.Y. PENAL LAW § 245.02 (Consol. 2008)); and offensive exhibition (N.Y. PENAL LAW § 245.05 (Consol. 2008)). N.Y. CRIM. PROC. LAW § 160.55 (1) (Consol. 2008).

162. This information will include the docket number of the case. Sometimes a court will assign more than one docket number to a single arrest. Make sure that you include all of the docket numbers associated with the arrest that you want to seal. If you do not do so, you might not succeed in sealing that part of your record.

163. See Legal Action Center of the City of New York, Inc., Your New York State Rap Sheet: A Guide to Getting, Understanding & Correcting Your Criminal Record (2013), available at http://lac.org/wp-content/uploads/2014/12/Your_New_York_State_Rap_Sheet_2013.pdf (last visited Sept. 29, 2019).

Sealing your records may take DCJS several months. As with correcting mistakes on your rap sheet, the best way to determine whether the sealing was accomplished is to request another copy of your rap sheet.

(d) Getting Your FBI Rap Sheet

The process of getting your FBI rap sheet is quite similar to the process of getting your rap sheet in New York. It may be a good idea to do so if you have any criminal history outside the state of New York. To request your rap sheet from the FBI, write to:

U.S. Department of Justice
Federal Bureau of Investigation
Criminal Justice Information Services Division-Record Request
1000 Custer Hollow Road
Clarksburg, WV 26306

In your letter, state that you are requesting your criminal history under the Freedom of Information Act (FOIA).¹⁶⁴ Include in your letter your name, address, birth date, and fingerprints. The FBI charges a processing fee of \$18, which is payable to the “Treasury of the United States” by money order or certified check. If you cannot afford to pay the fee, you can request a fee waiver. To request a fee waiver, write a notarized letter or affidavit explaining why you can’t pay the fee, and mail it to the FBI with the request for your rap sheet.

You cannot apply directly to the FBI to seal any records included on your rap sheet. You need to go through the DCJS or through the equivalent agency in any other state in which you have sealable cases, and the FBI will seal the record when the state agency tells it to do so.

D. Child Custody

Chapter 33 of the *JLM*, “Rights of Incarcerated Parents,” contains detailed information regarding the federal and New York State law governing your legal relationship with your child before and during your incarceration. Chapter 33 also explains the procedures that New York State follows with custodial parents who are incarcerated.¹⁶⁵ That includes the procedures that you are required to follow in making arrangements for the care of your child,¹⁶⁶ the rights and continued obligations that you have as an incarcerated parent,¹⁶⁷ and the things you can do while incarcerated to defend yourself against the state’s involuntary termination of your parental rights.¹⁶⁸ If you are hoping to have your parental rights restored upon your release, it is extremely important that you understand the information in that chapter.

This Part explains what your parental rights and obligations are upon your release under New York State law, assuming that the state did not terminate (end) your rights during your incarceration and that you did not surrender (give up) those rights by giving your child or children up for adoption. This Part also explains the law governing the right of people with criminal convictions to serve as foster or adoptive parents. If your child is not living in New York State upon your release, a different body of law will govern, and may differ significantly from what is described below, so you should be sure to check the laws of the state where your child is living.

164. 5 U.S.C. § 552. See *JLM* Chapter 7, “Freedom of Information,” for more information. You can also visit the FBI’s website at: <https://www.fbi.gov/services/cjis/identity-history-summary-checks> (last visited Nov. 22, 2020).

165. See *JLM* Chapter 33, “Rights of Incarcerated Parents.”

166. See *JLM* Chapter 33, “Rights of Incarcerated Parents,” Parts B and C.

167. See *JLM* Chapter 33, “Rights of Incarcerated Parents.”

168. See *JLM* Chapter 33, “Rights of Incarcerated Parents,” Part D(2).

1. Reestablishing Custody

Even if your children were voluntarily or involuntarily placed in foster care upon your incarceration,¹⁶⁹ or you granted temporary custody to a friend or relative,¹⁷⁰ you should be able to reassert your parental rights upon your release as long as the State did not terminate your parental rights and you did not surrender those rights.

Re-establishing custody is usually easier if you have voluntarily placed your children in foster care or with a friend or relative. For voluntary foster care placements, the Voluntary Placement Agreement that you made with social services will usually name a date when the department will return your children. The Voluntary Placement Agreement may also specify an event, such as your release, or your completion of certain post-release conditions, that will cause the social services department to return your children.¹⁷¹ On that date or when that event happens, the foster care agency must return your children to you.

There is an exception to the foster care agency's duty to return your children. If the agency (or another party) has gotten a court order that prevents your children from being returned to you,¹⁷² then your children will not be returned. Usually this type of court order is issued only if the state, the foster parents, or the legal guardians of the children have initiated proceedings to terminate your parental rights prior to your release.¹⁷³ Ordinarily, you will have had notice of these proceedings and an opportunity to attend and participate in hearings before any such order is entered.¹⁷⁴

If you wish to have your children returned to you before the date or event specified in your Voluntary Placement Agreement, you can submit a written request to the foster care agency that your children be returned to you. Once you have submitted this request, the foster care agency must return your children or else must notify you within ten days that your request is denied.¹⁷⁵ If the agency denies your request or fails to respond to it, you may file a petition in family court for the return of your children and an order to show cause for the agency's failure to comply with your request. Alternatively, you can file a writ of habeas corpus in the family court or New York Supreme Court.¹⁷⁶

If there is no return date specified in the Voluntary Placement Agreement, you can make a request to the foster care agency. The agency must then return your children to you within twenty days.¹⁷⁷ However, the agency may refuse to return your children if a court order has already been issued in a case brought by the foster care agency or another party for the termination of your parental rights.¹⁷⁸

If your children have been living with a friend or relative during your incarceration, and you have not involved the state in making these arrangements, you have not relinquished any of your parental rights permanently.¹⁷⁹ If the agreement you entered into with the friend or relative said that your children are to be returned to you after your release, you should be able to be reunited with them. However, there is once again the possibility that if a court order has terminated your parental rights, the children may not be returned to you.¹⁸⁰ If the friend or relative does not return your children to you upon your request, you can file a petition in family court for an order that they be returned to you.

169. See *JLM* Chapter 33, "Rights of Incarcerated Parents," Part C.

170. See *JLM* Chapter 33, "Rights of Incarcerated Parents," Part B.

171. N.Y. SOC. SERV. LAW§ 384-a(2)(a) (Consol. 2008).

172. N.Y. SOC. SERV. LAW§ 384-a(2)(a) (Consol. 2008); see also N.Y. SOC. SERV. LAW§ 384-b (Consol. 2008).

173. *JLM* Chapter 33, "Rights of Incarcerated Parents," provides detailed information on what you can do if someone initiates proceedings to have your parental rights terminated. This information is particularly useful while you are still incarcerated. However, this type of proceeding may be brought after you are released from custody as well.

174. See *JLM* Chapter 33, "Rights of Incarcerated Parents," Part D.

175. N.Y. SOC. SERV. LAW§ 384-a(2)(a) (Consol. 2008).

176. N.Y. SOC. SERV. LAW§ 384-a(2)(a) (Consol. 2008).

177. N.Y. SOC. SERV. LAW§ 384-a(2)(a) (Consol. 2008).

178. N.Y. SOC. SERV. LAW§ 384-a(2)(a) (Consol. 2008).

179. See *JLM* Chapter 33, "Rights of Incarcerated Parents," Part B.

180. N.Y. SOC. SERV. LAW§ 384-b (Consol. 2008).

(a) Preventive Services

When you are reunited with your children, you may be able to receive supportive and rehabilitative help from the Department of Social Services. Such help, called “preventive services,” is provided to help return your children from foster care more quickly, or to prevent your children from having to return to foster care.¹⁸¹ Depending on your situation, preventive services may include case management, case planning, casework contacts (e.g., regular meetings with your case worker), daycare, homemaker services, housekeeper/chore services, family planning, home management services, clinical services, parent aide services, day services to children, parent training, transportation services, emergency cash or goods, emergency shelter, housing services, intensive home-based family preservation services, outreach activities, and respite care and services.¹⁸²

A social services official will decide whether you need these services, and that decision is reviewed first after you and your children have received services for six months, and then every six months after that.¹⁸³ If your children have been given back to you from foster care and you are receiving preventive services, New York State regulations require that the Department of Social Services, or the foster care agency, make twelve contacts with you in each six month period that you are receiving preventive services.¹⁸⁴ Of these twelve contacts, four must be individual face-to-face meetings with you and/or your children, and two must take place in your children’s home.¹⁸⁵

The Department of Social Services must provide you with preventive services if the Department believes that you would not be able to adequately take care of your children without help.¹⁸⁶ Such services are not likely to be provided to you and your family long-term because, if you need these services long-term, the Department may think that you are not able to provide a stable home for your children. If the social services official believes that you are not able to provide a stable home, the official may recommend placing your children in foster care again. For this reason, you should plan to use these services only temporarily (for a short time) to help your family get back on its feet.

2. Becoming a Foster or Adoptive Parent

New York State, in compliance with the Adoption and Safe Families Act of 1997 (ASFA),¹⁸⁷ has a law that restricts the ability of people with criminal histories to be adoptive or foster parents, or even to live in households with foster or adopted children.¹⁸⁸ This section only applies to you if you are looking to become a foster parent, you are applying to adopt a child, or if you are planning to live in a household with foster or adopted children. If you were an adoptive parent before conviction, you have the same rights as a biological parent. New York Social Services Law Section 378-a provides that all current and potential foster and adoptive parents, as well as all adults over the age of eighteen living in the homes of foster or adoptive children, must both be fingerprinted and undergo a criminal history check.¹⁸⁹

Certain felony convictions in your criminal history will (1) result in the denial of your application to be a foster or adoptive parent,¹⁹⁰ (2) result in the denial of your application for renewal if you are a

181. N.Y. SOC. SERV. LAW§ 409 (Consol. 2011).

182. N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2(b)(1)–(19) (2019).

183. N.Y. SOC. SERV. LAW§ 409-a(1)(b) (Consol. 2010); N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4(b)(1) (2019).

184. N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4(c)(ii)(d) (2019).

185. N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4(c)(ii)(d)(2)(i) (2019).

186. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.9(c) (2019).

187. Adoption and Safe Families Act of 1997, Pub. L. 105–89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

188. N.Y. SOC. SERV. LAW§ 378-a (Consol. 2010).

189. N.Y. SOC. SERV. LAW§ 378-a(2)(a)–(b) (Consol. 2010).

190. N.Y. SOC. SERV. LAW§ 378-a(2)(e)(1)(A)–(B) (Consol. 2010). *But see* In re Adoption of Abel, 33 Misc.3d 710, 717–718, 931 N.Y.S.2d 829, 834–835 (N.Y. Fam. Ct. Bronx County 2011) (finding that § 378-a(2)(e)(1) was unconstitutional as applied to the petitioner because it violated his due process right to an individualized determination of whether he should be able to adopt a child).

current foster parent,¹⁹¹ (3) result in the revocation of your certification if you are a current foster parent,¹⁹² and (4) result in the revocation of your approval to be an adoptive parent if you have not completed the adoption process.¹⁹³ These felony convictions are:

- (1) Child abuse or neglect;¹⁹⁴
- (2) Spousal abuse;¹⁹⁵
- (3) A crime against a child, including child pornography;¹⁹⁶ or
- (4) A crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery.¹⁹⁷

Furthermore, a felony conviction in the last five years for physical assault, battery, or drug-related offenses will have the same result.¹⁹⁸

If any of the above-listed felony convictions appear on your record, you can try to show two things to prevent your application from being denied and/or your approval of certification from being revoked: (1) that denial or revocation will create an unreasonable risk of harm to the physical or mental health of the child, and (2) that approval of the application will not place the child's safety at risk and will be in the best interests of the child.¹⁹⁹ You will only be successful if you can prove to the court that, because of these two things, § 378-a(2)(e)(1) is unconstitutional as applied to you.²⁰⁰

The Office of Children and Family Services may also decide to deny your application for certification or approval to be an adoptive or foster parent if (1) you have any criminal charges or

191. N.Y. SOC. SERV. LAW § 378-a(2)(e)(4) (Consol. 2010).

192. N.Y. SOC. SERV. LAW § 378-a(2)(e)(5) (Consol. 2010).

193. N.Y. SOC. SERV. LAW § 378-a(2)(e)(5) (Consol. 2010).

194. N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(A)(i) (Consol. 2010). *But see* In re Adoption of Abel, 33 Misc.3d 710, 717–718, 931 N.Y.S.2d 829, 834–835 (N.Y. Fam. Ct. Bronx County 2011) (finding that § 378-a(2)(e)(1) was unconstitutional as applied to the petitioner because it violated his due process right to an individualized determination of whether he should be able to adopt a child).

195. N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(A)(ii) (Consol. 2010). *But see* In re Adoption of Abel, 33 Misc.3d 710, 717–718, 931 N.Y.S.2d 829, 834–835 (N.Y. Fam. Ct. Bronx County 2011) (finding that § 378-a(2)(e)(1) was unconstitutional as applied to the petitioner because it violated his due process right to an individualized determination of whether he should be able to adopt a child). Furthermore, “spousal abuse” may not be a disqualification if the Department of Social Services finds that the offense called “spousal abuse” was committed by a victim of physical, sexual, or psychological abuse, and that the victimization was a factor in causing the potential foster or adoptive parent to commit the offense. N.Y. SOC. SERV. LAW § 378-a(2)(j) (Consol. 2004).

196. N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(A)(iii) (Consol. 2010). *But see* In re Adoption of Abel, 33 Misc.3d 710, 717–718, 931 N.Y.S.2d 829, 834–835 (N.Y. Fam. Ct. Bronx County 2011) (finding that § 378-a(2)(e)(1) was unconstitutional as applied to the petitioner because it violated his due process right to an individualized determination of whether he should be able to adopt a child).

197. N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(A)(iv) (Consol. 2010). *But see* In re Adoption of Abel, 33 Misc.3d 710, 717–718, 931 N.Y.S.2d 829, 834–835 (N.Y. Fam. Ct. Bronx Cty. 2011) (finding that § 378-a(2)(e)(1) was unconstitutional as applied to the petitioner because it violated his due process right to an individualized determination of whether he should be able to adopt a child).

198. N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(B) (Consol. 2010). *But see* In re Adoption of Abel, 33 Misc.3d 710, 717–718, 931 N.Y.S.2d 829, 834–835 (N.Y. Fam. Ct. Bronx Cty. 2011) (finding that § 378-a(2)(e)(1) was unconstitutional as applied to the petitioner because it violated his due process right to an individualized determination of whether he should be able to adopt a child).

199. In re Adoption of Abel found that § 378-a(2)(e)(1) was unconstitutional as applied to the petitioner because it violated his due process right to an individualized determination of whether he should be able to adopt a child. The court allowed petitioner and his wife to adopt the child because denial would have created an unreasonable risk of harm to the child and granting adoption would have been in the child's best interest and not have placed his safety in jeopardy. In re Adoption of Abel, 33 Misc.3d 710, 717–718, 931 N.Y.S.2d 829, 834–835 (N.Y. Fam. Ct. Bronx County 2011).

200. This is called an “as applied” challenge to a statute. In an “as applied” challenge, you are not arguing that the statute is *always* unconstitutional. Arguing that a statute is always constitutional is called a “facial challenge,” because you are arguing the statute is unconstitutional “on its face” (meaning, from the text of the statute). Instead, in an “as applied” challenge, you are arguing that the statute cannot be applied to *you* because applying the statute to you would violate your constitutional rights. To learn more about facial versus as-applied challenges, read the definition of the word “facially” in *JLM*, Appendix V, Definitions of Words Used in the *JLM*.

convictions at all on your record,²⁰¹ or (2) if you live with someone over the age of eighteen who has been charged with, or convicted of, any crime.²⁰² In addition, if you have any pending criminal charges, your application will be suspended until the matter is resolved.²⁰³

If the record of any foster or adoptive parent, or of anyone living in the same household above the age of eighteen, contains any criminal charges or convictions, the foster care agency or adoption agency is required by law to perform a safety assessment of the home. In performing this assessment, the agency must determine the following:

- (1) Whether the person with this record resides in the household;
- (2) How much contact the person with this record may have with foster children or other children residing in the household; and
- (3) The status, date and nature of the criminal charge or conviction.²⁰⁴

After this assessment, the agency may remove the child from your home if the child is currently living there. For example, if the assessment reveals that the health and safety of the child is at risk, the agency may decide to remove the child. On the other hand, if your approval or certification is revoked, or your application denied, for one of the reasons already discussed in this section, the agency must remove the child from your home if the child is currently living there.²⁰⁵

If your application to be a foster or adoptive parent is denied, the Office of Children and Family Service must tell you the reasons why.²⁰⁶ The Office must also tell you about its review and remedial procedures.²⁰⁷ The same is true if your current approval or certification is revoked. You can also request a hearing in family court in order to present evidence that the child's best interests would be served by having the certification granted or continued.²⁰⁸ If you officially completed the adoption process prior to your conviction, despite the above, you have full parental rights that can only be terminated through formal legal proceedings.

If you want to become an adoptive or foster parent, you should make sure your criminal record is as clean and as accurate as possible. Additionally, you should make sure that the criminal record of anyone who lives with you is also as clean and as accurate as possible. For more information on how to clean up your record or rap sheet, please consult Part C(3) above.

E. Military Service

1. The Draft

Virtually all men living in the United States are required by federal law to register for the Selective Service (commonly known as "the draft") within thirty days of their eighteenth birthday.²⁰⁹ If you fail to register for the draft, you may be turned down for benefits like federal student loans and grants, job training, government jobs, and citizenship (if you are not yet a citizen). In addition, many states and municipalities have laws that tie registration with the Selective Service to education, training, employment opportunities, and even driver's licenses. Indeed, failure to register is a felony punishable by up to five years in prison and a fine of \$250,000.²¹⁰

201. N.Y. SOC. SERV. LAW § 378-a(2)(e)(3)(A) (Consol. 2010).

202. N.Y. SOC. SERV. LAW § 378-a(2)(e)(3)(B) (Consol. 2010).

203. N.Y. SOC. SERV. LAW § 378-a(2)(e)(2)(A)–(B) (Consol. 2010).

204. N.Y. SOC. SERV. LAW § 378-a(2)(h) (Consol. 2010).

205. N.Y. SOC. SERV. LAW § 378-a(2)(h) (Consol. 2010).

206. N.Y. SOC. SERV. LAW § 378-a(2)(g) (Consol. 2010). *See also* N.Y. COMP. CODES R. & REGS. tit. 18, § 421.27(e) (2019) (explaining the procedures if your application is denied).

207. N.Y. SOC. SERV. LAW § 378-a(2)(g) (Consol. 2010). *See also* N.Y. COMP. CODES R. & REGS. tit. 18, § 421.27(e) (2019) (explaining the procedures if your application is denied).

208. *See In re Adoption of Abel*, 33 Misc.3d 710, 717–718, 931 N.Y.S.2d 829, 834–835 (N.Y. Fam. Ct. Bronx County 2011) (finding that § 378-a(2)(e)(1) was unconstitutional as applied to the petitioner because it violated his due process right to an individualized determination of whether he should be able to adopt a child).

209. Selective Service System, *Who Must Register*, available at <https://www.sss.gov/Registration-Info/Who-Registration> (last visited Nov. 22, 2020).

210. Selective Service System, *Why Register? Benefits and Penalties*, available at <https://www.sss.gov/Registration/Why-Register/Benefits-and-Penalties> (last visited Sept. 29, 2019).

The Selective Service Act (that is, the federal law that requires you to register for the draft) states that “[n]o person shall be relieved from training and service under this title ... by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.”²¹¹ In other words, the government may choose to exempt you from the draft because of a felony conviction. Note that you are not automatically exempt because of a felony conviction, and that you will never be exempt because of a misdemeanor conviction.²¹² Also, if the draft is ever reinstated, a felony conviction will not automatically exempt you from military service.

2. Voluntary Service

If you are considering a career in the military, you should know that it is a very different sort of employment than the types discussed above in Part C. First of all, Title VII of the Civil Rights Act of 1964, which guarantees that all individuals are treated equally with respect to civilian employment (see Part C(1)(b) above), does not apply to uniformed members of the military.²¹³ Further, once you are in the military, you will give up some of your rights because the courts generally respect and uphold military rules and regulations. The Supreme Court has said that “the military is, by necessity, a specialized society separate from civilian society” and that “the essence of military service is the subordination of the desires and interests of the individual to the needs of the service.”²¹⁴

If you decide to try to enlist, it is a good idea to get a copy of your rap sheet and make sure it is accurate. For more information on rap sheets, see Part C(3) above. You will be asked about your criminal record by the recruiter, and the recruiter is very likely to run a background check on you. You should be careful not to make false statements on your application. It is a violation of federal law to make false statements on your application.²¹⁵

No branch of the U.S. armed forces will *automatically* deny admission to anyone with misdemeanor convictions, but some branches may choose to deny admission based on a misdemeanor. A drug offense is particularly likely to get you barred from any service. A felony conviction, on the other hand, typically makes someone ineligible for any military service, although the Secretary of each branch can make exceptions in “meritorious cases.”²¹⁶ Indeed, each branch of the military has its own recruiting standards, and decides differently whether or not to accept someone with a criminal conviction. Even within a single branch, recruiting officers will often make case-by-case decisions based on the number and nature of your convictions, how much time has passed since your last conviction, and other factors.

211. 50 U.S.C. 3806(m) (2015).

212. *Korte v. United States*, 260 F.2d 633, 637 (9th Cir. 1958) (holding that a felon may, but not necessarily shall, be excused from military service, while those convicted of misdemeanors are not categorically excused from service).

213. *See Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d 83, 88–89 (2d Cir. 2004) (holding that lawsuits against military employers are barred “if the injuries for which a plaintiff seeks to recover arise out of or are in the course of activity incident to the plaintiff’s military service.”) (internal citations omitted); *see also Baldwin v. United States Army*, 223 F.3d 100, 101 (2d Cir. 2000) (holding that uniformed members of the armed service cannot bring claims under Title VII). If you are not a “uniformed” member of the armed service, but a civilian who works for the armed services, you can bring Title VII claims against your military employer. 42 USC § 2000e-16(A) (2012). *See Roper v. Dept. of Army*, 832 F.2d 247, 248 (2d Cir. 1987) (holding that Title VII applies only to civilian employees and not to uniformed members of the armed services).

214. *Goldman v. Weinberger*, 475 U.S. 503, 506, 106 S. Ct. 1310, 1312–1313, 89 L. Ed. 2d 478, 483 (1986) (holding that the “First Amendment did not prohibit application of air force regulation to prevent wearing of yarmulke by plaintiff while on duty and in uniform”) (internal citations omitted), *superseded in part by statute*, 10 U.S.C. § 774(a)–(b) (2012) (stating that “a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force...[unless]...the wearing of the item would interfere with the performance of the member’s military duties; or if the Secretary determines...that the item of apparel is not neat and conservative”).

215. 10 U.S.C. § 907 (2019); 10 U.S.C. § 904(a) (2019).

216. 10 U.S.C. § 504(a) (2012); *see also* 32 C.F.R. § 96.4 (2019) (stating that it is the policy of the Department of Defense and Military Services to investigate the background of each applicant to identify those whose backgrounds raise questions as to their fitness for service or those who cannot enlist without a waiver).

The Army, for example, has publicly stated how it decides whether to enlist people with criminal histories: it requires them to request waivers.²¹⁷ In general, the Military Services have a policy against allowing people with criminal records to enlist because they feel that doing so might cause disciplinary problems or present security risks.²¹⁸ However, the Army may issue waivers to allow people to join when it decides that their criminal history does not make them a disciplinary risk.²¹⁹ These waivers are required for people who have been convicted of felonies.²²⁰

If you apply for a waiver, you have the burden to prove both that you can overcome the reason for your disqualification and that it would be in Army's best interest to accept you.²²¹ You will have to undergo a "suitability review" if you have been accused of a serious offense or even for some lower-level offenses if you have more than one.²²² Depending on the seriousness of the offense, different levels of review will be appropriate.²²³ You may also be required to apply for a waiver if you have certain

217. 32 C.F.R. § 571.3 lists the basic criteria and processes for obtaining waivers, which are generally necessary for people with criminal records. *See also* Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, Chapter 4: Enlistment Waivers (Waiverable and Nonwaiverable Criteria and Administrative Instructions) (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585, (last visited Oct. 27, 2019) (prescribing documents necessary for waiver requests and defining waiverable and nonwaivable disqualifications).

218. U.S. Dept. of Def., Instruction 1304.26, Qualification Standards for Enlistment, Appointment, and Induction, Part E3(2)(h), at 9-10 (23 Mar. 2015, modified 26 Oct. 2018), *available at* <https://www.esd.whs.mil/Directives/issuances/dodi/> (last visited Oct. 27, 2019) (discussing necessity of enlisting those with good moral character in the Armed Forces).

219. U.S. Dept. of Def., Instruction 1304.26, Qualification Standards for Enlistment, Appointment, and Induction, Part E3(2)(h)(2), at 9 (23 Mar. 2015, modified 26 Oct. 2018), *available at* <https://www.esd.whs.mil/Directives/issuances/dodi/> (last visited Oct. 27, 2019) (listing a "significant criminal record" as a possible disqualification for service, but also providing for a waiver in that circumstance).

220. Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, ch. 4-7 (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585, (last visited Oct. 27, 2019) ("A waiver is required for any applicant who has received a conviction or other adverse disposition for a major misconduct offense, or any offense considered a felony under local law.") Additionally, note that any criminal history, including arrests, will require you to undergo a suitability review. Ch. 4-2(e)(1); U.S. Dept. of Def., Instruction 1304.26, Qualification Standards for Enlistment, Appointment, and Induction, Part E3(2)(h)(2), at 9 (23 Mar. 2015, modified 26 Oct. 2018), *available at* <https://www.esd.whs.mil/Directives/issuances/dodi/> (last visited Oct. 27, 2019) ("Except as limited by paragraph (3) [conviction of various sex offenses] below, persons convicted of felonies may request a waiver to permit their enlistment. The waiver procedure is not automatic, and approval is based on each individual case.").

221. Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, Ch. 4-2(c) (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585 (last visited Oct. 27, 2019).

222. Army Publishing Directorate, Reg. 601-210, Regular and Reserve Components Enlistment Program, Ch. 4-2(e)(1)(a), (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585 (last visited Oct. 27, 2019). Serious offenses include, but are not limited to, such crimes as aggravated assault, burglary, domestic violence, forgery, kidnapping, larceny, murder, narcotics, rape, and robbery. Ch. 4-11. For some offenses and conditions, however, you will not be able to get a waiver. You cannot enlist if you are on probation or parole, or if you are on the sex offender registry. Ch. 4-22(h) and (j). For instance, if you have been convicted of a misdemeanor crime of domestic violence, you cannot enlist and a waiver will not be approved. Ch. 4-7(c)(2).

223. Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, Chs. 4-2(e) and 4-4 (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585, (last visited Oct. 27, 2019). (describing types of charges that require a suitability review, the level of command that conducts that review, and the evaluation guidelines).

non-criminal offenses on your record, such as traffic violations,²²⁴ or other offenses for which you received penalties other than prison.²²⁵

In order to apply for a waiver, you will need, among other documents, police checks, court documents, documents from probation or parole officers, and documents from your correctional facility.²²⁶ Make sure to obtain all of these if you plan to apply for a waiver. You may also be asked to provide letters of recommendation from community leaders such as school officials, ministers, or police officers.²²⁷ Additionally, keep in mind that there may be a waiting period following your release before you can submit your waiver.²²⁸

While the Air Force, the Navy, and the Marine Corps do not have published regulations, they may use a similar approach to potential enlistees with criminal histories. However, the military has a lot of discretion in deciding whether to allow someone with a criminal history to enlist. This makes it difficult to accurately predict whether you will be allowed to enlist. If you are interested in joining one of the branches of the armed forces, you should call or visit the recruiter in your area and ask what standards are applied in evaluating applicants with a criminal background.

F. Voting Rights

The Supreme Court has held that it is constitutional if states pass laws that “disenfranchise” (take away the right to vote) individuals who have been convicted of a felony.²²⁹ However, this does not mean that you will necessarily be denied the right to vote, because different states have different laws about the voting rights of people with criminal convictions. For both federal and state elections, your right to vote is controlled by the law of the state where you live, not the state where you were convicted. If you move to another state after your release from prison, your rights may be affected differently than in your previous home state. The impact of a criminal conviction on the right to vote varies widely from state to state and many states rewrite their voting laws frequently. Most states have placed some restrictions on the right to vote for people who have been convicted of a crime. It is unlikely that you will be disqualified from voting solely because of a misdemeanor conviction. In some states, your criminal conviction does not affect your voting rights at all.²³⁰ Before registering, you must determine

224. Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, Ch. 4-6(a), (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585, (last visited Oct. 27, 2019).

225. Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, Ch. 4-6 (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585, (last visited Oct. 27, 2019), (requiring waivers for applicants who have had a certain number of civil court convictions or dispositions that are not serious criminal misconduct).

226. Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, Ch. 4-28(e) (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585, (last visited Oct. 27, 2019) (laying out waiver approval procedures).

227. U.S. Dept. of Def., Instruction 1304.26, Qualification Standards for Enlistment, Appointment, and Induction, Part E4(1)(c), at 11 (23 Mar. 2015, modified 26 Oct. 2018), *available at* <https://www.esd.whs.mil/Directives/issuances/dodi/> (last visited Oct. 27, 2019).

228. Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, Ch. 4-32(b) (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585, (last visited Oct. 27, 2019) (laying out waiting periods for different amounts of confinement); *see also* Army Publishing Directorate, Reg. 601-210, Regular Army and Reserve Components Enlistment Program, Ch. 4-7(a) (31 Aug. 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1000585, (last visited Oct. 27, 2019) (noting that for serious criminal misconduct, applicants have a 24-month wait from the date of conviction prior to waiver processing).

229. *Richardson v. Ramirez*, 418 U.S. 24, 56, 94 S. Ct. 2655, 2670, 41 L. Ed. 2d 551, 570 (1974) (holding that the exclusion of convicted felons from the vote is not a violation of any provision of the Constitution).

230. *See, e.g.*, VT. STAT. ANN. tit. 17, § 2121–2122 (2012); ME. REV. STAT. ANN. tit. 21-A, §§ 111, 112(14) (2012).

whether you are eligible to vote lawfully. If you vote when you are ineligible or if you make false statements on a voter registration form, you could face criminal penalties.²³¹

If you are incarcerated and are entitled to vote through an absentee ballot, it may still be difficult to obtain an absentee ballot, as prisons are unlikely to have them on hand. The town clerk, the registrar of voters, or the board of elections in the municipality where you are registered will generally send an absentee ballot to any registered voter who writes to request one. You may also be able to request a ballot by telephone. In order to fulfill your request, the clerk or registrar will likely need to know both the address where you are registered and your date of birth. However, even if the law of the state in which you are registered does not restrict the right of incarcerated persons to vote, you will still probably face obstacles in getting election officials to send you an absentee ballot. If an official does not understand the law regulating to your right to vote, he or she might refuse to send you a ballot even if you are entitled to one. For this reason, you may want to find out if your state election law allows third parties, such as family members, to obtain a ballot and send it to you.

1. Restoring Your Right to Vote²³²

If you live in a state where you will be able to exercise some of your voting rights, you will want to find out how to get your rights restored. Some states automatically restore your right to vote after you are released from jail or prison;²³³ others do so only after you have completed your entire sentence, including any parole or other supervision.²³⁴ In some states you must petition the sentencing court or the governor's office in order to have your civil rights restored, including your right to vote.²³⁵ (Courts have generally held that civil rights include not only your right to vote, but also your right to serve on a jury and your right to hold public office).²³⁶ Several other states require you to ask for and be granted

231. For example, under New York law, “[a]ny person who . . . knowingly votes or offers or attempts to vote at any election, when not qualified . . . is guilty of a felony.” N.Y. ELEC. LAW § 17-132(1) (McKinney 2018). California law provides that “[e]very person who willfully causes, procures, or allows himself or herself or any other person to be registered as a voter, knowing that he or she or that other person is not entitled to registration, is punishable by imprisonment . . . for 16 months or two or three years, or in a county jail for not more than one year.” CAL. ELEC. CODE § 18100(a) (West 2011). In Florida, “[w]hoever, knowing he or she is not a qualified elector, willfully votes at any election is guilty of a felony of the third degree.” FLA. STAT. ANN. § 104.15 (2012). Connecticut law provides that “[a]ny person who procures such person or another to be registered after having been disfranchised by reason of conviction of crime . . . and any person who votes at any election after having forfeited such privileges by reason of conviction of crime and confinement, shall be fined not more than five hundred dollars and imprisoned not more than one year.” CONN. GEN. STAT. ANN. § 9-45(b) (2012). While some states seem to criminalize only registration by people who know they are unqualified, others, like Connecticut, make it a crime for unqualified voters to register even if they do not know they are unqualified. Since different states have different rules, and these rules frequently change, you should make sure that the state in which you live makes you eligible to vote before you register.

232. The National Conference of State Legislatures publishes a website with state-by-state information about how to restore your right to vote after a felony conviction. See National Conference of State Legislatures, *Felon Voting Rights* (1 Oct. 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited Nov. 22, 2020).

233. Some states allow formerly incarcerated people to vote once they are released, even if they are still on probation or parole. For more information, see National Conference of State Legislatures, *Felon Voting Rights* (1 Oct. 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited Nov. 22, 2020).

234. For more information, see National Conference of State Legislatures, *Felon Voting Rights* (1 Oct. 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited Nov. 22, 2020).

235. For more information, see National Conference of State Legislatures, *Felon Voting Rights* (1 Oct. 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited Nov. 22, 2020).

236. Your civil rights sometimes also include your right to hold certain licenses, such as occupational licenses or handgun licenses. The laws governing how, if at all, political rights can be restored to people with criminal convictions may differ a great deal from state to state. In New York, for example, while the law defines in detail the ways convicted felons are to be excluded from the voting rolls, and how they can be restored, there is

a pardon by the governor of your state (or in some cases, from a separate state board that deals with pardons) before your voting rights and other civil rights can be restored.²³⁷ In some states these pardons are issued as long as you have remained crime-free for a certain period of time after fulfilling the conditions of your sentence. In others, however, the need to obtain a pardon is almost like a lifetime ban on voting, because pardons are granted only in highly unusual circumstances. Furthermore, in some states, including New York, you may be issued a restricted pardon that does not restore all of your political rights.²³⁸ Finally, some states may revoke your voting rights until you have served your full sentence or had your civil rights restored, or they may revoke your voting rights permanently for certain specific convictions.²³⁹

However, voting law is not always clear, and it changes frequently. Therefore, upon your release, you should (1) consult the election law in your state, and (2) contact your local or state board of elections to determine your eligibility to vote and the procedures necessary for regaining your eligibility. Currently the American Civil Liberties Union hosts a website that answers basic questions you may have about voting rights.²⁴⁰ Similarly, the National Conference of State Legislatures provides information regarding voter restoration online.²⁴¹ Remember that if you move to a different state, the laws governing the right to vote for people with felony convictions in your *new* state will determine whether you may vote, and they may differ from your previous home state.

In most states, the rules governing the right to vote are the same whether you have been convicted of a federal crime or a state crime, and regardless of the state in which you were convicted. However, if the state where you live requires a pardon in order to regain your voting rights, you may have to contact the governor's office in the state where your conviction occurred. If you were convicted of a federal crime you may have to contact the federal government.²⁴²

no statute that either specifically disqualifies a felon from holding office or describes how the right to hold office can be restored. N.Y. ELEC. LAW § 5-106 (McKinney 2018). Further, while a felony conviction is a bar to serving on a jury, you can often remove this bar by applying for and receiving a Certificate of Good Conduct or a Certificate of Relief from Disabilities (described in detail in Part C(2) of this Chapter). By contrast, Connecticut has statutes stating that voting rights and the right to hold or run for office can be restored once you have been released and have finished any parole, but you cannot serve on a jury until seven years have passed following your conviction of a felony. CONN. GEN. STAT. ANN. §§ 9-46, 9-46a, 51-217 (2008).

237. For more information, see National Conference of State Legislatures, *Felon Voting Rights* (1 Oct. 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited Nov. 22, 2020).

238. An advisory opinion issued by New York's Attorney General's office states that the pardon of a felony is not sufficient to restore all the rights of citizenship. 1930 N.Y. Op. Att'y Gen. 279, 284 (1930).

239. In Delaware, if you are convicted of murder, manslaughter (except vehicular homicide), any felony that is a sexual offense, or improper influence or abuse of office you cannot have your voting rights restored. For other offenses, your right to vote may be restored once you are pardoned or have finished serving your sentence, whichever comes first. DEL. CONST. ART. V, § 2 (2012). Missouri permanently disqualifies from voting those convicted of certain crimes related to voting. For other offenses, you maybe be deprived of the right to vote while you are serving your sentence and permanently barred from serving as a juror. MO. REV. STAT. 561.026 (2012). The Missouri statute does allow for an exception if your conviction has been successfully expunged under MO. REV. STAT. 610.140 (2012). The Florida Constitution was recently amended so that most people with felony convictions will regain the right to vote once they have completed their sentence, including any term of parole or probation. There is an exception for people convicted of murder and felony sex offenses who cannot vote until their civil rights are restored. FLA. CONST. ART. VI, § 4 (2018). There has been ongoing litigation about whether or not someone who has not paid all their fines and fees will be considered to have served their whole sentence. It may be best to check with a local legal aid organization before registering to vote.

240. American Civil Liberties Union, *Know Your Voting Rights: Voting Rights*, available at <https://www.aclu.org/know-your-rights/voting-rights/> (last visited Nov. 22, 2020).

241. National Conference of State Legislatures, *Felon Voting Rights* (1 Oct. 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited Nov. 22, 2020).

242. For more information about federal pardons, you can visit the website of the Office of the Pardon Attorney of the Department of Justice at: <https://www.justice.gov/pardon> (last visited Nov. 22, 2020). You can contact the Office of the Pardon Attorney to ask for additional information. The Office prefers to be contacted by email: USPardon.Attorney@usdoj.gov. You can also contact the Office by mail: U.S. Department of Justice, Office

If you believe you are eligible to vote and have difficulty registering, contact the appropriate state agency, usually the state's Board of Elections. You may also contact your state agency to obtain information about the latest changes to election law in your state. The federal website www.usa.gov provides contact information for each state election agency. If this agency is unable to help you, or if you want to report a problem, you may contact:

U.S. Department of Justice
Civil Rights Division
Voting Section
950 Pennsylvania Avenue AV NW
4CON 8th Floor
Washington, DC 20530

Phone: (202) 307-2767; (800) 253-3931 (toll-free)

Fax: (202) 307-3961

Email address: voting.section@usdoj.gov

<http://www.justice.gov/crt/voting-section>

G. Conclusion

There are many legal issues you may face after your release from prison. For instance, it may be difficult to obtain housing. Some laws may permit or require that you to be denied public housing assistance based on your criminal conviction. There are also restrictions on public benefits that may affect you because of your conviction. In addition, getting a job after you are released can be difficult. Federal or state laws may restrict you from holding certain jobs, but in general you should be able to find work in most areas.

Other issues that may be affected by your criminal conviction include child custody, your ability to serve in the military, and your ability to vote. Almost all of these areas are governed by both federal and state laws, so you should be sure to familiarize yourself with the state law applicable to you. This will help you to navigate the different issues that will arise upon your release.

APPENDIX A

CONTACT INFORMATION FOR HOUSING ASSISTANCE AGENCIES

For information regarding federal public housing assistance:

U.S. Department of Housing and Urban Development (HUD)
451 7th Street, SW
Washington, DC 20410
Phone: (202) 708-1112
TTY: (202) 708-1455
<http://www.hud.gov>

For a directory of state and local housing authorities, agencies, and organizations nationwide:

The Public Housing Authorities Directors Association
http://www.phada.org/ha_list.php

New York State Housing and Urban Development Offices

New York City

Jacob K. Javits Federal Building
(Broadway between Duane & Worth Streets)
26 Federal Plaza, Suite 3541
New York, NY 10278-0068
Phone: (212) 264-8000
Fax: (212) 264-0246
Email: NY_Webmanager@hud.gov

Albany

52 Corporate Circle
Albany, NY 12203-5121
Phone: (518) 464-4200
Fax: (518) 464-4300
Email: NY_Webmanager@hud.gov

Buffalo

Lafayette Court
465 Main Street, 2nd Floor
Buffalo, NY 14203-1780
Phone: (716) 551-5755
Fax: (716) 551-5752
Email: NY_Webmanager@hud.gov

For information about public housing assistance in New York City:

(NYCHA)
250 Broadway
New York, NY 10007
Phone: (212) 306-3000
<http://www.nyc.gov/html/nycha/html/home/home.shtml>

For information about and applications for Section 8 housing in New York City, contact a NYCHA application office:

Bronx/Manhattan

478 East Fordham Road (1 Fordham Plaza), 2nd Floor

Bronx, NY 10458

Phone: (718) 707-7771

Brooklyn/Staten Island

787 Atlantic Avenue, 2nd Floor

Brooklyn, NY 11238

Phone: (718) 707-7771

Queens

90-27 Sutphin Boulevard, 4th Floor

Jamaica, NY 11435

Phone: (718) 707-7771

For emergency shelter:

There are five drop-in centers run by the New York City Department of Homeless Services. The drop-in centers are located throughout the City. They provide hot meals, showers, laundry facilities, clothing, medical care, recreational space, employment referrals, and other social services. Staff can also help you find a safe and secure place to sleep. Some drop-ins operate twenty-four hours a day; others operate from 7:30am to 8:30pm. **Dial 311** to contact any drop-in center, receive directions, or obtain other information.

Manhattan

Olivieri Center for Women (7:30am to 8:30pm)

257 West 30th Street

New York, NY 10001

Mainchance (24 Hours)

120 E. 32nd Street

New York, NY 10017

Bronx

The Living Room (24 Hours)

800 Barretto Street

Bronx, NY 10474

Brooklyn

The Gathering Place (7:30am to 8:30pm)

2402 Atlantic Avenue

Brooklyn, NY 11233

Staten Island

Project Hospitality (7:30am to 8:30pm)

25 Central Avenue

Staten Island, NY 10036

APPENDIX B

STATE HUMAN SERVICES DEPARTMENTS/ ASSISTANCE FOUNDATIONS

Alabama

Alabama Department of Human Resources

Family Assistance Division

50 North Ripley Street

Montgomery, AL 36130

Phone: (334) 242-1773

http://dhr.alabama.gov/services/Family_Assistance/Family_Assistance_Program.aspx

Alaska

Alaska Temporary Assistance Program

P.O. Box 110640

Juneau, AK 99811-0640

Phone: (907) 465-3347

Fax: (907) 465-5254

<http://dhss.alaska.gov/dpa/Pages/atap/default.aspx>

Arizona

Arizona Department of Economic Security

Family Assistance Administration

1717 W. Jefferson Street

Phoenix, Arizona 85007

Phone: (855) 432-7587

<https://des.az.gov/>

Arkansas

Arkansas Department of Human Services

Donaghey Plaza

P.O. Box 1437

Little Rock, AR 72203-1437

Phone: (501) 682-1001

<http://humanservices.arkansas.gov/Pages/default.aspx>

California

California Department of Social Services

744 P Street

Sacramento, CA 95814

Phone: (916) 445-6951

<http://www.dss.cahwnet.gov/cdssweb/>

Colorado

Colorado Works

1575 Sherman St.

Denver, CO 80203-1714

Phone: (303) 866-5700

Fax: (303) 866-4047

<http://www.cdhs.state.co.us/>

Connecticut

State of Connecticut
Department of Social Services
25 Sigourney Street
Hartford, CT 06106-5033
Phone: (800) 842-1508 (toll-free)
<http://www.ct.gov/dss/site/default.asp>

Delaware

The Division of Social Services
1901 N. Du Pont Hwy., Lewis Building
New Castle, DE 19720
Phone: (302) 255-9668
Fax: (302) 255-4433
<http://dhss.delaware.gov/dhss/>

District of Columbia

Department of Human Services
Income Maintenance Administration
64 New York Avenue, NE, 6th Floor
Washington, DC 20002
Phone: (202) 671-4200
Fax: (202) 671-4325
<http://dhs.dc.gov/>

Florida

Work Force Florida
1580 Waldo Palmer Lane, Ste. 1
Tallahassee, FL 32308
Phone: (850) 921-1119
Fax: (850) 921-1101
<http://www.workforceflorida.com>

Georgia

Georgia Department of Human Resources
Division of Family & Children Services
2 Peachtree Street, N.W. Suite 18-486
Atlanta, Georgia 30303
Phone: (404) 651-9361, or (877) 423-4746
<http://dfcs.dhr.georgia.gov>

Guam

Department of Public Health and Social Services
Bureau of Social Services Administration
194 Hernan Cortez Avenue,
Terlaje Professional Building, 3rd Floor, Ste. 309
Hagatna, Guam 96932
Phone: (671) 475-2653 or (671) 475-2672
Fax: (671) 477-0500
<http://www.dphss.guam.gov/>

Hawaii

Department of Human Services
1390 Miller Street, Room 209
Honolulu, HI 96813
Mailing Address:
P.O. Box 339
Honolulu, HI 96809-0339
Phone: (808) 586-4997
Fax: (808) 586-4890
<http://www.hawaii.gov/dhs>

Idaho

Idaho Department of Health & Welfare
450 W. State Street #9
Boise, ID 83720-0036
Phone: (208) 334-5500
<http://www.healthandwelfare.idaho.gov>

Illinois

Department of Human Services
401 S. Clinton St.
Chicago, IL 60607
Phone: (800) 843-6154 (toll-free)
<http://www.dhs.state.il.us>

Indiana

Indiana Family and Social Services Administration
P. O. Box 7083
Indianapolis, IN 46207-7083
Phone: (800) 457-8283 (toll-free)
<http://www.in.gov/fssa>

Iowa

Iowa Department of Human Services
Family Investment Program
Hoover State Office Building
1305 E. Walnut Street
Des Moines, Iowa, 50319
Phone: (800) 972-2017 (toll-free) or (515) 281-5454
Fax: (515) 281-4980
<http://www.dhs.state.ia.us>

Kansas

Kansas Department for Children and Families
915 SW Harrison St.
Topeka, KS 66612
Phone: (888) 369-4777
<http://www.dcf.ks.gov/services/ees/Pages/default.aspx>

Kentucky

Cabinet for Health and Family Services
Office of the Secretary
275 East Main Street
Frankfort, KY 40621
Phone: (800) 372-2973 (toll-free)
<http://chfs.ky.gov>

Louisiana

Department of Children & Family Services
627 N. Fourth St.
Baton Rouge, LA 70802
Phone: (888) 524-3578
<http://www.dcfsls.la.gov/>

Maine

Office for Family Independence
11 State House Station
19 Union Street
Augusta, ME 04333
Phone: (207) 624-4168
Fax: (207) 287-5096
<http://www.maine.gov/dhhs/ofi/services/home.html>

Maryland

Department of Human Resources
Constituent Services Unit
311 West Saratoga Street
Baltimore, MD 21201
Phone: (800) 332-6347 (toll-free)
<http://www.dhr.state.md.us>

Massachusetts

Health and Human Services
Department of Transitional Assistance
One Ashburton Place, 11th Floor
Boston, MA 02108
Phone: (617) 573-1600
<http://www.mass.gov/eohhs/>

Michigan

Department of Human Services
235 S. Grand Avenue
P.O. Box 30037
Lansing, MI 48909
Phone: (855) 275-6424
<http://www.michigan.gov/dhs>

Minnesota

Department of Human Services
444 Lafayette Road North
Saint Paul, MN 55155
Phone: (651) 431-2000
<http://mn.gov/dhs/>

Mississippi

Department of Human Services
Division of Economic Assistance
750 North State Street
Jackson, MS 39202
Phone: (800) 345-6347 (toll-free)
<http://www.mdhs.state.ms.us/ea.html>

Missouri

Department of Social Services
Broadway State Office Building
P.O. Box 1527
Jefferson City, MO 65102-1527
Phone: (573) 751-4815
Fax: (573) 751-3203
<http://www.dss.mo.gov>

Montana

Department of Public Health & Human Services
111 North Sanders St.
Helena, MT 59601
Phone: (406) 444-5622
<http://www.dphhs.mt.gov/>

Nebraska

Department of Health & Human Services
301 Centennial Mall South
Lincoln, NE 68509-5044
Mailing Address:
P.O. Box 95026, Lincoln
Nebraska 68509-5026
Phone: (402) 471-3121
<http://dhhs.ne.gov/Pages/default.aspx>

Nevada

Human Resources, Division of Welfare and Supportive Services
1470 College Parkway
Carson City, NV 89706
Phone: (775) 684-0500
Fax: (775) 684-0646
<http://dwss.nv.gov/>

New Hampshire

Department of Health and Human Services
Division of Family Assistance
129 Pleasant Street
Concord, NH 03301-3857
Phone: (603) 271-9700
<http://www.dhhs.state.nh.us>

New Jersey

Department of Human Services
222 South Warren Street
P.O. Box 700
Trenton, NJ 08625-0700
Phone: (609) 292-3717
<http://www.state.nj.us/humanservices/>

New Mexico

Human Services Department
P.O. Box 2348
Santa Fe, NM 87504-2348
Phone: (505) 827-7130
<http://www.hsd.state.nm.us/>

New York

Office of Temporary and Disability Assistance
40 North Pearl Street
Albany, NY 12243
Phone: (800) 342-3009 (toll-free)
<http://www.otda.state.ny.us>
New York City Human Resources Administration
Phone: 718-557-1399

North Carolina

Department of Health and Human Services
Division of Social Services
2401 Mail Service Center
Raleigh, NC 27601
Phone: (919) 733-3055
Fax: (919) 334-1018
<http://www.dhhs.state.nc.us/dss>

North Dakota

Department of Human Services
Economic Assistance Policy Division
600 E. Boulevard, Dept. 325
Bismarck, ND 58505-0250
Phone: (800) 755-2716 (toll-free)
<http://www.nd.gov/dhs/services/>

Ohio

Department of Job and Family Services
Office of Family Stability
30 E. Broad St., 32nd Floor
Columbus, OH 43215-3414
Phone: (614) 466-4815
Fax: (614) 466-1767
<http://jfs.ohio.gov/ofam/index.stm>

Oklahoma

Department of Human Services
Family Support Services Division
P.O. Box 25352
Oklahoma City, OK 73125
Phone: (405) 521-3646
<http://www.okdhs.org/>

Oregon

Department of Human Services
500 Summer St. NE
Salem, OR 97301-1063
Phone: (503) 945-5944
Fax: (503) 945-6214
<http://www.oregon.gov/DHS>

Pennsylvania

Department of Public Welfare
P.O. Box 2675
Harrisburg, PA 17105-2675
Phone: (800) 692-7462 (toll-free)
<http://www.dpw.state.pa.us>

Puerto Rico

Department of the Family
P.O. Box 11398
Hato Rey, PR 00917
Phone: (787) 294-4900
<http://www.familia.gobierno.pr/>

Rhode Island

Department of Human Services
Louis Pasteur Building #57
600 New London Ave.
Cranston, RI 02920
2001 Mail Service Center
Raleigh, NC 27699-2001
Phone: (919) 855-4800
<http://www.ncdhhs.gov/>

South Carolina

Department of Social Services
P.O. Box 1520
Columbia, SC 29202-1520
Phone: (803) 898-7601
<https://dss.sc.gov/>

South Dakota

Department of Social Services
700 Governors Drive
Pierre, SD 57501
Phone: (605) 773-3165
<http://dss.sd.gov>

Tennessee

Department of Human Services
400 Deaderick Street, 15th Floor
Nashville, TN 37243-1403
Phone: (615) 313-4700
FAX: (615) 741-4165
<https://www.tn.gov/humanserv/>

Texas

Health and Human Services Commission
4900 North Lamar Blvd.
Austin, TX 78751-2316
Phone: (512) 424-6500
<http://www.hhsc.state.tx.us>

Utah

Department of Human Services
195 North 1950 West
Salt Lake City, UT 84116
Phone: (801) 538-4171
FAX: (801) 538-4016
<http://www.hs.utah.gov/>

Vermont

Economic Services Division
Department for Children and Families
103 South Main Street, Osgood 3
Waterbury, VT 05671-2401
Phone: (802) 241-2131
<http://dcf.vermont.gov/esd/>
Phone: (401) 462-5300
<http://www.dhs.ri.gov>

Virginia

Department of Social Services
801 E. Main St.
Richmond, VA 23219-2901
Phone: (800) 552-3431 (toll-free)
<http://www.dss.state.va.us>

U.S. Virgin Islands

Department of Human Services
1303 Hospital Ground Knud Hansen Complex Building A
St. Thomas, VI 00802
Phone: (340) 774-0930
<http://www.dhs.gov.vi>

Washington

Department of Social and Health Services
Constituent Services
P.O. Box 45130
Olympia, WA 98504-5130
Phone: (800) 737-0617 (toll-free)
<http://www.dshs.wa.gov>

West Virginia

Department of Health and Human Resources
One Davis Square, Ste. 100 E.
Charleston, WV 25301
Phone: (304) 558-0684
Fax: (304) 558-1130
<http://www.wvdhhr.org>

Wisconsin

Department of Workforce Development
P.O. Box 7946
Madison, WI 53707-7946
Phone: (608) 266-3131
<http://www.dwd.state.wi.us>

Wyoming

Department of Family Services
3rd Floor Hathaway Building
2300 Capitol Avenue
Cheyenne, WY 82002-0490
Phone: (307) 777-7561
FAX: (307) 777-7747
<http://dfsweb.wyo.gov/home>

APPENDIX C*

TABLE OF SELECTED NEW YORK STATE LAWS THAT BAR OR RESTRICT PEOPLE WITH CRIMINAL RECORDS FROM WORKING IN CERTAIN OCCUPATIONS

Industry or Career	Law	Restriction or Bar the Law Creates on Employment of People with Criminal Convictions
Banking	N.Y. BANKING LAW § 592-a (Consol. 2013)	§ 592-a gives the Superintendent the power to deny a certificate of registration as a mortgage broker if the applicant has been convicted of certain felonies. For a business applying for one if a director, officer, partner, agent, employee, or substantial stockholder has been convicted of certain felonies.
State Civil Service jobs	N.Y. CIV SERV. LAW § 50(4)(d) (Consol. 2013)	§50 allows the state civil service department to refuse to allow a person who has been found guilty of a crime to take any civil service examination or, if the person has already taken a civil service examination, to refuse to certify that person as eligible to take a civil service job.
Corrections	N.Y. CORRECT. LAW § 22-a (Consol. 2013)	§22-a bars anyone who has been convicted of a felony from serving as a corrections officer. It also gives the commissioner the discretion to bar the appointment of anyone who has been convicted of a misdemeanor if the employment of that person would not be “in the best interest of the department.”
Notary Public	N.Y. EXEC. § 130 (Consol. 2013)	§ 130 bars the appointment of notaries public who have been convicted of a wide range of felonies. It also allows the secretary of state to suspend or remove from office, for misconduct, notaries public who have been convicted of those felonies.
Security System Installation and Maintenance	N.Y. GEN. BUS. LAW § 69-q(5) (Consol. 2013)	§ 69-q requires employers of those who will install, service, or maintain security or fire alarm systems to submit fingerprints of all employees to the government so that the Division of Criminal Justice Services can perform a criminal background check for each employee. It also bars any employee that was convicted of a felony from being employed to install, service, or maintain security or fire alarm systems.
Private Investigators, Bail Enforcement Agents, and Private Security Agencies	N.Y. GEN. BUS. § 81(2)(d) (Consol. 2013)	§81 prohibits employers who are licensed as private investigators, bail enforcement agents, or private security agencies from hiring persons convicted of any felonies and certain misdemeanors.
Security Guards	N.Y. GEN. BUS. LAW § 89-g(3)(a) (Consol. 2013);	§ 89-g makes it unlawful for security guard companies to hire persons convicted of “serious offenses” to work as security guards and gives the secretary discretion to bar hiring of misdemeanants to work as security guards in cases where the misdemeanor of which the

	N.Y. GEN. BUS. LAW § 89-1(2)(a) (Consol. 2013)	<p>person was convicted of committing “bears such a relationship to the performances of the duties of a security guard, as to constitute a bar to employment.”</p> <p>§89-1 authorizes the secretary to suspend or revoke a security guard’s registration card if the security guard is convicted of a felony or certain misdemeanors. The security guard may request a hearing to contest the suspension.</p>
Child Care	N.Y. SOC. SERV. LAW § 390-b (3)(a) (2013)	<p>§390-b (3)(a) requires the office of Children and Family Services to reject a person’s application to be an operator of a child day care center, school age child care program, group family day care home, or family day care home if that person has been convicted of a felony that is a sex offense, a felony against a child, a felony involving violence, or a felony within the five years prior to the application for a drug-related offense unless the office determines, in its discretion, that approving the application will not in any way jeopardize the health, safety or welfare of the children in the center, program or home. It also allows the office of Children and Family Services to reject a person’s application to be an operator of a child day care center, school age child care program, group family day care home, or family day care home if that person has been convicted of any other crime.</p>

* This table does not provide a complete list of the bars against employment for people with criminal convictions imposed by New York State law – there are over 100. The law is always changing, so you should check the law that applies to the particular jobs you want.

APPENDIX D

CONTACT INFORMATION FOR EX-OFFENDER ASSISTANCE ORGANIZATIONS

Legal Action Center

Phone: (800) 223-4044 (toll-free)

<http://www.lac.org>

New York:

225 Varick Street

New York, NY 10014

Phone: (212) 243-1313

Phone: (800) 223-4044 (toll-free)

E-mail: lacinfo@lac.org

District of Columbia:

236 Massachusetts Avenue NE., Suite 505

Washington, DC 20002-4980

Phone: (202) 544-5478

E-mail: lacdc@lac.org

Office of Community Outreach Services: Correctional Facilities and Ex-Inmates

The New York Public Library

455 Fifth Avenue

New York, NY 10016

Phone: (212) 340-0812

<http://www.nypl.org/help/community-outreach/correctional-services>

The Fortune Society

29-76 Northern Blvd.

Long Island City, NY 11101

Phone: (212) 691-7554

E-mail: info@fortunesociety.org

<http://www.fortunesociety.org>

Community Resources for Justice

355 Boylston Street

Boston, MA 02116

Phone: (617) 482-2520

E-mail: crj@crjustice.org

<http://www.crjustice.org/>

Offender Aid and Restoration

1400 North Uhle Street, Suite 704

Arlington, VA 22201

Phone: (703) 228-7030

Fax: (703) 228-3981

Email: Info@OARonline.org

<http://www.oaronline.org>

The Osborne Association

809 Westchester Avenue
Bronx, NY 10455
Phone: (718) 707-2600
Fax: (718) 707-3102
<http://www.osborneny.org>
175 Remsen Street, 8th Floor
Brooklyn, NY 11201
Phone: (718) 637-6560
Fax: (718) 237-0686

25 Market St., 6th Floor
Poughkeepsie, NY 12601
Phone: (845) 345-9845
Fax: (845) 849-0621

Center for Community Alternatives

39 West 19th St, 10th Floor
New York, NY 10011
Phone: (212) 691-1911
<http://www.communityalternatives.org>

Brooklyn Office
25 Chapel Street, 7th Floor
Brooklyn, NY 11201
Phone: (718) 858-9658
Fax: (718) 858-9670
E-mail: ccachapel@communityalternatives.org

Syracuse Office
115 E. Jefferson Street, Suite 300
Syracuse, NY 13202
Phone: (315) 422-5638
Fax: (315) 471-4924
Email: cca@communityalternatives.org

Rochester Office
228 South Plymouth Avenue
Rochester, NY 14608
Phone: (585) 328-8230
Fax: (585) 328-8232
Email: cca-rochester@communityalternatives.org

East New York Office
100 Pennsylvania Ave., 2nd Floor
Brooklyn, NY 11207
Phone: (929) 234-3636
E-mail: cca-eny@communityalternatives.org

Exodus Transitional Community

2271 3rd Avenue, 2nd Floor

New York, NY 10029

Phone: (917) 492-0990

E-mail: info@etcny.org

<http://www.etcny.org>

Center for Employment Opportunities

32 Broadway, 15th Floor

New York, NY 10004

Phone: (212) 422-4430

<http://www.ceoworks.org>

CHAPTER 38

RIGHTS OF YOUTH IN PRISON*

A. Introduction

1. Goals of this Chapter

This chapter discusses the rights and treatment of young people in state and federal prison or juvenile detention facilities.

First, this Chapter will discuss the different ways that young people are categorized and convicted of crimes. It will then talk about the rules the government must follow when it tries to convict young people accused of crimes and what you should do if the government did not follow those rules.

Second, this Chapter will tell you about your rights while you are in prison. When the government puts you in prison, it has to obey certain rules to make sure that your rights are protected. If these rules are not being followed, you can file a special complaint (a type of lawsuit): either a Section 1983 claim when filed against a state government,¹ or a *Bivens* claim when filed against the federal government.² If you convince a court that you are not being treated properly, the court may issue an “injunction,” which is an order that will force your caretakers to provide you with better treatment.

2. Are you a “juvenile”?

The first thing you need to know is whether you were tried as a “juvenile”. Majority age (the age when you legally become an adult) will depend on the specific rules of the state in which you were convicted. In many states, the law says you are an adult when you are seventeen or eighteen. If you were accused of committing a crime before you reached majority age, then you were likely tried as a “juvenile”. Even if you were tried as an adult, the law may give you certain young people protections, such as placement in a “juvenile facility”. This Chapter will provide you with information about the specific legal protections that you have.

If you were accused of breaking a federal law before you turned eighteen, then you were likely tried as a “juvenile”. However, there are a few exceptions to this rule, which this Chapter will discuss below.

If you were accused of breaking a state law, then you need to know the particular laws of your state on “juveniles”. In some states, you may be considered an adult before you reach eighteen, depending on the type of offense and your age. For example, in North Carolina, you are considered an adult if you commit a crime when you are sixteen or older. Similarly, you are considered an adult if you commit a crime when you are seventeen or older in Georgia, Michigan,³ Missouri, Texas, and Wisconsin.⁴ In all other states, you are generally considered a “juvenile” for crimes you committed before you turned eighteen, unless you are moved to adult court for a special reason. This Chapter will discuss some of these special reasons below.

* This Chapter was rewritten by Kristin Lieske, based in large part on previous versions written by Kat Stoller and Valentina M. Morales.

1. For a detailed description of a Section 1983 claim, see *JLM*, Chapter 16, “Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law.”

2. The *Bivens* cause of action, which generally has the same standards as a Section 1983 claim, was established by the Supreme Court in *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397, 91 S. Ct. 1999, 2005, 29 L. Ed. 2d 619, 627 (1971).

3. As of October 21, 2021, 17-year-olds in Michigan will be tried as “juveniles.” See S.B. 102, 2019 Leg., Reg. Sess. (Mi. 2019).

4. See Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. OF STATE LEGISLATURES, (Jan. 11, 2019), available at <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> (last visited Mar. 10, 2020). You should also note that for status offenses, abuse, neglect, and dependency matters, you may be tried as a juvenile in many states.

3. Why are young people treated differently than adults?

Laws treat young people differently from adults for a few reasons. First, because young people are not considered to be as mature as adults, young people cannot understand why their actions were wrong the same way adults can. Also, young people may be more influenced by peer pressure. Second, people think young people are less dangerous to the public than adults. Third, people think it is easier to teach young people to follow the law in the future. Finally, the government thinks that young people can be taught why the crimes they committed are wrong. Therefore, the goals of the “juvenile justice system” are to hold you responsible for your actions and provide you with treatment and education.⁵

4. Differences between the Adult Criminal System and “Juvenile” Delinquency System

First, the adult criminal justice system is punitive, which means it focuses on punishing people for breaking the law. Adult offenders are put in prison as punishment for their actions and to protect the community. The “juvenile” delinquency system is usually “rehabilitative,” which means that it focuses on teaching young people who commit criminal offenses to follow the law. This means the “juvenile” system focuses on fixing criminal behavior and improving a young person’s life.⁶ Some states, however, also include punishment as a goal.

Second, the adult criminal justice system focuses on the crime, not the offender. For example, in adult criminal cases, the only question is whether you committed the crime. If a jury finds that you committed the crime, then you will be punished. The “juvenile” system, however, places greater emphasis on the offender. The court is interested in whether you committed the crime, why you committed the crime, and what can be done to prevent you from committing a crime in the future.

Third, young people sometimes have different constitutional rights than adults. Defendants in the adult criminal system have certain constitutional rights, such as a right to a jury trial and to a lawyer. Young people do not have all of the same constitutional rights as adults.⁷ For example, young people do not always have the rights to a speedy trial⁸ or to a jury trial.⁹

Fourth, in the adult criminal system, all proceedings are open to the public unless the judge orders that they are closed for some special reason. A proceeding is an appearance in court in which you, the judge, and lawyers are all present. The proceedings include the trial and events before the trial. However, in most states’ “juvenile” delinquent systems, proceedings are confidential. This means the courtrooms are not open to the public and the full names of accused young people are kept private.

5. See *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1196, 161 L. Ed. 2d 1, 21–22 (2005) (discussing general differences between youth and adult offenders, that, when taken together, demonstrate that “juvenile offenders” cannot reliably be classified as among the worst offenders); see also *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 2698, 101 L. Ed. 2d 702, 718 (1988) (holding that the differences between youth and adult offenders indicate that less culpability should attach to a crime committed by a young person than to a comparable crime committed by an adult). But see, e.g., *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 843 (9th Cir. 2006) (declining to consider the defendant’s age at the time of the offense in determining his status under a federal law requiring deportation for the commission of certain offenses).

6. See *Kent v. United States*, 383 U.S. 541, 554, 86 S. Ct. 1045, 1054, 16 L. Ed. 2d 84, 93–94 (1966) (describing the role of the Juvenile Court); see also Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 175–176 (2007).

7. See *In Re Gault*, 387 U.S. 1, 14, 31–58, 87 S. Ct. 1428, 1436, 1445–1460, 18 L. Ed. 2d 527, 538, 548–563 (1967) (discussing the basic due process rights young people have in court); *O’Brien v. Marshall*, 453 F.3d 13, 17–18 (1st Cir. 2006) (holding that the Fifth Amendment is not applicable in “juvenile” court transfer hearings).

8. *Sadler v. Sullivan*, 748 F.2d 820, 827 (3d Cir. 1984) (holding that a young person does not have a constitutional right to a speedy trial until he loses the protections of the juvenile court system and becomes subject to penalties faced by adults); *United States v. Hill*, 538 F.2d 1072, 1077 (4th Cir. 1976) (young people do not have a Sixth Amendment claim for right to speedy trial).

9. See *United States v. Torres*, 500 F.2d 944, 948 (2d Cir. 1974) (finding no constitutional right to jury trial); *Cotton v. United States*, 446 F.2d 107, 110 (8th Cir. 1971) (finding no constitutional right to jury trial); *United States v. King*, 482 F.2d 454, 455–456 (6th Cir. 1973) (finding no constitutional right to jury trial); *United States v. James*, 464 F.2d 1228, 1230 (9th Cir. 1972) (finding no constitutional right to jury trial).

Also, the judge may order a young person's record to be sealed. This means that once you are an adult, your "juvenile offenses" will not be part of a permanent criminal record.¹⁰

Fifth, when you are found guilty as an adult in the adult criminal system, your sentence is based on your crime and criminal record. You cannot be forced to serve more time than the maximum punishment decided by the judge unless you commit another crime.

However, when you are found guilty as a young person in the "juvenile" delinquency system, you are given a "disposition" instead. A disposition is the time you must serve at a facility or in a program for the crime. A disposition is based on many things, including why you committed the crime, how serious the crime was, and whether you have committed crimes before. Dispositions are "indeterminate" (not given for a set amount of time) because the exact amount of time you have to serve may not be decided all at once and is not based on the specific crime for which you are convicted. Instead, it depends on your "rate of rehabilitation," which means the amount of time the court thinks you need to correct your behavior. The court can extend the amount of time you have to serve if the judge thinks that you have not corrected your behavior at the end of your disposition.

Young people who commit criminal offenses are not always sent to detention facilities. There are other programs, often run by juvenile courts, called "alternatives to incarceration" or "ATIs," as well as community- and residential-based programs, where young people may be sent. You will learn more about these later in this Chapter.

When you are charged with a crime, there are rules that the government and its lawyers (the prosecutors) must follow. These rules create rights for people who have been accused of crimes (the defendants). If the government breaks these rules and violates your rights, then you can file an appeal and ask a higher court to review your conviction based on the specific mistake the government made. Part B of this Chapter explains the rules that the government must follow when it accuses you of breaking a federal law. Part C of this Chapter explains the rules that the government must follow when it accuses you of breaking a New York State law.

B. The Federal System

1. Procedure in the Federal System

The federal government must follow the rules in the Juvenile Justice and Delinquency Prevention Act (or "JJDP") in cases involving juvenile defendants. You can find the JJDP rules in Section 18 of the United States Code, Sections 5031–5042 (2006). If you are considered a "juvenile" and the government prosecutor did not follow one of the JJDP rules in your case, you may be able to appeal your conviction. If your appeal succeeds, you may have your conviction vacated (reversed).¹¹ Read the rules below and think about whether the government followed them in your case. If you think the government broke any of the JJDP rules, you should tell your lawyer.

According to the JJDP, a "juvenile" is:

- (1) Anyone who is not yet eighteen years old; or
- (2) Anyone who is not yet twenty-one and who is accused of committing an act of "juvenile delinquency" before he was eighteen.¹²

10. However, it may be possible for "juvenile records" to be accessed for future use under limited circumstances. *See, e.g.*, *United States v. Washington*, 706 F.3d 1215, 1219 (10th Cir. 2012) (holding that under state law, prior juvenile adjudications may be used for sentencing and other purposes); *United States v. Carney*, 106 F.3d 315, 318 (10th Cir. 1997) (holding that under state law, a federal court can use a defendant's sealed "juvenile records" when sentencing him as an adult for manslaughter). Moreover, in New York, family court proceedings are open to the public and you must make a motion to seal court records after a finding of delinquency if you want your records to be sealed. N.Y. FAM. CT. §375.2 (McKinney 2008).

11. *United States v. Juvenile Male*, 595 F.3d 885, 906 (9th Cir. 2010), (instructing district court to vacate defendant's convictions if a violation of JJDP procedure was found); *United States v. Chambers*, 944 F.2d 1253, 1260–1261 (6th Cir. 1991), *superseded by statute on other grounds*, (vacating defendants' convictions where the Attorney General did not complete the JJDP procedures until after defendants were convicted).

12. *See* 18 U.S.C. § 5031.

If you fit one of these two definitions of a “juvenile”, then the JJDPa probably applies to your case. The JJDPa does contain some complicated exceptions if you are in New York, which are explained in Part C(1) below.

The JJDPa contains two sets of rules the government must follow. The first covers the “certification” of your case. The second covers “determining the status” of your case.

The first thing the federal government must do when prosecuting a juvenile is to “certify” the case. This means that the prosecutor representing the government must provide a document¹³ to the court that states that:

- (1) There is a substantial “federal interest” in the case; and
- (2) The state where the crime happened does not have or refuses to exercise jurisdiction; or
- (3) The state with jurisdiction does not have adequate programs or services for juveniles; or
- (4) The offense charged is a violent felony, a drug trafficking or importation offense, or a firearms offense.¹⁴

If you live in New York and are on trial in a federal court for a federal crime, the first thing the government must do is explain why there is a “federal interest” in your case. This means that the government must explain why your crime is dangerous to people in your home state and to people in other states, too. If you were accused of selling drugs in New York, for example, the government would probably say that there is a federal interest in prosecuting your case because the drugs you sold might end up in another state, where they could hurt other people. It is not always clear why some things are considered federal interests and others are not.

Next, the government must explain why the federal court should hear your case instead of the state court. The government can do this in a few different ways. It can say that the state court does not want to hear your case, that the state does not offer the programs and services you will need if you are convicted (like a juvenile detention center), or that your crime involved violence, drugs, or guns. The federal government does not need to do much to establish a federal interest in your case as long as it meets these minimal requirements of the JJDPa.

Unfortunately, it is very hard to challenge certification mistakes. The majority of federal circuit courts believe that as long as there was “substantial” good faith compliance with the certification requirements (that the prosecutor did his best to follow the rules), you may not appeal certification mistakes. This means that most courts will not review certification mistakes unless the government made no effort at all to comply with the JJDPa’s certification requirements.¹⁵

You will have the best chance of challenging certification if your case was brought in the Fourth Circuit.¹⁶ The Fourth Circuit includes all federal courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. Although all federal courts generally follow the same rules, the federal courts in these states are especially willing to listen to complaints about certification from incarcerated youth. The courts in other circuits, which cover other regions of the United States, have not, and

13. These documents do not have to be detailed. An example of a proper certification is a piece of paper saying: “Comes now Joseph L. Famularo, United States Attorney for the Eastern District of Kentucky, who, after investigation, and pursuant to the provisions of Title 18, United States Code, § 5032, hereby certifies to this court that the offenses for which this juvenile, [John Doe], is charged herein by information, include a crime of violence, that is a felony under the laws of the United States, and that there is a substantial federal interest in the case and the offense to warrant the exercise of federal jurisdiction.” *United States v. Doe*, 226 F.3d 672, 677 n.2 (6th Cir. 2000).

14. This fourth condition is more specific in the statute: “[T]he offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. [§] 841), or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. [§§] 952(a), 953, 955, 959, 960(b)(1)(2)(3)), § 922(x) or section 924(b), (g), or (h) of [Title 18 U.S.C.], and that there is a substantial Federal interest . . . to warrant the exercise of Federal jurisdiction.” 18 U.S.C. § 5032.

15. *See United States v. Wong*, 40 F.3d 1347, 1369 (2d Cir. 1994). *But see Impounded (Juvenile I.H.)*, 120 F.3d 457, 461 (3d Cir. 1997) (concluding that the JJDPa mandates strict and literal compliance with the certification rules).

16. *United States v. T.M.*, 413 F.3d 420, 424 (4th Cir. 2005) (“[T]he Fourth Circuit is the only circuit that requires a more searching review of the government’s assertions in its § 5032 certifications.”); *see, e.g., United States v. C.A.M.*, 251 F. App’x 194, 195 (4th Cir. 2007) (*unpublished*) (ordering of transfer vacated and remanded).

probably will not hear certification appeals.¹⁷ Therefore, if you think the government did not follow the rules in certifying your case and you are in one of the states in the Fourth Circuit, then you should immediately tell your lawyer about the mistake. If you think there was a certification mistake and you are not in one of those states, then you should still check with your lawyer. However, you probably will not be able to challenge your conviction on certification grounds unless the government did not even try to follow the requirements.

The second set of rules the federal government must follow under the JJDPa relates to “determining status.” Your “status” refers to whether you are a juvenile or an adult. Although the government will usually consider you a juvenile if you committed the crime before your eighteenth birthday, there are some complicated rules on this. “Determining your status” means applying the rules to determine whether you will be tried as a juvenile or an adult.

After the federal government has certified your case, there are four things that can happen:

- (1) You may be tried as a “juvenile”;
- (2) You may agree to be tried as an adult;
- (3) The law may require that you be tried as an adult; or
- (4) The judge may decide to try you as an adult, even if the law does not require it.¹⁸

You should know which of these options the government followed in your case. The rest of this Section will explain the rules the government must obey when proceeding with any of these options. As you read, if you see a rule that you think the government did not obey in your case, then you should tell your lawyer.

2. Being Tried as a Juvenile in the Federal System¹⁹

(a) That Apply Before Your Hearing

Generally, youth offenders must be brought to trial within thirty days and can only be held in certain types of places while waiting for trial.²⁰ This “speedy trial” rule means that your trial must

17. See, e.g., *United States v. Female Juvenile A.F.S.*, 377 F.3d 27, 32 (1st Cir. 2004) (agreeing with other circuits that the United States Attorney’s “certification of a substantial federal interest is an act of prosecutorial discretion that is shielded from judicial review”) (citing *United States v. Smith*, 178 F.3d 22, 25 (1st Cir. 1999)); *United States v. F.S.J.*, 265 F.3d 764, 771 (9th Cir. 2001) (holding that “the United States Attorney’s certification of a ‘substantial federal interest’ under § 5032 is not subject to judicial review except for such formalities as timeliness and regularity (e.g., signed by the proper official) and for allegations of unconstitutional prosecutorial misconduct”); *United States v. Doe*, 226 F.3d 672, 678 (6th Cir. 2000) (holding that “Congress did not intend that the Attorney General’s certification of the existence of a substantial federal interest be subject to judicial review for the sufficiency of the underlying facts”); *United States v. Jarrett*, 133 F.3d 519, 538 (7th Cir. 1998) (“We agree with the Government, as well as with the majority of courts to consider this question, that we cannot substantively review the Attorney General’s certification of a substantial federal interest”); *United States v. Juvenile Male J.A.J.*, 134 F.3d 905, 909 (8th Cir. 1998) (holding that certification of a substantial federal interest is an unreviewable act of prosecutorial discretion).

18. Additionally, under some state laws, after the entry of a guilty plea a young person may be sentenced as either a “juvenile” or an adult. See, e.g., *Gonzales v. Tafoya*, 515 F.3d 1097, 1107, 1128 (10th Cir. 2008) (where a 14-year-old was sentenced as an adult under New Mexico state law after pleading guilty to murder).

19. For a discussion of changing views regarding juvenile delinquency and the impact this has had on the treatment of young people in the federal system, see Juan A. Arteaga, Note, *Juvenile (In) Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051 (2002).

20. 18 U.S.C. §§ 5035, 5036 (stating that while waiting for trial, young people can only be detained in a juvenile facility or other appropriate place, not with adult criminals; young people must be tried within 30 days of detention, unless the “interest of justice” creates an exception; courts cannot use the excuse of having too many cases to hear). See *United States v. Female Juvenile A.F.S.*, 377 F.3d 27, 34 (1st Cir. 2004) (recognizing that the 30 day speedy trial period begins to run on the date a juvenile is taken into federal custody and continues to run, subject to certain exceptions, until the delinquent is “brought to trial.”); *United States v. Baker*, 10 F.3d 1374, 1397 (9th Cir. 1993) (holding that extensions of time applied for by defendant are excluded from calculation of delay and that delay in this particular case is acceptable in the interest of justice), *overturned on other grounds* by *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); see also *United States v. Juvenile Male*, No. 96–1270, 1996 U.S. App. LEXIS 28663, at *6 (2d Cir. Nov. 1, 1996) (*unpublished*) (holding that the time between the

begin within thirty days of the date you were arrested.²¹ If you are not brought to trial within thirty days, your case might be dismissed.²²

However, the courts have restricted thirty-day appeals, and it may be difficult to bring this type of claim successfully. For instance, many courts have said that if you caused the delay, or if you agreed to the delay, then you gave up your right to a speedy trial. A delay might also be okay if the court believes it is in the “interest of justice.”²³ Additionally, your case will not be dismissed if the delay was only because of the court’s busy schedule. In that situation, a judge with many cases to hear is allowed to hear your case after the thirty-day deadline. In addition, time taken for transfer hearings does not count toward the thirty days. Therefore, if the trial does not start until thirty-five days after your arrest because the transfer hearing took five days, those five days do not count and your speedy trial right has not been violated.²⁴

(b) Rules That Apply During Your Hearing

If you are tried as a “juvenile”, then you are given a “delinquency hearing” instead of a formal trial. In a juvenile delinquency hearing, the court must decide if you are “delinquent.” “Delinquent” is a word used to describe individuals younger than eighteen years old who have broken a United States law, which would be a crime if committed by an adult.²⁵ Note that there are fewer due process (constitutional) protections in a delinquency hearing (described in Section A(4) of this Chapter) than in the adult system.²⁶ However, there are a number of rules that the government must follow.

First, the hearing may not be open to the public.²⁷ Second, there will not be a jury at your hearing. The judge will make the decision by their self.

(c) At the End of Your Hearing

After deciding whether you are “delinquent” (whether you broke the law), the judge gives the “disposition,” which means the final status of the case. The judge has three choices: (1) give you probation, which is a period of release outside of prison supervised by a probation officer; (2) order you to be placed in a correctional facility, which may also include an order of a period of supervision after detention in the facility; or (3) suspend the findings of “juvenile delinquency” (decide not to impose any punishment). The judge may also order you to pay money to the victim to make up for the crime.²⁸

government’s filing of a motion to transfer to adult status and the court’s ruling on the motion is excluded from the 30 day requirement); *United States v. Romulus*, 949 F.2d 713, 716 (4th Cir. 1991) (finding that delay caused by defendant’s misrepresentation of age does not violate speedy trial requirement).

21. *See, e.g.*, *United States v. Female Juvenile*, A.F.S., 377 F.3d 27, 38 (1st Cir. 2004); *United States v. Wong*, 40 F.3d 1347, 1371 (2d Cir. 1994). *See also* *United States v. Romulus*, 949 F.2d 713, 716 (4th Cir. 1991) (quoting 18 U.S.C. § 5036 (1985) to illustrate the 30-day requirement).

22. 18 U.S.C. § 5036.

23. *See* *United States v. Doe*, 49 F.3d 859, 865—866 (2d Cir. 1995) (acknowledging that if a miscarriage of justice would result, the district judge may decline to follow the 30 day requirement and that this decision would be reviewable on appeal only for an abuse of discretion) (citing *United States v. Marrero*, 705 F.2d 652, 656 n.6 (2d Cir. 1983)); *United States v. Juvenile Male*, 595 F.3d 885, 896 (9th Cir. 2010). *See also* *United States v. Doe*, 571 F. App’x 656, 659 (10th Cir. 2014) (*unpublished*).

24. *See, e.g.*, *United States v. Wong*, 40 F.3d 1347, 1371 (2d Cir. 1994) (holding that the speedy trial rule was not violated when the government filed a motion on the 30th day of detention); *United States v. Romulus*, 949 F.2d 713, 716 (4th Cir. 1991) (finding that the delay between the government’s filing of a motion to transfer and the court’s approval of the motion was properly excluded from the speedy trial rule in the interest of justice).

25. 18 U.S.C. § 5031.

26. There are fewer ways for a young person to claim that the procedure of a juvenile court violates his constitutional rights, but there are certain due process rights that apply even in juvenile court. For a discussion of the basic due process rights that young people have in court, see *In Re Gault*, 387 U.S. 1, 31—58, 87 S. Ct. 1428, 1445—1460, 18 L. Ed. 2d 527, 548—563 (1967).

27. However, in some instances the district court has been granted discretion to permit public access to delinquency hearings on a case-by-case basis. *See, e.g.*, *United States v. A.D.*, 28 F.3d 1353, 1361 (3d Cir. 1994); *In re Washington Post Motion to Open Juvenile Detention Hearing*, 247 F.Supp.2d 761, 762—763 (D. Md. 2003).

28. 18 U.S.C. § 5037(a).

Dispositions may be different depending on your age. If you are under eighteen years old, then you may be given probation or put in a facility until you are twenty-one years old. If you are between eighteen and twenty-one years old, then you may get probation for up to three years or get put in prison for up to five years.²⁹

(d) After Your Hearing

First, no matter what happened, the government must seal all records after your hearing.³⁰ This means that people who were not involved in your case will not be able to see the records.³¹

Second, if the government did not follow any of the above rules at your hearing, then you have the right to appeal in two ways. The first way you can appeal is to use the government's mistake to appeal your entire conviction. If your appeal works, then you may have your conviction overturned or erased. The second way you can appeal is to challenge the mistake in order to get better living conditions. You can complain that you are not being treated fairly based on the rules that the government must follow for juveniles. If this challenge works, you may be able to switch to better living conditions or get into a new incarceration program. This challenge is described in detail in Part C below. If possible, try to get a lawyer or an adult to assist you with any legal papers. You should talk to your lawyer about your options and the type of appeal that would be most likely to help you.

The most important part of your appeal is the way you describe the facts of your case. Especially in juvenile cases, judges have a lot of power and can make decisions "in the interests of justice" in ways they cannot for adults. For example, this could mean the judge may ignore any mistakes made by the government and refuse to overturn the conviction if the facts of your crime make you sound like a dangerous threat to the community. As a result, you should be very careful about how you talk about your crime and yourself. You should also help the judge understand any circumstances or facts that might work in your favor. You should never lie to a judge because that is a crime, but you do not need to draw attention to the most serious parts of your crime either. You need to show the judge that you have "rehabilitative potential." This means you have to show that you want to change your life and that you will not commit crimes in the future. A judge looking at your case will try to figure out which is greater: your rehabilitative potential or the seriousness of your offense.

29. 18 U.S.C. § 5037(b).

30. Unlike regular criminal records, which anyone can get, you can only get "juvenile records" with special permission or procedures. *See* 34 U.S.C. § 11186; 18 U.S.C. § 5038. In some jurisdictions, including New York, "juvenile convictions" can be used to calculate a later adult sentence. *See, e.g.,* *United States v. Franklyn*, 157 F.3d 90, 99–100 (2d Cir. 1998) (considering prior "juvenile convictions" for putting the defendant in a higher sentence category, because his criminal history score did not show the seriousness of his criminal history since his convictions as a youth had not been counted for the score); *U.S. v. Matthews*, 205 F.3d 544, 548 (2d Cir. 2000) (at sentencing, trial judge could consider defendant's conviction as a youth under New York's youthful offender statute). Courts have mixed opinions about whether adult convictions or adult sentences are most important when figuring out a later sentence. Some courts have said that a young person must have received an adult sentence in order for that conviction to count when figuring out a later adult sentence. *See United States v. Mason*, 284 F.3d 555, 562 (4th Cir. 2002) (holding that defendant's prior conviction led to sentencing as a youth and so could not be counted as a predicate felony for purposes of figuring out if he was a "career offender," which would have led to a higher sentence). *But see United States v. Gregory* 591 F.3d 964, 967 (7th Cir. 2010) (holding that when deciding whether a conviction from before counts as a predicate felony, the most important factor is whether the defendant was convicted as an adult, not whether he was sentenced as an adult); *United States v. Jones*, 415 F.3d 256, 264 (2d Cir. 2005) (finding that when deciding career offender status, a youthful offender decision could count as an adult conviction if the defendant had pleaded guilty in an adult forum and had received and served a sentence of over a year in an adult prison); *U.S. v. Cruz* 136 F. App'x 386, 388–389 (2d Cir. 2005) (*unpublished*) (prior conviction from when defendant was a young person counts toward deciding if he was a career offender, when defendant had been convicted in an adult court and received and served an adult sentence, even though under state law, he was classified as a "youthful offender"); *U.S. v. Gregory*, 591 F.3d 964, 968 (7th Cir. 2010) (stating that a prior conviction counted for figuring out a future sentence because the defendants' sentences were for adult convictions even though they had served time in a youth, not in an adult prison).

31. State statutes (laws) may also require the sealing of "juvenile records." *See Donohue v. Hoey*, 109 F. App'x 340, 365 (10th Cir. 2004) (*unpublished*) ("[c]ourts have recognized that a state statute can seal records, thus creating a legitimate privacy expectation for a juvenile").

3. Being Tried as an Adult in the Federal System

(a) Agreeing to be Tried as an Adult

You may agree to be tried as an adult as part of a “plea agreement” in order to get a shorter sentence.³² In plea agreements, you and the prosecutor make a deal in which you plead guilty to a specific crime. In return for pleading guilty, the government recommends a lesser sentence than what you would face if you went to trial and were found guilty.

You should know, however, that you will not always get a shorter sentence by agreeing to being tried as an adult. Usually you need to have the right background. The sentencing guidelines in the federal system can sometimes be harsh for young people. They do not usually consider the defendant’s age as a reason for giving a shorter sentence. To be sure that you are making the right choice for yourself, speak with your lawyer.

To agree to be tried as an adult, you must go in front of the court and tell the judge that you know what you are doing and fully understand the legal results of being tried as an adult. Before you do this, you should talk to your lawyer and make sure that you really understand and that this is something you definitely want to do. If you do not understand, you should let the judge know that you are confused or need more information. The decision about whether to be tried as an adult is very important and impacts your future. Remember, being tried as an adult could affect future convictions and sentencing decisions you may face. It is your lawyer’s job to be your voice in court and to make sure that you understand what is going on so that you can make informed decisions. Do not be afraid to ask a lot of questions and speak up when you do not understand something.

In order for the government to try you as a “juvenile”, you must agree to that in writing. However, to be tried as an adult, you must give up your right and knowingly refuse to agree to be tried as a “juvenile.” In order for you to properly give up your right, the government has to meet certain requirements.³³

If you did not know that you had a right to be tried as a “juvenile”, then you probably did not agree to be tried as an adult.³⁴ Similarly, just because you did not agree to be tried as a “juvenile” does not mean there is enough evidence for the government to prove that you knowingly said you did not want to be tried as a “juvenile.” It also does not mean there is enough evidence to prove you gave up that right.³⁵

If you did not agree to be tried as an adult in front of a judge, or if you did not fully understand what you were doing, then you may be able to challenge your conviction for those reasons.

(b) Mandatory Transfer to Adult Status

Under the JJDPa, some young people in federal court must be tried as adults, whether or not they agree to it. According to the JJDPa, you must be tried as an adult if the alleged crime happened after you turned sixteen, the alleged crime involved physical force, and you were previously convicted of certain crimes listed in the statute. This is called mandatory transfer to adult status. As one court explained it, transfer of young people to adult status is mandatory “for purposes of prosecution where:

- (1) a young person, after his sixteenth birthday, allegedly commits an offense that would be a felony if committed by an adult;
- (2) the offense involved the use, attempted use, or threatened use of physical force, or, by its very nature, involved a substantial risk that physical force would be used in committing the offense; and

32. *See, e.g.,* Hernandez v. United States, 839 F. Supp. 140, 145 (E.D.N.Y. 1993) (noting that a young person consented to trial as an adult as part of a plea agreement).

33. 18 U.S.C. § 5032.

34. *See, e.g.,* United States v. Williams, 459 F.2d 903, 904 (2d Cir. 1972) (holding that in order to make an intelligent waiver of his right to be tried as a “juvenile”, the young person must in some manner be fully apprised of his rights and respective consequences of proceeding as an adult).

35. *See* United States v. Williams, 459 F.2d 903, 907 (2d Cir. 1972).

- (3) the young person ‘has previously been found guilty of an act which if committed by an adult would have been’ one of the enumerated offenses supporting discretionary transfer.”³⁶

Whether you have been convicted in the past is important when figuring out whether you will be transferred to adult status. If the government is arguing that you have to be transferred to adult status, the government is only allowed to bring up convictions that happened before the crime you are being accused of in your trial.

If your mandatory transfer was made because of a crime you were convicted of after you committed the crime that you are now being charged with, then you can appeal your transfer for this reason.³⁷ Also, if your transfer was made without a hearing, you can use this rule to challenge your transfer.³⁸

(c) Discretionary Transfer to Adult Status in the Federal System

Even if you do not agree to being tried as an adult and the government does not have enough evidence to make your transfer mandatory, your case might still be transferred to adult court. The discretionary parts of the JJDPa allow judges to transfer you to adult status in certain circumstances aside from the rules for mandatory transfer.³⁹ This means that a judge can still decide to try you as an adult even though he does not have to. When the government asks the judge for a discretionary transfer, there must be a separate, “discretionary transfer hearing” to decide whether you can be transferred to adult status.⁴⁰

(i) Discretionary Transfer Hearing

At the hearing, your record will have to be certified and then the court will look at certain things. The Attorney General must certify any “juvenile records” that you may have. This means that if you have gone to court for crimes as a youth before, the Attorney General must make sure the court has a copy of those records. If this certification has not happened yet, you can challenge the transfer. After certification, the court will decide whether or not to transfer you to adult status. The court should only transfer you if it is “in the interest of justice.”⁴¹ The court will consider the following factors to decide:

- (1) your age and social background (for example, where you grew up, your lifestyle, whether you were in foster care, your economic status, and whether you were the victim of physical or emotional abuse);
- (2) the nature of the crime you were accused of (e.g., whether the crime involved violence or whether someone was killed);
- (3) your prior “juvenile record” (e.g., whether you have been convicted of any crimes in the past and, if so, how many);
- (4) your present intellectual development and maturity (e.g., your current school year, whether you can read, whether you have any learning disabilities, whether you suffer from a psychological condition like schizophrenia or depression, and whether you can understand your actions and the effects they have on others);
- (5) your response to past treatments and the nature of those treatments (e.g., whether you have been treated in the past for similar problems and whether such treatment has worked); and

36. *United States v. Juvenile Male*, 844 F. Supp. 2d 333, 338 n. 5 (E.D.N.Y. 2012) (citing 18 U.S.C. § 5032).

37. *See* 18 U.S.C. § 5032; *see also* *United States v. Doe*, 74 F. Supp. 2d 310, 314 (S.D.N.Y. 1999).

38. *United States v. Rivera*, 912 F. Supp. 70, 73–74 (S.D.N.Y. 1995) (vacating criminal proceedings and forcing the government to start over when the government did not follow the steps required by the JJDPa).

39. 18 U.S.C. § 5032.

40. *See* 18 U.S.C. § 5032. For a list of factors that a judge must consider in deciding whether to approve a discretionary transfer, *see* *United States v. Ramirez*, 297 F.3d 185, 192 (3d Cir. 2002).

41. *United States v. Male Juvenile E.L.C.*, 396 F.3d 458, 461 (1st Cir. 2005) (requiring discretionary transfers to be in the interest of justice).

- (6) the availability of programs to treat any “behavioral problems” (whether there are treatment programs that can help you change).⁴²

The court will analyze these factors. Then, the court will weigh how likely your “rehabilitation” (changing your ways) is against your potential danger to the community (how much of a threat you are to the people around you).⁴³ The court will look at your entire situation. One single factor will probably not determine your chances.

(ii) Trying to Keep Your “Juvenile Status” at the Discretionary Transfer Hearing

Before your transfer hearing, you should tell your lawyer any information about your situation that is related to these six factors. Tell your lawyer as much about yourself and your history as you can. Let your lawyer know what you were thinking and why you behaved the way you did. You may also tell your lawyer that you really do not remember why you acted a certain way. Let them know if you have any problems with drugs or alcohol, if your life at home has been very difficult, or if you have problems learning in school.

It may be a good idea to get tested for a learning disability. If you have a history of poor performance in school, the judge might think you are unlikely to change. If you show that your poor performance is due to a learning disability, this may help you keep your “juvenile status.” If you keep your “juvenile status,” you can stay out of adult criminal court.

At the hearing, the judge can also consider any crimes you committed after the offense at issue but before the transfer hearing. So, you should do your best to avoid problems with the law during that time. It will help you during the hearing if you are on your best behavior. You should try to show signs that you can improve your behavior.

(iii) Challenging Your “Discretionary Transfer”

Generally, you can have your conviction vacated (reversed) if there was no discretionary transfer hearing and you were wrongly treated as an adult. You should not have been treated as an adult if you were under eighteen years old at the time of the alleged crime and under twenty-one years old when the prosecution began.⁴⁴

If there was a discretionary transfer hearing, then it may be hard to challenge the transfer. One way to challenge the transfer is to convince a court that the government did not show everything it was supposed to. The government has to prove by a “preponderance of the evidence” (evidence which is more credible and convincing than that presented by the government) that the reasons for transferring you to adult status outweighed the reasons for keeping your “juvenile status.”⁴⁵ There is

42. *United States v. Doe*, 113 F. Supp. 2d 604, 605 (S.D.N.Y. 2000) (describing the factors that a judge must consider in deciding whether to ask for a discretionary transfer).

43. *United States v. A.C.P.*, No. 04–159(PG), 2005 U.S. Dist. LEXIS 11306, at *5–6 (D.P.R. Apr. 28, 2005) (quoting *United States v. Male Juvenile E.L.C.*, 396 F.3d 458, 461 (1st Cir. 2005)) (“The purpose of the juvenile delinquency process is to ‘remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.’ The court must balance these important interests against ‘the need to protect the public from violent and dangerous individuals.’”).

44. *United States v. Rivera*, 912 F. Supp. 70, 73–74 (S.D.N.Y. 1995) (vacating criminal proceedings and forcing the government to start over when the government did not follow the steps required by the JJDPa).

45. *Rosado v. Corr.*, 109 F.3d 62, 63 (1st Cir. 1997) (adopting a preponderance of evidence standard for transfer to adult status in agreement with the 2d, 6th, and 11th circuits); *United States v. Doe*, 113 F. Supp. 2d 604, 605 (S.D.N.Y. 2000) (“Juvenile adjudication is presumed appropriate unless the government establishes by a preponderance of the evidence that prosecution as an adult is warranted.”); preponderance of the evidence here means that the government’s reasons for transferring you to adult status must be more likely true and convincing than not true. In other words, more than 50% of their evidence must support their case. This standard is lower than standards of evidence used in other contexts, including “clear and convincing” evidence and “beyond a reasonable doubt.”

a statutory presumption in favor of treatment as a “juvenile” (meaning the court will begin the process assuming you will be tried as a “juvenile”).⁴⁶

Although you must convince the judge that your rehabilitation is “likely,”⁴⁷ the government must still make its case. This means that the government must show that you are a bad candidate for rehabilitation. They may do this by showing, for example, that you are not likely to change even after help. The government may use this to argue that you should be charged as an adult because the rehabilitation services you need are not available to young people. The government must demonstrate “that it has investigated various options but it is still unable to find a suitable and available program” for your behavior problem.⁴⁸ This means that the government must have tried many times to find a program but could not find one that was good for you. If the government did not show this in your transfer hearing, you can appeal the transfer.

Courts do not usually overturn transfer decisions. Higher courts usually trust the lower courts’ decisions, and will only overturn decisions where there was an “abuse of discretion.” An “abuse of discretion” means the decision was completely unreasonable and obviously wrong. Because this is a very difficult standard to meet, higher courts generally do not overturn lower court decisions.

(d) Making Sure You Get JJDPa Protections if You Are Eligible

In the federal system, if you committed a crime before your eighteenth birthday and you are under twenty-one years old, you are a “juvenile.” Once you turn twenty-one years old, you are not a “juvenile” and the JJDPa does not protect you.

If you are currently older than eighteen years old and you are accused of committing a crime sometime after your eighteenth birthday, then you are not a “juvenile.” The JJDPa does not apply to you. However, if you are between eighteen and twenty-one years old and you are being charged for a crime that happened when you were younger than eighteen years old, then you are a “juvenile” under the JJDPa.

After your twenty-first birthday, the JJDPa no longer applies to you, even if the crime happened before your eighteenth birthday.⁴⁹ For this reason, prosecutors may try to delay your trial until after

46. *United States v. A.F.F.*, 144 F. Supp. 2d 797, 801 (E.D. Mich. 2001) (“[t]here is a statutory presumption in favor of treating the offender as a juvenile”). A court should deny a motion to transfer “where, all things considered, the juvenile has a realistic chance of rehabilitative potential in available treatment facilities during the period of his minority.” However, a “realistic chance” involves more than a futile or empty gesture toward rehabilitation. *United States v. E.K.*, 471 F. Supp. 924, 932 (D. Ore. 1979).

47. *United States v. Ramirez*, 297 F.3d 185, 193, (2d Cir. 2002) (determining that when a crime is especially serious, this may be given greater weight by the court than the other transfer factors); *United States v. L.M.*, 425 F. Supp. 2d 948, 954 (N.D. Iowa 2006) (recognizing that under the JJDPa, a court may consider in transfer proceedings the young person's background, intellectual development, and emotional maturity as they relate to the possibility of rehabilitation).

48. *United States v. Nelson*, 68 F.3d 583, 591 (2d Cir. 1995); *see also United States v. Doe*, 113 F. Supp. 2d 604, 609 (S.D.N.Y. 2000) (stating that the government must do more than “merely assert the unavailability of an appropriate juvenile rehabilitation program . . . to carry its burden of persuading the court that no such programs exist.”).

49. *United States v. Wright*, 540 F.3d 833, 839 (8th Cir. 2008) (stating that a defendant accused of committing a crime before his 18th birthday may not claim the protections of the JJDPa if criminal proceedings begin after the defendant reaches the age of 21); *United States v. Ramirez*, 297 F.3d 185, 191 (2d Cir. 2002) (observing that “courts have uniformly concluded that the applicability of the JJDPa is determined by the defendant’s age at the time of filing the [charges for crimes of ‘juvenile delinquency’]”); *United States v. Araiza-Valdez*, 713 F.2d 430, 432–433 (9th Cir. 1980) (finding that filing the complaint is not sufficient to begin proceedings under the JJDPa); *United States v. Doe*, 631 F.2d 110, 112–113 (9th Cir. 1980) (allowing treatment of a defendant over 21 years old as a “juvenile” where both charges and indictment were filed before defendant’s 21st birthday); *United States v. Hoo*, 825 F.2d 667, 669–670 (2d Cir. 1987) (explaining that defendant who is alleged to have committed a crime before his 18th birthday may not invoke the protection of the JJDPa if criminal proceedings begin after the defendant reaches the age of 21); *In re Martin*, 788 F.2d 696, 697–698 (11th Cir. 1986) (noting that the date of the indictment, not the complaint, determines the start date of criminal proceedings for the purpose of calculating age and application of JJDPa).

your twenty-first birthday.⁵⁰ The JJDPa does not always require that prosecution for acts that happened before your eighteenth birthday begin before your twenty-first birthday.⁵¹ In other words, if you are charged after your twenty-first birthday, you do not have an unconditional right to the protections of the JJDPa.⁵² The judge might decide to try you as an adult if the delay is your fault—for example, if you skipped bail or ran away.⁵³

You may be able to challenge this delay. Some courts may consider the delay to be a violation of your due process rights. To bring this challenge, you can show that the delay was due to “unjustifiable government conduct” or to “illegitimate prosecutorial motives” (when the prosecutor illegally wants to make things more difficult for you).⁵⁴ However, it is hard to prove this type of behavior on the part of the prosecutor, which is also called “prosecutorial misconduct.” Sometimes ongoing investigations delay prosecutions, and courts will usually accept this as a valid reason for prosecutor bringing the case late.⁵⁵

To challenge delays on the basis of prosecutorial misconduct, you must prove that:

- (1) The prosecutor delayed bringing your case on purpose. They did this to gain an unfair advantage or to serve an unlawful purpose;⁵⁶
- (2) Your case was hurt or “prejudiced” by this delay;⁵⁷ and

50. *United States v. Smith*, 851 F.2d 706, 709–710 (4th Cir. 1988) (saying that once a defendant is proceeded against as a “juvenile delinquent,” he may still be tried as a “juvenile” at the age of 21 if there are delays caused by the government, even if the delays are not in bad faith); *United States v. Doe*, 631 F.2d 110, 113 (9th Cir. 1980) (saying that intentional government delay of bringing charges until suspect may be 21 years old is unconstitutional).

51. *United States v. Wong*, 40 F.3d 1347, 1367 (2d Cir. 1994); *In re Martin*, 788 F.2d 696, 697–698 (11th Cir. 1986); *United States v. Araiza-Valdez*, 713 F.2d 430, 432–433 (9th Cir. 1980); *United States v. Doe*, 631 F.2d 110, 112–13 (9th Cir. 1980).

52. *United States v. Ramirez*, 297 F.3d 185, 192 (2d Cir. 2002) (explaining that the JJDPa doesn’t apply to persons indicted after they turned 21); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987) (noting that a defendant charged two weeks after 21st birthday was not entitled to protection of JJDPa for offenses committed prior to 18th birthday, even though delay was through no fault of his own); *United States v. Wai Ho Tsang*, 632 F. Supp. 1336, 1339 (S.D.N.Y. 1986) (noting that there is no guarantee of JJDPa treatment and no automatic presumption against delays resulting in changed status).

53. *United States v. Araiza-Valdez*, 713 F.2d 430, 432–433 (9th Cir. 1980) (explaining that through voluntary actions and ignoring the proceedings, the defendant had “outgrown” his status under JJDPa).

54. *See United States v. Scala*, 388 F. Supp. 2d 396, 399 (S.D.N.Y. 2005) (stating that in order for due process concerns to exist, there must have been (1) substantial prejudice to the defendant, and (2) delay was used intentionally as a tactical device); *United States v. Gross*, 165 F. Supp. 2d 372, 377–378 (E.D.N.Y. 2001) (explaining that dismissal is proper in situations where allowing the trial to proceed would be so unfair as to violate “fundamental conceptions of justice”) (citing *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 2049, 52 L. Ed. 2d 752, 759 (1977)); *United States v. Wai Ho Tsang*, 632 F. Supp. 1336, 1339 (S.D.N.Y. 1986) (holding that delay could violate the Due Process Clause if delay was due to unjustified conduct of the government or illegitimate motives of the prosecution); *see also United States v. Davilla*, 911 F. Supp. 127, 130 (S.D.N.Y. 1996) (stating that plaintiff could not simply allege improper delay, but must make some affirmative showing of an improper prosecutorial motive in the delay).

55. *See, e.g., United States v. Persico*, 10-CR-147 (S-4) (SLT), 2012 U.S. Dist. LEXIS 67881, at *23–25 (E.D.N.Y. 2012) (*unpublished*) (no violation of due process where defendant fails to meet “heavy burden” of proving improper motive for the delay); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987) (“due process clause does not require that decisions to prosecute be subjected to pre-indictment judicial inquiry simply because the timing of the decision affects the availability of juvenile procedures” without showing of improper prosecutorial motive); *United States v. Lovasco*, 431 U.S. 783, 791, 97 S. Ct. 2044, 2049, 52 L. Ed. 2d 752, 759 (1977) (affirming prosecutorial discretion in timing the indictment). *But see United States v. DeCologero*, 530 F.3d 36, 78 (1st Cir. 2008) (citing *United States v. Soto-Beniquez*, 356 F.3d 1, 25 (1st Cir. 2003) (acknowledging that generally the statute of limitations provides the primary protection of a defendant’s due process rights in the context of delay)).

56. *See United States v. Scala*, 388 F. Supp. 2d 396, 399 (S.D.N.Y. 2005); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987).

57. *See United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 465, 30 L. Ed. 2d 468, 481 (1971) (holding that the Due Process Clause requires the dismissal of an indictment because of pre-indictment delay in this case only when the delay causes “substantial prejudice to appellees’ rights to a fair trial and that the delay was an

- (3) The delay was the prosecutor's fault. The prosecutor cannot show that the delay was due to your actions or the actions of your attorney.⁵⁸

If you are under eighteen and tried as an adult, you are still protected by the JJDPa until you turn eighteen. When you turn eighteen, the JJDPa protections no longer apply to you. For example, once you turn eighteen, you can be held in a cell with other adults.

If you are under the age of majority and you are not transferred to adult status, you can only be convicted of "juvenile delinquency." You cannot be convicted of any other crime. That means that the JJDPa protections will extend to you until you are twenty-one years old. This means that if you are prosecuted as a "juvenile," you will still be separated from the adult incarcerated people⁵⁹ until your twenty-first birthday. Even if you turn twenty-one during the prosecution of your case, you are still protected by the JJDPa.⁶⁰

C. Procedure in New York State⁶¹

1. Who is considered a "juvenile" in New York State?

The rules in New York State courts are not as clear as the rules in federal court. In New York, youth who are accused of committing crimes fall into four categories: (1) adult, (2) "Juvenile Delinquent," (3) "Juvenile Offender," and (4) "Adolescent Offender."⁶²

If you were eighteen or older when the crime happened, then you will be treated as an adult and the rest of this Section will not apply to you. But if you were younger than eighteen when the crime happened, you need to figure out whether you are considered a "juvenile delinquent," "juvenile offender," or "adolescent offender." Your age at the time the crime was committed is the one that determines how you will be tried.

If you were eighteen years old or older when you committed a crime, then New York State considers you an adult. As an adult, the State will charge you with crimes and punish you as an adult in adult court. If you were seventeen years old or younger when the crime happened, you will be tried as a "juvenile" in Family Court (as long as you are not a "Juvenile Offender" or "Adolescent Offender"). This is true even if you are now eighteen or older.

(a) "Juvenile Delinquent" ("JD")

You are considered a "Juvenile Delinquent" if you are over 7 years old, but under 18 years old, and commit an act that would be a crime if it had been committed by an adult. Specifically, 16 and 17-year-olds charged with misdemeanors are considered "Juvenile Delinquents." If you are considered a

intentional device to gain tactical advantage over the accused." *But see* United States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 2048–2049, 52 L. Ed. 2d 752 (1977) (holding that a good faith investigative delay in prosecution, even if it prejudices the defendant, does not necessarily violate due process rights); United States v. DeCologero, 530 F.3d 36, 78 (1st Cir. 2008) (holding that "substantial prejudice" requires more than mere inconvenience to the defendant and must involve a demonstration of actual prejudice, where the unavailability of witnesses or evidence may not be sufficient).

58. *See* United States v. Doe, 49 F.3d 859, 866 (2d Cir. 1995) (excusing the government's delay because of the defendant's own lies about his age and other bad conduct); United States v. Chambers, 944 F.2d 1253, 1260 (6th Cir. 1991), *superseded by statute on other grounds*, (excusing the delay because the defense was at fault for failing to raise the issue of juvenile status).

59. If you are either younger than 18 or were treated as a "juvenile" and are younger than 21, and you have not been separated from the adult incarcerated people, you can bring a Section 1983 motion in court to enforce your rights. For more information, *see* Part D of this Chapter.

60. United States v. Ramirez, 297 F.3d 185, 190 (2d Cir. 2002) ("JDA continues to apply to the prosecution of a defendant who has attained the age of twenty-one during the pendency of the criminal proceedings."); United States v. Leon H., 365 F.3d 750, 753 (9th Cir. 2004) (finding that the Act applies if the defendant filed the case before turning twenty-one) (citing United States v. Doe, 631 F.2d 110, 112–113 (9th Cir. 1980)).

61. For a history of the development of the New York State system, *see* Michael A. Corriero, *Juvenile Sentencing: The New York Youth Part as a Model*, 11 FED. SENT. R. 278 (1999).

62. New York State most recently changed its categories for offenses committed by youth in the 2017 legislative session. *See* Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM. PROC. LAW §722).

“Juvenile Delinquent,” your case is handled in a confidential Family Court proceeding. The court will decide if you need supervision, treatment or placement through the local department of social services or the New York State Office of Children and Family Services. “Juvenile Delinquents” do not have criminal records, and in some instances your case can be sealed (kept confidential).

If you are being treated as a “juvenile delinquent,” then you are being treated under the delinquency procedures. These can be more favorable to you than adult criminal procedures. The rest of this Section will not apply to you.

(b) “Juvenile Offender” (“JO”)

You are considered a “juvenile offender,” or “JO,” if you committed a “serious” crime when you were thirteen, fourteen, or fifteen.⁶³ Your case will be heard in the Youth Part of the Supreme or County Court.⁶⁴ If you are convicted as a JO, you will have a permanent criminal record unless the Court grants you Youth Offender status.⁶⁵ As a JO, your case can be transferred to Family Court where you will be considered a “Juvenile Delinquent.” Your case will only be transferred to Family Court if the Youth Part of the Supreme or County Court determines that the transfer would be in the interests of justice.⁶⁶

You will be prosecuted as a JO if you are charged with the following crimes at the designated ages:

- (1) 13-year-olds charged with murder or a sexually motivated felony; and
- (2) 14- and 15-year-olds charged with: murder (including attempted), kidnapping (including attempted), arson, assault, manslaughter, rape, a criminal sexual act, aggravated sexual abuse, burglary, robbery, or weapon possession.⁶⁷

(c) “Adolescent Offender” (“AO”)

The “Adolescent Offender” category was created by the 2017 Raise the Age law.⁶⁸ You are considered an “Adolescent Offender” (AO) if you are 16 or 17 years old and are charged with a felony. Your case would start in the Youth Part of the Supreme or County Court.⁶⁹ As an AO, your case can be transferred to Family Court where you will be considered a “Juvenile Delinquent” if the Court determines that the transfer is in the interests of justice. If you stay in the Youth Part as an AO, you will be treated as an adult, but the judge will consider your age when deciding your sentence at the sentencing phase.⁷⁰

If your trial was in Family Court, you were tried as a “juvenile delinquent.” If your trial was in the Youth Part of a criminal court, you were tried as a JO or AO. If you will be treated as a JO or AO, there are ways for your case to be transferred from adult court to Family Court. Transferring to Family Court comes with some benefits. You should talk to your defense attorney about requesting this “removal.”⁷¹

63. N.Y. PENAL LAW 10.00(18)(1)–(2) (McKinney 2009).

64. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM. PROC. LAW §722.10).

65. See Part C(2)(c) of this chapter.

66. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM. PROC. LAW § 722.22).

67. N.Y. PENAL LAW §10.18(2) (McKinney 2009).

68. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM. PROC. LAW §1.20).

69. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM. PROC. LAW §722.20(1)).

70. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM. PROC. LAW §722.20(1)).

71. N.Y. CRIM. PROC. LAW § 180.75 (McKinney 2007); N.Y. CRIM. PROC. LAW § 722.23 (McKinney 2011). See *People v. Roe*, 74 N.Y.2d 20, 28, 542 N.E.2d 610, 614, 544 N.Y.S.2d 297, 301 (N.Y. 1989) (acknowledging that if a young person tried as an adult is convicted of only a lesser offense for which he is not criminally responsible by reason of infancy, that conviction is vacated and replaced by a “juvenile delinquency” fact determination and the matter removed to Family Court).

If you are being treated as a JO or AO, then the government must follow some rules. The rest of this Section explains some of those rules for JOs and AOs. If you think that the government did not follow any of these rules in your case, you should talk to your lawyer. You may have a reason to appeal.

2. Being Tried as a “Juvenile Offender” (“JO”)

(a) Transferring to Family Court

There are several advantages to transferring your case from criminal court to Family Court. If you are transferred to Family Court, you will probably have better facilities while you are detained. If you are convicted, the judge will have more flexibility to lower your sentence. Also, you will not have a criminal conviction on your permanent record. Family Court records are automatically sealed (kept secret) if you win your case. If you lose your case, then you will have to apply to get the court to keep your records sealed.

If you are being treated as a JO, there are three ways to have your case transferred to Family Court: (1) the district attorney asks for your case to be transferred, (2) you make a motion to transfer your case, or (3) the court believes that there is “reasonable cause” that you do not fit in the JO category.

The district attorney can always ask that your case be transferred to family court if doing so would be in the interests of justice.⁷² You should talk to your lawyer to see if the prosecutor in your case is willing to do this for you.

You can also make a motion to transfer your case to Family Court. You can only do this if you did not waive your felony hearing and if the hearing has not started yet. The transfer must also be in the interests of justice.⁷³ If you do not know if you waived your hearing or if it has started, talk to your lawyer.

After receiving your motion to be transferred, the court will look at what you are charged with and will examine:

- (1) The seriousness and circumstances of the offense;
- (2) How much harm the crime caused;
- (3) The evidence of guilt against you, even if it will not be admitted in trial;
- (4) Your history, character, and condition;
- (5) The sentence the court can impose on you for the offense;
- (6) Whether removing your case to Family Court will hurt the safety or welfare of the community;
- (7) Whether removing your case to Family Court will hurt the public’s trust in the criminal justice system;
- (8) The way the victim feels about removing your case to Family Court; and
- (9) Any other relevant fact that might mean that convicting you in criminal court would serve no useful purpose.⁷⁴

You must convince the court that you are open to rehabilitation and are not a threat to the community. Talk to your lawyer about how to best convince them.

It might be harder to get transferred to Family Court if you were charged with a “serious offense.” If you are charged with second degree murder, first degree rape, a first-degree criminal sexual act, or an armed felony, you can argue that you should be transferred to Family Court because it is in the interests of justice. However, the district attorney must agree, and you also have to convince the court that one of the following three reasons applies to your case:

- (1) There are “mitigating circumstances,” which means that something unique to you or to your case suggests that you should be treated less harshly;
- (2) Other people were involved in the crime and your participation was minor (although not so minor that you should not have been charged in the first place); or

72. N.Y. CRIM. PROC. LAW § 722.22(a) (McKinney 2011).

73. N.Y. CRIM. PROC. LAW § 722.22(a) (McKinney 2011).

74. N.Y. CRIM. PROC. LAW § 722.22(a) (McKinney 2011).

- (3) There is not enough evidence or there is something wrong with the evidence being used to prove that you committed the crime.⁷⁵

If you waived your felony hearing or if your hearing has already started, then you cannot make a motion to remove your case to Family Court. However, the court will remove your case to Family Court anyway if, after the hearing, the court finds reasonable cause to believe that you are a “juvenile delinquent” and not a JO.⁷⁶ A juvenile delinquent is a child between seven and sixteen years old who committed an act that would be criminal if an adult committed it but is not able to be charged because of their age.

If you are younger than eighteen and are charged with both JO and non-JO crimes (charges that would have been heard in Family Court without the JO charges), and you are only found guilty of non-JO crimes, then you have to be sentenced in Family Court. This is true even if your case was heard in criminal court.⁷⁷ If this happens and you are in detention, the Family Court has ten days to make its decision unless you agree to give the court more time.⁷⁸

You also will be sentenced in Family Court if you reach a plea agreement on a non-JO offense. This is only true if you were in County Court (not Supreme Court) before being removed.⁷⁹ If you were sentenced for a non-JO crime in criminal court, you can appeal your sentence and have it vacated (eliminated).

After your case is in Family Court, problems with “juvenile delinquency petitions” may influence your disposition and punishment.⁸⁰ However, New York courts may not allow you to move back into adult criminal court.⁸¹ But if you are tried in adult court, you may still be able to get yourself declared a “youthful offender” even after entering a plea or after a jury finds you guilty (see (g) below).

(b) Sentencing for JOs

If you have been convicted of a JO crime, then you have a criminal record and can receive a range of sentences.⁸² The sentence that you receive depends on how your crime is classified. For a Class A Felony of murder in the first degree, the maximum sentence is life imprisonment.⁸³ For other Class A Felonies of arson or kidnapping in the first degree, the sentence is twelve to fifteen years.⁸⁴ For a Class B Felony the longest sentence is ten years, for a Class C Felony the longest is seven years, and for a Class D Felony the longest is four years.⁸⁵

If you were convicted as a JO and received a sentence longer than those listed, you may be able appeal your sentence. You should tell your lawyer that you think your sentence is too harsh.

75. N.Y. CRIM. PROC. LAW § 722.20(4)(a) (McKinney 2011).

76. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM PROC. LAW §722.21).

77. *See, e.g., In re Williams*, 120 Misc. 2d 257, 258, 465 N.Y.S.2d 949, 950 (Fam. Ct. Onondaga County 1983) (removing a case to Family Court).

78. N.Y. Fam. Ct. Act § 350.1 (McKinney 2008). *See, e.g., In re Julu LL*, 217 A.D.2d 749, 751, 629 N.Y.S.2d 507, 508 (3d Dept. 1995) (dismissing proceeding for failing to hold a dispositional hearing within 10 days).

79. *See People v. Statton*, 156 Misc. 2d 778, 781, 594 N.Y.S.2d 580, 582 (Nassau Cnty. Ct. 1992) (“The removal to Family Court is mandated after a juvenile pleads to a crime for which he is not criminally responsible”).

80. *In re Michael M.*, 3 N.Y.3d 441, 448, 821 N.E.2d 537, 542, 788 N.Y.S.2d 299, 304 (2004) (observing that the N.Y. Court of Appeals has “consistently viewed petitions failing to satisfy Family Court Act § 311.2(3) as exhibiting a nonwaivable jurisdictional defect”). A jurisdictional defect means that some element is missing and the court does not have the power to rule on your case.

81. *See Rodriguez v. Myerson*, 69 A.D.2d 162, 170–171, 418 N.Y.S.2d 936, 941 (2d Dept. 1979) (finding that a criminal indictment by a grand jury will not justify removal back to criminal court); *People v. Gregory C.*, 158 Misc. 2d 872, 880, 602 N.Y.S.2d 492, 497 (Sup. Ct. Erie Cnty. 1993) (removing a case to Family Court after a grand jury indictment).

82. N.Y. PENAL LAW §§ 60.10, 70.05 (McKinney 2009).

83. N.Y. PENAL LAW § 70.05(2)(a) (McKinney 2009).

84. N.Y. PENAL LAW § 70.05(2)(b) (McKinney 2009).

85. N.Y. PENAL LAW § 70.05(2)(c)–(e) (McKinney 2009).

(c) Youthful Offender Treatment

(i) Qualifying as a “Youthful Offender” (“YO”)

If you were tried as a JO, you may be eligible for “youthful offender” status. A “youthful offender” is the term for someone younger than nineteen years old in adult court.⁸⁶ As a youthful offender (“YO”), you may receive special protections. For example, protections may shorten your sentence or seal your criminal record.⁸⁷

To qualify for YO status, you must: (1) have been under nineteen years old when the alleged crime was committed, (2) meet the eligibility requirements, (3) pose no threat to the community; *and* (4) show commitment to rehabilitation. The seriousness of the crime is the most important thing that the court will look at.⁸⁸

If you meet the requirements, you can qualify as a YO unless one of the following conditions applies to your case. First, you will not be considered a YO if your conviction was for one of the following: (i) a Class A-I or Class A-II felony, (ii) an armed felony involving violence, including possessing or displaying a firearm, or (iii) rape in the first degree, criminal sexual act in the first degree, or aggravated sexual abuse. Second, you cannot be considered a YO if you have been convicted of a felony in the past. Third, you will not be considered a YO in your current case if the court decides that you were a YO for an earlier felony conviction. Finally, you will not be considered a YO if the court decides that you were a “juvenile delinquent” who was found guilty of a certain felony on or after September 1, 1978.⁸⁹ If none of these apply to you, then you may be eligible for YO status.

There is a way to become eligible for YO treatment even if you have been convicted of an armed felony or one of the other felonies listed above.⁹⁰ Your felony must involve mitigating circumstances. Mitigating circumstances are special factors that make your conduct more understandable,⁹¹ or show that your role was small (for example, if you were a look-out or follower instead of a main actor in a crime).⁹²

Your attorney will usually speak with the judge and/or the prosecutor to decide on your YO status. You do not receive YO status until after you are prosecuted and found guilty in the adult system.⁹³

86. N.Y. CRIM. PROC. LAW § 720.10 (McKinney 2011); *see also* *People v. Drayton*, 39 N.Y.2d 580, 584, 350 N.E.2d 377, 379, 385 N.Y.S.2d 1, 3 (1976) (“The youthful offender provisions of the Criminal Procedure Law emanate from a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals.”).

87. N.Y. CRIM. PROC. LAW § 720.20(1) (McKinney 2011); *see also* *People v. Drayton*, 39 N.Y.2d 580, 584, 350 N.E.2d 377, 379, 385 N.Y.S.2d 1, 3 (1976).

88. *People v. Drayton*, 39 N.Y.2d 580, 584, 350 N.E.2d 377, 379, 385 N.Y.S.2d 1, 3 (1976).

89. N.Y. CRIM. PROC. LAW § 720.10(2) (McKinney 2011) (listing certain disqualifying felonies).

90. Essentially, this includes rape in the first degree, criminal sexual acts in the first degree, aggravated sexual abuse or any armed felony.

91. *See, e.g.,* *People v. Cruickshank*, 105 A.D.2d 325, 334, 484 N.Y.S.2d 328, 337 (3d Dept. 1985), *aff’d sub. nom.* *People v. Dawn Maria C.*, 67 N.Y.2d 625, 499 N.Y.S.2d 663, 490 N.E.2d 530 (1986) (giving “youthful offender” treatment to a defendant who had shot her father because of the mitigating circumstance that she had been abused); *see also* *People v. Shrubsall*, 167 A.D.2d 929, 931, 562 N.Y.S.2d 290, 292 (4th Dept. 1990) (granting defendant a new sentence of a shorter length after the court determined parental abuse of the defendant was the driving force behind the crime the defendant committed).

92. *See, e.g.,* *People v. Marquis A.*, 145 A.D.3d 61, 68–69, 40 N.Y.S.3d 609, 615–616 (3d Dept. 2016) (finding that lack of injury to others and willingness to cooperate with the police warranted treating defendant as a youthful offender, despite his conviction of armed robbery in the first degree); *People v. John “B.”*, 93 A.D.2d 957, 957, 463 N.Y.S.2d 275, 276 (3d Dept. 1983) (finding mitigating circumstances included the facts that the defendant was not a ringleader of the crime, defendant did not carry a gun, and defendant was pressured by older participants to take part in the crime). *People v. Thomas R.O.*, 136 A.D.3d 1400, 1402, 25 N.Y.S.3d 766, 768 (4d Dept. 2016) (finding mental illness to be a mitigating circumstance for purposes of youthful offender determination).

93. N.Y. CRIM. PROC. LAW § 720.20(1) (McKinney 2011).

Once found guilty, the sentencing court must consider whether to sentence you as a YO.⁹⁴ The court must consider this even if you do not request to be considered a YO.

If the sentencing court does not consider treating you as a YO, you might be able to appeal the decision to deny you YO treatment.⁹⁵ This is true even if you did not request that the court consider you a youthful offender. This is also true even if you waived your right to appeal generally as part of your plea agreement.⁹⁶

Even if your attorney did not raise your eligible status at sentencing, courts can still decide that you should have been granted YO status. Therefore, the court may change your sentence later.⁹⁷ For example, one court changed a sentence after both the court and defense lawyer made a mistake and did not realize that the child was eligible for YO status until after sentencing.⁹⁸

(ii) Consequences of “Youthful Offender” Treatment

First, if you are declared a “youthful offender,” your conviction in adult court is replaced by a “youthful offender finding.” As a result, no conviction for that offense should appear on your criminal record.⁹⁹

Second, there are different penalties for YOs than for people convicted in adult court. For example, YOs who have committed felonies are sentenced like adults convicted of an E-class felony, which is the lowest form of felony. Note that there is one exception for controlled substances crimes.¹⁰⁰ Under E-class felonies, sentences are usually shorter, and probation is available. Once you are considered a YO, that determination cannot be taken away from you without your consent. The court has also found that if the sentence you received in adult court is longer than what you would have received as a YO, the sentence must be overturned.¹⁰¹

94. *People v. Rudolph*, 21 N.Y.3d 497, 501, 997 N.E.2d 457, 458, 974 N.Y.S.2d 885, 886 (2013).

95. *People v. Rudolph*, 21 N.Y.3d 497, 501, 997 N.E.2d 457, 458, 974 N.Y.S.2d 885, 886 (2013).

96. *People v. Pacherille*, 25 N.Y.3d 1021, 1024, 32 N.E.3d 393, 395, 10 N.Y.S.3d 178, 180 (2015) (noting that a valid waiver of the right to appeal is not enforceable in the face of a failure to consider youthful offender treatment.).

97. *See, e.g., People v. Griffin*, 17 A.D.3d 927, 927, 793 N.Y.S.2d 649, 650 (3d Dept. 2005); *People v. Harrington*, 281 A.D.2d 748, 748–749, 721 N.Y.S.2d 709, 710 (3d Dept. 2001) (holding that, though a defendant’s waiver of the right to appeal normally eliminates his challenge to a denied request for YO treatment, defendant’s challenge survives when the Court fails to consider YO treatment at all because YO consideration is mandated by statute).

98. *People v. Torres*, 238 A.D.2d 933, 934, 661 N.Y.S.2d 153, 154 (4th Dept. 1997).

99. N.Y. CRIM. PROC. LAW § 720.35 (McKinney 2011); *see, e.g., People v. Cruz*, 38 A.D.3d 740, 740, 833 N.Y.S.2d 527, 528 (2d Dept. 2007) (holding that “[o]nce the defendant was adjudicated a youthful offender, his conviction was deemed vacated and replaced by a youthful offender finding, and thus, it may not later be used as a prior felony conviction for a sex crime”). There are a number of other benefits to having a “youthful offender” finding instead of a criminal conviction. *See, e.g., People v. Gray*, 84 N.Y.2d 709, 712, 646 N.E.2d 444, 445, 622 N.Y.S.2d 223, 224 (1995) (noting that a YO finding cannot be used to impeach a defendant’s credibility on cross-examination because a YO finding is not considered a criminal conviction); *State Farm Fire and Cas. Co. v. Bongiorno*, 237 A.D.2d 31, 35–36, 667 N.Y.S.2d 378, 381 (2d Dept. 1997) (holding that a YO finding can be kept confidential from an insurance company forced to indemnify the YO in a civil suit); *Nielson v. United Parcel Serv. Inc.*, 210 A.D.2d 641, 642, 619 N.Y.S.2d 844, 845 (3d Dept. 1994) (acknowledging a probation department’s finding that it was not improper for the plaintiff, who claimed he had been denied a promotion based on his YO status, to deny having a criminal record on his application). However, there are some circumstances where your YO finding will not remain confidential. *See, e.g., N.Y. CRIM. PROC. LAW § 720.35* (McKinney 2011); *In re Dillon*, 171 Misc. 2d 665, 671, 655 N.Y.S.2d 322, 326 (Nassau Cnty. 1997) (holding that YO records could be unsealed where prosecutor demonstrated compelling need for use of records in criminal prosecution of YO’s attorney).

100. Courts cannot impose a sentence of conditional discharge if the YO is convicted of a felony relating to the possession, sale, or use of controlled substances. N.Y. PENAL LAW § 60.02 (McKinney 2009).

101. *People v. Calderon*, 79 N.Y.2d 61, 65–66, 588 N.E.2d 61, 63–64, 580 N.Y.S.2d 163, 165–166 (1992) (finding that where a “youthful offender” finding has been properly made, the court is “statutorily required to sentence defendant pursuant to the mandates of the youthful offender law” and has no authority to revoke its finding that defendant is youthful offender).

Third, YOs may have to pay money to a victim for what the victim lost in the crime (“restitution”) or other fees. One example of a required fee is a DNA databank fee.¹⁰²

Fourth, as a YO, if you are convicted of another felony in the future, you will not be considered a “predicate felon.” A “predicate felon” is someone with a prior felony conviction who thus receives much harsher sentences.¹⁰³ However, if you are convicted of a felony in another state that does not grant YO status (or if another state court decided not to give you YO status), your prior conviction may be used against you in future sentencing.¹⁰⁴ This is important if you have been convicted before in other places. A court can use those convictions to find out if you are a repeat felony offender.

(iii) Alternatives to Incarceration Programs

Instead of deciding your YO status before sentencing, a court can issue a deferred sentence. As part of a deferred sentence, the court will order you to participate in an Alternative To Incarceration (“ATI”) program. If you complete the program successfully, then you will be granted YO status.

A court can order you to participate in an ATI program in any criminal sentencing in New York.¹⁰⁵ However, an ATI order is especially likely if you are seeking YO status. Because the YO status decision must be made before sentencing, participation in the ATI is not officially part of your sentence. Instead, your sentence is finalized after a progress report from the ATI program.

3. Being Tried as an “Adolescent Offender” (“AO”)

(a) Transferring to Family Court

If you are an “Adolescent Offender” charged with a non-violent felony, you will be sent to the Family Court unless the District Attorney files a motion within 30 days requesting that the court keep the case in the Youth Part due to “extraordinary circumstances.”¹⁰⁶ If the District Attorney files this motion, you have the chance to oppose the motion. You or the District Attorney can request a hearing at this point. The Judge will decide if the case should be sent to the Family Court within 5 days of the hearing or motion.¹⁰⁷ If you are an Adolescent Offender charged with a violent felony, you can also have your case sent to the Family Court unless your charges include any of the following:

- (1) Displaying a firearm or deadly weapon,
- (2) Causing significant physical injury, or
- (3) Engaging in unlawful sexual conduct.¹⁰⁸

If your case involves any of the above elements, you must remain in the Youth Part unless the District Attorney agrees to remove your case to Family Court.¹⁰⁹ If your case does not involve any of these

102. N.Y. PENAL LAW § 60.35 (McKinney 2009).

103. *People v. Elliott*, 99 Misc. 2d 794, 795, 417 N.Y.S.2d 191, 192 (Sup. Ct. N.Y. County 1979) (finding that “a youthful offender adjudication cannot be used as the basis for a finding that a defendant is a predicate felon”).

104. *See People v. Coolbaugh*, 259 A.D.2d 781, 782, 687 N.Y.S.2d 737, 738 (3d Dept. 1999) (quoting *People v. Arroyo*, 179 A.D.2d 393, 394, 577 N.Y.S.2d 843, 844 (1st Dept. 1992)) (holding that “[w]here youthful offender treatment is not accorded in a foreign jurisdiction, the fact that the defendant would have been eligible for youthful offender treatment had the offense been committed in New York does not preclude the use of such conviction in New York as a predicate felon for enhanced sentencing”); *People v. Meckwood*, 86 A.D.3d 865, 866, 927 N.Y.S.2d 729, 730–731 (3d Dept. 2011) (holding that defendant’s prior felony conviction in another state qualified defendant as a “predicate felon” even though that felony would have made him a “youthful offender” in New York State).

105. *See, e.g., United States v. Flowers*, 983 F. Supp. 159, 170, 173 (E.D.N.Y. 1997) (applying Alternative sentences to incarceration for drug trafficking conviction).

106. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM PROC. LAW § 722.23).

107. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM PROC. LAW § 722.23).

108. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM PROC. LAW § 722.23).

109. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM PROC. LAW §

elements, you will remain in the Youth Part if the judge agrees with the District Attorney's motion that "extraordinary circumstances" exist.¹¹⁰ Vehicle and Traffic Law misdemeanor charges cannot be sent to Family Court.¹¹¹

D. Prison Conditions

There are special rules when the government puts juveniles in prison. The government has to keep you away from adults even if you are in an adult prison. If you are disabled, the government has to give you education. This section explains how these rules work. This section explains federal law in Part D(1) and explains New York State law in Part D(2).

1. Federal Laws About Conditions of Incarceration

(a) Separation from Adults Required by the JJDPa

First, the JJDPa keeps young people in a federal prison away from adults.¹¹² This law applies everywhere in the federal system. It also applies to any person treated as a "juvenile" in a state system. The JJDPa only protects you if the state is treating you as a "juvenile" and not as an adult.¹¹³ The JJDPa does not apply to young people who are treated as adults within a state system.¹¹⁴

The JJDPa says there has to be "sight and sound" separation between incarcerated youth and incarcerated adults in the federal system. That means incarcerated people who are eighteen years old or younger have to be kept away from those who are older than eighteen years old.¹¹⁵ No sight contact means incarcerated adults and incarcerated youth should not be able to see each other. No sound contact means young people and incarcerated adults should not be able to speak directly to one another in the prison.

The building you are in has to keep incarcerated adults away from JOs in all secure areas. This includes admissions, sleeping quarters, and shower and toilet areas. Other areas might be included too. Contact that happens for a short time by accident does not always break the law. But that is only true when you are in a place that is not just for JOs and is nonresidential. Places where contact might not break the law includes areas for hallways and dining, recreation, education, training for a job, health care, or entry areas. In an area of the prison that is only for young people, any contact between incarcerated youth and incarcerated adults breaks the law and you can report it.¹¹⁶

If you are not being kept away from adults, you could have a federal claim under the JJDPa.¹¹⁷ You may also be able to file a Section 1983 claim of violation of your rights under either the Fourteenth Amendment or the Eighth Amendment to the Constitution.¹¹⁸ You should talk to your lawyer about these options.

722.23).

110. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM PROC. LAW § 722.23).

111. Assemb. B. 3009-C, 2017-18 Leg., 2017 Sess. (N.Y. 2017) (to be enacted in N.Y. CRIM PROC. LAW § 722.23).

112. 42 U.S.C. § 5633(a)(13).

113. These rules governing prison conditions are different from the rules discussed earlier in the Chapter, which discussed how the government must follow different rules depending on whether you were convicted under federal or state law. See Part B of this Chapter.

114. Bureau of Justice Assistance, Dept. of Justice, Publ'n. No. NCJ 182503, *Juveniles in Adult Prisons and Jails: A National Assessment*, 14 (2000), available at www.ncjrs.gov/pdffiles1/bja/182503.pdf (last visited Dec. 7, 2016).

115. 42 U.S.C. § 5633(a)(13); 28 C.F.R. § 31.303(d)(1)(i).

116. 28 C.F.R. § 31.303(d)(i).

117. See *Horn by Parks v. Madison Cnty. Fiscal Court*, 22 F.3d 653, 658 (6th Cir. 1994) (holding that a violation of the JJDPa creates a Section 1983 action for rights protected under the JJDPa); *James v. Jones*, 148 F.R.D. 196, 199 (W.D. Ky. 1993) (holding that the JJDPa extends enforceable federal rights to young people who are incarcerated); *Grenier v. Kennebec Cnty.*, 748 F. Supp. 908, 913 (D. Me. 1990) (holding that an incarcerated youth could use Section 1983 to seek relief for alleged infringement of his rights under JJDPa).

118. For a detailed description of a Section 1983 claim, see *JLM*, Chapter 16, "Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law." See also *Doe v. Borough of Clifton Heights*, 719 F. Supp. 382, 384

Although young people in adult prisons must be kept away from incarcerated adults, this does not mean that prison officials can isolate you or keep you out of programs. If they do, that might be a violation of your civil rights. If you think you have been unfairly kept out of adult prison programs, you should speak with your lawyer.

(b) Incarcerated Youth with Disabilities

(i) Before Incarceration

If you have a disability, you may be eligible for some protections under the Individuals with Disabilities Education Act (IDEA).¹¹⁹ The disability can be a physical, emotional, or learning disability.¹²⁰ Sometimes a court will consider disabilities when deciding if they will send your case to Family Court. If your parent or guardian asks, you can get tested for a disability under IDEA and your home school district has to pay for the test. You can use the information from the test to argue for being treated as a “juvenile” in court. Talk to your lawyer to find out how this is done, because different jurisdictions have different ways for asking for a test.

If you are evaluated and found to have a disability, it is important to tell the court. Some studies say that as many as seventy percent of incarcerated youth suffer from a disability. Some disabilities are invisible. For example, learning or emotional disabilities often lead to problems with other people. Proper evaluation and treatment can make rehabilitation easier, and treatment can also help make education and other programs more helpful.

If you have already been diagnosed with a disability but your previous Individualized Education Program (“IEP”) was not followed while you attended school, you should tell your lawyer. For instance, if you were diagnosed with a learning disability and your IEP required you to have a tutor, but your school never gave you a tutor, the school system’s failure to follow the IEP could help you explain to the judge why you may have had trouble with rehabilitation programs before. If your lawyer can convince the judge that this is true, you may receive a lighter sentence.

(ii) Special Education While You are Incarcerated

The government must give you free special education if you have a disability until you are twenty-one years old.¹²¹ Anyone in a correctional facility who would normally need special education services

(E.D. Pa. 1989), *aff’d*, Doe v. Borough of Clifton Heights, 902 F.2d 1558 (3d Cir. 1990) (requiring showing of deliberate indifference to establish an Eighth Amendment challenge); *see also* Baker v. Hamilton, 345 F. Supp. 345, 352 (W.D. Ky. 1972) (concluding that punitively treating young people as adults and not according them due process violates the Fourteenth Amendment).

119. 20 U.S.C. §§ 1400–1482.

120. 20 U.S.C. § 1401(26)(A). IDEA requires that the school develop an Individualized Education Plan (IEP) every year for children with disabilities to make sure that the child is receiving a free, appropriate public education. IDEA describes how an IEP is designed and who must be involved in creating it (parents, teachers, etc.). The IEP can include a range of services, from vocational training, transition services and psychological counseling to special tutoring which will assist the student in overcoming learning problems.

IDEA lists a number of disabilities that allow students to obtain special services. This list includes: intellectual disability, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, orthopedic impairment, and specific learning disabilities. A “specific learning disability” is defined as a “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written,” and may show itself in an “imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. § 1401(30)(A); 34 C.F.R. § 300.8(c)(10)(i). This may include conditions such as perceptual disabilities (disabilities in seeing, hearing, feeling, or in other ways sensing things), brain injury, minimal brain dysfunction, dyslexia and developmental aphasia, but does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 20 U.S.C. § 1401(30)(B)–(C); 34 C.F.R. § 300.8(c)(10)(i)–(ii).

For general information about IDEA rights during incarceration, see Special Education and the Juvenile Justice System, Juvenile Justice Bull. No. NCJ 179359 (Office Of Juvenile Justice & Delinquency Prevention, Dept. of Justice), (Jul. 2000), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf> (last visited Dec. 7, 2016).

121. *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482. However, some courts are

outside of prison must also receive them during their time in prison.¹²² The IDEA applies to almost all the people who would get special education services outside prison.¹²³ However, there are three exceptions:

- (1) In some states, the government does not have to provide public education to children who are between three and five years old or between eighteen and twenty-one years old. In those states, the prison is not required to provide special education services to incarcerated youth who are between three and five or between eighteen and twenty-one;¹²⁴
- (2) In some states, if you are ages eighteen to twenty-one and were not identified as disabled before going to prison, or if you did not receive a personal education program at your old school, the prison does not have to provide you special education services;¹²⁵ or
- (3) If a state gives early intervention services to a child with disabilities, then the state does not have to give free special education to that child.¹²⁶

Unless one of the exceptions above applies to you, you are entitled to a free appropriate public education (“FAPE”), even while you are incarcerated. You can request a review if your IEP is not being followed. If your IEP is not being followed or you are not getting FAPE, then you first must try to resolve your problem through administrative methods (contact the state Department of Education to find out more about administrative remedies) and, if that fails, through state court. You can sue in federal court only after administrative and state remedies have failed. The only reason your FAPE can be denied is for prison security. Students and parents also have the right to challenge any changes made to an IEP.

2. New York State Laws Regarding Conditions of Incarceration

Similar to the federal laws explained above, New York state laws keep juveniles separate from adults and provide for the education of juveniles in New York state prisons.

(a) Juveniles and Adults Must be Separated

The federal law JJDPA also applies to New York state prisons. The JJDPA requires that all states must have sight and sound separation between adults and youth in jails and prisons.¹²⁷

more willing than others to find that incarcerated youth have a constitutional right to education and treatment. *Compare* *Santana v. Collazo*, 714 F.2d 1172, 1176–1177 (1st Cir. 1983) (holding that rehabilitative training is desirable but institutionalized young people have no constitutional right to such treatment); *Morales v. Turman*, 562 F.2d 993, 998 (5th Cir. 1977) (distinguishing between the commitment of the mentally ill and the confinement of youth offenders and rejecting the argument that youth offenders have a comparable constitutional right to treatment) *with* *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir. 1974) (holding that incarcerated youth have a constitutional right to treatment which includes the right to individualized care); *Alexander S. v. Boyd*, 876 F. Supp. 773, 798 (D.S.C. 1995) (recognizing the right of young people to minimally adequate training, including special education for incarcerated youth).

122. This claim is somewhat complicated because various states have constitutions or statutes giving their residents a right to an education even if they are not disabled, but there is no federal right to a general education. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S. Ct. 1278, 1297, 36 L. Ed. 2d 16, 44 (1973) (holding that education is not afforded explicit constitutional protection).

123. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.102(a)(2).

124. 20 U.S.C. § 1412(a)(1)(B)(i); 34 C.F.R. § 300.102(a)(1).

125. 20 U.S.C. § 1412(a)(1)(B)(ii); 34 C.F.R. § 300.102(a)(2)(i). *See* *Los Angeles Unified Sch. Dist. v. Garcia*, 58 Cal. 4th 175, 184, 314 P.3d 767, 772 (2013) (finding that the individual in question had met both prongs even though the established standard was to 20 U.S.C. § 1412(a)(1)(B)(2), whose text specifies that either prong may be satisfied).

126. 20 U.S.C. § 1412(a)(1)(C); 34 C.F.R. § 300.102(a)(4).

127. 42 U.S.C. § 5633.

In New York, adulthood begins at age eighteen for the purposes of prosecution,¹²⁸ and the JJDPa does not apply if you are a young person but were tried as an adult by the state.¹²⁹ As a result, JJDPa sight and sound protections do not apply in New York if you were tried as an adult, even if you were only sixteen.¹³⁰

If you were tried as a “juvenile” and are not being separated from the adults in your prison or lock-up, you can sue under Section 1983.¹³¹ If you bring a lawsuit, you must direct it against the state or local agency rather than the police or corrections officers.

There are some special protections for “Juvenile Offenders” (“Jos”) in New York. Remember, JOs are technically classified as different from “juveniles.” JOs are kept in juvenile facilities before they reach age 18.¹³² Under New York law, these separate facilities should have services more appropriate for juveniles than the services in adult prisons.¹³³

(i) Rules for Transferring from a “Juvenile Offender” to Adult Facility

There are some circumstances where you can be transferred to adult Department of Corrections and Community Supervision (“DOCCS”) facilities if you are a “juvenile offender” between the ages of sixteen and twenty-one years old.¹³⁴ First, you may be transferred if there is no substantial likelihood that you will benefit from the programs offered by “juvenile offender” facilities.¹³⁵ Second, there are rules called “transfer guidelines” that provide possible reasons that you may be transferred to an adult facility.¹³⁶ For example, you may be transferred if you are a danger to yourself or others, if you refuse to participate in programs, if you are in possession of any contraband (things you are not allowed to have in prison), or if you violate parole.¹³⁷

There are three rules that New York must follow in deciding whether to transfer you to a DOCCS facility. First, if you are older than twenty-one, you must be transferred to a DOCCS facility.

Second, if you are older than eighteen but younger than twenty-one, you can be transferred to a DOCCS facility by the Office of Children and Family Services Commissioner (“OCFS”).¹³⁸ OCFS is required to explain its reasons for transfer, and the director of the division must review these reasons and issue a “certification,” or authorization, to DOCCS.¹³⁹ However, if it is “necessary to ensure the health and safety of [other] individuals” in your facility and if you are a juvenile offender eighteen years of age or older, you can be transferred to DOCCS facilities with only a verbal certification.¹⁴⁰ In this situation, OCFS is not required to provide a written certification, but it must submit written

128. See N.Y. CRIM. PRO. LAW § 510.15 (McKinney 2019) (Effective on December 1, 2019, 16 and 17-year-olds charged with misdemeanors are considered “juveniles” and will have cases decided in the Family Court; 16 and 17-year-olds charged with traffic misdemeanors are considered adults and will have cases decided in the local criminal court; 16 and 17-year-olds charged with felonies are considered “Adolescent Offenders” (“AO”) and their cases begin in the Youth Part of the Supreme or County Court).

129. See N.Y. CRIM. PRO. LAW § 510.15 (McKinney 2019).

130. Individuals who are 16 and 17 years old must be separated from those 18 and older in county correctional facilities. N.Y. CORRECT. LAW § 500-b (McKinney 2014). State regulations require separate housing for individuals in this age range. N.Y. COMP. CODES R. & REGS. tit. 9, § 7013.4 (2020).

131. For a detailed description of a Section 1983 claim, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and to Obtain Relief From Violations of Federal Law.”

132. N.Y. CRIM. PROC. LAW § 510.15 (McKinney 2017); see also 83 N.Y. JUR. 2d *Penal and Correctional Institutions* § 57, West (database updated 2019) (“The Office of Children and Family Services (OCFS) must maintain secure facilities for the care and confinement of juvenile offenders. . . . The [OCFS] may apply to the sentencing court for permission to transfer a youth not less than 16 nor more than 18 years of age to the Department of Corrections . . .”).

133. N.Y. EXEC. LAW § 508(1) (McKinney 2020).

134. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.2 (2020).

135. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.2 (2020).

136. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.3 (2020).

137. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.3 (2020).

138. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.2 (2020).

139. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.4 (2020).

140. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.5 (2020).

confirmation and reasons for the quicker transfer within one business day after the transfer occurs.¹⁴¹ You can ask for a copy of your transfer documents any time within seven days after you are transferred. You also have the right to appeal in writing within thirty days after you are transferred.¹⁴² The director of the division must decide on your written appeal within ten days of receiving your appeal.¹⁴³ You can also ask a court to review these decisions through filing an Article 78 petition.¹⁴⁴

Third, sixteen and seventeen year-olds can be transferred to a DOCCS facility when it is unlikely that the young person will benefit from the Division of Youth Development and Partnerships for Success's services.¹⁴⁵ If you are sixteen or seventeen, you can only be transferred to a DOCCS facility after both the deputy director for residential services and the director of the division have reviewed the reasons given for the need for transfer, and the director has determined that you should be transferred.¹⁴⁶ The director must decide whether to transfer you within five business days after receiving the documents about your transfer, and you must be told within seven days of the decision.¹⁴⁷

The OCFS oversees all detention facilities for incarcerated youth in New York State.¹⁴⁸ In New York City, the Administration for Children's Services runs "juvenile" pre-trial facilities.¹⁴⁹ You can use the OCFS and Administration for Children's Services websites (provided in the footnotes below) to find the addresses, visiting hours, and regulations of detention centers, as well as annual reports and other information.

(b) Your Right to an Education under New York State Law

Incarcerated youth in New York have rights to education in addition to those provided by IDEA under federal law. First, the New York Constitution guarantees all children an education.¹⁵⁰ This means that you have a right to an education until your twenty-first birthday, including while in prison and pre-trial detention, until you earn a high school diploma or an equivalent degree (such as a GED).¹⁵¹ This applies whether or not you have a disability. Second, DOCCS has a policy goal that all incarcerated people receive a high school diploma or its equivalent.¹⁵²

All incarcerated youth should be offered at least three hours of daily instruction, five days per week, by qualified teachers, in an environment that facilitates learning.¹⁵³

141. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.5 (2020).

142. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.7(a)–(b) (2020).

143. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.7(c) (2020).

144. See *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more information about Article 78 proceedings.

145. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.2 (2020).

146. N.Y. COMP. CODES R. & REGS. tit. 9, § 175-4.6(a)–(c) (2020).

147. N.Y. COMP. CODES R. & REGS. TIT. 9, § 175-4.6(c)–(e) (2020).

148. Information about the OCFS (for New York State) is available online at <http://www.ocfs.state.ny.us/main/> (last visited March 10, 2020).

149. Information about the Administration for Children's Services' "juvenile" justice services is available online at <https://www1.nyc.gov/site/acs/justice/juvenile-justice.page> (last visited March 1, 2020).

150. N.Y. CONST. art. XI, § 1. See *Mitchell C. v. Bd. of Ed. of City Sch. Dist. of City of N.Y.*, 67 A.D.2d 284, 288, 414 N.Y.S.2d 923 (2d Dept. 1979) ("[W]here a State or subdivision thereof undertakes to provide free education to all its students, it must recognize an individual student's legitimate entitlement to a public education as a property interest protected by the due process clause" (citation omitted)).

151. N.Y. EDUC. LAW § 3202 (McKinney 2015) ("A person over five and under 21 years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition."); see also N.Y. COMP. CODES R. & REGS. tit. 9, § 7070.2 (2020); *Mitchell C. v. Bd. of Ed. of City Sch. Dist. of City of N.Y.*, 67 A.D.2d 284, 288, 414 N.Y.S.2d 923, 926 (2d Dept. 1979).

152. State of New York, Department of Corrections and Community Supervision, Directive No. 4804, Academic Education Program Policies (2015), available at <http://www.doccs.ny.gov/Directives/4804.pdf> (last visited March 1, 2020). In addition, incarcerated people can be sanctioned if they have not obtained a diploma or its equivalent and have reading or math skills below a 9.0 level. According to the directive, incarcerated people can be denied good behavior allowances under N.Y. CORRECT. LAW § 803 (McKinney 2014).

153. The regulations in New York require: (1) instruction on the same days it is available in the local school

If you are not receiving the kind of education described above, you may request it.¹⁵⁴ In New York City, the court has upheld the right of incarcerated people to access special education.¹⁵⁵ If you request an evaluation for special education in New York, the evaluation must be made within ten school days following receipt of your request.¹⁵⁶ Recommendations for your education must be made within twenty days of receiving your request.¹⁵⁷ However, this only applies if you have not been evaluated within the last three years.¹⁵⁸ If you have been evaluated within the last three years, that evaluation can be used instead of a new one.¹⁵⁹

E. Conclusion

If you are a young person who is considered a “juvenile,” “juvenile offender,” or “youthful offender,” federal laws and New York state laws give you various rights and protections with respect to the legal process and the conditions of your incarceration. To receive these protections, you must first make sure you fit the eligibility requirements described above. Then, speak with your lawyer about the next steps to take, including a possible appeal of your case or bringing a separate lawsuit if your rights have been violated.

district; (2) not less than three hours a day of schooling; and (3) that the instruction shall begin within eleven days of the district's receipt of your request for educational services. N.Y. COMP. CODES R. & REGS. tit. 8, § 118.4 (2020); *see also* N.Y. COMP. CODES R. & REGS. tit. 9, § 7070.6 (2020).

154. N.Y. COMP. CODES R. & REGS. tit. 9, § 7070.4(f) (2020); N.Y. COMP. CODES R. & REGS. tit. 8, § 118.5 (2020) (“Within 10 days after admission . . . youth shall be apprised . . . of the availability of educational services. If the youth requests, the correctional facility shall submit a request for such educational services to the school district in which the facility is located, which request shall include, but need not be limited to, the following information: a) the youth's name; b) the name and location of the facility; c) the last school grade completed by the youth as indicated by the youth; d) the anticipated duration of the incarceration; and e) the address of the last known residence of the youth at the time of the child's commitment to custody.”).

155. *Handberry v. Thompson*, 92 F. Supp. 2d 244, 245–249 (S.D.N.Y. 2000) (finding that incarcerated people ages 16–21 without high school degrees were denied special education services in violation of IDEA and general education services in violation of New York law, and ordering DOCCS to find a way to make sure that the rights of incarcerated people are respected and that they receive the education they deserve), *judgment limited by Handberry v. Thompson*, 446 F.3d 335, 356 (2d Cir. 2006) (vacating the decision of the district court insofar as the injunction is based on state law, excessively burdensome, violated the parental consent provision of the IDEA and where it makes little sense within the context of prison regulation).

156. N.Y. COMP. CODES R. & REGS. tit. 8, § 118.3(a) (2020).

157. N.Y. COMP. CODES R. & REGS. tit. 8, § 118.3(a) (2020).

158. N.Y. COMP. CODES R. & REGS. tit. 8, § 118.3(b) (2020).

159. N.Y. COMP. CODES R. & REGS. tit. 8, § 118.3(b) (2020).

APPENDIX A

GLOSSARY OF LEGAL TERMS¹⁶⁰

Appeal: When a person asks a higher court to review the decision made in his case by a lower court with the hope that the higher court will find mistakes and overturn that decision.

Arraignment: When someone who has been accused of a crime is brought to court for the first time. This is when the court (i) tells you what crime you are being accused of and (ii) asks you to enter an initial or first plea of “guilty,” “not guilty,” or “no contest.”

Burden of proof: The level of proof the prosecutor must reach for a person to be convicted or found delinquent. In a criminal case, the burden of proof is “beyond a reasonable doubt,” which means that no juror or judge should have any reasonable doubt that the person being tried is actually guilty. If the jury has a reason to believe the defendant did not commit the crime, then it must find him not guilty.

Defense Attorney: The person who defends you in court is called a defense attorney. You are entitled to have a defense attorney in a criminal trial where you are at risk of going to jail or being committed to an institution.¹⁶¹ If your family is unable or refuses to hire an attorney to defend you, the court will assign you an attorney, often known as a public defender or “legal aid.” When the court assigns you a lawyer, make sure you write down his name, telephone number, and license number so you can contact him when you need him.

District Attorney: The lawyer who represents the Government in criminal trials; see “prosecutor.”

Guardian ad litem: Depending on the type of case, a guardian ad litem can mean different things. Usually in the criminal and delinquency courts, if you do not have parents or guardians that can help you, or if your parents’ interests are different from yours, the court will choose someone to be your guardian for the purpose of your trial and/or proceedings. This is especially true in the federal system.¹⁶² This person will usually be a lawyer, but if you are in foster care, it might be your social worker or someone else who is very familiar with your case.

Incarcerate: To order that a person be placed in a prison or other lock-down facility for a period of time. If you are “incarcerated,” it means that you are in prison.

Indictment: A formal document written by a grand jury accusing someone of a crime. It is presented to the court as the reason for prosecuting someone.

Jurisdiction: Jurisdiction has two separate definitions. First, it is the power of a court to decide a case. If a court has the power to decide your case, we say the court has “jurisdiction.” Second, it is a geographic area in which a court may exercise its power to decide a case. For example, New York and New Jersey are different “jurisdictions” because New York courts only have authority to decide cases brought in New York.

Plea bargain: When the accused person makes an agreement with the prosecutor to plead guilty to a lesser crime in exchange for the possibility of a lower sentence. When you accept a plea bargain, you give up your right to a trial.

Prosecutor: The attorney who works for the state or federal government who is in charge of preparing the case against you. Prosecutors usually work for the District Attorney in the state system or the U.S. Attorney in the federal system. Your lawyer and/or parent/guardian should be with you whenever you speak to the prosecutor. You have a right to have your lawyer present to help you with any questions that the prosecutor may ask. If your lawyer is not present for a meeting, you have the right to ask for your lawyer and to not speak to the prosecutor until your lawyer arrives.

160. All definitions are adapted and paraphrased from those listed in BLACK’S LAW DICTIONARY (11th ed. 2019).

161. The Supreme Court has said: “We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.” *In re Gault*, 387 U.S. 1, 41, 87 S. Ct. 1428, 1451 18 L. Ed. 2d 527 (1967).

162. 18 U.S.C. § 5034.

Transfer: When your case is moved to a different court. In order to be tried as an adult, your case must be transferred to criminal court and must meet the rules or requirements for transfer.

Trial: When the court formally examines the evidence and legal claims brought by the prosecutor against the accused person.

“Waive your right”: When you waive a legal right it means you voluntarily give it up. Some rights are not waivable. To waive a right, you must know the facts and intend to give up the right. Otherwise the waiver will not be valid.

Vacate: When a court of appeals cancels a decision that was made by a lower court. Once the court vacates a decision, it might make its own decision or send the case back to the lower court to review the case again. Sending the case back to the lower court is called “remanding.”

CHAPTER 39

TEMPORARY RELEASE PROGRAMS*

A. Introduction

If you are incarcerated in New York State, this Chapter will help you understand many temporary release programs that you may be eligible for. In general, this Chapter tells you about the different types of temporary release programs in New York State, summarizes the application procedures you must follow, and explains your rights regarding temporary release programs. Part B explains the temporary release programs available. Part C addresses eligibility requirements. Part D discusses how to apply for temporary release programs. Part E concerns what you must do if your temporary release request is either denied or revoked. Finally, Part F describes the parts of state and federal temporary release programs that the Second Chance Act of 2007 changed. Previous editions of the *JLM* had a special chapter for New York City temporary release programs, but as of January 1, 1995, New York City has stopped all of its temporary release programs. Therefore, this Chapter deals only with New York State provisions.

New York State temporary release programs allow incarcerated people to leave the prison for short periods of time before they are paroled or serve their full sentence. There are several programs. Each program has a specific purpose and there are separate rules to qualify. The laws allowing the State Department of Corrections and Community Supervision to create release programs can be found in the New York Correction Law (N.Y. Correct. Law) Sections 851 to 861 and 870 to 879. You can find regulations establishing the specific programs in the Official Compilation of Codes, Rules and Regulations of the State of New York (N.Y. Comp. Codes R. & Regs.), title 7, Chapter XII (parts 1900–04).

The superintendent of each New York State correctional institution and a Temporary Release Committee (“TRC”) oversee the day-to-day operations of the various programs. The TRC is made up of a chairperson and two staff members. It represents the parole, program services, and security departments. The superintendent nominates the TRC members and three alternates, and the Commissioner of Corrections approves them. The TRC must meet at least once a week to consider temporary release applications.

B. Overview of Temporary Release Programs

First, you should know that not all facilities have temporary release programs. Those facilities that do offer temporary release may not have every type of program. You should ask at your facility to see what programs it offers. You may be transferred to another facility to take part in a temporary release program.¹

There are both short-term release programs and continuous temporary release programs. The short-term programs allow incarcerated people to leave the facility for only a specific period of time (often for seven days or less) and only for certain limited purposes. The continuous temporary release programs allow incarcerated people to leave the facility for up to fourteen hours per day until the purpose of the program has been fulfilled.

You should also be aware that getting into these programs is hard. Acceptance into these programs depends on which program you are interested in and your particular criminal history. Between 2008 and 2018, the percentage of applicants accepted into all of the temporary release programs in the state has dropped from about seven to five percent.² Also, the total number of participants in these programs

* This Chapter was written by Anna Moody based in part on a previous version by Judith M. Shampanier. Special thanks to Bill Gibney of The Legal Society of New York City, Special Litigation Unit for reviewing this Chapter.

1. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(a) (2020).

2. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE

has dropped almost every year since 2004, when there were 4,028 incarcerated people participating in these programs.³ In 2018, the number was just 1,239.⁴

1. Short-Term Temporary Release Programs

There are three types of short-term temporary release programs: (a) leaves of absence, (b) community service programs, and (c) furloughs. Participation in a community service program may be short-term or continuous.

(a) Leaves of Absence

Leaves of absence are different from other release programs. You do not need to be within two years of eligibility for release on parole in order to qualify for the program. You may be granted a leave of absence to leave the facility for a certain period of time for one of three reasons:

- (1) If death may happen soon, you may leave to visit your spouse, child, brother, sister, grandchild, parent (natural or legally adoptive), grandparent, or ancestral aunt or uncle during their last illness;
- (2) To attend a funeral of such individual; or
- (3) To receive surgery or to receive medical or dental treatment not available at the facility, only if it is absolutely necessary to your health and well-being.⁵

The Commissioner or his or her representative must approve the third type of leave.⁶ This approval depends on your criminal history and your institutional behavior. The Department of Corrections and Community Supervision (DOCCS) uses a point system to determine your eligibility for programs. The point system is discussed in Part D(2)(a) below. You will need thirty points to participate in a short-term program and thirty-two points to participate in a continuous program. Even if you have the necessary number of points, you still may not be allowed to participate. But, you must be considered. Leaves of absence are available at all facilities in the state except shock incarceration facilities.⁷ However, it is important to know that leaves are fairly uncommon. They are uncommon mostly because very few incarcerated people apply for them. In 2018, eight leaves were granted out of thirteen applications.⁸

One deathbed visit may be allowed for each terminally ill relative. If you have already had one escorted visit, you will not get another visit to the same person. The facility will confirm the facts of your case and may contact the patient's doctor or funeral home director. Once the TRC is sure you have a relative who is ill or deceased, it will make a decision. If it approves your leave, the superintendent must also do so in order for you to get the leave of absence. You will be given only the

PROGRAM: 2018 ANNUAL REPORT 13 (2019), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 24, 2020).

3. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 13 (2019), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 24, 2020).

4. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 13 (2019), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 24, 2020).

5. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a) (2020).

6. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a) (2020).

7. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 5 (2019), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 24, 2020).

8. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 16 (2019), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 24, 2020).

shortest length of time necessary to accomplish the purpose of the leave. Out-of-state leaves of absence will be granted only with the Commissioner's approval.⁹

If you have applied for a medical or dental leave, you must be willing to get such treatment nearby and from a doctor selected by the institution. You must get TRC Form 4188 filled out and signed by the facility Health Services Director.¹⁰ The temporary release committee must:

- (1) have a plan that predicts the number of visits you will need for treatment;
- (2) have you examined by your prison's dentist or physician after each visit to the outside doctor to make sure you actually got treated; and
- (3) make sure that your leaves of absence for dental or medical treatment are never more than a "reasonable number of hours" within a single day (unless a longer leave is medically necessary).¹¹

Your bounds of confinement must state that you will proceed directly to the dentist's or physician's office upon release and return directly to your institution once your visit is done.¹² All medical or dental leaves longer than one day, even when you are not a Central Review case, require approval from the Director of Temporary Release Programs.¹³ See Part D(2)(c) of this Chapter for an explanation of Central Review.

(b) Community Service Programs

Under the community service program, eligible incarcerated people may leave the facility for up to fourteen hours on any day to volunteer at nonprofit organizations or public agencies (for example, hospitals or charities). These organizations must have an established volunteer program with a job description outlining the duties and responsibilities of a volunteer. You may not fill a position ordinarily taken by a paid worker. Participants in a volunteer work program will receive an allowance from the facility's Temporary Release Program appropriations.¹⁴ You may also be allowed to participate in religious services and athletic or cultural events if they are not available at your facility.¹⁵

(c) Furloughs

A furlough program allows eligible incarcerated people to leave an institution for up to seven days in order to:

- (1) Solve family problems or maintain family ties,
- (2) Attend a short educational course,
- (3) Look for a job, or
- (4) Seek post-release housing.¹⁶

Thus, if you can convince the TRC that you need to see your family (for example, because you have children, or because your parents are going through a divorce), you may be allowed to take a furlough only for this narrow purpose. You may not take an out-of-state furlough.¹⁷

Furloughs are available at all facilities throughout the state except for shock incarceration locations.¹⁸ Be aware, though, that furloughs are rarely granted. For example, 100% of applications

9. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a)(1)(i)(e) (2020).

10. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a)(2)(v)(a) (2020).

11. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a)(2)(v) (2020).

12. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a)(2)(v)(e) (2020).

13. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a)(2)(iv) (2020).

14. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(b)(1)–(3) (2020).

15. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(b)(6)–(7) (2020).

16. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c) (2020).

17. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c) (2020).

18. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 5 (2019), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 24, 2020).

have

been rejected in some years.¹⁹ In both 2013 and 2014, there were 34 applications for furlough and none were granted.²⁰

General confinement incarcerated people who have been accepted for previous furloughs may apply with these limitations:

- (1) You cannot take more than twenty-eight days in any furlough year,
- (2) You cannot take more than fourteen days in the first six months of any furlough year, and
- (3) You cannot take more than seven days in any twenty-eight day period.
- (4) A furlough year begins on the day you take your first furlough and ends 365 days later.
- (5) No furlough can be longer than seven days.²¹

If you apply and do not fit into this timing, the TRC may hold onto your application.²² Please note that if you want to take a furlough during a holiday season, you must submit your application at a time set by the Director of Temporary Release at your facility.²³

(i) Family-Tie Furlough

If you are applying for a family-tie furlough, you must go to an approved residence. An approved residence must be the home of a relative by blood or legal adoption, a legal guardian, or a spouse. If your family lives out-of-state, you may request that the TRC and Central Office approve a different in-state location.²⁴ You will still be allowed to meet with your family to maintain family ties even if your family lives out-of-state. However, the meeting must take place in the state in which you are imprisoned and at an approved residence.

(ii) Job-Search and Post-Release Housing Furloughs

The job-search furlough and the post-release housing furlough are available to incarcerated people preparing for release from prison. There is no pre-approved residence requirement for a one-day furlough. For a longer furlough, you must meet the same residence requirements (home of a relative by blood or legal adoption) as for the family-tie furlough. If that is not available, you must go to a legal and verifiable residence.²⁵

(iii) Short Educational/Vocational Training Course Furlough

The short educational/vocational training course furlough program serves one of two purposes:

- (1) One-day rehabilitation therapy in order to provide the incarcerated person with counseling and therapy for problems such as drug, alcohol, or gambling addictions; or
- (2) An educational furlough to take an entrance exam or attend an educational conference, short course, or seminar.

19. *See, e.g.*, N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE PROGRAM: 2013 ANNUAL REPORT 17 (2014), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2013.pdf> (last visited Jun. 24, 2020); N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE PROGRAM: 2014 ANNUAL REPORT 15 (2015), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2014.pdf> (last visited Jun. 24, 2020).

20. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2013 ANNUAL REPORT 17 (2014), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2013.pdf> (last visited Jun. 24, 2020); STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2014 ANNUAL REPORT 15 (2015), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2014.pdf> (last visited Jun. 24, 2020).

21. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.3(c)(2) (2020).

22. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.3(c)(2)–(3) (2020).

23. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c)(2)(iv)(b)(3)(ii) (2020).

24. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c)(2)(i)(a)–(b) (2020).

25. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c)(2)(ii)–(iii) (2020).

This program can be for one day or for a longer period of time. Educational furloughs require Central Office approval.²⁶

All furlough approvals will last continuously unless the decision says that the furlough is for a specific period of time. After the first furlough, the superintendent will schedule later requests as long as the TRC says that you are still qualified. If you are only approved for a furlough, though, you are not approved for any other temporary release program.²⁷

If you have a pending transfer to a work release or educational release program facility, you will be eligible for a furlough from the transferring facility after Central Office approval. Remember that furlough approval, like approval for other temporary release programs, is entirely up to the prison officials. If the Commissioner of Corrections approves you for a work or educational furlough, the superintendent of the prison facility can postpone the furlough in the interest of “the efficient and orderly operation of the transferring facility.”²⁸

2. Short-Term Temporary Release Procedures

As soon as you are approved for a short-term temporary release program, you will be notified so that you may make the arrangements necessary to complete the program. If the TRC feels that there is not enough information about your requested residence, whom you will be staying with, or any other part of your case, it will investigate the problem. If the result of the investigation is negative, you will be notified and you may be denied that residence.²⁹

You will usually be allowed to bring no more than \$100 over and above your transportation costs on a short-term release. If you cannot afford transportation, your release may be postponed until you have the money. If you leave on short-term release, you must pay for the entire trip. In exceptional cases, the facility may grant you an advance to cover the costs of the trip.³⁰

You will receive a photo identification card to carry during your temporary release. This card must be with you at all times when you are out of the facility.³¹ You will also be required to sign a “Memorandum of Agreement” before you leave. It lists the rules and regulations that you must follow while on temporary release. It also includes any special conditions that apply specifically to you.³² You will not be allowed to return to the facility with any item that you did not take out with you.³³ The law requires that you be supervised by a parole officer during your short-term temporary release.³⁴

3. Continuous Temporary Release Programs

There are four different types of continuous temporary release programs. These releases allow incarcerated people to leave prison grounds for up to fourteen hours a day on a continuous basis. They are granted to let incarcerated people work, volunteer for community service, get educational or vocational training, or attend an industrial training leave program. If the Central Office approves you for any long-term temporary release program, that approval also implies that you are approved for all other temporary release programs. However, this implied approval is at the discretion of the TRC and the facility superintendent. There are no out-of-state continuous release programs.³⁵ Not every

26. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c)(2)(iv)(b)(1) (2020).

27. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 1901.1(d)(1), (9) (2020).

28. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(7)–(8) (2020). See Part D(2)(c) of this Chapter for more information.

29. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(a)(2) (2020).

30. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(a)(6) (2020).

31. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(a)(7)(i) (2020).

32. For a copy of a typical Memorandum of Agreement, see N.Y. COMP. CODES R. & REGS. TIT. 7, § 1902.1 (2020).

33. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(a)(7)(ii) (2020).

34. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(b)(2)(i) (2020).

35. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1 (2020).

institution offers each release program. Where programs are offered, the number of available spots may be limited. You will need to check this at your facility.

(a) Work Release

The work release program allows an eligible incarcerated person to leave a facility for up to fourteen hours in a day to work, get on-the-job training, or do any activity that will make employment possible, like shopping for work clothes. One of the purposes of work release is to make it possible for you to accumulate savings before your release on parole, in the hope that this will make your return to the community easier.

Incarcerated people are expected to secure their own employment.³⁶ Work release is by far the most popular temporary release program. This popularity is shown in both the number of applications and the number of incarcerated people who are approved. In 2018, work release figures show 23,611 applications were received, and 1,154 incarcerated people were approved.³⁷ To participate in this program, you must be physically, mentally, and emotionally capable of finding and keeping a steady job. You must also satisfy the other temporary release eligibility requirements outlined below in Part C.³⁸

(b) Educational Leave

The educational leave program allows incarcerated people to leave a facility for up to fourteen hours in any day to attend school or vocational training. Before you can apply for an academic college release program in New York City, Long Island, Westchester, or Rockland County you must have completed six semester hours of college level study with a passing grade. You must also have applied to a college within commuting distance of a participating facility. However, you do not have to complete six credit hours of college level study to participate in an educational release program from an upstate correctional facility or in a vocational training program upstate or in the New York metropolitan area. For either program, you must submit your temporary release application to the facility TRC by July for the fall semester, November for the spring semester, and April for the summer semester.

Educational leave is one of the rarest of the temporary release programs. In 2018, for example, only ten incarcerated people applied, and no one was approved.³⁹ This should not discourage you from applying if you are qualified, but you should be aware that it may be difficult to get.

If you are approved to participate in an educational release program and are transferred to a correctional facility in New York City to take part in such a program, but your application for admission is rejected by the college, you will be considered approved for the work release program as long as you are physically capable of keeping a job.⁴⁰

(c) Community Services Program

As described in Part B(1)(b) above, the community services program allows incarcerated people to leave the facility for up to fourteen hours a day in order to participate in religious services, athletic events, volunteer work, or cultural events not offered at the facility. An example of the volunteer work that is available is the work done by incarcerated people in Fishkill. They commute to the surrounding areas and work with community organizations on projects like arts festivals and the Special

36. See N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(d)(2) (2020) (discussing procedures for those prisoners granted work release to search for a job and the support a correction counselor or temporary release parole officer must give to those prisoners).

37. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 16 (2018), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 27, 2020).

38. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(a) (2019).

39. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 16 (2018), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 27, 2020).

40. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(b) (2019).

Olympics.⁴¹ The advantage of participating in the continuous community services program is that once accepted, you will not have to reapply in order to get released. That is, so long as your disciplinary record remains the same, you will be able to leave your facility for up to fourteen hours a day, week after week. The short-term program has fewer benefits (for example, you can only leave the facility for a maximum of seven days at a time before reapplying for temporary release privileges). But, as discussed in Part C below, it has less strict requirements.⁴² The short-term version of this program is almost never used. Statistics for 2018 show that not a single incarcerated person applied for it. Fifty incarcerated people did apply for the continuous version in that year. One of those applicants was approved.⁴³

(d) Industrial Training Leave

This program allows an eligible incarcerated person to leave the facility for up to fourteen hours in any day to participate in an industrial training program. An industrial training program assigns an incarcerated person to the supervision of a federal, state, county, or local government employee, who is not a corrections officer, to help that employee in performing his job.⁴⁴ You must have either a high school diploma or a GED to qualify for this program.⁴⁵

Currently the only location with industrial training programs is the Hudson Correctional Facility.⁴⁶ The incarcerated people participating in this program work at the DOCS warehouses located in Menands.⁴⁷ Incarcerated people accepted into this program will work and learn how to take inventory, complete bills of lading, operate forklifts, and repair furniture. Others will work in the office learning business procedures.⁴⁸ This program allows incarcerated people to develop good work habits, to acquire job skills and become familiar with the distribution industry that can be a great help after release from prison.⁴⁹

4. Continuous Temporary Release Procedures

In order to qualify for a continuous temporary release, you must first apply and be approved at the facility level. If you are approved, you may be transferred to a different correctional facility that has the temporary release program you applied to. When you arrive at the new facility, you will be

41. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 7 (2018), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 27, 2020).

42. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(c) (2019).

43. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 16 (2018), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Feb. 28, 2020).

44. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(d) (2019).

45. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, INDUSTRIAL TRAINING PROGRAM, *available at* <https://doccs.ny.gov/industrial-training-program> (last visited Jun. 27, 2020).

46. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, INDUSTRIAL TRAINING PROGRAM, *available at* <https://doccs.ny.gov/industrial-training-program> (last visited Jun. 27, 2020).

47. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, INDUSTRIAL TRAINING PROGRAM, *available at* <https://doccs.ny.gov/industrial-training-program> (last visited Jun. 27, 2020); *see also* Corcraft Products, *available at* <http://www.corcraft.org/> (last visited Feb. 28, 2020).

48. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, INDUSTRIAL TRAINING PROGRAM, *available at* <https://doccs.ny.gov/industrial-training-program> (last visited Jun. 27, 2020); NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 7 (2018), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Jun. 27, 2020).

49. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 8 (2014), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Feb. 28, 2020).

interviewed by a corrections counselor and a temporary release parole officer. You will participate in an orientation program that will introduce you to the facility and to the program.⁵⁰

If you have no money when you arrive at the program facility, prison administrators may give you part of your salary in advance. You can use the advanced money to cover the costs of your job search, tuition or related expenses, transportation costs for a weekend furlough, or an emergency leave of absence. You must repay the advanced money as soon as possible. Incarcerated people in a work release program will earn money. All other incarcerated people may receive an allowance, or the equivalent, provided they perform their institutional duties well. All the money you make while you are in a continuous temporary release program must be given to the facility processing officer to be deposited into your account. If you are in a work or educational release program, you must pay for all expenses related to participation in that program. If you do not have money or other educational funds (like a scholarship), you will not be allowed to enroll in college.⁵¹

Just as with short-term temporary release programs, you must have a photo identification card and a signed "Memorandum of Agreement." You must carry the identification card at all times.⁵²

There are many restrictions on the types of jobs you may take. If you are accepted into a work release program, the facility will help you determine what job you may accept. If necessary, you may be granted an eight-hour, non-continuous job search furlough. You may be removed from the program if you have not found employment within six weeks after orientation and the TRC decides you are unwilling or unable to secure a job.⁵³

5. Family Reunion Program

If you do not qualify for either the leave of absence for funeral/deathbed visits, or the furlough family-ties programs, you may still have another chance to visit your family. The Family Reunion Program allows some incarcerated people and their families to meet privately for an extended period of time.⁵⁴ This program has nothing to do with the temporary release program. It is part of visitation. It is only available if you are *not* eligible for the temporary release program. You may apply if your location offers the program.⁵⁵ Twenty-two locations currently offer the program: Albion, Attica, Auburn, Bedford Hills, Clinton, Collins, Downstate, Eastern, Elmira, Fishkill, Great Meadow, Green Haven, Shawangunk, Sing Sing, Southport, Sullivan, Taconic, Ulster, Wallkill, Washington, Wende and Woodbourne.⁵⁶

The rules state that to be eligible, you:

- (1) Must have been in the department's custody for at least six months, must be living for at least thirty days at the facility that offers the program;⁵⁷ and
- (2) Must have shown good behavior, and have not recently had any major bad behavior problems, nor a long history of bad behavior.⁵⁸

You must also maintain good behavior while applying and visiting.⁵⁹ Further, you are not eligible for the Family Reunion Program if you:

- (1) Are eligible for the Temporary Release Program, unless your application for temporary release has been denied;
- (2) Require more security than allowed at the program site;

50. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(b)(2) (2019).

51. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(f)(1)(ii) (1999).

52. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(c)(8) (1999).

53. N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(d)(2)(vi) (1999).

54. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.1 (2013).

55. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2 (2013).

56. New York State Department of Corrections and Community Supervision Family Reunion Program, available at <https://doccs.ny.gov/family-reunion-program> (last visited Feb. 29, 2020).

57. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2(a)(1) (2013).

58. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2(a)(2) (2013).

59. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2(a)(2) (2013).

- (3) Are assigned to special housing for bad behavior; or
- (4) Have violated the Family Reunion Program rules within six months from the date of the bad behavior hearing finding.⁶⁰

Applicants who have violated Family Reunion Program rules in the past must be approved and reviewed by the Central Office.⁶¹ For more information about which family members may participate in the program, the procedures for applying, and the instructions for visiting, please see N.Y. Comp. Codes R. & Regs. tit. 7, § 220.

C. Eligibility Requirements for Temporary Release Programs

If you were *ever* convicted of any of the following offenses, you are ineligible for temporary release:

- (1) Escape—first, second, or third degree;
- (2) Absconding—first or second degree; and
- (3) Absconding from furlough or from a community treatment facility.⁶²

If you are *currently* serving a sentence for one of these crimes, you are ineligible for temporary release:

- (1) Criminally negligent homicide;
- (2) Vehicular manslaughter—first or second degree;
- (3) Manslaughter—first or second degree;
- (4) Aggravated manslaughter—first or second degree;
- (5) Murder—first or second degree;
- (6) Aggravated murder;
- (7) Abortion—first or second degree;
- (8) Self-abortion—first or second degree;
- (9) Issuing abortifacient articles;
- (10) Sexual misconduct;
- (11) Rape—first, second, or third degree;
- (12) Criminal sexual act—first, second, or third degree;
- (13) Forcible touching;
- (14) Persistent sexual abuse;
- (15) Sexual abuse—first, second, or third degree;
- (16) Aggravated sexual abuse—first, second, third, or fourth degree;
- (17) Course of sexual conduct against a child—first or second degree;
- (18) Female genital mutilation;
- (19) Facilitating a sex offense with a controlled substance;
- (20) Sexually motivated felony;
- (21) Predatory sexual assault;
- (22) Predatory sexual assault also against a child;
- (23) Aggravated harassment of an employee by an inmate;
- (24) Incest—first, second, or third degree;
- (25) Use of a child in a sexual performance;
- (26) Promoting or possessing an obscene sexual performance by a child;
- (27) Promoting or possessing a sexual performance by a child;
- (28) Attempting to get or providing support for an act of terrorism—first or second degree;
- (29) Making a terrorism threat;
- (30) Committing an act of terrorism;
- (31) Hindering prosecution of terrorism—first or second degree;

60. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2(b)(1)–(4) (2013).

61. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2(b)(4) (2013).

62. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(2)(i) (2018). “Absconding” refers to failing to report to your parole officer or moving without informing your parole officer.

(32) Criminal possession of a chemical weapon or biological weapon—first, second, or third degree;

(33) Criminal use of a chemical weapon or biological weapon—first, second, or third degree⁶³

Also, you will not be eligible for temporary release if your conviction was for a crime that involved either the use or threatened use of a deadly weapon or a dangerous instrument, or the crime involved causing someone serious physical injury.⁶⁴ However, if you can show the Temporary Release Committee Chairperson a document from the court or Office of the District Attorney that the crime you were convicted of did not include: “being armed with, the use of or threatened use of, or the possession with the intent to use unlawfully against another of, a deadly weapon or a dangerous instrument or the infliction of a serious physical injury as defined in the Penal Law,” you will be eligible for temporary release.”⁶⁵

You are eligible to participate in temporary release programs (short-term or continuous) only if you are within twenty-four months of your next scheduled appearance before the parole board.⁶⁶ If you have been held by the parole board, you must be within twenty-four months of your parole date (except for leaves of absence).⁶⁷ If you are serving an indeterminate sentence, you will be considered eligible for temporary release if you have served the minimum period of imprisonment set by either the court or the parole board.⁶⁸

You will not be eligible for a temporary release program if:

- (1) You have an outstanding warrant;⁶⁹
- (2) You have been committed to a local, state, out-of-state, or federal jurisdiction currently or in the past;⁷⁰
- (3) You have an outstanding charge;⁷¹

63. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(2)(ii) (2018).

64. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(1)(iii) (2018).

65. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(1)(iii) (2018).

66. N.Y. CORRECT. LAW § 851(2) (McKinney 2014).

67. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(1)(i) (2018).

68. N.Y. CORRECT. LAW § 851(2) (McKinney 2014).

69. Any of the following warrants (from any jurisdiction) will make you ineligible: (1) family court warrant (except alimony, child support, or paternity); (2) out-of-state or federal criminal detainer; (3) felony arrest warrant for a crime which is not barred by the statute of limitations, as provided by N.Y. CRIM. PROC. LAW, § 30.10; (4) misdemeanor arrest warrant for a crime committed on or after your current conviction, and which is not barred by the statute of limitations, as provided by N.Y. CRIM. PROC. LAW, § 30.10; (5) bench warrant; (6) probation violation warrant in or out of state, or out-of-state parole warrant; (7) immigration warrant; (8) military warrant; (9) securing order; or (10) if there is an indication of an active warrant and the warrant has not been filed at the facility, the interviewer must contact the issuing agency to determine the status of the warrant. If no response is received within 30 days, the warrant will be considered inactive, and the prisoner will not be barred from temporary release. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(i)(a)–(j) (2018).

70. You will be eligible, however, if the sentencing court has indicated in writing that there is no objection to your being in a temporary release program. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 1900.4(c)(7)(ii)(a)–(c) (2018).

71. Your interviewer must write to the correct court to make sure that the charge is still outstanding. If the court does not reply within thirty days, it will be assumed that the charge is no longer outstanding. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(iii)(c) (2018).

- (4) You are the subject of a Bureau of Immigration and Customs Enforcement (ICE)⁷² deportation proceeding;⁷³
- (5) You were eligible for the shock incarceration program and either chose not to participate or failed to complete it;⁷⁴ or
- (6) In the eight weeks before your application, you engaged in particularly bad behavior.⁷⁵

Repeat parole violators (“RPVs”) must serve at least six months after their most recent return before they can apply for temporary release.⁷⁶

Each incarcerated person receives a certain number of points depending on his criminal history and institutional behavior. You must meet the minimum number of points needed for any program you want to do. The scoring system will be explained in Part D(2)(a) below. You will not have to worry about how many points you have if you were only convicted as a youthful offender. Youthful offenders are treated as if they have scored the right number of points that each program needs. Youthful offenders will simply appear before the TRC. They will then make the decision.⁷⁷

Temporary release is a privilege. Approval can be taken away at any time. To remain approved, you must show continuing good behavior from the time conditional approval is given until the time you begin the period of temporary release. Conditional approval will be taken away if:

- (1) After the conditional approval, you are found guilty at a disciplinary or superintendent’s hearing;
- (2) You do not do well in your program; or
- (3) If the TRC finds out something very negative about you.

If your conditional approval has been taken away, you may re-apply right away unless you have recently shown particularly bad behavior. In that case, you may not re-apply for eight weeks. If your eligibility for temporary release changes, your new application will be processed as if it were the first one you had submitted.⁷⁸

If you are approved for a continuous temporary release program, you are also approved for all other temporary release programs. This approval is at the will of the TRC and facility superintendent.⁷⁹ This means that if you have been approved for any continuous program (like a continuous educational release program) and you wish to do a different program, there is no formal way to change programs. Once you have been approved for one continuous release program, you may be eligible for a different one as long as the TRC and the superintendent agree.⁸⁰

72. ICE is the agency formally known as the Immigration and Naturalization Service or INS. ICE is the main investigative arm of the U.S. Department of Homeland Security and the second largest investigative agency in the federal government. It is mainly responsible for identifying, investigating, and getting rid of weaknesses having to do with the nation's border, economic, transportation, and infrastructure security. See the *JLM* Supplement on Immigration and Consular Access for more information on immigration agencies.

73. You will not be considered for temporary release if ICE shows: (1) that deportation proceedings are underway; (2) a show cause order for deportation has been issued; and (3) there is an actual ICE warrant on file. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(iii)(d)(3) (2018). Your prison facility *must* write to ICE asking it about your alien status. If ICE does not respond within thirty days, your facility will assume that ICE does not plan to deport you. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(iii)(d)(2) (2018).

74. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(6) (2018).

75. Serious bad behavior problems include all those that make you lose good-time credit, lead to being placed in special housing unit (“SHU”), or lead to being placed in keep lock for more than 30 days. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(8) (2018).

76. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(10)(iii) (2018).

77. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(12) (2018).

78. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(6) (2012).

79. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(9) (2012).

80. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(9) (2012).

D. How to Apply for Temporary Release Programs

1. Application Procedures

To participate in a temporary release program, ask your counselor or parole officer for information about the types of programs your facility offers. Also, ask for a form called the “Notification to the TRC.” When you complete this form, you must indicate the type of program you are applying to and explain your reasons for applying. If you are physically unable to submit your application, the facility health services director or other staff person may submit the application for you.⁸¹ You should be as specific as possible in explaining what type of release you are seeking and why that particular program fits your needs and qualifications. You should apply as early as possible because the application process takes a while.

If your application is denied, you must wait at least eight weeks from the date it was turned down before re-applying for the same type of release.⁸² The eight-week waiting period does not apply to leaves of absence.⁸³

2. How the Department Handles Applications

(a) The Point System

If you are not a youthful offender (the point system does not apply to youthful offenders),⁸⁴ you must have a certain number of points to qualify for a particular program, even after you have met all the other requirements. The point system was developed to provide a standard way to measure your willingness to comply with the rules of temporary release. The system rewards good behavior in prison and in prison programs. It is also partly based on your criminal history and the crime for which you have been convicted. Still, if you have a good disciplinary record in prison, or if you are granted a temporary release and follow the rules, your chances of getting a release in the future are better.

After you have filled out your application, it will go to an interviewer. The interviewer will score the application. There are eleven items in the point system scoring. Six are based on your criminal history, and five are based on your behavior while in prison.⁸⁵ At the end of Part D(2)(a) of this Chapter, there is a chart that summarizes this point system and the points that may be gained or lost. You can use this chart to easily add up your score. However, it is important to read through these more detailed explanations first because the chart does not include every detail. Pay special attention to the time periods for each section, as some items extend as far back as ten years while others only apply to things that have happened in the last year. The more points you have, the better.

The items in the point system are scored as follows:

(i) Criminal History⁸⁶

a. Previous Sentences⁸⁷

You will get one point (+1) if, in the ten years before you started your current sentence, you were not in prison at all because of a conviction. You will get zero points (0) if in the last ten years you were in prison for only misdemeanor or youthful offender convictions. You will lose one point (-1) if in the last ten years you were in prison because of a felony conviction. If you were sentenced to time served, this counts as incarceration after adjudication.

81. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(a) (2018).

82. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(11) (2018).

83. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(11) (2018).

84. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(12) (2018).

85. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e) (2018).

86. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1) (2018).

87. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(i) (2018).

b. Number of Felony Convictions⁸⁸

If you were convicted of a felony before or during your current prison sentence, you will get fewer points. It will be harder for your application to be approved. If the sentence you are serving is your only felony conviction in the last ten years, you will get two points (+2). If, during the last ten years, you were convicted of only one other felony, you will get zero points (0). If on top of your current conviction and that one other conviction, you have also been arrested for any other felonies, and those arrests have ended in conviction, even if you were convicted of these other felonies while you are serving your current sentence, you will lose two points (-2). If you have never previously been convicted of a felony and were convicted of your only felony during your current prison sentence, you will get zero points (0). If you were convicted of two or more felonies during your current prison sentence, you will lose two points (-2).

c. Number of Misdemeanor Convictions⁸⁹

If you were convicted of a misdemeanor before or during your current prison sentence, you will get fewer points. It will be harder for your application to be approved. If you were not convicted of a misdemeanor in the last ten years, you will get one point (+1). If you were convicted of three or fewer than three misdemeanors in the last ten years, including the one you are serving time for now, you will get zero points (0). If you were convicted of four or more misdemeanors in the last ten years, including the one you are serving time for now, you will lose one point (-1). If you were convicted of your first misdemeanor during the sentence you are serving, you will get zero points (0).

d. Outstanding Warrants⁹⁰

If you have outstanding warrants, you will get fewer points. It will be harder for your application to be approved. You will get two points (+2) if you have no outstanding warrants. You will get zero points (0) if you have one or more outstanding criminal warrants. A criminal warrant does not include alimony, child support, or a paternity warrant. If you can clearly show that the outstanding warrant against you was cleared because there was no evidence or there was a mistake, then that warrant will not count against you.

e. Parole or Probation Violations⁹¹

If in the last ten years, or after you started your current prison sentence, your parole or probation was never revoked because of a technical violation or because you were arrested, you failed to report to your Parole Officer, or you moved without telling your Parole Officer ("abscondance"), you will get two points (+2). If your parole or probation was revoked one or more times, you will get zero points (0).

f. Nature of Prior, Current, and Subsequent Convictions⁹²

This category is about the kind of crimes you committed in the last ten years. The more serious the crime, the more points you will lose. If you are not in prison for any of the crimes listed below, you will get zero points (0). In this point system, attempted crimes are counted the same as completed crimes. If you have been convicted of more than one of these crimes, you will be scored according to the most serious of them. If you also were convicted as a youthful offender, that conviction will not be included in the point score.

88. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(ii) (2018).

89. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(iii) (2018).

90. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(iv) (2018).

91. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(v) (2018).

92. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(vi) (2018).

You will lose six points (-6) if you were convicted of any of the following crimes in the last ten years: murder—first or second degree; kidnapping—first or second degree; rape—first, second, or third degree; sodomy—first, second, or third degree; sexual abuse—first degree; incest; use of a child in sexual performance; or promoting a sexual performance by a child (including an obscene sexual performance).

You will lose four points (-4) if you were convicted of any of the following in the last ten years: assault—first degree; manslaughter—first or second degree; arson—first or second degree; burglary—first degree; robbery—first degree; sexual misconduct; sexual abuse—second or third degree; or endangering the welfare of a child.

You will lose two points (-2) if in the last ten years you were convicted of any of the following: criminal trespass—first degree; robbery—second or third degree; criminally negligent homicide; assault—second or third degree; possession of firearms and other dangerous weapons; menacing; reckless endangerment—first degree; unlawful imprisonment; coercion—first degree; riot—first degree; arson—third or fourth degree; vehicular assault; or vehicular manslaughter.

If you have been convicted of more than one of these crimes during the last ten years, then you will lose points only for the most serious one. So if you have been convicted of kidnapping (-6) and vehicular assault (-2), you will only lose six points (-6) in total.

(ii) Institutional Behavior⁹³

Participation months are used to add up the score that describes your behavior in prison. A participation month is a thirty-day period of regular participation. The participation month only counts if you did it within the last two years before you apply for temporary release. Regular participation means that you are taking part in the activity at least once either in the morning, afternoon, or evening, for five days per week and for four weeks per month. The participation month must be in either a program or a work assignment. It must be supervised by a certified instructor or teacher. If you are in involuntary protective custody ("IPC"), and you have no chance to do a work assignment or participate in any programs, you will get one point (+1) for every six months you spent in IPC during the last two years before you apply for temporary release.

a. Program Participation I⁹⁴

In this category, you can get as many as sixteen points (+16), but no more than sixteen points, for participating in programs and/or work assignments. For each three-month period, you can get one point (+1) for doing a work assignment and one point (+1) for doing a program, for a total of two points (+2) for the three months.

b. Program Participation II⁹⁵

In this category, you can get only one point (+1). You can only get this extra point if you have been in prison for longer than twenty-four months. You can get this extra point if you did a program or a work assignment for eight months in the twenty-five to thirty-six months leading up to your application for temporary release. In other words, you get up to sixteen points for the programs and/or work assignments you did in the two-years before you apply for temporary release (Program Participation I). You only get one extra point for anything you did before these two years (Program Participation II).

c. Discipline I⁹⁶

In this category, the longer you go with little or no disciplinary proceedings, the more points you get and the more likely it is that your application will be approved. You can get no more than four

93. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2) (2018).

94. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(i) (2018).

95. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(ii) (2018).

96. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(iii) (2018).

points (+4) in this category. The disciplinary proceeding decisions that count against you are if you lose your privileges for fourteen days or more, or if you are put into special housing or keeplock. Room and dorm restrictions count as keeplock. If you did not have any of these disciplinary proceeding decisions in the last three months before you apply for temporary release, you will get one point (+1). If you had one or none of these disciplinary proceeding decisions in the last six months, you will get one point (+1). If you had two or fewer decisions in the last nine months, you will get one point (+1). If you had three or fewer decisions in the last twelve months, you will get one point (+1).

d. Discipline II⁹⁷

In this category, you can only get one point. You can get this extra point only if you have been in prison for longer than twenty-four months. If you had three or fewer disciplinary proceedings in the twelve to twenty-four months before your application, you get one point (+1). The types of disciplinary proceedings that count are the same as above.

e. Temporary Release Record⁹⁸

This section only applies if you were previously on temporary release. If you were convicted or arrested for a crime while on temporary release in the past year, you will lose six points (-6). If you were removed from work release or educational leave for disciplinary reasons other than re-arrest in the last year, you will lose three points (-3). If you were convicted or arrested while on temporary release in the twelve to twenty-four months before your application, you will lose three points (-3). If you returned late or under the influence of drugs or alcohol, or broke any temporary release program rules in the last six months, you will lose two points (-2). If you successfully finished your last temporary release and it was within the last year, you will gain two points (+2). If your two most recent releases in the last year were successful, you will get four points (+4).

You will get zero points (0) if: none of the above applies to you; your last release was over a year ago, or if it was an escorted or supervised group activity; or you have had your parole revoked since your last successful participation in temporary release.

Anyone found to be an absconder (failing to report or moving without telling your Parole Officer) will not be approved for temporary release.

(iii) Total Score⁹⁹

After you have finished scoring, you should add twenty-six points (+26) to your score to make sure that your score is not negative.¹⁰⁰ You need thirty points (30) to participate in a short-term temporary release program.¹⁰¹ You need thirty-two points (32) to participate in a continuous program.¹⁰² So, while you could participate for one day in a community service program with a score of thirty, a score of thirty-two lets you participate on a daily basis.¹⁰³

However, having the right number of points is only a requirement. Just because you have scored at least thirty points (30) does not mean that you automatically get the release. Having enough points only means that you can meet with the interviewer.¹⁰⁴

97. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(iv) (2018).

98. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(v) (2018).

99. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(3) (2018).

100. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(3)(i) (2018).

101. N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a) (2012).

102. See N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(c), (d) (2020) (requiring 32 points for participation in community services leave program and industrial training leave program).

103. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.3(b) (2020).

104. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(f) (2020).

a. Point System Chart

As you go through this chart, write the points that apply to you in the right-hand column. Remember to refer back to the previous sections if you do not understand the short-hand explanations included here. This chart is meant to make the process of calculating your own score faster and easier. It is not supposed to replace the in-depth explanations in Part D(2)(a)(iv) and Part D(2)(a)(v) of this Chapter.

(iv) Criminal History¹⁰⁵

	Possible Points available	Your Point subtotal per each category
Previous Sentences (last ten years only)		
No prior incarceration due to conviction	+1	
Prior incarceration due to misdemeanor or youthful offense only	0	
Incarcerated due to a felony conviction	-1	
Number of Felony Convictions (last ten years only)		
Current sentence is your only felony conviction	+2	
First felony conviction was for act committed during your current incarceration	0	
One previous felony conviction	0	
Two or more felony convictions	-2	
Number of Misdemeanor Convictions (last ten years only)		
No misdemeanor convictions	+1	
Three or fewer misdemeanor convictions, including your current sentence	0	
First misdemeanor conviction was for an act committed during your current incarceration	0	
Four or more misdemeanor convictions	-1	
Outstanding Warrants		
No outstanding warrants	+2	
One or more outstanding warrants	0	
Previous Arrests (last ten years only)		
You have never had parole or probation revoked due to re-arrest, absconding, or violating program rules	+2	
You have had parole or probation revoked one or more times	0	
Nature of Convictions (last ten years only; apply only the most severe)		
Convicted of murder (1 st or 2 nd degree), kidnapping (1 st or 2 nd degree), rape (1 st , 2 nd , or 3 rd degree), sodomy (1 st , 2 nd , or 3 rd degree), sexual abuse (1 st degree), incest, use of a child in a sexual performance, or promoting a sexual performance by a child (including an obscene sexual performance)	-6	
Convicted of assault (1 st degree), manslaughter (1 st or 2 nd degree), arson (1 st or 2 nd degree), burglary (1 st degree), robbery (1 st degree), sexual misconduct or sexual abuse (2 nd or 3 rd degree), or endangering the welfare of a child	-4	

105. The following point computations for Criminal History can be found at: N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1) (2020).

Convicted of criminal trespass (1 st degree), robbery (2 nd or 3 rd degree), criminally negligent homicide, assault (2 nd or 3 rd degree), possession of firearms and other dangerous weapons, menacing, reckless endangerment (1 st degree), unlawful imprisonment, coercion (1 st degree), riot (1 st degree), arson (3 rd or 4 th degree), vehicular assault, or vehicular manslaughter	-2	
WRITE YOUR TOTAL HERE FOR (i) Criminal History:		

(v) Institutional Behavior¹⁰⁶

Program Participation I (last two years only)	Points Available	Your Points
Each three-month period of participation in a work assignment (max. of +2)	+1	
Each three-month period of participation in a program (max. of +2)	+1	
Each six months in involuntary protective custody (IPC) in which you have not had the chance to participate in a program or work assignment	+1	
Program Participation II		
Eight months of participation in a program or work assignment in the twenty-five to thirty-six-month period prior to application	+1	
Discipline I (max. of +4)		
No disciplinary proceedings in the last three months	+1	
One or no disciplinary proceedings in the last six months	+1	
Two or fewer disciplinary proceedings in the last nine months	+1	
Three or fewer proceedings over the last twelve months	+1	
Discipline II		
Three or fewer disciplinary proceedings in the twelve to twenty-four months prior to application	+1	
Temporary Release Record		
Convicted or arrested for crime while on temporary release during the last year	-6	
Convicted or arrested for a crime while on temporary release during the thirteen to twenty-four-month period prior to application	-3	
Removed from work release or educational leave during the last year for other disciplinary reasons	-3	
Returned late or under the influence or violated any other temporary release rules within the last six months	-2	
Successfully completed your last temporary release within the last year	+2	
Successfully completed your last two temporary releases within the last year	+4	
None of the above apply	0	
WRITE YOUR TOTAL HERE FOR (ii) Institutional Behavior:		
GRAND TOTAL after combining (i) Criminal History; (ii) Institutional Behavior; and an additional +26 points:		

Once you have added up the scores from both the Criminal History and Institutional Behavior sections of the chart, add another twenty-six points (+26) to find your GRAND TOTAL score. Remember that short-release programs require thirty points (30), and continuous programs require a

106. The following point computations for Institutional Behavior can be found at: N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2) (2020).

score of thirty-two points (32). Remember also that no score alone guarantees that your application will be granted.

(b) Department Procedures for Considering Your Application

After scoring the application, the interviewer will conduct a preliminary review.¹⁰⁷ The interviewer will review the information in your application and determine if you are eligible based on your point score, your crime, and any other factors that were discussed in Part C above.¹⁰⁸ After the interview, you will have two work days to challenge the information used in the point score.¹⁰⁹ Once any challenges have been resolved, the interviewer will refer the scored application to the Temporary Release Committee ("TRC") chairperson.¹¹⁰ See Part E of this Chapter on appeals for further information on challenging scoring information.

The TRC chairperson will review your file and check to see if you have either low-point status or are included in a special review category.¹¹¹ If you are considered a low-point incarcerated person, you may be considered for release by the TRC when one of the following conditions applies:

- (1) You have been given community preparation open date status by the parole board, and central office approval has been obtained;
- (2) You are a graduate of the shock incarceration program;
- (3) You are a graduate of the CASAT annex program; or
- (4) You are a first felony offender, who legally would have been eligible to get a sentence of probation instead of the sentence of imprisonment that was actually imposed.¹¹²

You will be notified of your official point score, the range into which it falls, and when you will appear before the TRC.¹¹³ If you are in either the regular consideration or low-point range, the TRC will interview you and then decide whether or not to approve your application.¹¹⁴

If you receive a score of forty (40) or more, your application for furlough (temporary release) will automatically be forwarded to the superintendent (without a TRC recommendation) for review as long as:

- (1) You are not serving a sentence for a crime involving infliction of serious physical injury upon another, a sex offense involving forcible compulsion, or any other offense involving the use or threatened use of a deadly weapon;
- (2) You are not designated as a CMC (central monitoring case);
- (3) Yours is not a "low-O.D. case" (defined in Part D(2)(d) below); and
- (4) You are not in a special review category (see Part D(2)(d) below).¹¹⁵

Once your application has gone to the TRC and has been reviewed, the TRC will schedule a personal interview with you. After the committee members have met with you, they will approve or deny your application. At least two of the three committee members must support a decision to approve. In making its decision, the TRC must look at your score on the eleven items in the point system, your interview, and the other factors used to evaluate incarcerated people. These other factors include recommendations of the professional staff. The committee can also consider aspects of your record that are not addressed by the point system. These other aspects include the quality of your performance in programs or on work assignment. In addition, the TRC must consider what it sees as

107. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(g) (2020).

108. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(b)–(c) (2020).

109. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(i) (2020).

110. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(i) (2020).

111. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j) (2020).

112. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j)(1)(i)–(iv) (2020).

113. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(k) (2020).

114. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 1900.4(j)(3), (l) (2020).

115. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j)(4) (2020).

your ability to benefit from participating in temporary release against any risk to the community or program from your participation.¹¹⁶

All applications for temporary release submitted to the TRC will be forwarded to the superintendent for review. Each application will be accompanied by either:

- (1) A statement of reasons for its denial by the TRC, or
- (2) A memo setting out the proposed temporary release program, stating the bounds of confinement, and including any other relevant information.

If the superintendent rejects the application or rejects the specific program that the TRC approved, he or she must give reasons for doing so in writing. You will get a copy of the reasons. Another copy will go to the Central Office for immediate review by the Commissioner. You will not have to make any other appeals. The Commissioner will tell you whether he accepts the superintendent's decision.¹¹⁷ If you are denied, see Part E below for legal remedies that may be available to you.

(c) Applications that Require Central Office Approval

The Central Office must review and approve all applications for temporary release.¹¹⁸ There are several categories that your application might fall under. One of these categories requires special review. Special review means that the Commissioner doesn't need to approve those applications. The Director of temporary release will make the final decision.¹¹⁹ The first application category is the statutory review category. This category includes incarcerated people serving time for:

- (1) Possession, use, or threatened use of a weapon;
- (2) A case resulting in prolonged physical injury, disability, or death of the victim; or
- (3) A sexual offense involving force.¹²⁰

The Commissioner gives final approval for this category of applications.¹²¹

The second category of application is "central monitoring cases" ("CMCs"). Generally, central monitoring cases are incarcerated people convicted of sophisticated or highly publicized criminal activity, whose release would pose special monitoring problems.¹²² Incarcerated people found to be CMCs require approval of the Commissioner for correctional facilities.¹²³

Incarcerated people considered to have a "low-O.D." must also have the Commissioner approve their applications. Low-O.D. cases are those cases where incarcerated people receive the lowest point score possible, but are given an O.D. or community preparation open date status by the parole board. If the parole board has given you O.D. status, you will have a better chance of getting approval, even though your point score is the lowest possible.¹²⁴

The fourth group of incarcerated people requiring Central Office approval is the Special Review category. This category includes incarcerated people who have:

- (1) Any convictions for arson;
- (2) Any convictions for sex-related felonies;
- (3) Any convictions for conspiracy, criminal facilitation, or criminal solicitation in a statutory case;
- (4) Three or more felonies (including any youthful offender adjudications);

116. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(l)(1)–(5) (2020).

117. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(m) (2020).

118. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n) (2020).

119. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(1) (2020).

120. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(1) (2020).

121. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n) (2020).

122. *See Pugliese v. Nelson*, 617 F.2d 916, 918–919 (2d Cir. 1980) (discussing central monitoring cases); *see also In re Smith v. Goord*, 43 A.D.3d 1236, 1237, 843 N.Y.S.2d 468, 469 (3d Dept. 2007) (holding petitioner's designation as CMC was not arbitrary or capricious based on the nature of his crimes because he was convicted of a robbery that involved a significant amount of cash).

123. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(2) (2020).

124. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j)(1)(i), (n)(3) (2020).

- (5) Any parole or temporary release violations;
- (6) A history of mental instability;
- (7) Any kidnapping convictions; or
- (8) Victim(s) or bystander(s) who were physically injured as a result of the instant offense, and the instant offense doesn't fall under the statutory review category discussed above.¹²⁵

If you fall into any of these categories, your chances of being granted temporary release are much lower. Your entire application must be reviewed by the Central Office and approved by the Commissioner¹²⁶ (except for Special Review applications, which only need final approval from the Director of Temporary Release).¹²⁷ In general, the more people who review your application, the less likely you are to receive approval.

E. What to Do if Your Temporary Release Application Is Denied or Revoked

1. Denial of Temporary Release

(a) Appeals Within the Department

You can appeal your point score if the interviewer disqualified you because he added up your point score incorrectly. The interviewer can also be disqualified if the information he used was wrong. You can also appeal the decision of the TRC or the decision of the Central Review Office. To appeal your point score or the TRC's decision, you must submit Form 4145 and any other relevant information to the director of central office temporary release programs. You must submit this within ten working days of the date that the notice of denial of your application was sent. The director must receive your completed appeal within thirty days of the denial. If your appeal application is made within the thirty-day limit, the chairperson will send your appeal package to the Central Office. The appeal package will include any information not available in the Central Office files.¹²⁸ The Central Office reviewer will notify you and the TRC of his findings.¹²⁹

If you think the disapproval by the Central Review Office was unfair or unreasonable, you may appeal the decision. You can appeal by applying to the Director of the Central Office to review your case. You should only do this when TRC accepted your application, but then the Central Office denies it. As explained in Part D(2)(b) above, all denials by the superintendent must be referred directly to the Central Office for an automatic Commissioner review. You do not have to do anything in this case.¹³⁰

If the Deputy Commissioner or the Commissioner denies your application at any point in the proceeding, your administrative remedies are exhausted, and you cannot appeal this decision.¹³¹ If your case has been designated a "central monitoring case" ("CMC"), you may only appeal by using existing departmental policy. Central Office temporary release staff do not handle CMC appeals.¹³²

You cannot re-apply for the same program until the appeals process on a prior application is complete. You may withdraw a pending appeal at any time.¹³³

(b) Other Forms of Review if Your Application is Denied

If your application is denied, you can appeal to the courts under Article 78 of the New York Civil Practice Law and Rules ("C.P.L.R."). See *JLM*, Chapter 22, "How to Challenge Administrative

125. N.Y. COMP. CODES R. & REGS. tit. 7 § 1900.4(n)(4)(i)-(viii) (2020).

126. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 1900.4(n)(1)–(3) (2020).

127. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(4) (2020).

128. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n) (2020).

129. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6 (2020).

130. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6(a)(2), (c) (2020).

131. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6(c) (2020).

132. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6(e) (2020).

133. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6(f) (2020).

Decisions Using Article 78 of the New York Civil Practice Law and Rules” for guidance on appealing. However, New York courts have addressed this question often and now apply a test that makes it difficult for a claim to be successful. The Second Department has said that because participation in temporary release programs is a privilege and not a right, courts will only look at claims where either the temporary release committee violated a statutory requirement (such as failing to give you an interview if you have the right amount of points, or failing to inform you of the committee’s decision), or if the committee’s decision was affected by “irrationality, bordering on impropriety.”¹³⁴ Because the TRC has such enormous discretionary power, it is very difficult to convince a court that its decision was irrational and unfair. The TRC only has to say that it thinks you might pose a threat to society. The TRC could also say that it does not think you will work hard. The court will accept the TRC’s findings. If you have not yet participated in the temporary release program, you also do not have the right to challenge the legislature or executive’s decision to make you ineligible for temporary release. The legislature or executive’s decision is based upon the crime for which you were convicted.¹³⁵

However, it is possible to win, as seen in *Lopez v. Coughlin*.¹³⁶ In that case, an HIV-positive incarcerated person applied for work release. The TRC approved the application because the facility doctor, who was familiar with the incarcerated person’s condition, said his medical condition would not affect his ability to be on temporary release. The Central Office reversed and denied the application solely on the basis of the incarcerated person’s condition. The Albany County Supreme Court held that this was completely irrational since the doctor had already given his approval for temporary release. The court said that the Central Office’s findings “were based on generalizations and possibly inaccurate assumptions.” The court ordered the TRC to reevaluate its decision.¹³⁷

2. Revocation of Temporary Release

(a) How Your Temporary Release Can Be Revoked

The superintendent or director of your correctional institution upon recommendation of the TRC, the Commissioner of the Department of Corrections and Community Supervision, or the chairman of the board of parole may suspend or revoke your temporary release.¹³⁸ This suspension or revocation can be made at any time if the Superintendent or Director has information that:

- (1) Your continued participation in the program is not in the interest of community safety *or* goes against your best interests; *or*
- (2) Based on your conduct, there is a substantial likelihood that you cannot successfully complete the temporary release program.¹³⁹

Some factors that will be considered indicators that you are unsuited for temporary release include:

- (3) Arrests and/or convictions for crimes committed while participating in the program;
- (4) Absconding, or attempting to abscond, from the program;

134. *Grant v. Temp. Release Comm.*, 209 A.D.2d 617, 617, 619 N.Y.S.2d 106, 106 (2d Dept. 1994) (citing *Young v. Temp. Release Comm.*, 122 A.D.2d 606, 606, 505 N.Y.S.2d 279, 280 (4th Dept. 1986)).

135. *See Lee v. Governor of N.Y.*, 87 F.3d 55, 59–60 (2d Cir. 1996) (finding no constitutional violation when the class of prisoners excluded from participation in programs based on their crime was expanded to include petitioners while they were incarcerated); *see also Romer v. Morgenthau*, 119 F. Supp. 2d 346, 358 (S.D.N.Y. 2000) (holding that prisoner did not have a liberty interest in participating in work release programs); *In re Cody v. Pataki*, 24 A.D.3d 1058, 1059, 805 N.Y.S.2d 726 (3d Dept. 2005) (holding that prisoners have no right to compel Commissioner of Correctional Services to provide temporary release program).

136. *Lopez v. Coughlin*, 139 Misc. 2d 851, 529 N.Y.S.2d 247 (Sup. Ct. Albany County 1988); *see also Flaherty v. Coughlin*, 713 F.2d 10, 14 (2d Cir. 1983) (reversing dismissal of prisoner’s claim because evidence suggested he may have been denied temporary release privileges in retaliation for filing a class action lawsuit challenging state prison policies).

137. *Lopez v. Coughlin*, 139 Misc. 2d 851, 854, 529 N.Y.S.2d 247, 249 (Sup. Ct. Albany County 1988).

138. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.1(a) (2020).

139. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.1(b) (2020).

- (5) Violations of departmental, institutional, or temporary release program rules;
- (6) Threats made by you against yourself or others;
- (7) Threats made against you that require protective custody;
- (8) Changes in your physical or mental status that result in your inability to successfully complete the program;
- (9) Poor attitude on your part as shown by a failure to participate successfully;
- (10) Your lack of motivation;
- (11) Significant change in employment or student status;
- (12) Failure to get a job six weeks after orientation in a work release program;
- (13) Your refusal to repay the advance;
- (14) Your refusal to repay the weekly work release charge;
- (15) You have outstanding warrants or your immigration status changes;
- (16) Your presence in the community places you at risk.¹⁴⁰

Any employee of the Department of Corrections and Community Supervision who is assigned to the facility of your confinement and has firsthand knowledge of your unsatisfactory or worsening progress in the temporary release program can help remove you from the program. The employee who thinks you are not doing well in your program may file a written statement to the Chairperson of the facility's TRC. This statement may request that the Temporary Release Committee to review your unsatisfactory or worsening adjustment to the program. The TRC will then evaluate your progress.¹⁴¹ If you have not been transferred from the temporary release facility because of disciplinary problems, the TRC will make a recommendation to the superintendent. This recommendation states whether you should continue in temporary release.¹⁴² The superintendent will then either approve or reject the recommendation of the TRC. If the superintendent approves the recommendation of removal from the program, your temporary release is revoked.¹⁴³

If your unsatisfactory progress appears to be caused by departmental, institutional, or temporary release rule violations, these rule violations must be referred to in either a disciplinary hearing or a superintendent's hearing. If you do something to be considered a security risk, you can be transferred to a more secure facility before the TRC has time to review the complaint.¹⁴⁴

If a temporary release participant is charged with misbehavior, the hearing disposition cannot recommend removal from the temporary release program as a disciplinary penalty. The TRC cannot use a report as a reason for recommending that you be removed from a temporary release program. However, the TRC can do this if you are found guilty at a disciplinary hearing.¹⁴⁵

(b) How to Appeal a Revocation of Your Temporary Release

Once you have been granted temporary release, you have a constitutionally protected interest in ensuring that your liberty is not deprived and that you are not re-incarcerated without fair procedures. That is, if you have not violated any rules, and your temporary release is still revoked, you may be protected under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. You may also be protected under the state laws governing your confinement. Due Process, under the Fourteenth Amendment, means that the government must follow certain procedures—including giving you notice and an opportunity to be heard—before it can take away your liberty earned through the temporary release program. You can be removed from the program only if the facility's temporary release administrators follow the required procedures. Note, however, that the Supreme Court's decision in *Sandin v. Conner* makes it rather difficult for you to prove that your removal from the

140. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.1(c)(1)–(14) (2020).

141. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(a) (2020).

142. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(a) (2020).

143. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 1904.2(i)–(k) (2020).

144. For a list of factors that are considered security risks, see N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(c) (2020).

145. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(g) (2020).

program has caused you harm that is “atypical” of what you should expect as an incarcerated person.¹⁴⁶ The Second Circuit, however, has held that temporary release programs and work release programs are liberty interests protected by the U.S. Constitution for New York State incarcerated people.¹⁴⁷

Unfortunately, the regulations governing temporary release leave much discretion to the facility’s temporary release administrators. They will be able to make many decisions as they see fit. These decisions will stand as long as they are considered fair and unbiased. If your temporary release is denied, you will only be entitled to the minimum due process requirements. The Dutchess County Supreme Court stated in *Roman v. Ternullo* that correctional facility superintendents were required to extend the procedural due process safeguards outlined by the Supreme Court in *Wolff v. McDonnell* and discussed in detail in the New York Code to proceedings regarding work release programs.¹⁴⁸ These requirements include a hearing, an electronic recording of the hearing, prior notice of the hearing, and a written statement of the decision made and the reasons relied on at the hearing.¹⁴⁹ If you are in a special housing unit or keeplock, there are also provisions made to assist you in your defense.¹⁵⁰ At the hearing, you are able to call witnesses, produce evidence and may be able to cross-examine adverse witnesses.¹⁵¹ The Second Circuit has applied the due process requirements set out by the Supreme Court to release revocation hearings.¹⁵² These requirements include:

- (1) written notice of the claimed violations of parole;
- (2) disclosure to the parolee of evidence against you;
- (3) opportunity to be heard in person and to present evidence;
- (4) the right to confront and cross-examine adverse witnesses;
- (5) a “neutral and detached” hearing body such as a traditional parole board; and
- (6) a written statement by the fact-finders as to the evidence relied on and their reasons for revoking parole.¹⁵³

146. *Sandin v. Conner*, 515 U.S. 472, 486–87, 115 S. Ct. 2293, 2301–02, 132 L. Ed. 2d 418, 431–32 (1995) (holding that a prisoner is not deprived of a liberty interest when he is removed from the general prison population and placed in segregated confinement for 30 days because discretionary discipline by prison officials in response to misconduct falls within the expected boundaries of the prisoner’s sentence).

147. *See Anderson v. Recore*, 446 F.3d 324, 328 (2d Cir. 2006) (holding that a prisoner has a liberty interest in continuing his participation in his temporary release program); *Friedl v. City of New York*, 210 F.3d 79, 84–85 (2d Cir. 2000) (holding that due process protections apply to the revocation of work release participation); *Gutierrez v. Joy*, 502 F. Supp. 2d 352, 357 (S.D.N.Y. 2007) (affirming that the Second Circuit recognizes that due process protects a prisoner’s liberty interest in continued participation in temporary release programs).

148. *Roman v. Ternullo*, 81 Misc. 2d 1023, 1024–1025, 367 N.Y.S.2d 197, 198 (Sup. Ct. Dutchess Cnty. 1975); *Wolff v. McDonnell*, 418 U.S. 539, 563–566, 94 S. Ct. 2963, 2978–2980, 41 L. Ed. 2d 935, 955–957 (1974) (finding that due process safeguards applied to a prisoner’s interest in disciplinary proceedings); *see also* *Marciano v. Goord*, 38 A.D.3d 217, 218, 830 N.Y.S.2d 552, 553 (1st Dept. 2007) (discussing a prisoner’s due process rights and the requirements for removal of a prisoner from a temporary release program, including requirements of prior hearing, notice, and opportunity to be heard); *MacCowan v. Cummings*, 99 Misc. 2d 914, 916, 417 N.Y.S.2d 366, 367 (Sup. Ct. Orleans Cnty. 1978) (holding that “any removal [of the prisoner] from the [work release] program should be as a result of a hearing following the rationale and procedures set forth in *Wolff v. McDonnell*”). *See* Chapter 32 of the *JLM*, “Parole,” for a more detailed explanation of the due process rights guaranteed under *Wolff*. The U.S. Supreme Court has also held that due process requires certain procedural protections for prisoners participating in a state-created pre-parole conditional supervision program. *See Young v. Harper*, 520 U.S. 143, 146–147, 117 S. Ct. 1148, 1151, 137 L. Ed. 2d 270, 276 (1997).

149. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(h) (2020).

150. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(h)(4) (2020).

151. N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(h)(5)–(6) (2020).

152. *Friedl v. City of New York*, 210 F.3d 79, 84–85 (2d Cir. 2000) (noting that the due process requirements of *Morrissey v. Brewer* have been extended to revocation of probation and loss of good-time credits and therefore should be extended to work release revocation) (*citing* *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)); *Kroemer v. Joy*, 2 Misc. 3d 265, 268, 769 N.Y.S.2d 357, 360 (Sup. Ct. Yates County 2003) (applying the procedural due process requirements of *Morrissey*, including the right to confront adverse witnesses, to a Temporary Release Program revocation hearing).

153. *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484, 499 (1972).

However, in order to succeed on appeal, you *must* be able to prove that the wrong conclusion was reached in your TRC hearing and that the procedure was incorrect.¹⁵⁴

If you believe your rights have been violated in a revocation of temporary release, you can file a lawsuit. In order to do this, you must base your complaint on a particular statute or law that will give a judge power to hear how the prison authorities have treated you. If you are in New York, there are two different ways that you can do this: (1) Article 78 of the New York Civil Practice Law and Rules (called Article 78 of the C.P.L.R.) in New York state courts, or (2) 42 U.S.C. § 1983 (called Section 1983) in *either* state or federal court. Both of these statutes will be explained in further detail below.

(i) Article 78 of the C.P.L.R.

If you think that prison officials used either improper procedures or obviously incorrect information in deciding your case, you should bring a state court proceeding under Article 78 of the New York Civil Practice Law and Rules. A proceeding is a courtroom or related matter that occurs during the course of a dispute or lawsuit, or any individual courtroom or related event that takes place during the course of the dispute or lawsuit. Bringing a state court action can have advantages over a federal action. It is easier for a state court judge to order a state agency to correct its actions than it is for a federal court judge to do the same. A state court action is the most common and best way to fight to get reinstated in a temporary release program. If you choose to proceed under Article 78, however, you will not be awarded money damages. Money damages refers to the money awarded by a court to a person who has suffered loss, injury, or harm, either to the person's body or to property. Something else to keep in mind is that Article 78 claims are less complicated than federal Section 1983 claims. If you are going to file *pro se* (without a lawyer), Article 78 proceedings will be much easier for you to file than a Section 1983 claim. It will be easier to file Article 78 proceedings because of the complicated federal court procedure needed for Section 1983 claims. For more information on Article 78 proceedings, see *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you are not in New York, you should research any similar statutes in your state.

(ii) Section 1983¹⁵⁵

Your second option is to bring a claim under 42 U.S.C. § 1983 ("Section 1983"). This claim can only be used if an officer or agent of the government violates one of your rights protected by the Constitution or violates a federal statute.¹⁵⁶ Section 1983 allows you to be awarded money damages if you win your case. Remember that you must first try the prison's administrative remedies before using Section 1983.¹⁵⁷ Section 1983 can also be used only if you are not asking to be released completely from prison. Even if you are on temporary release, you are still considered to be in prison. Please see *JLM* Chapter 16 on using Section 1983, as well as *JLM* Chapter 14 on the Prison Reform Litigation Act ("PLRA"), for more information. Remember, however, that the court strongly considers the TRC. The TRC is

154. See *Roucchio v. Coughlin*, 29 F. Supp. 2d 72, 79–80 (E.D.N.Y. 1998) (holding that a due process claim for damages was not valid when the inmate failed to show that his removal from the work release program was invalidated).

155. If you would like to file a 42 U.S.C. § 1983 claim, read Chapter 14 of the *JLM*, which discusses the Prison Litigation Reform Act ("PLRA"). Under the PLRA, prisoners must satisfy certain requirements before filing § 1983 actions in federal court. For more information about § 1983 claims, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

156. Please note that some officials cannot be sued under 42 U.S.C. § 1983. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law" for more information.

157. See *Hill v. Chalanor*, 419 F. Supp. 2d 255, 257 (N.D.N.Y. 2006) (holding that no action challenging prison conditions can be brought under federal law by a prisoner until all available administrative remedies are exhausted); *Francis v. Zavadill*, No. 06 Civ. 249 (SAS), 2006 U.S. Dist. LEXIS 79323, at *14 (S.D.N.Y. Oct. 30, 2006) (*unpublished*) ("Failure to exhaust is an absolute bar to an inmate's action in federal court."); *Garcia v. Payne*, 97 Civ. 0880 (DAB), 1998 U.S. Dist. LEXIS 1274, at * 9–10 (S.D.N.Y. Feb. 6, 1998) (*unpublished*) (dismissing prisoner's claims for the failure to pursue state remedies prior to filing).

given substantial discretion to remove “unsuitable” incarcerated people from the temporary release program. As long as the TRC follows procedural due process guidelines (as outlined in *Wolff*¹⁵⁸) and its decision is found to be rational, the courts will not overturn its decision.

F. The Second Chance Act of 2007 and Federal Bureau of Prisons Temporary Release Programs

The Second Chance Act of 2007¹⁵⁹ made some important changes to temporary release programs. It expanded the types of opportunities available to incarcerated people upon release. It also improved existing programs in prisons and modified how incarcerated people can serve sentences in community facilities. It allows government agencies and nonprofit groups to receive grants of money from the federal government in order “to assist offenders reentering the community from incarceration to establish a self-sustaining and law-abiding life by providing sufficient transitional services.”¹⁶⁰ However, these agencies and groups must apply for the money to receive it. They must also comply with certain requirements to receive the grant money.¹⁶¹ This section will discuss, as established by the Second Chance Act, (1) The Federal Prisoner Reentry Program and Services, (2) Drug Treatment Programs, and (3) Alternatives to Incarceration.

1. Federal Prisoner Reentry Program and Services

The Second Chance Act created a federal prisoner reentry program under the Bureau of Prisons to help you adjust to life outside prison.¹⁶² This program is meant to provide you with information regarding health and nutrition, employment, literacy and education, personal finance and consumer skills, community resources, personal growth and development, as well as release requirements and procedures.¹⁶³ Once you are released, the Re-entry Courts, at the state and local level, will monitor you and help you access support programs. Such programs include drug and health counseling, case management, and “any other service or support needed for reentry” after your release.¹⁶⁴ Nonprofit organizations may also provide programs to help you after your release. There may also be mentoring and transitional services programs run by nonprofit organizations (as opposed to the state or the Bureau of Prisons itself) available to you during your incarceration.¹⁶⁵ These mentoring programs can give you mentoring services, services to help you transition to life after your release. Transitional services programs offer education, literacy, and job training.¹⁶⁶ These services take place during incarceration and post-release.¹⁶⁷ The Second Chance Act requires that the Bureau of Prisons allow anyone who provided you with mentoring services during your incarceration to continue those services after your release.¹⁶⁸ Remember, it is not yet clear which nonprofit organizations or government agencies will be receiving grant money and how the programs will function.

Before you leave prison, the Bureau of Prisons is required to help you prepare for your release. The Bureau of Prisons is required to ensure your eligibility for state and federal benefits such as Social Security, Medicare, Medicaid, and Veterans benefits, and to support parent-child relationships. Where the law permits, the Bureau must also help you secure those benefits you are eligible for before

158. *Wolff v. McDonnell*, 418 U.S. 539, 563–566, 94 S. Ct. 2963, 2978–2980, 41 L. Ed. 2d 935, 955–957 (1974).

159. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified at 34 U.S.C. § 60501).

160. 34 U.S.C. § 60501.

161. 34 U.S.C. § 10631.

162. 34 U.S.C. § 60541.

163. 18 U.S.C. § 4042(a).

164. 34 U.S.C. § 10631(f)(3)(C).

165. 34 U.S.C. § 60531.

166. 34 U.S.C. § 60531(b)(2).

167. 34 U.S.C. § 60531(b).

168. 34 U.S.C. § 60533(a).

release.¹⁶⁹ For the three years before you are released from prison, you may have access to programs that would train you for jobs and careers.¹⁷⁰ Earlier in your incarceration, the Bureau of Prisons is required, if it has enough funding, to offer a program to assess your skill level in various areas. It also is required to help you to improve in certain areas, including academic, health, and interpersonal skills.¹⁷¹ It will determine whether you have any special reentry needs and help you maintain relationships with your family and children during your imprisonment.¹⁷² This program will also help you obtain an official form of photo identification, a social security card, and/or a birth certificate as your release nears.¹⁷³

2. Drug Treatment Programs

The First Step Act allows state and local prosecutors to set up full drug-treatment programs during your time in prison or jail, as well as while you are on parole or under court supervision.¹⁷⁴ Depending on what state you are in, there may be drug treatment programs where you can get treatment for drug dependence or addiction.¹⁷⁵ If you are in a community confinement center rather than a regular prison, the Bureau of Prisons is required to ensure that you have any necessary medical care, mental health care, and medicine.¹⁷⁶

The Second Chance Act provides for Prison-Based Family Treatment Programs.¹⁷⁷ To be eligible for a Prison-Based Family Treatment Program, you must be pregnant or have a child under 18 years of age and you must have been convicted of a nonviolent drug-related felony.¹⁷⁸ These programs require that you serve your term in prison, and they provide substance abuse treatment, child early intervention services, family counseling, legal services, medical care, mental health services, nursery and preschool, parenting skills training, pediatric care, physical therapy, prenatal care, sexual abuse therapy, relapse prevention, transportation, and vocational or GED training.¹⁷⁹ The Second Chance Act also changed the Residential Substance Abuse Treatment for State Offenders Program ("RSAT"), which provides drug treatment in a facility set apart from the general prison population.¹⁸⁰ If you are involved in an RSAT program, the state may be required to give you a wide range of support services after your release from prison. This may include case management services.¹⁸¹

3. Alternatives to Incarceration

Though you do not have an absolute right to do so, you may be able to spend some or all of the last twelve months of your sentence in a community confinement facility, or under other conditions that help you adjust to release.¹⁸² You also may be able to spend six months or ten percent of your sentence, whichever is shorter, in home confinement.¹⁸³ Courts, however, are not allowed to require or guarantee that your sentence be served in a civil confinement facility. Therefore, only the Bureau of Prisons can make this decision.¹⁸⁴ Again, it is unclear how this will work in practice.

169. 18 U.S.C. § 4042(a)(6).

170. 34 U.S.C. § 60511(b).

171. 34 U.S.C. § 60541(a).

172. 34 U.S.C. § 60541(a)(1)(F).

173. 34 U.S.C. § 60541(b)(1).

174. 34 U.S.C. § 60521(a).

175. 34 U.S.C. § 60521.

176. 18 U.S.C. § 3621(i).

177. 34 U.S.C. § 10591.

178. 34 U.S.C. § 10596.

179. 34 U.S.C. § 10596.

180. 18 U.S.C. § 3621(e)(1)–(e)(6).

181. 18 U.S.C. § 3621(e)(1)–(e)(6).

182. 18 U.S.C. § 3624(c)(1).

183. 18 U.S.C. § 3624(c)(2).

184. *See* 18 U.S.C. § 3621(b) ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment.").

G. Conclusion

Each temporary release program has its own set of requirements for eligibility, as well as many different rules for participating. The law treats participation in these programs as a privilege, not a right. The Department of Corrections and Community Supervision is not required to create release programs, and the eligibility and approval rules are strict. The Constitution protects you against discrimination or an unfair denial of access to temporary release. This protection does not mean that you *must* be allowed to participate. Instead, it means that the temporary release officials must show that they have a good reason for not allowing you to participate or for removing you from participation. The officials must also follow the standards of due process, which the New York courts have ordered them to provide.¹⁸⁵ However, because your participation is deemed a privilege and not a right, it is very difficult to successfully appeal a decision regarding a temporary release program.

¹⁸⁵. Roman v. Ternullo, 81 Misc. 2d 1023, 1025, 367 N.Y.S.2d 197, 198–199 (Sup. Ct. Dutchess County 1975).

CHAPTER 40

PLEA BARGAINING*

A. Introduction

Most criminal cases in the United States court system end in guilty pleas.¹ This Chapter addresses the plea bargaining process and how to appeal a conviction based on a plea.

A plea bargain is a deal in which the prosecutor reduces your charges or sentence in return for a guilty plea. Because a guilty plea is basically the same as a conviction (but without the trial),² if you plead guilty you are giving up many important constitutional rights associated with the trial process, and you are also giving up multiple grounds to appeal. You should carefully consider the consequences of any plea deal before agreeing.

The government must follow certain procedures and it must meet specific legal requirements before entering into a plea bargain agreement with you. If you have already accepted a plea agreement, entered a guilty plea before a judge, or were sentenced and incarcerated, but the government did not meet the legal and procedural requirements, you may be able to appeal or challenge your conviction or sentence. Depending on your claim, convictions based on a guilty plea may be challenged on direct appeal, in a state or federal habeas corpus petition, or under Article 440 of the New York Criminal Procedure Law.³

This Chapter focuses specifically on New York State law⁴ and on federal law. If you have been sentenced in a state court outside of New York, the laws governing your ability to appeal from a guilty plea may be different from the New York laws and the federal laws described here. Although many states have modeled their plea bargaining systems on federal law, the system in each state is unique to that state. You should do research in your law library on the relevant statutes and court decisions on plea bargaining in your state.

Part B of this Chapter lists many important points to consider before accepting or challenging a plea. Part C describes the process of negotiating a plea bargain with the prosecutor. Part D explains the legal and constitutional requirements that courts must meet when accepting a plea bargain. Part E discusses how to withdraw from a guilty plea prior to sentencing and also discusses what you must do to preserve some claims after sentencing.

B. Plea Bargaining Considerations

In order to convince you to plead guilty, the prosecutor may offer various sentencing benefits including: reducing or dropping some of the charges, or recommending a particular sentence to the court. Plea bargaining may benefit both you and the prosecutor. Plea bargaining is usually faster than going to trial, which may benefit you. The speedier process also usually helps the prosecutor avoid

* This Chapter was written by Bryan Hull and revised by Syed Wasim.

1. Nearly 97% of criminal cases in the federal court system and 94% in the state systems result in guilty pleas. See John L. Kane, “Plea Bargaining and the Innocent,” *The Marshall Project* (Dec 26, 2014), available at <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent> (last accessed Feb. 2, 2020). In New York, the courts recognized plea bargaining as necessary due to the overcrowded justice system. *People v. Seaberg*, 74 N.Y.2d 1, 7, 541 N.E.2d 1022, 1024, 543 N.Y.S.2d 968, 970 (1989). The Supreme Court has also held that plea bargaining is an essential component of the administration of justice. *Santobello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427, 432 (1971).

2. N.Y. CRIM. PROC. LAW § 1.20(13) (McKinney 2018); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711–1712, 23 L. Ed. 2d 274, 279 (1969).

3. See *JLM*, Chapter 9, “Appealing Your Conviction or Sentence”; *JLM*, Chapter 13, “Federal Habeas Corpus”; and *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence.”

4. The New York statute providing for plea bargaining is N.Y. CRIM. PROC. LAW Sec. 220.10 (McKinney 2014).

having to spend time and resources preparing for trial. A plea bargain establishes your guilt for a specific criminal charge against you, which removes the uncertainty about how the trial would turn out. In addition, accepting a plea agreement often reduces the risk that you could receive the maximum sentence. Sometimes the plea agreement will include the terms of a sentence, meaning it is unlikely that you or the prosecutor will be surprised by a lesser or greater sentence.

Although there may be benefits to accepting a plea agreement, there are many things you should consider when deciding whether or not to accept a plea bargain. You are never required to accept a plea bargain that a prosecutor offers, and you always have the right to go to trial without fear of vindictiveness.⁵ It is your choice, and only your choice, whether to accept a plea bargain.

When you accept a plea bargain, you give up important constitutional rights in exchange for a possibly more favorable sentence than you would receive if convicted after trial. The constitutional rights that you waive (give up) when you enter a guilty plea include: the right to a trial by jury,⁶ the right to testify or not to testify at trial,⁷ the privilege against self-incrimination (meaning the right to not reveal information about criminal acts that you may have committed),⁸ the right to confront your accusers,⁹ the right to plead “not guilty,”¹⁰ the right to require the prosecution to prove your guilt beyond a reasonable doubt by an undivided verdict of the jurors, the right to compel favorable witnesses,¹¹ and the right to present any available defenses at trial. If you decide to plead guilty, you cannot later challenge your conviction, or appeal your case, by arguing you were not given these rights.

Once you have accepted a plea bargain, your ability to challenge a conviction resulting from that guilty plea will be very limited. New York courts have stated that a guilty plea “marks the end of a criminal case” and does not provide a “gateway to further litigation.”¹² A guilty plea communicates that you do not intend to challenge the issue of your guilt.¹³ The conviction is based on the sufficiency of your plea and not the constitutional or legal sufficiency of the proceedings.¹⁴ By pleading guilty, you waive claims that you were deprived of your rights in the proceedings prior to entering the plea.¹⁵ Your

5. U.S. CONST. amend. VI; *See Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 610–611 (1978) (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 32–33, n. 20, 93 S. Ct. 1977, 1986, 36 L. Ed. 2d 714, 727) (“To punish a person because he has done what the law plainly allows him to do is as due process violation of the most basic sort and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is ‘patently unconstitutional.’”); N.Y. CONST. art. 1, § 2 (McKinney 2016).

6. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279–280 (1969); *see also* Fed. R. Crim. Pro. 11(b)(1)(c) (2020).

7. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279–280 (1969).

8. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279–280 (1969); *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964) (holding that the privilege against self-incrimination applies in state criminal trials). *See also* U.S. CONST. amend. V.

9. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279 (1969); *see also* *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 1069, 13 L. Ed. 2d 923, 928 (1965) (extending the constitutional right to confront one’s accusers to state criminal defendants); U.S. CONST. amend. VI.

10. U.S. CONST. amend. V; N.Y. CRIM. PROC. LAW § 220.10(1) (McKinney 2014); *see also* FED. R. CRIM. PRO. 11(b)(1)(F) (2020).

11. U.S. CONST. amend. VI. *See* *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019, 1023 (1967) (affirming the right to compel favorable witnesses to testify in state criminal cases).

12. *People v. Taylor*, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985).

13. *People v. Campbell*, 73 N.Y.2d 481, 486, 539 N.E.2d 584, 586, 541 N.Y.S.2d 756, 758 (1989).

14. *People v. Di Raffaele*, 55 N.Y.2d 234, 240, 433 N.E.2d 513, 515–516, 448 N.Y.S.2d 448, 450–451 (1982).

15. *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973) (“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea...”); *see also* *People v. Hansen*, 95 N.Y.2d 227, 230, 738 N.E.2d 773, 776, 715 N.Y.S.2d 369, 372 (2000) (holding that “a defendant who in open court admits guilt of an offense charged may not later seek review of claims relating to the deprivation of rights that took place before the plea was entered.”); *People v. Di Raffaele*, 55 N.Y.2d 234, 240, 433 N.E.2d 513, 515, 448 N.Y.S.2d 448, 450 (1982) (“Where defendant has by his

guilty plea also waives the right to challenge the underlying conviction,¹⁶ and the ability to appeal any non-jurisdictional defects in the case.¹⁷

There are a couple of defects, or errors in the legal proceedings, that you can still challenge after pleading guilty. Such defects include:

- (1) Jurisdictional defects, meaning that the particular court you were in did not have authority to convict you, no matter what evidence may have been presented against you at trial;
- (2) Defects that go directly to the guilty plea itself; or
- (3) Defects in relation to the sentence subsequently imposed which was not part of the plea agreement.

There are a number of examples that fall under these categories. One is if the indictment (or other accusatory instrument) did not charge an offense.¹⁸ Another is if the prosecutor knows the conviction or indictment is only supported by false evidence.¹⁹ Another is if the conviction was based on an unconstitutional statute (to which you have the right to challenge on appeal).²⁰ Another example is a guilty plea that was not entered voluntarily, knowingly, or intelligently, (such as if you were forced to plead guilty or did not understand the plea agreement).²¹ More examples include proceedings that did

plea admitted commission of the crime with which he was charged, his plea renders irrelevant his contention that the criminal proceedings preliminary to trial were infected with impropriety and error;" his conviction rests directly on the sufficiency of his plea, not on the legal or constitutional sufficiency of any proceedings which might have led to his conviction after trial."). *But see* Schmidt v. State, 909 N.W.2d 778, 789 (Iowa 2018) (holding that convicted defendants can attack their pleas when claiming actual innocence even if the attack is extrinsic to those pleas as well as overruling cases that do not allow defendants to attack their pleas based on extrinsic grounds when they claim innocence.)

16. *People v. Seaberg*, 74 N.Y.2d 1, 8, 541 N.E.2d 1022, 1025, 543 N.Y.S.2d 968, 971 (1989) ("[A] defendant, by pleading guilty, forfeits the right to challenge the underlying conviction and loses many privileges and protections granted defendants by courts.").

17. *See* *United States v. Broce*, 488 U.S. 563, 569, 109 S. Ct. 757, 762, 102 L. Ed. 2d 927, 935 (1989) (holding that defendants, convicted based on guilty pleas, can challenge only the constitutionality of the conviction; in other words, the only issues are whether the plea was both "counseled and voluntary"); *People v. Thomas*, 74 A.D.2d 317, 319–320, 428 N.Y.S.2d 20, 23 (2d Dept. 1980) ("[O]nly those issues fully disclosed in the record which relate either to the exercise of jurisdiction by the court or to the voluntary and knowing nature of the plea are appealable after a plea of guilty.").

18. *See* *Bousley v. United States*, 523 U.S. 614, 618–619, 118 S. Ct. 1604, 1609, 140 L. Ed. 2d 828, 837 (1998) (stating that a plea would be constitutionally invalid if the record revealed that a defendant, his counsel and the court had not correctly understood the "essential elements of the crime with which he was charged"); *People v. Iaonnone*, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 664, 412 N.Y.S.2d 110, 117–118 (1978) (holding that an indictment is jurisdictionally defective "only if it does not effectively charge the defendant with the commission of a particular crime"); *People v. Guerrero*, 28 N.Y.3d 110, 117, 65 N.E.3d 51, 57, 42 N.Y.S. 3d 80, 86 (2016) ("Insufficiency of an indictment's factual allegations, however, does not constitute a jurisdictional defect that is reviewable by [the] Court, and, once a guilty plea has been entered 'the sufficiency of the evidence before the Grand Jury cannot be challenged.'"); *People v. Case*, 42 N.Y.2d 98, 100, 365 N.E.2d 872, 873, 396 N.Y.S.2d 841, 842 (1977) (holding that a defendant can challenge the substantive sufficiency of information in the indictment because sufficiency is a jurisdictional prerequisite to the conviction); *People v. Alejandro*, 70 N.Y.2d 133, 511 N.E.2d 71, 517 N.Y.S.2d 927 (1987) (holding that a defendant may challenge an informational as facially insufficient after being convicted at trial if there are no non-hearsay allegations for each element of the crime in the charging document).

19. *People v. Pelchat*, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984).

20. *People v. Lee*, 58 N.Y.2d 491, 493, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418 (1983).

21. *See* *People v. Seaberg*, 74 N.Y.2d 1, 11–12, 541 N.E.2d 1022, 1026–1027, 543 N.Y.S.2d 968, 972–973 (1989) (finding that defendants had validly waived their right to appeal in their plea bargains because the pleas were reasonable, voluntary, knowing, and intelligent); *see also* *Boykin v. Alabama*, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 1712 n. 5, 23 L. Ed. 2d 274, 280 n.5 (1969) (stating that if defendant's plea was not entered voluntarily and knowingly, "it has been obtained in violation of the Due Process Clause and is therefore void").

not meet the standards of a constitutional speedy trial,²² an illegal sentence,²³ an excessively harsh or severe sentence,²⁴ or ineffective assistance of counsel in the plea bargaining process.²⁵ Because these issues are not waived by a guilty plea, you cannot waive these claims simply by pleading guilty and you may challenge your conviction based on one of these claims at a later time.

By pleading guilty, however, you do waive certain rights. Entering a plea of guilty likely means you will not be able to challenge or appeal any issues which relate to trial or pretrial rights because these rights only protect you at trial.²⁶ Some issues which you may not appeal or use to challenge your sentence and conviction include: no probable cause for arrest;²⁷ illegally obtained confession;²⁸ problems with the form of the accusatory instrument;²⁹ improperly failing to provide a bill of particulars;³⁰ insufficient factual allegation in the indictment (unless it had been preserved by a previous on the record motion);³¹ the composition of the grand jury;³² the sufficiency of grand jury minutes;³³ a denial of a motion to dismiss the indictment in the interests of justice;³⁴ the correctness of a denial of a motion for a separate trial;³⁵ challenges to the underlying facts of the plea;³⁶ the racial

22. *People v. Blakley*, 34 N.Y.2d 311, 314, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 461–462 (1974).

23. *People v. Lynn*, 28 N.Y.2d 196, 203, 269 N.E.2d 794, 798, 321 N.Y.S.2d 74, 80 (1971).

24. *People v. Coleman*, 30 N.Y.2d 582, 583, 281 N.E.2d 845, 845, 330 N.Y.S.2d 797, 798 (1972); *see also* *People v. Mayham*, 272 A.D.2d 951, 709 N.Y.S.2d 265 (4th Dept. 2000) (holding that harshness of a sentence may be challenged if the defendant is not informed of the possible lengths of incarceration). *But see* *People v. Hidalgo*, 91 N.Y.2d 733, 737, 698 N.E.2d 46, 48, 675 N.Y.S.2d 327, 329 (1998) (holding that defendant who was informed of possible sentencing options could not challenge the harshness of the sentence).

25. *See* *People v. Gonzalez*, 171 A.D.2d 413, 413, 566 N.Y.S.2d 639, 639 (1st Dept. 1991) (finding that an evidentiary hearing was necessary to determine if counsel had coerced defendant to enter a guilty plea). On this issue, a motion should first be made to withdraw the plea or vacate the judgment under N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005). *See JLM* Chapter 20 for information on Article 440 motions, and *JLM* Chapter 12 for information about ineffective assistance of counsel.

26. *People v. Thomas*, 74 A.D.2d 317, 321, 428 N.Y.S.2d 20, 24 (2d Dept. 1980); *People v. Prescott*, 66 N.Y.2d 216, 218, 486 N.E.2d 813, 814, 495 N.Y.S.2d 955, 956 (1985) (holding that defendant forfeited right to challenge the trial court's adverse ruling on her statutory previous prosecution claim when she pleaded guilty to a reduced charge).

27. *People v. Smith*, 34 N.Y.2d 758, 759, 314 N.E.2d 875, 875, 358 N.Y.S.2d 135, 135 (1974) ("Defendants' claim that no probable cause existed for their arrest on the charge of loitering was waived when they pleaded guilty to that charge.")

28. *People v. Nicholson*, 11 N.Y.2d 1067, 1068, 184 N.E.2d 190, 191, 230 N.Y.S.2d 220, 221 (1962); *People v. Dobson*, 124 A.D.2d 744, 745, 508 N.Y.S.2d 246, 246 (2d Dept. 1986) (holding that a knowing and voluntary guilty plea prevents a defendant from appealing issues of illegally obtained confessions, when the defendant had never moved to suppress the confession prior to guilty plea). *But see* *McMann v. Richardson*, 397 U.S. 759, 767, 90 S. Ct. 1441, 1447 (1970) (holding that a guilty plea is "properly open to challenge ... where the circumstances that coerced the confession have abiding impact and also taint the plea."). *But see* *People v. Berger*, 9 N.Y.2d 692, 693, 173 N.E.2d 243, 243, 212 N.Y.S.2d 425, 425 (1961) (where defendant was allowed to appeal denied application for writ of error coram nobis for claims of coercion in the procurement of a confession used in guilty plea to a lesser charge).

29. *See* *People v. Iannone*, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 664, 412 N.Y.S.2d 110, 117 (1978).

30. *People v. Hendricks*, 31 A.D.2d 982, 982, 297 N.Y.S.2d 838, 839 (3d Dept. 1969).

31. *People v. Iannone*, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 663–664, 412 N.Y.S.2d 110, 117–118 (1978).

32. *See* *People v. Siciliano*, 40 N.Y.2d 996, 997, 359 N.E.2d 700, 700, 391 N.Y.S.2d 106, 106 (1976); *People v. Green*, 146 A.D.2d 281, 283, 50 N.Y.S.2d 95, 96, (4th Dept. 1989) ("Numerous other rights of both constitutional and non-constitutional dimension, however, have been held not to survive, including:...[a] challenge based on allegedly discriminatory composition of the grand jury")

33. *People v. O'Neal*, 44 A.D.2d 830, 830, 355 N.Y.S.2d 21, 22 (2d Dept. 1974); *People v. Thomas*, 74 A.D.2d 317, 321, 428 N.Y.S.2d 20, 24 (2d Dept. 1980) ("If the defendant's complaint relates to the loss of trial and pretrial rights and safeguards, a plea of guilty surrenders both the constitutional and nonconstitutional protections. Thus...the sufficiency of Grand Jury minutes...[is] effectively waived by a guilty plea.")

34. *People v. Travis*, 205 A.D.2d 648, 648, 613 N.Y.S.2d 252, 254 (2d Dept. 1994); *People v. Merlo*, 195 A.D.2d 576, 576, 600 N.Y.S.2d 494, 494 (2d Dept. 1993).

35. *People v. Smith*, 41 A.D.2d 893, 894, 342 N.Y.S.2d 513, 514 (4th Dept. 1973).

36. *People v. Pelchat*, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984).

composition of prospective jury pool (which includes peremptory challenges, or objections to jurors without explicit explanation why);³⁷ of speedy trial rights under N.Y. Crim. Proc. Law § 30.30;³⁸ violation of your double jeopardy rights under N.Y. Crim. Proc. Law § 40.20³⁹ or the Constitution;⁴⁰ statutory or transactional immunity (blanket immunity for crimes related to testimony);⁴¹ statute of limitations;⁴² and improper interpretation or application of a statute.⁴³

Because a guilty plea is largely equivalent to a conviction in a trial, you will face the same consequences as if you had been convicted of the charge.⁴⁴ For example, you should consider the effects a conviction will have on your parole, probation, immigration status, and employment status. The side effects resulting from a conviction are often called “collateral effects.” Your lawyer may not be obligated to advise you about these side effects.⁴⁵ However, if you are not an American citizen, your attorney *must* advise you that your conviction could have collateral effects on your immigration status.⁴⁶

The collateral effects are specific to you as an individual and generally result from actions taken by agencies (such as parole boards and employers).⁴⁷ Therefore, you should ask about these effects before you enter a guilty plea, and do research on your own. Even if the court or your attorney misinforms you about the collateral effects of your conviction, you may not be able to challenge your conviction on these grounds later.

37. *People v. Green*, 75 N.Y.2d 902, 904–905, 553 N.E.2d 1331, 1332, 554 N.Y.S.2d 821, 822 (1990).

38. *People v. O'Brien*, 56 N.Y.2d 1009, 1010, 439 N.E.2d 354, 355, 453 N.Y.S.2d 638, 639 (1982).

39. *People v. Prescott*, 66 N.Y.2d 216, 219, 486 N.E.2d 813, 815, 495 N.Y.S.2d 955, 957 (1985).

40. *See People v. Muniz*, 91 N.Y.2d 570, 574–575, 696 N.E.2d 182, 185–186, 673 N.Y.S.2d 358, 361–362 (1998) (holding that waiver of a constitutional double jeopardy claim is implied in a general appeals waiver; however, if defendant does not waive the right to appeal, the constitutional double jeopardy claim is maintained).

41. *People v. Flihan*, 73 N.Y.2d 729, 731, 532 N.E.2d 96, 535 N.Y.S.2d 590 (1988).

42. *People v. Dickson*, 133 A.D.2d 492, 494, 519 N.Y.S.2d 419, 421 (3d Dept. 1987) (stating that a guilty plea forfeits the defense of Statutory of Limitations) (“In our view, since defendant failed to raise the Statute of Limitations as a defense (*see*, CPL 210.20 [1][f]), he waived this challenge upon entry of his plea of guilty”).

43. *People v. Levin*, 57 N.Y.2d 1008, 1009, 443 N.E.2d 946, 457 N.Y.S.2d 472 (1982).

44. N.Y. CRIM. PROC. LAW § 1.20(13) (McKinney 2018); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711–1712, 23 L. Ed. 2d 274, 279 (1969).

45. *See, e.g., United States v. Ayala*, 601 F.3d 256, 270 (4th Cir. 2010) (“[Defendant’s] plea was not invalid simply because he was not informed of the possibility that it might be used against him in a subsequent federal prosecution.”); *Ruelas v. Wolfenbarger*, 480, F.3d 403, 404 (6th Cir. 2009) (“[A] defendant need not know all the possible consequences of his plea, like the loss of his right to vote or own a gun, or the effect of future sentence ...”); *Virsnieks v. Smith*, 521 F.3d 707, 721 (7th Cir. 2008) (“The [sex offender] registration order was a collateral consequence about which the State was not required to inform him.”); *Moore v. Hinton*, 513 F.2d 781, 782–783 (5th Cir. 1975) (“[A] defendant need not be informed, before pleading guilty to a charge of driving while intoxicated, that as a collateral consequence of his conviction, his driver’s license will be suspended.”); *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964) (“There was no abuse of discretion in the refusal of the court to grant leave to withdraw the plea of guilty because the appellant failed to understand the collateral effects such as the loss of civic rights [which, in this case, included voting and foreign travel].”). *But see Padilla v. Kentucky*, 559 U.S. 356, 360, 130 S. Ct. 1473, 1478, 176 L. Ed. 2d 284, 290 (2010) (“We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.”); *Bauder v. Dept. of Corr.*, 619 F.3d 1272, 1275 (11th Cir. 2010) (“Even if one could argue that the law was unclear, the Supreme Court has noted that when the law is unclear a criminal defense attorney must advise his client that the ‘pending criminal charges may carry a risk of adverse [collateral] consequences.’” (citing *Padilla v. Kentucky*, 559 U.S. 356, 369, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284, 296 (2010))).

46. *See Padilla v. Kentucky*, 559 U.S. 356, 368–369, 130 S. Ct. 1473, 1483, 176 L. Ed.2d 284, 295–296 (2010) (holding that when the immigration consequences of pleading guilty are clear, attorneys must notify clients about these consequences. If the immigration consequences (such as deportation) are not clear, the lawyer must tell the client that there *may* be immigrant consequences to pleading guilty).

47. *United States v. Sambro*, 454 F.2d 918, 920 (D.C. Cir. 1971); *see also People v. Ford*, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267–268, 633 N.Y.S.2d 270, 272–273 (1995) (holding that a court is not under an obligation to inform defendant of many collateral consequences), *overruled in part by People v. Peque*, 22 N.Y.3d 168, 3 N.E.3d 617, 980 N.Y.S.2d 280 (2013) (noting that a court’s failure to advise a defendant of potential deportation does affect the validity of the defendant’s plea).

C. Plea Bargaining Agreements

There is no constitutional right to a plea bargain which means that the prosecutor has no obligation to negotiate with you for a reduced sentence.⁴⁸ If you wish to plead guilty, the prosecutor might require that you plead guilty to all of the charges against you. If the prosecutor has not consented (agreed) to a plea, the court can only accept a guilty plea to the entire indictment (all the charges brought against you initially).⁴⁹ The prosecutor also has the discretion to decide what plea bargain to offer you, as long as the offer does not violate the law.⁵⁰ In New York, state statutes limit the kinds of plea bargains that prosecutors can offer you. They cannot offer a lower sentence than is required for the type of charge, or for a person who has committed multiple felonies.⁵¹ The prosecutor can require certain terms and conditions before agreeing to a plea bargain,⁵² as long as the terms and conditions are reasonable⁵³ and do not deny basic fairness.⁵⁴

Plea bargains in the federal system are governed by Rule 11 of the Federal Rules of Criminal Procedure.⁵⁵ New York does not have an equivalent rule, so you must look to past court decisions to understand how plea agreements are dealt with by prosecutors and courts in New York.

1. Types of Plea Agreements

There are many different types of plea agreements you may be offered in the course of a negotiation. A prosecutor may allow you to plead to a lesser charge or drop certain charges in exchange for a guilty plea.⁵⁶ This type of agreement is sometimes called a “charge agreement.” The prosecutor may propose a specific sentence or agree not to oppose your attorney’s recommended sentence. However, you should remember that the actual sentence that you may be charged with is up to the judge.⁵⁷ Even if the prosecutor offers to agree to a specific sentence if you plead guilty, the judge is not

48. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 846, 51 L. Ed. 2d 30, 43 (1977); *see also* *People v. Cohen*, 186 A.D.2d 843, 843–844, 588 N.Y.S.2d 211, 212 (3d Dept. 1992) (finding that where the policy differences were based on different caseloads and staffing, defendant was not denied right to equal protection by district attorney’s policy not to accept pleas to less than top count of indictment, though other counties had different plea-bargaining policies).

49. *People v. Antonio*, 176 A.D.2d 528, 529, 574 N.Y.S.2d 718, 719 (1st Dept. 1991); *see also* *People v. Melo*, 160 A.D.2d 600, 600, 554 N.Y.S.2d 530, 531 (1st Dept. 1990) (finding that the trial court did not deny due process in refusing to accept defendant’s plea to a lesser charge prior to trial; defendant had right to plead guilty only to the entire indictment and could plead guilty to lesser-included offense only with permission of court and consent of the People).

50. *See* N.Y. CRIM. PROC. LAW § 220.10(3), (4) (McKinney 2013); *People v. Antonio*, 176 A.D.2d 528, 529, 574 N.Y.S.2d 718, 719 (1st Dept. 1991) (explaining that the prosecutor may dictate the terms under which he or she will consent to accept a plea).

51. *See* N.Y. CRIM. PROC. LAW § 220.10(5) (McKinney 2013). Thus, if you agree to plead guilty to specific charges, the prosecutor cannot offer you a sentence below the minimum required for the charged crime. Additionally, if you have prior felony convictions, the charged crime may require an enhanced sentence, and the prosecutor must comply with these statutory requirements.

52. *People v. Antonio*, 176 A.D.2d 528, 529, 574 N.Y.S.2d 718, 719 (1st Dept. 1991) (“The prosecutor is free to dictate the terms under which he or she will agree to consent to accept a guilty plea, and where such terms are not met, consent may be withheld. Further, the withholding of such consent, by statutory mandate, renders the court without authority to accept a plea to anything less than the entire indictment.”).

53. *See* *People v. Grant*, 99 A.D.2d 536, 536, 471 N.Y.S.2d 325, 326 (2d Dept. 1984).

54. *See* *People v. White*, 32 N.Y.2d 393, 399–401, 298 N.E.2d 659, 663–664, 345 N.Y.S.2d 513, 519–520 (1973) (finding that the prosecutor’s requirement that defendant plead guilty before the court decided defendant’s speedy trial claim was coercive and denied defendant’s fundamental right to a speedy trial); *People v. Grant*, 99 A.D.2d 536, 536, 471 N.Y.S.2d 325, 326 (2d Dept. 1984).

55. FED. R. CRIM. P. § 11.

56. *See* N.Y. CRIM. PROC. LAW § 220.10(3), (4) (McKinney 2014); FED. R. CRIM. P. 11(c)(1)(A).

57. FED. R. CRIM. P. 11(c)(1)(B); *United States v. Norris*, 486 F.3d 1045, 1047 n. 1 (8th Cir.2007) (en banc) (plurality opinion) (“The plea agreement was made in accordance with Fed. R. Crim. P. 11(c)(1)(B), under which a sentencing ‘recommendation or request does not bind the court.’”); *United States v. Gomez*, 326 F.3d 971, 975 (8th Cir. 2003) (involving a plea agreement that did not bind the court).

required to follow this agreement and may choose not to accept the prosecutor's recommended sentence.⁵⁸ However, it is rare for a judge to find the prosecutor's recommended sentence unacceptable.

Another type of agreement the prosecutor may offer is a "cooperation agreement," in which you agree to cooperate with the government. For example, you may be asked to testify against another defendant in exchange for a reduced sentence or dropped charges. This type of plea bargain may require your cooperation for a long period of time, and your case may not be settled until you have completed your side of the agreement.

A "conditional plea" may allow you to enter a guilty plea without waiving the right to appeal certain pretrial motions.⁵⁹ For example, if the court rules that certain essential evidence is admissible at trial, but you believe the appellate court may reverse that decision and rule that the evidence cannot be introduced, you can enter a conditional plea of guilty, which preserves your right to appeal the evidentiary issue. If you appeal and the appellate court later rules that the evidence was not admissible, you have the right to withdraw your guilty plea and then either go to trial or enter into another plea bargain. A conditional plea cannot be made without the approval of the court and the prosecutor.⁶⁰ Note that conditional pleas are not valid in many states and most federal appeals courts.⁶¹ In these jurisdictions, even if the trial court allows you to enter a conditional plea, appellate courts have held that conditional pleas are invalid on appeal, because a guilty plea automatically forfeits the right to appeal any non-jurisdictional (outside of your court's area of control) issue, such as an evidentiary error.⁶²

Keep in mind that it is riskier for you to bargain for a specific sentence than it is for you to bargain for reduced charges. This is because when you bargain for a plea to a lesser offense, you immediately receive the benefit of the plea, but when you bargain for a specific sentence, there is a chance that the judge might not agree to the prosecutor's recommendation.

New York generally refuses to enforce off-the-record promises that a defendant claims were made by the prosecutor.⁶³ Therefore, if prosecutor makes a promise with you about your claims, make sure the promise was an on-the-record promise.⁶⁴ If you accept a plea offer, make sure your agreement is in writing and is as thorough as possible, describing in specific detail your obligations and the

58. See FED. R. CRIM. P. 11(c)(1)(B); *People v. Selikoff*, 35 N.Y.2d 227, 242, 318 N.E.2d 784, 794, 360 N.Y.S.2d 623, 639 (1974).

59. FED. R. CRIM. P. 11(a)(2).

60. FED. R. CRIM. P. 11(a)(2).

61. *People v. Thomas*, 53 N.Y.2d 338, 343, 424 N.E.2d 537, 539, 441 N.Y.S.2d 650, 654 (1981) (noting that states and federal circuits are "about evenly divided on the acceptability of such pleas" and that the Fifth, Sixth, Seventh and Ninth Circuits have disapproved such pleas (*citing* *United States v. Sepe*, 486 F.2d 1044 (5th Cir. 1973); *United States v. Cox*, 464 F.2d 937 (6th Cir. 1972); *United States v. Benson*, 579 F.2d 508 (9th Cir. 1978))); see also *People v. Di Donato*, 87 N.Y.2d 992, 993, 665 N.E.2d 186, 187, 642 N.Y.S.2d 616, 617 (1996) (stating that conditional pleas are generally not allowed in New York); N.Y. CRIM. PROC. LAW §710.70[2]. N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 2011) maintains that denial of a motion to suppress evidence may be reviewed upon appeal from a conviction judgement even if that judgement is entered upon a guilty plea.

62. See *People v. Di Raffaele*, 55 N.Y.2d 234, 240–241, 433 N.E.2d 513, 515–516, 448 N.Y.S.2d 448, 450–451 (1982) (In this case, the court saw no reason to disagree with *People v. Thomas* where the issue was the legal sufficiency of the evidence to sustain the charge against the defendant.); see also *People v. Thomas*, 74 A.D.2d 317, 324–325, 428 N.Y.S.2d 20, 26 (2d Dept. 1980) (interpreting case law as not allowing conditional pleas that try to preserve issues which no longer matter to the case after the defendant admits that he actually did the crime he is accused of doing).

63. See *Siegel v. New York*, 691 F.2d 620, 624 (2d Cir. 1982) (stating that, "with the exception of unusual cases, off-the-record promises made by the prosecutor or the court are a nullity and, accordingly, the defendant may not reasonably rely upon them; the defendant is entitled to rely only on recorded promises.").

64. See *People v. Selikoff*, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 639 (1974) (articulating the "desirability of having as complete a record as possible of the agreements and promises which have led to a guilty plea").

prosecutor's obligations.⁶⁵ The written agreement should contain every term that you have agreed upon.⁶⁶ Your agreement should also describe what will happen if you or the prosecution breaks the agreement. Make sure you completely understand every part of the agreement and have read the agreement closely. You also have a right to help from your attorney.⁶⁷

2. Rights Waivers

Many prosecutors will require you to say that you waive certain rights in your plea bargain, and the courts will enforce your waivers.⁶⁸ Some prosecutors require you to waive your right to appeal your conviction, and the courts will generally uphold this waiver, provided it was accepted voluntarily, knowingly, and intelligently.⁶⁹ If you waive your right to appeal when you accept a plea bargain, not only will you lose the claims that are automatically forfeited by entering a guilty plea, but you will also waive the right to appeal based on many of the claims that were not initially waived by the guilty plea. An appeals waiver, however, does not completely prevent your right to appeal, and you still can challenge the constitutionality of your sentence.⁷⁰

65. *See generally* State v. Frey, 817 N.W.2d 436, 343 Wis.2d 358, (Wis. 2012) ("The plea agreement should be reduced to writing if at all possible"); Booth v. State, 174 P.3d 171, 179 (Wyo. 2008) ("It is, unfortunate, if not inexcusable, that a plea bargain of this magnitude ... was not reduced to writing so that its perimeters could be better understood").

66. *See generally* State v. Frey, 817 N.W.2d 436, 343 Wis.2d 358, (Wis. 2012) ("The plea agreement should be reduced to writing if at all possible"); Booth v. State, 174 P.3d 171, 179 (Wyo. 2008) ("It is, unfortunate, if not inexcusable, that a plea bargain of this magnitude ... was not reduced to writing so that its perimeters could be better understood").

67. Missouri v. Frye, 566 U.S. 134, 143–144, 132 S. Ct. 1399, 1407–1408, 182 L. Ed. 2d 379, 389–390 (2012) (holding that the Sixth Amendment guarantees a defendant the right to counsel at all critical stages of the criminal proceeding, including the plea-bargaining phase); Lafler v. Cooper, 566 U.S. 156, 165–167, 132 S. Ct. 1376, 1385–1387, 182 L. Ed. 2d 398, 408–410 (2012) ("Its protections are not designed simply to protect the trial, even though 'counsel's absence [in these stages] may derogate from the accused's right to a fair trial.'"); *see* U.S. CONST. amend. VI.

68. *See* Schick v. United States, 195 U.S. 65, 72, 24 S. Ct. 826, 828, 49 L. Ed. 99, 103 (1904) (stating that accused can waive any right if there is no constitutional or statutory mandate and no public policy prohibits it), cited in People v. Seaberg, 74 N.Y.2d 1, 7, 541 N.E.2d 1022, 1024, 543 N.Y.S.2d 968, 970 (1989). These waivers are enforced with the understanding that the defendant bargained away these rights, in addition to the right to a trial, in order to receive a more favorable sentence. Once the more favorable sentence is received, the defendant must uphold his end of the bargain. *See also* United States v. Mezzanatto, 513 U.S. 196, 201, 115 S. Ct. 797, 801, 130 L. Ed. 2d 697, 704 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."). This case also stands for the proposition that rights guaranteed to defendants under the Federal Rules of Evidence are waivable. *See also* Ricketts v. Adamson, 483 U.S. 1, 10, 107 S. Ct. 2680, 2685, 97 L. Ed. 2d 1, 11–12 (1987) (finding that the double jeopardy defense is waivable by pretrial agreement); Newton v. Rumery, 480 U.S. 386, 394, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987) (stating that a defendant may knowingly and voluntarily waive their right to bring a § 1983 action pursuant to a plea agreement); Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279 (1969) (knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers); Johnson v. Zerbst, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1467 (1938) (holding that Sixth Amendment right to counsel may be waived).

69. United States v. Bushert, 997 F.2d 1343, 1351 (11th Cir. 1993) (holding that in most circumstances a judge must specifically discuss rights waiver with defendant for the defendant's waiver to be knowing and voluntary); People v. Moissett, 76 N.Y.2d 909, 911, 564 N.E.2d 653, 654, 563 N.Y.S.2d 43, 44 (1990) (upholding appeals waiver that was accepted knowingly, voluntarily, and intelligently).

70. *See* People v. Seaberg, 74 N.Y.2d 1, 9–10, 541 N.E.2d 1022, 1026, 543 N.Y.S.2d 968, 972 (1989) (holding defendant can still challenge the legality of the sentence or the voluntariness of the plea even after waiving the right to appeal).

Additionally, you cannot waive certain rights because of “society’s interest in the integrity of criminal process.”⁷¹ These non-waivable rights include the constitutional right to a speedy trial,⁷² the right to challenge the legality of the sentence,⁷³ or the right to be examined to determine if you are competent to stand trial.⁷⁴ However, even if you explicitly waived these rights in your plea agreement, the courts will not enforce the waiver, and you can challenge your case if one of these rights was violated.

3. Prosecutorial Discrimination in Plea Bargaining

Because there is no constitutional right to a plea bargain, prosecutors have wide discretion to decide whether or not to negotiate with you. Prosecutors are not required to offer you the same bargain they offer another defendant who was charged with the same crime under similar circumstances. However, prosecutors cannot treat you differently from other defendants because of an “impermissible classification,” such as race, gender, religion, or ethnicity.⁷⁵ Unfortunately, challenges to convictions based on discrimination in plea bargaining are not often successful. This is because it is difficult to prove the decision was based on an impermissible classification rather than any other reason.⁷⁶ If you believe the prosecutor has discriminated against you in the plea bargaining process, you should raise this issue before the trial begins and not while you are being sentenced. You should provide precise and specific evidence to support your discrimination claim.⁷⁷

D. Court Acceptance of a Plea Bargain

Once you reach a plea agreement with the prosecutor, it must be approved by the court.⁷⁸ The judge may accept one of the three possible forms of sentencing agreements in a plea bargain. In an open plea, the judge will not make any sentencing promises but has the ability to impose any punishment that is allowed for the charges to which you are pleading guilty. In a “cap plea,” the judge will agree not to exceed a certain maximum punishment if you plead guilty. In a “sentence agreement plea,” the judge agrees to impose the sentence that you and the prosecutor agreed upon in the plea bargain. However, although the prosecutor may not ask for a different sentence than the one you agreed upon, the judge has the power to impose a different sentence if he thinks that sentence you and the prosecutor agreed upon is inappropriate.⁷⁹ Whether the judge accepts the prosecutor’s sentence

71. *People v. Callahan*, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 111, 590 N.Y.S.2d 46, 49 (1992).

72. *People v. Blakley*, 34 N.Y.2d 311, 314–315, 313 N.E.2d 763, 764–765, 357 N.Y.S.2d 459, 462 (1974) (holding that a defendant cannot waive his right to a speedy trial).

73. *People v. Francabandera*, 33 N.Y.2d 429, 434 n.2, 310 N.E.2d 292, 294 n.2, 354 N.Y.S.2d 609, 612 n.2 (1974); *People v. Lynn*, 28 N.Y.2d 196, 203, 269 N.E.2d 794, 798, 321 N.Y.S.2d 74, 80 (1971).

74. *See People v. Armlin*, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975).

75. *United States v. Bell*, 506 F.2d 207, 221–222, 165 U.S. App. D.C. 146, 160–161 (D.C. Cir. 1974) (stating that defendants must show a disparity in plea offers based on a constitutionally-suspect standard, such as race, gender, or religion).

76. *See United States v. Alcaraz-Peralta*, 27 F.3d 439, 444 (9th Cir. 1994) (reversing District Court’s determination that prosecutor discriminated in plea bargaining when defendant showed similarly situated female defendants received a significantly lesser sentence bargain than males, because defendant failed to meet burden of proving intentional gender discrimination); *United States v. Moody*, 778 F.2d 1380, 1386 (9th Cir. 1985) (denying defendants’ appeals because they could not prove they were intentionally singled out because of race or another classification when the prosecutor entered a bargain with only one defendant).

77. *See United States v. Redondo-Lemos*, 27 F.3d 439, 442 (9th Cir. 1994) (holding that more than “minimal evidence” is needed for a finding of intentional discrimination).

78. *People v. Huertas*, 85 N.Y.2d 898, 899, 650 N.E.2d 408, 408, 626 N.Y.S.2d 750, 751 (1995); *see* N.Y. CRIM. PROC. LAW § 220.10(3), (4) (McKinney 2014); *see also* FED. R. CRIM. P. 11(c)(3).

79. *See People v. Farrar*, 52 N.Y.2d 302, 305–306, 419 N.E.2d 864, 865, 437 N.Y.S.2d 961, 962 (1981). Many judges are hesitant to accept a sentence agreement plea because it removes their power to impose a sentence. In this situation, the defendant may seek a pre-plea investigation, which will be conducted by the probation department. Following the investigation, the judge will determine what sentence would be imposed if the defendant entered a guilty plea. *See People v. Louis*, 161 Misc. 2d 667, 675 n.6, 614 N.Y.S.2d 888, 893 n.6 (Sup.

recommendations depends on whether that sentence is lawful and appropriate in light of the pre-sentence report and other relevant information.⁸⁰ The judge may accept or reject the agreement, but if he rejects it, you must be offered the opportunity to withdraw your guilty plea.⁸¹

1. Constitutional Requirements for Accepting a Guilty Plea

Before the court accepts a plea bargain, the judge must be sure that it meets certain requirements that are protected by the Federal constitution. Specifically, the judge must confirm that your guilty plea is entered “knowingly, voluntarily, and intelligently.”⁸² In most courts, the judge will address you and ask you a number of questions to determine whether your guilty plea was entered knowingly, voluntarily, and intelligently. The judge will confirm that you are not agreeing to the plea bargain because you were coerced or promised something other than what is stated in the plea agreement.⁸³ To be “coerced” is to be persuaded to do something with the use of force or threats. When ensuring that your plea is constitutional, the judge will also make sure that the facts of the case support your plea,⁸⁴ that you understand the nature of the charges against you,⁸⁵ that you understand the rights you are giving up by pleading guilty,⁸⁶ and that you know the possible penalties.⁸⁷

Before a trial court can accept a guilty plea, the court must confirm that the plea meets the constitutional requirements. The court will do this by reviewing the terms of the plea agreement and the reasonableness of the bargain. In addition, the court will consider your age, experience, and background.⁸⁸ If you enter a plea bargain because you were promised a particular sentence, this must appear on the court record at the time you enter the plea.⁸⁹ This is necessary to prove that the plea was entered with your knowledge and consent.⁹⁰

Ct. N.Y. County 1994).

80. *People v. Farrar*, 52 N.Y.2d 302, 306, 419 N.E.2d 864, 865–866, 437 N.Y.S.2d 961, 962–963 (1981).

81. *FED. R. CRIM. P. 11(c)(5)(B)*; *People v. Selikoff*, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 635 (1974).

82. *See Boykin v. Alabama*, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 1712 n.5, 23 L. Ed. 2d 274, 280 n.5 (1969); *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (1970) (holding that “waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences”); *People v. Harris*, 61 N.Y.2d 9, 17–18, 459 N.E.2d 170, 174, 471 N.Y.S.2d 61, 65 (1983) (trial judge accepting guilty plea has vital responsibility to make sure that accused has full understanding of what the plea means and its consequences).

83. *FED. R. CRIM. P. 11(b)(2)*; *Brady v. United States*, 397 U.S. 742, 755, 90 S. Ct. 1463, 1472, 25 L. Ed. 2d 747, 760 (1970).

84. *See People v. Lopez*, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–467 (1988).

85. *FED. R. CRIM. P. 11(b)(1)(G)*; *People v. Moore*, 71 N.Y.2d 1002, 1005, 525 N.E.2d 740, 741–742, 530 N.Y.S.2d 94, 95–96 (1988) (citing *Henderson v. Morgan*, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 2257 n.13, 49 L. Ed. 2d 108, 114 n.13 (1976)).

86. *Henderson v. Morgan*, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 2257 n.13, 49 L. Ed. 2d 108, 114 n.13 (1976).

87. *FED. R. CRIM. P. 11(b)(1)(H)–(J)*; *see People v. Camacho*, 102 A.D.2d 728, 728–729, 476 N.Y.S.2d 566, 567–568 (1st Dept. 1984) (allowing defendant to withdraw guilty plea because convicting court misstated the maximum permissible sentence due to mistake about defendant’s age). *But see People v. Garcia*, 92 N.Y.2d 869, 870–871, 700 N.E.2d 311, 677 N.Y.S.2d 772 (1998) (holding awareness of possible penalties is only one factor to consider when determining voluntariness of the plea; it is not dispositive).

88. *See People v. Hidalgo*, 91 N.Y.2d 733, 736, 698 N.E.2d 46, 47, 675 N.Y.S.2d 327, 328 (1998) (citing *People v. Seaberg*, 74 N.Y.2d 1, 11, 541 N.E.2d 1022, 1026–1027, 543 N.Y.S.2d 968, 972–973 (1989)).

89. *N.Y. CRIM. PROC. LAW § 220.50(5)* (McKinney 2014).

90. *N.Y. CRIM. PROC. LAW § 220.50(5)* (McKinney 2014); *see People v. Davey*, 193 A.D.2d 1108, 1108–1109, 598 N.Y.S.2d 637, 638 (4th Dept. 1993) (granting defendant ability to withdraw from guilty plea because judge should not have sentenced defendant based on an unclear sentence agreement without allowing him opportunity to withdraw guilty plea).

If your guilty plea is not entered “knowing, voluntary, and intelligent”, you may challenge your conviction.⁹¹ Challenging your conviction allows the court to take another look at your case. Even if there was strong evidence of your guilt, a conviction that comes from a coerced or uninformed guilty plea is unconstitutional.⁹² The court will not believe that you have waived any of your constitutional rights unless there is evidence that you “intelligently and understandingly rejected” those rights.⁹³ To preserve a claim that the plea was not knowing, voluntary, or intelligent, you should file a motion with the judge that accepted your plea. If you have entered a plea of guilty or nolo contendere and would like to withdraw the plea, the timing of the withdrawal is important. If the court has not accepted the plea yet, you may withdraw the plea at any time for any reason or no reason.⁹⁴ If the court has accepted the plea, but not imposed a sentence yet, you may withdraw the plea if the court has rejected a plea agreement or you can show a fair and just reason for requesting the withdrawal.⁹⁵ After a sentence is imposed, a plea cannot be withdrawn and can only be set aside on a direct appeal or a collateral attack where one tries to overturn a judgment in a proceeding that is not the original action or an appeal from the original action.⁹⁶ New York law demands that before you challenge your plea, you give the trial court an opportunity to correct any mistake they may have made.⁹⁷ You can do this either at the plea proceeding by asking that the plea be vacated,⁹⁸ or you can file a motion to vacate judgment.⁹⁹ To vacate a plea is to withdraw it because it was not entered voluntarily or knowingly.

2. Factors Making a Plea Not Voluntary, Knowing, or Intelligent

(a) Coercion

Your guilty plea must be entered voluntarily, which means that you were not threatened or forced by the court, the prosecutor, or your defense attorney.¹⁰⁰ The judge will ask you about the facts of the crime to determine if your plea was voluntary. If your statement of the facts raises doubt about whether you are actually guilty, the court must ask additional questions before accepting your plea.¹⁰¹ The judge’s questions confirm that you entered the plea agreement on your own free will.¹⁰² If you

91. See *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279–280 (1969) (affirming that, on the face of the record, it was erroneous for a trial judge to accept a petitioner’s guilty plea without an affirmative showing that it was intelligent or voluntary); see also *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973) (holding that defendant can only attack voluntary and intelligent character of guilty plea, and cannot raise an independent claim after making the plea that he was deprived of constitutional rights prior to entering the plea).

92. See *Henderson v. Morgan*, 426 U.S. 637, 644–645, 96 S. Ct. 2553, 2557–2258, 49 L. Ed. 2d 108, 114 (1976).

93. See *People v. Harris*, 61 N.Y.2d 9, 17, 459 N.E.2d 170, 173, 471 N.Y.S.2d 61, 64 (1983) (holding that waiver of constitutional rights, required by a guilty plea, cannot be presumed from a silent record).

94. FED. R. CRIM. P. 11(d)(1).

95. FED. R. CRIM. P. 11(d)(2).

96. FED. R. CRIM. P. 11(e).

97. See *People v. Lopez*, 71 N.Y.2d 662, 665–666, 525 N.E.2d 5, 6, 529 N.Y.S.2d 465, 466 (1988) (“In order for there to be a question of law reviewable by this court, the trial court generally must have been given an opportunity to correct any error in the proceedings below at a time when the issue can be dealt with most effectively.”).

98. N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 2014).

99. N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005).

100. *Brady v. United States*, 397 U.S. 742, 750, 90 S. Ct. 1463, 1470, 25 L. Ed. 2d 747, 757 (1970) (state may encourage guilty plea, but the plea cannot be produced by actual or threatened physical harm or by mental coercion overbearing the defendant’s will).

101. *People v. Lopez*, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–467 (1988) (stating that “where a defendant’s factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered”).

102. *People v. Murphy*, 243 A.D.2d 954, 955, 663 N.Y.S.2d 378, 379 (3d Dept. 1997) (affirming County Court’s decision to deny defendant’s motion to withdraw the guilty plea because court had conducted sufficient

later claim that you did not enter the plea voluntarily or you want to challenge the constitutionality of the plea, the judge will need to find enough evidence in the record that supports your claims.¹⁰³

The court cannot force you to accept a plea bargain by threatening to give you a harsher sentence if you decide to go to trial.¹⁰⁴ However, if the sentence you receive after trial is higher than the sentence offered to you during plea negotiations, that is not a sign that you were punished for choosing to have a trial.¹⁰⁵ Unless the sentence you were given after trial is much higher than the plea offer, or the sentence does not match the crime you were convicted of, your constitutional rights have not been violated.¹⁰⁶ The court may tell you, in advance, of the possible sentences you would receive if convicted on the charges at trial.¹⁰⁷ The court is acting coercively if it told you that you will receive the highest sentence if you go to trial, but a much lighter sentence if you plead guilty.¹⁰⁸ However, the Court requiring that you accept or decline a plea offer within a short period of time is not considered coercive.¹⁰⁹

Guilty pleas that are entered because of threats or deception by the prosecutor cannot be a knowing, voluntary, and intelligent agreement.¹¹⁰ However, the prosecutor does control the charges against you, and during plea negotiations, the prosecutor may increase the charges or seek additional

inquiry when allocution called into question the voluntariness of the guilty plea and defendant denied being coerced or threatened).

103. See, e.g., *People v. Sung Min*, 249 A.D.2d 130, 131–132, 671 N.Y.S.2d 480, 481 (1st Dept. 1998) (holding that defendant's motion to withdraw plea should have been granted because his allegations of coercion were supported by the record. The record showed that the lower court wrongly burdened the defendant's right to a trial by telling defendant that he would "receive the maximum sentence, or maximum consecutive sentences, after trial, but a significantly lighter sentence after a plea," which was inaccurate); *People v. Tien*, 228 A.D.2d 280, 281, 643 N.Y.S.2d 345, 345 (1st Dept. 1996); *People v. Jimenez*, 179 A.D.2d 840, 840, 579 N.Y.S.2d 173, 174 (3d Dept. 1992) (affirming lower court's decision to deny defendant's motion to appeal because the record did not support defendant's claim "that the court 'threatened' to impose a greater sentence if defendant opted to go to trial").

104. See *People v. Christian*, 139 A.D.2d 896, 897, 527 N.Y.S.2d 1020, 1021 (4th Dept. 1988) ("To capitulate and enter a plea under a threat of an 'or else' can hardly be regarded as the result of the voluntary bargaining process between the defendant and the People sanctioned by propriety and practice") (quoting *People v. Picciotti*, 4 N.Y.2d 340, 344, 151 N.E.2d 191, 194, 175 N.Y.S.2d 32, 35 (1958)); *People v. Wilson*, 245 A.D.2d 161, 163, 666 N.Y.S.2d 164, 165–166 (1st Dept. 1997) (finding judge's statement that defendant *would* receive greater sentence if convicted at trial, rather than *could* receive a greater sentence, was a virtual promise of an increased sentence and coerced defendant to plead guilty).

105. *People v. Patterson*, 483 N.Y.S.2d 55, 57, 106 A.D.2d 520, 521 (2d Dept. 1984). See *People v. Pena*, 50 N.Y.2d 400, 412, 406 N.E.2d 1347, 1353, 429 N.Y.S.2d 410, 416 (1980) (holding that court was free, after finding defendant guilty at trial, to impose a greater term of imprisonment than the sentence offered in the plea bargain context).

106. See *People v. Howard*, 217 A.D.2d 530, 530, 629 N.Y.S.2d 765, 765 (1st Dept. 1995) (holding that defendant was punished for exercising his right to a trial because he was sentenced based on the facts of uncharged crimes rather than the crime for which he was convicted); *People v. Cosme*, 203 A.D.2d 375, 376, 610 N.Y.S.2d 293, 294 (2d Dept. 1994) (finding that defendant was punished for exercising his right to a trial on two remaining charges when judge imposed a harsher sentence for the first charged crime than the judge had offered for all three charges).

107. *People v. Tien*, 228 A.D.2d 280, 281, 643 N.Y.S.2d 345 (1st Dept. 1996) (affirming conviction because judge's informing defendant of possible sentences under the indictment was not coercion); *People v. Jimenez*, 179 A.D.2d 840, 840, 579 N.Y.S.2d 173, 174 (3d Dept. 1992) (finding that the reality that trial may expose defendant to a harsher sentence is not sufficient to establish coercion).

108. *People v. Sung Min*, 249 A.D.2d 130, 132, 671 N.Y.S.2d 480, 481 (1st Dept. 1998) (a court wrongly burdens the defendant's exercise of his right to trial when it indicates he will receive the maximum sentence, or maximum consecutive sentences, after trial, but a significantly lighter sentence after a plea.).

109. *People v. Lesame*, 239 A.D.2d 801, 802, 657 N.Y.S.2d 544, 545 (3d Dept. 1997); *People v. Eaddy*, 200 A.D.2d 896, 897, 606 N.Y.S.2d 928, 929 (3d Dept. 1994).

110. See *People v. Jones*, 44 N.Y.2d 76, 81, 375 N.E.2d 41, 44, 404 N.Y.S.2d 85, 88 (1978) (citing *People v. O'Neill*, 7 N.Y.2d 867, 164 N.E.2d 869, 196 N.Y.S.2d 998 (1959)).

charges if you do not plead guilty.¹¹¹ As long as you have the choice to accept or reject the prosecutor's offer, the offer is not coercion.¹¹²

It is not coercion if your defense attorney encourages you to accept a plea agreement that is favorable to you, as long as the plea was made knowingly, intelligently, and voluntarily.¹¹³ A favorable plea agreement is one that benefits you or is in your best interest to accept. However, the court may hold a hearing if there is evidence that your defense attorney forced you to plead guilty and you later made a motion to withdraw your plea.¹¹⁴

(b) Duress

Your guilty plea may not be voluntary if you entered the plea under circumstances of duress.¹¹⁵ Circumstances of duress include situations where you were threatened or otherwise forced to plead guilty. If you are claiming that you were under duress, your claim must be well supported by evidence in the record.¹¹⁶ Even if duress was only part of the reason for your plea, you must still be given the option to withdraw your plea.¹¹⁷ The situation causing duress must be serious enough to make your decision involuntary or unintelligent.¹¹⁸ Simply claiming to be frightened or upset at the time of your plea will not be enough to constitute duress. Further, fear of the death penalty is also not enough to

111. *United States v. Goodwin*, 457 U.S. 368, 381–382, 102 S. Ct. 2485, 2493, 73 L. Ed. 2d 74, 86 (1982) (After initially expressing an interest in pleading on misdemeanor charges, respondent decided not to plead guilty and requested a trial by jury. While the misdemeanor charges were still pending, the prosecutor brought a felony charge arising out of the same incident as the misdemeanor charges. Respondent moved to set aside the verdict on the ground of prosecutorial vindictiveness, but the Court held that the prosecutor was allowed to increase the charges).

112. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 611 (1978) (holding no constitutional violation occurred when prosecutor re-indicted defendant for a more serious offense after defendant refused to plead guilty). *But see Blackledge v. Perry*, 417 U.S. 21, 28–29, 94 S. Ct. 2098, 2103, 40 L. Ed. 2d 628, 635 (1974) (holding prosecutor who sought higher charges on retrial violated constitutional rights of defendant by coercing him not to exercise right to a new trial).

113. *See, e.g., People v. Babcock*, 304 A.D.2d 912, 913, 758 N.Y.S.2d 412, 414 (3d Dept. 2003) (holding that “counsel’s advice to accept the plea offer to avoid the possibility of a harsher sentence after trial does not, contrary to defendant’s contention, constitute undue pressure or coercion”); *People v. Coco*, 220 A.D.2d 312, 313, 650 N.Y.S. 2d 636 (1st Dept. 1995) (finding no coercion where defendant claimed he was “almost forced” by his attorney to accept a favorable plea offer because of evidence on record that plea was voluntary, knowing, and intelligent); *People v. Franklin*, 211 A.D.2d 453, 453, 621 N.Y.S.2d 857, 857 (1st Dept. 1995) (finding no coercion when defendant claimed he “felt pressured” to plead guilty, because the allocution showed the plea was voluntary, knowing, and intelligent).

114. *People v. Gonzalez*, 171 A.D.2d 413, 414, 566 N.Y.S.2d 639, 640 (1st Dept. 1991) (remanding for a hearing because the record was too incomplete to determine if the plea was coerced by counsel and because the evidence raised a question of attorney conflict of interest).

115. *See People v. Flowers*, 30 N.Y.2d 315, 319, 284 N.E.2d 557, 558–559, 333 N.Y.S.2d 393, 395–396 (1972) (finding that defendant suffered duress during guilty plea because of sexual abuse and beatings in local jail; after entering guilty plea, defendant inquired if he could finally be moved to another jail).

116. *See People v. Flowers*, 30 N.Y.2d 315, 317, 284 N.E.2d 557, 557, 333 N.Y.S.2d 393, 394 (1972) (“[Duress] is ... often asserted, and entitled more often than not to short shrift when supported only by the convicted defendant’s say-so.” Evidence in the record was sufficient to show duress, as it showed “that prison conditions were intolerable in that defendant was sexually abused, beaten, and in potential danger of his life, so long as he remained in the local jail.”); *People v. Nash*, 288 A.D.2d 937, 937, 732 N.Y.S.2d 201, 201 (4th Dept. 2001) (refusing to allow defendant to withdraw a plea based on a duress claim because defendant’s allegation of having been beaten in the holding center was not supported in the record).

117. *People v. Flowers*, 30 N.Y.2d 315, 319, 284 N.E.2d 557, 559, 333 N.Y.S.2d 393, 395 (1972) (finding it “immaterial that the hearing court did not believe that the alleged duress was the *only* motivation for the plea”) (emphasis added).

118. *See People v. Wood*, 207 A.D.2d 1001, 1001, 617 N.Y.S.2d 248, 249 (4th Dept. 1994) (finding that the defendant was frightened and upset when he entered the plea was not enough to qualify as an involuntary or unintelligent decision.)

render your guilty plea unconstitutional.¹¹⁹ The United States Supreme Court has found that a guilty plea encouraged by fear of the death penalty is not considered involuntary.¹²⁰

(c) Not Understanding the Charges

If you do not know or understand the charges against you, your plea cannot be voluntary and intelligent.¹²¹ To determine whether you fully understand the charges, the court will see if the acts that you say you have committed and the crime you are pleading guilty to are similar.¹²² This is done in the “plea allocution” or “plea colloquy,” where the court will ask you to admit the facts of your case that are the necessary elements of the crime you are charged with.¹²³ Elements of a crime describe what must happen for a person to be charged and convicted of the crime. If your description of what occurred raises doubt that you are guilty of the crime you are charged with, the court must go further to determine whether you understand the charges you are pleading guilty to.¹²⁴ If you do not or will not admit a fact that is an element of the crime, the judge should not accept your guilty plea without asking for further clarification.¹²⁵ The judge may not ask for further clarification if it can easily be inferred from the facts, however.

However, if you plead guilty to a lesser crime than the one you were charged with originally, the court does not have to match the facts of your case with the elements required for the lesser charge.¹²⁶ Additionally, if you plead guilty while insisting that you are innocent or do not recall the crime, the court may sentence you without requiring you to admit the facts making up the crime. To do so, however, your plea must be entered knowingly, voluntarily, and intelligently.¹²⁷ If the court is aware of a possible defense that can be raised in your case, the judge must inform you of it and determine that you knowingly waive the defense.¹²⁸

119. *People v. Van Dyne*, 179 Misc. 2d 467, 469, 685 N.Y.S.2d 591, 593 (Co. Ct. Monroe County 1999) (reversed on other grounds by *People v. Van Dyne*, 12 A.D.3d 120, 784 N.Y.S.2d 795 (4th Dept. 2004); *See also* *Brady v. United States*, 397 U.S. 742, 758, 90 S. Ct. 1463, 1474, 25 L. Ed. 2d 747, 762 (1970) (holding that where defendant was advised by competent counsel and tendered his plea after his codefendant, who had already given a confession, defendant's plea of guilty was not rendered involuntary because he was gripped by fear of the death penalty).)

120. *Brady v. United States*, 397 U.S. 742, 747, 90 S. Ct. 1463, 1468, 25 L. Ed. 2d 747, 756 (1970).

121. *People v. Moore*, 71 N.Y.2d 1002, 1005, 525 N.E.2d 740, 741, 530 N.Y.S.2d 94, 95 (1988) (citing *Henderson v. Morgan*, 426 U.S. 637, 644–645 n.13, 96 S. Ct. 2253, 2257 n.13, 49 L. Ed. 2d 108, 114 n.13 (1976)). *See also* *Bousley v. United States*, 523 U.S. 614, 618–619, 118 S. Ct. 1604, 1609, 140 L. Ed. 2d 828, 837 (1998) (stating that if neither defendant, nor his counsel, nor the trial court correctly understood the essential elements of the crime with which defendant was charged, defendant's guilty plea would be invalid under due process clause).

122. *See* *People v. Serrano*, 15 N.Y.2d 304, 308, 206 N.E.2d 330, 332, 258 N.Y.S.2d 386, 388–389 (1965).

123. *See* *People v. Lopez*, 71 N.Y.2d 662, 664–665, 525 N.E.2d 5, 5–6, 529 N.Y.S.2d 465, 465–466 (1988); *see also* *People v. Zeth*, 148 A.D.2d 960–961, 538 N.Y.S.2d 963, 964 (4th Dept. 1989) (finding admission of the facts necessary for each offense to which defendant pleaded guilty).

124. *People v. Lopez*, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–467 (1988).

125. *See* *People v. Lopez*, 71 N.Y.2d 662, 666 n.2, 525 N.E.2d 5, 7 n.2, 529 N.Y.S.2d 465, 467 n.2 (1988) (noting that an indication that a guilty plea is “improvident or baseless” may trigger a judge to inquire further).

126. *People v. Clairborne*, 29 N.Y.2d 950, 951, 280 N.E.2d 366, 367, 329 N.Y.S.2d 580, 581 (1972) (holding that “a bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed”). *See also* *People v. Anderson*, 63 A.D.3d 1617, 1617, 879 N.Y.S.2d 784, 784 (4th Dept. 2009) (applying the *Clairborne* rule).

127. This is called an *Alford* plea. *See* *North Carolina v. Alford*, 400 U.S. 25, 37–38, 91 S. Ct. 160, 167–168, 27 L. Ed. 2d 162, 171–172 (1970) (affirming conviction of defendant who could not recall the events surrounding the crime, but confronted with overwhelming evidence against him, knowingly, voluntarily, and intelligently pleaded guilty to a lesser charge); *People v. Francabandera*, 33 N.Y.2d 429, 434–435, 310 N.E.2d 292, 294, 354 N.Y.S.2d 609, 612–613 (1974) (applying the *Alford* rule where a defendant pleaded guilty to a lesser crime even though he did not remember committing the crime and finding that defendant's plea was voluntary and intelligent).

128. *People v. Costanza*, 244 A.D.2d 988, 989, 665 N.Y.S.2d 487, 488 (4th Dept. 1997); *see also* *People v.*

While the court will try to make sure that you understand your charges during the plea discussion, the court will consider all of the circumstances surrounding your plea. Failure to admit to an element of the crime may not raise a constitutional question if the court determines that you understood the nature of the charges against you and that you voluntarily and intelligently pleaded guilty to the charges.¹²⁹ Your defense counsel's explanation of the nature of the offense may also be enough to guarantee that you understand the nature of the charges.¹³⁰

(d) Not Understanding the Consequences of a Guilty Plea

In order to plead guilty, you must understand the rights you are giving up by doing so.¹³¹ In most states, the trial judge will inform you of your rights and ask you to acknowledge that you are waiving these rights. The judge is not required to read any specific list of rights that you are giving up before the judge accepts your guilty plea. The judge must make sure, however, that you were not pressured into a plea, that you know what you are doing, and that you generally understand the rights you give up by pleading guilty.¹³² If your defense counsel explains the consequences of a guilty plea, that explanation may be enough to ensure your plea is knowledgeable and intelligent.¹³³ In addition to the "direct consequences" of your guilty plea, if you are not a United States citizen, your defense counsel must inform you of the risk of deportation.¹³⁴

However, the judge is only required to make sure you know the direct consequences of your plea, not the collateral consequences.¹³⁵ A "direct consequence" is "one which has a definite, immediate and largely automatic effect on defendant's punishment," such as a prison term or probation.¹³⁶ A "collateral consequence" is something that affects you in particular because of your personal characteristics, such as your immigration or parole status.¹³⁷ Examples of collateral consequences are the "loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, loss of the right to possess firearms, or an undesirable discharge from the Armed Services."¹³⁸

Braman, 136 A.D.2d 382, 384, 527 N.Y.S.2d 104, 105 (3d Dept. 1988) (vacating a guilty plea in part because a defendant's statement to the court, that he was so "loaded" at the time the offense was committed that he had no recollection of the events, not only pertained to the impairment of his ability to honestly admit guilt, but also clearly raised the possibility of an effective defense of intoxication).

129. *People v. Moore*, 71 N.Y.2d 1002, 1005, 525 N.E.2d 740, 530 N.Y.S.2d 94, 95–96 (1988).

130. *See Henderson v. Morgan*, 426 U.S. 637, 647, 96 S. Ct. 2253, 2258–2259, 49 L. Ed. 2d 108, 115–116 (1976) (finding that it is appropriate in most cases to presume that defendant's attorney explained the nature of the crime in enough detail that defendant understood what he was pleading to, but not where defendant had low mental capacity and where the trial court found as a fact that defendant's attorney did not explain the element of intent).

131. *Henderson v. Morgan*, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 2257 n.13, 49 L. Ed. 2d 108, 114 n.13 (1976).

132. *See People v. Nixon*, 21 N.Y.2d 338, 353, 234 N.E.2d 687, 695–696, 287 N.Y.S.2d 659, 670–671 (1967) (finding that it is up to the court's discretion to decide how far it should go in questioning a defendant before accepting a guilty plea).

133. *See People v. Harris*, 61 N.Y.2d 9, 16–17, 459 N.E.2d 170, 173, 471 N.Y.S.2d 61, 64 (1983) ("[T]here is no requirement that the Judge conduct a *pro forma* inquisition in each case on the off-chance that a defendant who is adequately represented by counsel may nevertheless not know what he is doing").

134. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483, 176 L.Ed.2d 284, 296 (2010) (Defense attorney had a duty to "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences . . . [and] when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.").

135. *People v. Catu*, 4 N.Y.3d 242, 244, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005). *See also* *Zhang v. United States*, 506 F.3d 162, 167 (2d Cir. 2007) (stating that a court does not need to "inform a defendant about the 'collateral' consequences of a guilty plea").

136. *People v. Ford*, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267, 633 N.Y.S.2d 270, 272 (1995) (overruled on other grounds by *People v. Peque*, 22 N.Y.3d 168, 3 N.E.3d 617, 980 N.Y.S.2d 280 (2013)).

137. *See* Part B of this Chapter.

138. *People v. Ford*, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267–268, 633 N.Y.S.2d 270, 272–273 (1995) (overruled on other grounds by *People v. Peque*, 22 N.Y.3d 168, 3 N.E.3d 617, 980 N.Y.S.2d 280 (2013)).

If the judge or your attorney does not tell you about the collateral consequences of a conviction, it will not usually make your plea unknowing, involuntary, or unintelligent.¹³⁹ However, one collateral consequence that your defense counsel *must* tell you about is the possibility of deportation.¹⁴⁰ Depending on where you live, the trial court may not have to tell you about the risk of deportation, even if your defense counsel does.¹⁴¹

(e) Misrepresentation or Incorrect Information

If you plead guilty based on the judge's or prosecutor's misrepresentation of fact or false information that they provided, your plea was not voluntary and intelligent.¹⁴² To challenge a plea based on "misrepresentation," you must show that you relied on the incorrect information when you entered your guilty plea and that you would have pleaded not guilty and gone to trial if you had received the correct information.¹⁴³ For example, if you received incorrect or misleading sentencing information and you would have pled "not guilty" if you had received the correct information, a guilty plea would not be voluntary, knowing, and intelligent.¹⁴⁴

(f) Broken Promises

If you pleaded guilty because you were persuaded by a promise that was not kept or a misrepresentation by the prosecutor or the court, your plea was not voluntary and not intelligent, and it must either be removed or the promise must be honored.¹⁴⁵ However, the court is not required to choose the sentence that you agreed upon with the prosecutor. But if the court determines the sentence in the plea bargain agreement is not acceptable and should be increased, the court must give you the option to withdraw the plea or accept the harsher sentence.¹⁴⁶ Furthermore, if the court states on the record the sentence it expects to impose when it accepts the guilty plea, the court must grant the

139. *People v. Ford*, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267–268, 633 N.Y.S.2d 270, 272–273 (1995).

140. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483, 176 L.Ed.2d 284, 296 (2010).

141. *People v. Carty*, 96 A.D.3d 1093, 1097, 947 N.Y.S.2d 617, 621 (3d Dept. 2012) (finding that the trial court is not required to inform the defendant of the risk of deportation). However, in New York, a trial court is "compelled" to let the defendant know of the risk of deportation according to Peque, but even if he is not informed, it does not automatically mean that he is entitled to withdraw his guilty plea. *See People v. Peque*, 22 N.Y.3d 168, 176 (2013) (finding that a trial court is compelled to tell the defendant that he may be deported if he is not an American citizen, but that he still has to establish "the existence of a reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial" in order to withdraw the guilty plea).

142. *Randall v. Rothwax*, 161 A.D.2d 70, 76, 560 N.Y.S.2d 409, 413 (1st Dept. 1990) (finding that "a plea induced by materially false information imparted by a trial judge, has been coerced and cannot be permitted to stand").

143. *See for example*, *People v. Burnett*, 221 A.D.2d 355, 355, 633 N.Y.S.2d 365, 366 (2d Dept. 1995) (affirming the court's decision not to permit a withdrawal of the plea based on incorrect sentencing information because the information would not have had an effect on defendant's decision to enter a guilty plea).

144. *People v. Gotte*, 125 A.D.2d 331, 331, 508 N.Y.S.2d 607, 608 (2d Dept. 1986); *People v. Camacho*, 102 A.D.2d 728, 729, 476 N.Y.S.2d 566, 567–568 (1st Dept. 1984).

145. *People v. Selikoff*, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974) (citing *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)).

146. *People v. Michael*, 593 N.Y.S.2d 292, 293 (2d Dept. 1993) (finding error when court imposed a greater sentence than agreed to in the plea bargain without permitting defendant to withdraw the plea); *People v. Easterling*, 191 A.D.2d 579, 580, 594 N.Y.S.2d 805, 807 (2d Dept. 1993) (finding error when the court vacated the guilty plea and ordered a trial, rather than permitting defendant to decide whether or not to maintain the guilty plea). *See also People v. Selikoff*, 35 N.Y.2d 227, 238–239, 318 N.E.2d 784, 792, 360 N.Y.S.2d 623, 634 (1974) (affirming lower court decision that guilty pleas negotiated with the prosecution and entered into in reliance on promised sentences were still valid despite the fact that sentencing courts later imposed harsher sentences, as defendants failed to take advantage of the opportunity given to withdraw their guilty pleas).

sentence unless the pre-sentence report or facts that later become available show that the sentence would not be appropriate.¹⁴⁷

A prosecutor must uphold your plea agreement unless you fail to obey it or other circumstances justify breaking the promise.¹⁴⁸ If you fail to perform promises you made that are part of the plea agreement, the prosecution no longer has to uphold your plea agreement and may re-charge you. The courts often require very strict compliance and complete cooperation with the terms of your plea agreement.¹⁴⁹ A violated plea agreement may not present a double jeopardy issue and allows the government to prosecute even higher charges.¹⁵⁰ “Double jeopardy” prevents a criminal defendant from going to trial twice for the same offense.¹⁵¹

Even if the specific plea agreement is not broken, other circumstances may allow the prosecution to break the bargain, such as committing additional crimes or not appearing for sentencing after the agreement.¹⁵² Some of these circumstances may not allow the court to sentence you to greater punishment than you and the prosecutor accepted in your plea bargain, unless you are given the opportunity to withdraw the plea.¹⁵³ However, if you do not tell the prosecutor relevant information, and that information is discovered, such as a prior felony record or failure to comply with the terms of the agreement, the court may impose a more severe sentence without allowing you to withdraw the plea.¹⁵⁴

The prosecution is free to decide the terms of the plea agreement. For example, the prosecution could require all co-defendants to accept the plea. Additionally, the prosecution may break the plea agreement if the terms are not met.¹⁵⁵ If the court decides to impose a lesser sentence than the prosecutor and you agreed upon, the prosecutor also has the ability to withdraw consent to the plea.¹⁵⁶ Before the court accepts your plea, the prosecutor may withdraw the offer for a plea bargain at any time, without violating your constitutional rights.¹⁵⁷ Normally, the prosecutor will not attempt to withdraw the offer, unless you have violated the agreement, been arrested, or misrepresented your past criminal record. Also, if a prosecutor promises not to recommend a sentence, a prosecutor may

147. *People v. Selikoff*, 35 N.Y.2d 227, 240, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 635 (1974) (stating that an opinion of the pleading court as to the prospective sentence was sufficient to constitute a promise by that court).

148. *See Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971) (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”).

149. *See, e.g., Ricketts v. Adamson*, 483 U.S. 1, 8–9, 107 S. Ct. 2680, 2684–2685, 97 L. Ed. 2d 1, 10 (1987) (assuming that defendant breached an agreement to testify against co-defendants, even though he testified against them at trial, because he refused to testify when the case was reversed on appeal and remanded for a new trial).

150. *See Ricketts v. Adamson*, 483 U.S. 1, 8, 107 S. Ct. 2680, 2685, 97 L. Ed. 2d 1, 11 (1987) (holding that defendant’s “breach of the plea arrangement to which the parties had agreed removed the double jeopardy bar to prosecution of respondent on the first-degree murder charge”).

151. U.S. CONST. amend. V.

152. *See People v. Gianfrate*, 192 A.D.2d 970, 973, 596 N.Y.S.2d 933, 935 (3d Dept. 1993) (affirming court’s decision to impose longer sentence than reached in plea bargain when defendant was clearly informed that failure to appear at sentencing would result in higher sentence, and defendant failed to appear). *But see People v. Moreno*, 196 A.D.2d 850, 850, 602 N.Y.S.2d 28, 28–29 (2d Dept. 1993) (holding court could not impose lengthier sentence than reached in plea bargain on defendant who did not appear at sentencing but was not informed that she would receive a higher sentence for failing to appear).

153. *People v. Annunziata*, 105 A.D.2d 709, 709, 481 N.Y.S.2d 148, 149 (2d Dept. 1984).

154. *See People v. Da Forno*, 73 A.D.2d 893, 895, 424 N.Y.S.2d 195, 197 (1st Dept. 1980).

155. *People v. Antonio*, 176 A.D.2d 528, 529, 574 N.Y.S.2d 718, 719 (1st Dept. 1991); *see also Gribetz v. Edelstein*, 66 A.D.2d 788, 788, 410 N.Y.S.2d 873, 874 (2d Dept. 1978) (holding that a district attorney could dictate the terms under which he would consent to accept a plea agreement, which in this case was that both co-defendants must accept his plea bargain or his offer would be withdrawn and consent to the plea withheld).

156. *People v. Farrar*, 52 N.Y.2d 302, 307–308, 419 N.E.2d 864, 866, 437 N.Y.S.2d 961, 963 (1981).

157. *See Mabry v. Johnson*, 467 U.S. 504, 510–511, 104 S. Ct. 2543, 2548, 81 L. Ed. 2d 437, 444–445, (1984) (holding that a withdrawn offer could not induce a guilty plea, and a subsequently accepted plea was not the result of government deception).

not recommend a sentence later in court.¹⁵⁸ Even actions by the prosecutor that suggest a possible sentence may be a violation of the agreement by the prosecutor.¹⁵⁹

To avoid disagreements about what promises were made when the guilty plea was entered, the entire plea agreement should precisely and clearly appear in the court record.¹⁶⁰ Promises that do not appear in the record will rarely be enforced.¹⁶¹ Federal courts have held that unclear agreements are generally interpreted against the government and in favor of the defendant.¹⁶²

When you claim that a prosecutor violated an agreement, the major legal question that comes up is if the agreement was actually broken. The courts will not use your personal understanding of the agreement to determine whether it was broken, but will take into account the side of the prosecution as well.¹⁶³

If the prosecutor breaks the agreement, the sentencing court is allowed to determine whether the appropriate remedy is specific performance or withdrawal of the plea.¹⁶⁴ “Specific performance” of a plea agreement requires the government to carry out the original terms of the agreement. A different judge will usually perform the re-sentencing, and the prosecutor will be forced to maintain the plea agreement. If the court allows you to withdraw the plea, you would then go to trial, unless another plea agreement could be reached.

In some situations, specific performance, or an order by a court to perform a specific act, of the plea agreement may be the only means to serve justice.¹⁶⁵ For example, defendants who place themselves in a position of “no return” by carrying out the requirements of a cooperative plea agreement, such as waiving the privilege against self-incrimination or testifying at length against co-defendants, would not be returned to their pre-plea status by a withdrawn plea, and they are therefore entitled to specific performance.¹⁶⁶

158. *See Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971) (remanding case and allowing defendant to withdraw plea or be resentenced because prosecutor did not uphold the promise of former prosecutor not to recommend sentence).

159. *People v. Tindle*, 61 N.Y.2d 752, 753–754, 460 N.E.2d 1354, 1355, 472 N.Y.S.2d 919, 919–920 (1984) (finding that the prosecutor’s description of the case as “very very serious” and reference to defendant’s flight and perjury was essentially a request for a lengthy prison term and in breach of the agreement not to take a position in sentencing). *See also People v. Di Tullio*, 85 A.D.2d 783, 784, 445 N.Y.S.2d 322, 323–324 (3d Dept. 1981) (finding that prosecutor inadvertently breached the essence of the agreement not to take a part in sentencing when he released information on the crime to the news media).

160. *People v. Selikoff*, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 639 (1974), *cited in People v. Davey*, 193 A.D.2d 1108, 1108, 598 N.Y.S.2d 637, 638 (4th Dept. 1993).

161. *See, for example, People v. Hood*, 62 N.Y.2d 863, 865, 466 N.E.2d 161, 161–162, 477 N.Y.S.2d 621, 622 (1984) (holding that defendants were not entitled to specific performance of an alleged plea bargain that was never formally entered on the record, stating that the statements on the record by the prosecutor rejecting the proposed plea bargain at issue were inconsistent with defendants’ contention that there had been an prior off-the-record unconditional acceptance by the People); *In re S.*, 55 N.Y.2d 116, 120–121, 432 N.E.2d 777, 779, 447 N.Y.S.2d 905, 907 (1982) (refusing to recognize an off-the-record promise if it is flatly contradicted by the record, if the defendant stated no other promises were made to induce the guilty plea, or if inconsistent terms appeared in the record).

162. *United States v. Cimino*, 381 F.3d 124, 127 (2d Cir. 2004) (holding that “plea agreements are subject to ordinary contract law principles, except that any ambiguity is resolved ‘strictly against the Government.’” (quoting *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996)). *See also United States v. Giorgi*, 840 F.2d 1022, 1026–1027 (1st Cir. 1988) (stating “the government must shoulder a greater degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements.”); *United States v. Anglin*, 215 F.3d 1064, 1067 (9th Cir. 2000) (holding that “plea agreements are generally construed according to the principles of contract law, and the government, as drafter, must be held to an agreement’s literal terms”).

163. *People v. Cataldo*, 39 N.Y.2d 578, 580, 349 N.E.2d 863, 864, 384 N.Y.S.2d 763, 763 (1976).

164. *Santobello v. New York*, 404 U.S. 257, 263, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971).

165. *People v. McConnell*, 49 N.Y.2d 340, 347–348, 402 N.E.2d 133, 136, 425 N.Y.S.2d 794, 797–798 (1980).

166. *People v. Danny G.*, 61 N.Y.2d 169, 171–172, 461 N.E.2d 268, 268–269, 473 N.Y.S.2d 131, 131–132 (1984); *People v. McConnell*, 49 N.Y.2d 340, 347–348, 402 N.E.2d 133, 136, 425 N.Y.S.2d 794, 797–798 (1980).

(g) Ineffective Assistance of Counsel

If your defense attorney inappropriately advised you to plead guilty and you can prove ineffective assistance of counsel, your plea may not meet the constitutional standards of “knowing, voluntary, and intelligent.”¹⁶⁷ Simply being unsatisfied or unhappy with your assigned counsel will not make your guilty plea involuntary or unknowing.¹⁶⁸ To prove “ineffective assistance of counsel,” you must show:

- (1) The advice of your counsel did not meet the competency standard required of attorneys in criminal cases,¹⁶⁹ and
- (2) If your counsel had not made these errors, there would have been a reasonable possibility that you would have pleaded “not guilty” and demanded a trial.¹⁷⁰

If you *did not* accept the agreement because your defense attorney did not give you adequate advice, you must show that if you did not receive ineffective advice from your counsel, there is a reasonable chance that:

- (1) The plea offer would have been presented to the court (in other words, the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), and
- (2) That the court would have accepted its terms, and
- (3) The conviction or sentence, or both, under the offer’s terms would have been better than under the judgment and sentence that in fact were imposed.¹⁷¹

If the court finds that your attorney’s performance did not affect the plea bargaining process, the court will assume that your plea was entered knowingly, voluntarily, and intelligently.¹⁷² This decision means that you will have waived any non-jurisdictional claims on which you could have appealed your conviction, including ineffective assistance of counsel.

A claim of ineffective assistance of counsel may exist in plea bargaining cases where counsel was not aware of the applicable law and unable to advise the defendant if it was best to accept a plea bargain¹⁷³ or where the defense attorney did not place the terms of the plea bargain on the record.¹⁷⁴ The claim may also exist where an attorney did not communicate the existence of a plea offer to the defendant, even when the defendant maintained his innocence and wanted to go to trial.¹⁷⁵

You do not have a claim of ineffective assistance of counsel with respect to plea bargaining if:

- (1) Your defense counsel held a reasonable but incorrect interpretation of the applicable criminal law;¹⁷⁶

167. *Brady v. United States*, 397 U.S. 742, 748–749, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756–757 (1970). *See JLM*, Chapter 12, “Appealing Your Conviction Based on Ineffective Assistance of Counsel.”

168. *People v. Artis*, 199 A.D.2d 839, 840, 605 N.Y.S.2d 545, 546 (3d Dept. 1993).

169. *Hill v. Lockhart*, 474 U.S. 52, 56–57, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203, 208–209 (1985).

170. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203, 209 (1985).

171. *Lafler v. Cooper*, 566 U.S. 156, 164, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398, 407 (2012). *See also Missouri v. Frye*, 566 U.S. 134, 147, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379, 391 (2012) (laying out a similar test for the situation where defense counsel fails to communicate a plea offer to his client).

172. *See People v. Dunn*, 261 A.D.2d 940, 940–941, 690 N.Y.S.2d 349, 349–350 (4th Dept. 1999).

173. *People v. Butler*, 462 N.Y.S.2d 263, 263–264 (2d Dept. 1983) (holding that defendant did not receive effective assistance of counsel where defense counsel did not know the applicable criminal laws, could not effectively counsel defendant to take a plea bargain for a lesser charge, and was not prepared for trial).

174. *People v. Roy*, 122 A.D.2d 482, 483–484, 505 N.Y.S.2d 242, 243–244 (3d Dept. 1986) (finding ineffective assistance of counsel where defendant pleaded guilty after being told incorrectly that his burglary charge would be dismissed after completing alcohol counseling but defense attorney did not put his understanding on the record where prosecution could have corrected the mistake).

175. *People v. Alexander*, 136 Misc. 2d 573, 585, 518 N.Y.S.2d 872, 879 (Sup. Ct. Bronx County 1987).

176. *See People v. Angelakos*, 70 N.Y.2d 670, 673–674, 512 N.E.2d 305, 307, 518 N.Y.S.2d 784, 786 (1987) (finding that the defendant received adequate representation by her attorney where, even if attorney correctly understood one element of the crime, attorney could have reasonably still advised defendant to plead guilty and where defendant “sought the result she received” when she avoided multiple criminal charges and jail time).

- (2) Your defense counsel did not advise you to accept or reject a plea bargain;¹⁷⁷
- (3) Your defense counsel did not participate in the proceedings to withdraw your guilty plea, you had the opportunity to present your case or no basis to withdraw the plea, and counsel's lack of participation worked no discernable prejudice;¹⁷⁸
- (4) Your defense counsel did not engage in certain pretrial procedures and this decision was based on a legitimate strategy;¹⁷⁹ or
- (5) You make a general claim that the plea was ill-advised, without reference to specific instances of ineffectiveness.¹⁸⁰

Ineffective assistance of counsel claims should be raised on a motion to vacate the judgment and conviction under New York Criminal Procedure Law Section 440.10.¹⁸¹

(h) Not competent to enter a guilty plea

You must be competent to realize you are entering a guilty plea. If you were determined competent to stand trial, you are also considered to be competent to plead guilty.¹⁸² Conversely, if you were not competent to assist in your own defense at trial, you would not have been competent to enter a guilty plea.¹⁸³ If the trial court was aware of the possibility of mental incompetence at the time the plea was entered, it should have ordered a mental examination to determine if you were competent to enter the plea.¹⁸⁴ However, if there was no indication of incompetence in the record, and you did not seek an examination, the court was not required to order one.¹⁸⁵ The right to a competency hearing is not waived by a guilty plea, and it may be raised for the first time on appeal.¹⁸⁶ However, based on how

177. *People v. Hoffman*, 256 A.D.2d 1195, 1195, 685 N.Y.S.2d 142, 143 (4th Dept. 1998) (holding that defendant received effective assistance of counsel where defendant's counsel did not advise defendant to accept a plea bargain but defendant was aware of the plea bargain and aware of the consequences of not accepting it).

178. *People v. Rodriguez*, 188 A.D.2d 623, 623–624, 591 N.Y.S.2d 846, 846 (2d Dept. 1992) (holding that defendant failed to show that he would have gone to trial if he had received effective assistance and that the failure of the defense counsel in withdrawing the plea was not ineffective counseling because defendant was still given an opportunity to be heard); *People v. Campbell*, 180 A.D.2d 808, 809, 580 N.Y.S.2d 445, 447 (2d Dept. 1992) (finding that the defense counsel's lack of participation in the defendant's application to withdraw his plea did not amount to ineffective representation because there was no basis for withdrawing the plea and the defendant's accomplice had received a substantially greater sentence after a trial).

179. *People v. Rivera*, 71 N.Y.2d 705, 709, 525 N.E.2d 698, 701, 530 N.Y.S.2d 52, 54 (1988), cited in *People v. Mouck*, 145 A.D.2d 758, 758–759, 535 N.Y.S.2d 273, 274–275 (3d Dept. 1988) (finding that defendants did not show ineffective assistance of counsel where they did not show that there was no legitimate reason for defense counsel not to seek a pretrial hearing or that the reason that defense counsel did not seek a pretrial hearing was illegitimate).

180. *See People v. Florian*, 145 A.D.2d 645, 645–646, 536 N.Y.S.2d 705, 705 (2d Dept. 1988) (holding allegations of counsel's bad advice to enter a guilty plea are not sufficient to make out a claim of ineffective assistance of counsel; defendant must allege specific instances of ineffective representation); *see also People v. Bourdonnay*, 160 A.D.2d 1014, 1015, 555 N.Y.S.2d 134, 136 (2d Dept. 1990) (citing *People v. Florian* for the same point).

181. *People v. Angelakos*, 70 N.Y.2d 670, 673, 512 N.E.2d 305, 307, 518 N.Y.S.2d 784, 786 (1987) (citing *People v. Brown*, 45 N.Y.2d 852, 854, 382 N.E.2d 1149, 1149, 410 N.Y.S.2d 287, 287 (1978)). *See JLM Chapter 20* for more information on § 440.10 of the New York Criminal Procedure Law.

182. *Godinez v. Moran*, 509 U.S. 389, 400–401, 113 S. Ct. 2680, 2687, 125 L. Ed. 2d 321, 333–334 (1993) (holding that no greater standard of competency is required for entering a guilty plea than for standing trial).

183. *See People v. Francabandera*, 33 N.Y.2d 429, 435, 310 N.E.2d 292, 295, 354 N.Y.S.2d 609, 613 (1974) (stating that the inquiry is not whether the defendant knew what they were doing, especially if they clearly did, but that the defendant cannot be forced to plead guilty due to a mental condition which prevented him from assisting in his own defense at trial).

184. *People v. Frazier*, 114 A.D.2d 1038, 1038–1039, 495 N.Y.S.2d 478, 478–479 (2d Dept. 1985).

185. *People v. Dover*, 227 A.D.2d 804, 805, 642 N.Y.S.2d 438, 439 (3d Dept. 1996) (finding a presumption of defendant's sanity, which is not rebutted merely by showing past mental illness).

186. *People v. Armlin*, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975).

courts have ruled in the past, it may be very difficult for you to successfully bring a competency claim on appeal in New York.¹⁸⁷

E. Withdrawing from a Plea Bargain

In New York, you must move to withdraw a guilty plea in the trial court¹⁸⁸ or move to vacate the judgment of conviction and sentence¹⁸⁹ in the trial court to preserve any claims for appellate review that the plea was unconstitutional.¹⁹⁰

1. Withdrawal Prior to Sentencing

You may withdraw from a plea bargain that you have already accepted if the plea did not meet the constitutional standards of knowing, voluntary, and intelligent, or if the court in its discretion permits you to withdraw from the guilty plea.¹⁹¹

If the court does not accept a bargain you have entered with the prosecution, you may be able to withdraw your guilty plea and maintain your right to a trial. In this circumstance, your guilty plea cannot be used as evidence against you during the trial.¹⁹² However, certain types of plea arrangements do not allow withdrawal of a guilty plea after sentencing. If you have agreed to a *non-binding* recommendation for a particular sentence, the court may accept the bargain but decide not to follow the recommendation, and you cannot withdraw the plea at that point.¹⁹³

In New York, you may be able to file a motion to withdraw a guilty plea. To withdraw, a court will first determine why you wish to withdraw the plea.¹⁹⁴ The courts do not have a specific fact-finding procedure to decide your motion. A limited review may be enough as long as you are given a reasonable opportunity to present your claims.¹⁹⁵ Courts will allow you to withdraw a plea that was not voluntary, knowing, and intelligent.¹⁹⁶ Defendants are also allowed to withdraw a guilty plea if they do not receive

187. See, e.g., *People v. Rivas*, 206 A.D.2d 549, 550, 614 N.Y.S.2d 753, 754 (2d Dept. 1994) (defendant's coherent responses during plea proceedings was enough to prove his competence for purposes of the plea); *People v. Hall*, 168 A.D.2d 310, 311 562 N.Y.S.2d 641, 642 (1st Dept. 1990) (suicidal defendant's plea upheld since his responses during the plea allocution were more than just "monosyllabic responses" and reflected normal thinking).

188. N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 2014).

189. N.Y. CRIM. PROC. LAW §§ 440.10, 440.20 (McKinney 2005).

190. *People v. Lopez*, 71 N.Y.2d 662, 665–666, 525 N.E.2d 5, 6, 529 N.Y.S.2d 465, 466 (1988). See also *People v. Mackey*, 77 N.Y.2d 846, 849, 569 N.E.2d 442, 442, 567 N.Y.S.2d 639, 639–640 (1991) (denying appeal because defendant must raise each issue in the motion to withdraw plea or it is not preserved for appeal).

191. N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 2014).

192. See FED. R. CRIM. P. 11(f); see also *Kercheval v. United States*, 274 U.S. 220, 223, 47 S. Ct. 582, 583, 71 L. Ed. 1009, 1012 (1927) (plea of guilty withdrawn by leave of court is inadmissible in subsequent prosecution); *People v. Spitaleri*, 9 N.Y.2d 168, 173, 173 N.E.2d 35, 37, 212 N.Y.S.2d 53, 56 (1961) ("We should say flatly and finally that a plea so allowed to be withdrawn is out of the case forever and for all purposes.").

193. See FED. R. CRIM. P. 11(e).

194. See, e.g., *People v. Stone*, 193 A.D.2d 838, 597 N.Y.S.2d 538 (3d Dept. 1993) (holding that defendant's mere conclusory statements about innocence, coercion, and distress are not sufficient).

195. *People v. Tinsley*, 35 N.Y.2d 926, 927, 324 N.E.2d 544, 544, 365 N.Y.S.2d 161, 162 (1974) (stating defendants will rarely be allowed an evidentiary hearing and often a limited interrogation by the court will be sufficient). See also *People v. Brown*, 205 A.D.2d 436, 436, 613 N.Y.S.2d 903, 904 (1st Dept. 1994) (remanding for further proceedings because court did not inquire into defendant's allegations of coercion which were the basis for his motion to withdraw the guilty plea). But see *People v. Braun*, 167 A.D.2d 164, 165, 561 N.Y.S.2d 244, 245 (1st Dept. 1990) (upholding court's decision to deny motion to withdraw guilty plea without further inquiry because motion was based on coercion and ineffective assistance of counsel, and the court had observed counsel's representation and defendant's bare allegations were unsupported by the record).

196. *People v. Jones*, 44 N.Y.2d 76, 81, 375 N.E.2d 41, 44, 404 N.Y.S.2d 85, 88 (1978). See *United States v. Baum*, 380 F. Supp. 2d 187, 203 (S.D.N.Y. 2005) (holding that, in determining whether there is a fair and just reason for withdrawal of a guilty plea, courts may look to "whether the defendant has raised a significant question about the voluntariness of the original plea"); *People v. Britt*, 200 A.D.2d 401, 402, 606 N.Y.S.2d 208, 209 (1st Dept. 1994) (ordering evidentiary hearing to determine if plea was involuntarily entered). Note that facts suggesting the lack of a knowing and voluntary decision must appear in the record. *People v. Coco*, 220 A.D.2d

the sentence the prosecutor promised to recommend to the judge,¹⁹⁷ if the sentence cannot legally be enforced,¹⁹⁸ if the prosecutor did not have the authority to make the promise,¹⁹⁹ or if the defendant was not adequately informed about the effects of the plea. Courts are not required to allow a defendant to withdraw the plea if the defendant breaches the plea agreement,²⁰⁰ or if the plea was entered knowingly, voluntarily, and intelligently.²⁰¹

A withdrawn guilty plea cannot be admitted as evidence against you in the trial, or in any subsequent civil trial or administrative proceeding.²⁰² Additionally, statements made in plea discussions or the factual allocation cannot be admitted in a trial.²⁰³

2. Withdrawal Following Sentencing

In New York, if you want to withdraw from a guilty plea after you have been sentenced, you must make a motion to vacate the judgment of conviction and sentence under Article 440 of the New York Criminal Procedure Law.²⁰⁴ This motion preserves your claim that the guilty plea was not entered voluntarily, knowingly, or intelligently.²⁰⁵ These issues must be raised in the court of first instance (the trial court) and cannot be raised for the first time in an appeal.²⁰⁶ If, however, when you pleaded guilty you stated facts that clearly cast doubt on your guilt and the court did not ask more questions to ensure that it was a valid guilty plea, there is a narrow exception that allows you to challenge on direct appeal the court's acceptance of your plea.²⁰⁷ In your motion to vacate the judgment, you must clearly state the reasons why it should be vacated; if you fail to list an issue in your motion, you will

312, 650 N.Y.S. 2d 636 (1st Dept. 1995) (denying defendant's motion to withdraw guilty plea because record showed it was entered knowingly, voluntarily, and intelligently).

197. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); People v. Selikoff, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974), *cited in* People v. Frederick, 45 N.Y.2d 520, 524, 382 N.E.2d 1332, 1334, 410 N.Y.S.2d 555, 558 (1978) (A guilty plea induced by an unfulfilled promise either must be vacated or the promise honored.).

198. People v. Cameron, 193 A.D.2d 752, 753, 597 N.Y.S.2d 724, 725 (2d Dept. 1993); People v. Tubbs, 157 A.D.2d 915, 916, 550 N.Y.S.2d 441, 442–443 (3d Dept. 1990).

199. People v. Selikoff, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974).

200. People v. Madden, 186 A.D.2d 49, 49, 587 N.Y.S.2d 637, 637 (1st Dept. 1992).

201. *See, for example* People v. Coco, 650 N.Y.S. 2d 636, 220 A.D.2d 312 (1st Dept. 1995) (denying defendant's motion to withdraw guilty plea because record showed it was entered knowingly, voluntarily, and intelligently).

202. *See* FED. R. CRIM. P. 11(f), FED. R. EVID. 410; *see also* Kercheval v. United States, 274 U.S. 220, 225, 47 S. Ct. 582, 584, 71 L. Ed. 1009, 1013 (1927) (holding that a guilty plea withdrawn by leave of court is inadmissible in subsequent prosecution); People v. Spitaleri, 9 N.Y.2d 168, 173, 173 N.E.2d 35, 37, 212 N.Y.S.2d 53, 56 (1961) (holding that a withdrawn guilty plea is completely out of the case and cannot be used for any purpose).

203. FED. R. CRIM. P. 11(f), FED. R. EVID. 410; *see also* People v. Moore, 66 N.Y.2d 1028, 1030, 489 N.E.2d 1295, 1296, 499 N.Y.S.2d 393, 394 (1985) (stating that the contents of plea allocation, in addition to withdrawn guilty plea, cannot be used against defendant for any purpose).

204. *See JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

205. *See, e.g.,* People v. Lopez, 71 N.Y.2d 662, 665–666, 525 N.E.2d 5, 6, 529 N.Y.S.2d 465, 466 (1988) (trial court made appropriate inquiry of defendant during guilty plea hearing to ensure that defendant's plea to first-degree manslaughter was knowing and voluntary, and thus defendant waived any challenge to allocation on appeal based on his failure to move in trial court for vacation of conviction or withdrawal of guilty plea).

206. *See* People v. Pellegrino, 60 N.Y.2d 636, 637, 454 N.E.2d 938, 467 N.Y.S.2d 355, 356 (1983) (holding that because defendant failed to raise his arguments that he should be relieved of his guilty plea in the court of first instance, his conviction must be affirmed).

207. People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–467 (1988) (noting that where the defendant's recitation of the facts casts doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, the trial court has a duty to inquire further to ensure that the guilty plea is both knowing and voluntary. If the trial court fails to conduct this inquiry, the defendant's right to appeal may be preserved even if the issue was not raised in the court of first instance.).

not be able to raise it on appeal.²⁰⁸ Chapter 20 of the *JLM*, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction of Illegal Sentence,” provides a thorough explanation of the process of vacating a sentence and conviction under Article 440.

F. Conclusion

Today, most of the criminal justice system *is* plea bargaining. However, it is important to remember that you still have rights when going through the plea bargaining process, and the prosecutors and court may not violate those rights. If the government offers you a plea agreement, make sure that you understand all of the consequences of the plea, including the potential collateral consequences on your immigration status, job prospects, housing, and other significant parts of your life. It is also important to get every part of the plea agreement in writing. And finally, if you are represented by a lawyer, make sure you talk to your lawyer before you sign any plea agreement. Doing these things will help make sure that you get the best plea agreement possible, so you are not faced with the very difficult task of trying to vacate your plea agreement later on.

208. See, e.g., *People v. Mackey*, 77 N.Y.2d 846, 847, 569 N.E.2d 442, 442, 567 N.Y.S.2d 639, 639 (1991) (holding that defendant did not preserve error for review where he did not raise his claim that he should have been permitted to withdraw his plea, because plea allocution suggested availability of agency defense, in his motion to withdraw plea or otherwise in court of first instance).

CHAPTER 41

SPECIAL ISSUES OF INCARCERATED WOMEN*

A. Introduction

Men greatly outnumber women in American prisons and jails. However, women are incarcerated at a much greater rate. As of 2019, 231,000 women were incarcerated in the United States.¹ Since 1980, the number of women incarcerated in the United States has grown at two-times the rate of increase in the number of incarcerated men.² Rates of incarceration for women vary significantly by region. Idaho has the highest female imprisonment rate at 138 per 100,000 women. Massachusetts has the lowest at 10 per 100,000 women.³

There are some important differences between incarcerated men and women. Women are more likely than men to be in prison for drug and property offenses. Men are more likely to be in prison for violent crime. As of 2018, 26% of women in state prisons had been sentenced to drug related offenses, compared to just 13% of the state male prison population.⁴ Furthermore, incarcerated women are three to four times more likely than incarcerated men to have experienced abuse, either as a child or as an adult.⁵ And incarcerated women are more likely to suffer from mental illness than incarcerated men.⁶

For these and many other reasons, prison can be a very different experience for women than for men. This Chapter explains the unique concerns and legal rights of incarcerated women. It is important that women who are incarcerated are able to learn about issues that specifically affect them. If you are a woman who is incarcerated, you should not rely only on this Chapter for information about your legal rights in prison. Instead, you should read any other parts of the *JLM* that may apply to your situation, since many issues people face in prison are shared across gender-lines.

This Chapter is divided into five parts, B to F. Part B describes the issue of equal protection in programs and services provided to both incarcerated men and women. Part C supplements Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.” It focuses on medical care for incarcerated women. It also includes the right to basic gynecological care, abortions, treatment for HIV, and resources and treatment for pregnant women. Please see Chapter 33 of the *JLM*, “Rights of

* This Chapter was updated by Hannah Canham, based on previous versions by Rena Stern, Michelle Maloney, Rachel Wilgoren, Melissa Rothstein, and Shelley Inglis. Special thanks to Y. Rupa Rao and Lisa Freeman.

1. Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (29 Oct. 2019), available at <https://www.prisonpolicy.org/reports/pie2019women.html> (last visited Dec. 2, 2020).

2. The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls* (Nov. 2020), available at <https://www.sentencingproject.org/wp-content/uploads/2020/11/Incarcerated-Women-and-Girls.pdf> (last visited Dec. 2, 2020) (“Though many more men are in prison than women, the rate of growth for female imprisonment has been twice as high as that of men since 1980.”); Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (29 Oct. 2019), available at <https://www.prisonpolicy.org/reports/pie2019women.html> (last visited Dec. 2, 2020) (“Women’s incarceration has grown at twice the pace of men’s incarceration in recent decades[.]”).

3. The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls* (Nov. 2020), available at <https://www.sentencingproject.org/wp-content/uploads/2020/11/Incarcerated-Women-and-Girls.pdf> (last visited Dec. 2, 2020).

4. The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls* (Nov. 2020), available at <https://www.sentencingproject.org/wp-content/uploads/2020/11/Incarcerated-Women-and-Girls.pdf> (last visited Dec. 2, 2020).

5. See American Civil Liberties Union, *Words From Prison – Did You Know...?*, available at <https://www.aclu.org/other/words-prison-did-you-know#I> (last visited Dec. 19, 2019) (citing American Civil Liberties Union, Brennan Center, & Break the Chains, *Caught in the Net: The Impact of Drug Policies on Women and Families* (Apr. 2005), available at <https://www.aclu.org/caught-net-impact-drug-policies-women-and-families> (last visited Dec. 2, 2020)).

6. Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (29 Oct. 2019), available at <https://www.prisonpolicy.org/reports/pie2019women.html> (last visited Dec. 2, 2020).

Incarcerated Parents” for general information about the rights of imprisoned parents. Part D focuses on privacy concerns, searches, sexual harassment, and sexual assault and rape. Your right to be free from assaults and illegal body searches is also described in *JLM*, Chapter 24, “Your Right to be Free from Assault by Prison Guards and Other Incarcerated People,” and Chapter 25, “Your Right to Be Free from Illegal Body Searches.” Part E discusses the growing popularity of alternative sentencing options, such as drug treatment programs. It explains why programs designed for men may not be as effective for women. Finally, Part F defines a form of sentencing adjustment called “clemency.” It includes a description of clemency proceedings. It also explains how you can petition for clemency as a battered (abused) woman. While Part F focuses on clemency for battered women, any person petitioning for clemency can use these procedures. Other possibilities for release are discussed in *JLM*, Chapter 39, “Temporary Release Programs,” Chapter 35, “Getting out Early: Conditional & Early Release,” and Chapter 32, “Parole.”

B. Equal Protection and Programming

Many prison programs fail to address issues that are specific to incarcerated women because the majority of the prison population is usually male. Nonetheless, being smaller in number is not a reason to be discriminated against. You should know that in many situations, incarcerated women have the right to seek programs and services substantially equivalent to the ones offered to males.

If you feel that you have been unfairly discriminated against, there are two different legal steps you can take. Which step you take depends on the type of discrimination you think you are experiencing. If the discrimination concerns vocational and educational programs in prison, you can bring a claim under a federal law called Title IX of the Education Amendments Act of 1972.⁷ Otherwise, you can bring a challenge under the Equal Protection Clause of federal and state constitutions.⁸ Each type of action will be explained below.

The Equal Protection Clause: The Equal Protection Clause guarantees that people must be treated equally if they are similarly situated. To win an equal protection challenge, you must demonstrate that:

- (1) groups of incarcerated men and women are “similarly situated,”⁹
- (2) the groups are treated differently on the basis of gender, and
- (3) the difference in treatment is not “substantially related” to a legitimate government objective.¹⁰

“Similarly situated” means that two groups share common features, or are the same in all major ways, except for their gender.¹¹ Courts have held that groups of incarcerated men and women *are*

7. 20 U.S.C. § 1681.

8. See, e.g., *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1043–1044 (S.D.N.Y. 1995) (holding that providing a sensorially disabled unit for men but not women violated equal protection); *West v. Virginia Dept. of Corr.*, 847 F. Supp. 402, 407–409 (W.D. Va. 1994) (holding failure to provide boot camp programs for women as well as men violated equal protection); *Casey v. Lewis*, 834 F. Supp. 1477, 1550–1552 (D. Ariz. 1993) (holding inequalities in mental health treatment available to men and women violated equal protection); *McCoy v. Nevada Dept. of Prisons*, 776 F. Supp. 521, 523–524 (D. Nev. 1991) (plaintiffs showed enough evidence that their equal protection rights were violated where incarcerated men had access to a wider variety of recreational and educational programs than women, including training for larger a range of careers); *Canterino v. Wilson*, 546 F. Supp. 174, 210–212 (W.D. Ky. 1982), vacated and remanded on other grounds, 869 F.2d 948 (6th Cir. 1989) (failure to provide incarcerated women with parity in the offering of institutional jobs and vocational training programs violated equal protection).

9. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”). This United States Supreme Court case involved zoning ordinances for a house for the mentally ill. The zoning ordinances were found to violate equal protection. The test from this case is used in cases involving equal protection challenges on the basis of gender in prisons. See, e.g., *Betts v. McCaughy*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993); *McCoy v. Nev. Dept. of Prisons*, 776 F. Supp. 521, 523 (D. Nev. 1991).

10. *Roubideaux v. N.D. Dept. of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009).

11. *Betts v. McCaughy*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993) *aff’d*, 19 F.3d 21 (7th Cir. 1994).

similarly situated in some circumstances.¹² In other cases, however, courts have decided that incarcerated men and women are not similarly situated. Some of the reasons why include the number of incarcerated people in their prison, the lengths of their sentences and differences in security classifications.¹³ If you are able to show that your group is similarly situated to a group of incarcerated men, the next step is to look at the type of different treatment you receive. Incarcerated men and women do not need to be treated identically. The Constitution only requires that your treatment be “substantially equivalent” or that incarcerated men and women receive “parity” of treatment.¹⁴ In other words, you need to show that the difference in treatment that you are challenging is meaningful. For example, one court held that small differences in the grooming accessories made available to incarcerated men and women were not significant enough to amount to a constitutional violation.¹⁵

The last step is to look at the reason for the different treatment. Prisons are actually allowed to discriminate between similarly situated incarcerated men and women. They can do this if the different treatment is “substantially related” to important prison goals. These goals may include safety and security.¹⁶ For example, the Third Circuit found that a County jail’s policy of serving hot meals to incarcerated women in a restricted housing unit (RHU), while serving cold, bagged meals to incarcerated men in the RHU, was “rationally connected” to a legitimate and neutral government objective.¹⁷ Before the policy, the jail gave hot meals to men in the RHU, but the men began to use the trays and utensils as weapons. The jail did not have the same problem with women in the RHU.¹⁸ Based on those facts, the court held the jail’s decision to only serve hot meals to women was “rationally connected” to the legitimate government interest in safety and security. For more information on how to make a claim under the Equal Protection Clause, read *JLM*, Chapter 16(B)(2)(c), “Fourteenth Amendment Claims: The Equal Protection Clause.”

12. See *Sassman v. Brown*, 99 F. Supp. 3d 1223, 1241 (E.D. Cal. 2015) (incarcerated men who otherwise met the criteria for California’s Alternative Custody Program were similarly situated to the incarcerated women who met the criteria); *Woods v. Horton*, 84 Cal. Rptr. 3d 332, 344 (Cal. Ct. App. 2008) (incarcerated men who had experienced significant levels of domestic violence as victims were similarly situated to women for the purpose of the need for domestic violence programs).

13. See *Klinger v. Dept. of Corr.*, 31 F.3d 727, 731–732 (8th Cir. 1994) (women incarcerated at an all-female prison were not similarly situated to men incarcerated at an all-male facility because of the differences in the sizes of the institutions, differences in the length of incarceration and differences in security classification); *Pargo v. Elliott*, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (incarcerated men and women were not similarly situated for the purposes of security and programming where the men were housed in different facilities by security classification and the women were housed together, served shorter sentences, and had special characteristics).

14. *Betts v. McCaughtry*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) *aff’d*, 19 F.3d 21 (7th Cir. 1994); *McCoy v. Nev. Dept. of Prisons*, 776 F. Supp. 521, 523 (D. Nev. 1991): “courts have required that female prisoners be treated ‘in parity’ with male prisoners.”

15. *Betts v. McCaughtry*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) *aff’d*, 19 F.3d 21 (7th Cir. 1994).

16. *Roubideaux v. N.D. Dept. of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009).

17. *Mathis v. Monza*, 530 F. App’x 124, 127–128 (3d Cir. 2013).

18. *Mathis v. Monza*, 530 F. App’x 124, 127–128 (3d Cir. 2013); see also *Roubideaux v. N.D. Dept. of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009) (incarcerated women challenged a statute under which, when there was insufficient space in state prisons, women were placed in county jails with limited prison programming, but men were not placed in those jails. The Court held that the statute was substantially related to the important governmental interest in providing adequate segregated housing for incarcerated women); *Davie v. Wingard*, 958 F. Supp. 1244, 1253 (S.D. Ohio 1997) (Differences in regulations governing hair length and styles for incarcerated men and women in the state prison system were justified by the much lower incidence of contraband concealment, escape, gang participation, and violence by incarcerated women compared to male prison population. Therefore, the different treatment was substantially related to the goal of promoting prison safety, security and discipline.). But see *Sassman v. Brown*, 99 F. Supp. 3d 1223, 1243–1244 (E.D. Cal. 2015) (Excluding men from an early release program was *not* substantially related to the government interest of reducing recidivism for women because the state did not show why excluding men from the program was necessary to achieve this goal).

Title IX: If you feel that your institution does not provide the same vocational and educational programs as the men's prisons, you can also bring a discrimination claim under Title IX of the Education Amendments of 1972.¹⁹ Title IX is a federal law that prohibits sex discrimination in federally funded educational programs and activities. The law states that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."²⁰ For example, if you know that the men's prison has a college program, and the women's prison does not, you might have a Title IX claim. Similarly, if you are aware that the men's prison has an athletics or sports program, and the women's prison does not, you might have a Title IX claim.

It may also be easier to win a Title IX claim than an Equal Protection claim. One reason for this is that in Title IX claims, you do not have to show that the two groups are "similarly situated." Courts have found that federal law already assumes that male and female participants in federally funded educational programs are similarly situated.²¹ Thus, they are entitled to the same opportunities and programs. Also, courts have held that Title IX holds prisons to a higher standard than the one required by the Equal Protection Clause. Under the Equal Protection Clause, prisons must treat similarly-situated incarcerated people with "parity" (discussed above), while Title IX requires "equality."²² For Title IX claims, courts consider multiple factors when deciding whether the discrimination is legal. Whether the discrimination is "reasonably related" to a legitimate prison interest is only one of the factors courts consider when deciding whether it is legal.²³ Other factors include: whether the prison has a legitimate security interest in providing very different educational opportunities to men than to women, and cost and management concerns.²⁴

For example, in one case incarcerated women sued their prison because incarcerated women could only choose from two vocational classes while incarcerated men could choose from twelve. The prison officials said the difference in class numbers was due to a "legitimate penological interest" (a justifiable interest of the prison) because the male prison population was bigger. The court said that this by itself did not prevent the women's claim.²⁵ The court decided that the incarcerated women were entitled to equal opportunities to the incarcerated men. Equal opportunity was not defined as being entitled to the same number of classes. But, it was decided that women are entitled to the same diversity of classes as well as access to some of the male classes.²⁶

C. Adequate Medical Care

Both incarcerated men and women have the right to adequate medical care, as explained in Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care." This Part addresses medical needs specific to incarcerated women. Therefore, you should be sure to read Chapter 23 for any concerns you have regarding your right to medical care that may be relevant to both men and women. Research has shown that incarcerated women have different, and often more severe, health problems than incarcerated men.²⁷ Many incarcerated women suffer from chronic and complex health conditions

19. 20 U.S.C. § 1681.

20. 20 U.S.C. § 1681(a).

21. *See* *Klinger v. Dept. of Corr.*, 107 F.3d 609, 614 (8th Cir. 1997).

22. *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1984).

23. *Jeldness v. Pearce*, 30 F.3d 1220, 1230 (9th Cir. 1984).

24. *Jeldness v. Pearce*, 30 F.3d 1220, 1230 (9th Cir. 1984).

25. *Jeldness v. Pearce*, 30 F.3d 1220, 1224, 1230–1231 (9th Cir. 1984).

26. *Jeldness v. Pearce*, 30 F.3d 1220, 1229 (9th Cir. 1984).

27. According to the World Health Organization, "Women in prison often have more health problems than male prisoners. . . . Women's prisons require a gender specific framework for health care which pays special attention for reproductive health, mental illness, substance use problems and physical and sexual abuse. Timely access to all services available for women outside prison, should be available for women inside prison. As with all prisoners, confidentiality of medical records should always be guaranteed." United Nations Office of Drugs and Crime & World Health Organization Europe, *Women's Health in Prison: Correcting Gender Inequities in Prison Health* (2009), available at <https://www.unodc.org/documents/hiv->

resulting from lives of poverty, drug use, family violence, sexual assault, adolescent pregnancy, malnutrition, and poor health care.²⁸ Incarcerated women also suffer from mental illness at higher rates than incarcerated men. As of January 2007, more than 42% of women in New York's prisons had been diagnosed with a serious mental illness, compared to nearly 12% of incarcerated men.²⁹ The prison environment does not always take into account women's specific health needs. For example, prisons often do not provide accessible hygiene products during menstruation, adequate nutrition for pregnant women, or specialized care for women who are infected with diseases like HIV/AIDS.³⁰

If you are concerned about the level of medical care that is provided in your prison, there are five possible steps you can take:

- 1) The first thing you should do is consult your institution's administrative grievance procedure. You should attempt to resolve your concerns following your institution's procedure before taking your concerns to court (see Chapter 15 of the *JLM*, "Inmate Grievance Procedures").
- 2) Only if you have "exhausted" (used up) all of your administrative remedies without success should you consider filing a claim in court.
- 3) If you think that prison officials have been "deliberately indifferent" towards your medical needs, you may want to pursue a claim that your Eighth Amendment rights were violated (see *JLM*, Chapter 16, Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief From Violations of Federal Law).
- 4) If you think that officials were just negligent (careless) towards your medical treatment, you may want to file a tort action in a state court (or in the Court of Claims, if you are in New York).
- 5) If you are trying to get the prison to provide you with specific medical care, rather than monetary damages, you may want to file an Article 78 petition in state court (if you are in New York). An Article 78 petition asks for a special proceeding against body or officer.³¹

See Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," and Chapter 5, "Choosing a Court & a Lawsuit: An Overview of the Options," for more information on choosing your claim and your court.

1. Eighth Amendment Claim for Adequate Medical Care

You have a federal right under the Eighth Amendment to receive adequate medical care for your serious medical needs.³² For information on bringing a claim that your Eighth Amendment rights were violated, see *JLM*, Chapter 16, "Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Law." Generally, to make an Eighth Amendment claim, you must show that:

aids/WHO_EURO_UNODC_2009_Womens_health_in_prison_correcting_gender_inequity-EN.pdf (last visited Feb. 16, 2020).

28. United Nations Office of Drugs and Crime & World Health Organization Europe, *Women's Health in Prison: Correcting Gender Inequities in Prison Health* (2009), available at https://www.unodc.org/documents/hiv-aids/WHO_EURO_UNODC_2009_Womens_health_in_prison_correcting_gender_inequity-EN.pdf (last visited Feb. 16, 2020).

29. Women in Prison Project, Correctional Association of New York, *Women in Prison Fact Sheet* (Apr. 2009), available at http://www.ncdsv.org/images/WIPP_Wome_in_Prison_Fact_Sheet_4-2009.pdf (last visited Feb. 16, 2020).

30. United Nations Office of Drugs and Crime & World Health Organization Europe, *Women's Health in Prison: Correcting Gender Inequities in Prison Health* (2009), available at https://www.unodc.org/documents/hiv-aids/WHO_EURO_UNODC_2009_Womens_health_in_prison_correcting_gender_inequity-EN.pdf (last visited Nov. 10, 2019).

31. N.Y. C.P.L.R. 7804 (McKinney 2008).

32. The main case in this area is *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976), in which the Supreme Court first held that deliberate indifference to the serious medical needs of an incarcerated person violates the Eighth Amendment. The Court in that case said that deliberate indifference to the serious medical needs of incarcerated people constitutes "the unnecessary and wanton infliction of pain," or cruel and unusual punishment, which is prohibited by the Eighth Amendment.

- (1) You were denied adequate medical care, and the denial was “sufficiently grave”;³³ and
- (2) The prison official knew about the seriousness of your condition and exhibited “deliberate indifference” to your medical needs.³⁴

“Deliberate indifference” means that the prison official had some idea of the seriousness of your medical condition and still did not provide you with necessary care.³⁵ A court may find “deliberate indifference” where a prison has a “pattern or practice” of providing less than adequate medical services and facilities to people incarcerated at the prison over a long period of time.³⁶

As an incarcerated woman, you have a right to adequate gynecological care and general physical examinations.³⁷ In 1977, incarcerated women at Bedford Hills Correctional Facility, New York’s maximum-security prison for women, brought a lawsuit against the facility. They claimed that there was an unconstitutionally defective medical care system.³⁸ They argued that the prison failed to provide gynecological and general physical examinations when the incarcerated people were first admitted, and did not provide proper follow-up care and recordkeeping.³⁹ The Second Circuit Court of Appeals found that extremely long delays and outright denial of medical care violated the incarcerated women’s constitutional rights.⁴⁰

Incarcerated women who are HIV positive are entitled to additional gynecological care. In the lawsuit described in the previous paragraph, Bedford Hills was required to provide its incarcerated women with improved services. These services included access to physicians who were knowledgeable about the treatment of HIV/AIDS, and more frequent gynecological examinations for incarcerated people with HIV/AIDS.⁴¹ In New York, the DOCCS has a written policy on Pap smears for women with HIV. It requires that HIV-positive women have Pap tests every six months, no matter what the results are.⁴² In a recent report on reproductive justice in prisons, the Correctional Association of New

33. *Helling v. McKinney*, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993). “Sufficiently serious” means that your future health has been unreasonably endangered, and that it is contrary to current standards of decency for you to be kept under such conditions.

34. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823–824 (1994). This case involved a failure to protect an incarcerated person from harm, not a failure to provide adequate medical care. However, the case is relevant to claims involving medical care because it explains the meaning of “deliberate indifference.” The Court said that the official must act or fail to act while *actually aware* of a substantial risk that serious harm will be suffered by the incarcerated person. Prison officials only need to be aware of the *risk* of harm. They do not need to *intend* or want to cause harm. Deliberate indifference can sometimes be proven from the fact that the risk would be obvious. *See Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976).

35. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (claim brought by an incarcerated person failed because he did not establish that prison officials had been deliberately indifferent to his medical needs. After he injured his back while working at the prison, medical personnel treated him on 17 occasions over three months. The Court held that the failure to properly diagnose and treat him might have amounted to medical malpractice, but that is not enough to constitute a constitutional violation); *see also Spavone v. N.Y. State Dept. of Corr. Services*, 719 F.3d 127, 138–139 (2d Cir. 2013).

36. *See, e.g., Todaro v. Ward*, 565 F.2d 48, 52–53 (2d Cir. 1977) (finding that a prison’s medical care violated the Eighth Amendment because of inadequate access to medical staff, the use of a “lobby clinic” for screening complaints, and record-keeping procedures that caused substantial delays).

37. *Todaro v. Ward*, 431 F. Supp. 1129, 1131–1133 (S.D.N.Y. 1977), *aff’d*, 565 F.2d 48 (2d Cir. 1977).

38. *Todaro v. Ward*, 431 F. Supp. 1129, 1131 (S.D.N.Y. 1977), *aff’d*, 565 F.2d 48 (2d Cir. 1977).

39. *Todaro v. Ward*, 431 F. Supp. 1129, 1137, 1145–1147 (S.D.N.Y. 1977).

40. *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir. 1977). The court appointed a monitor to make sure that the prison complied with the improvements ordered by the court. In August 2002, the court’s monitor found that after 20 years, Bedford Hills had finally complied with the court’s judgment, which included providing gynecological care and infectious disease care for women with HIV/AIDS. By agreement with the State of New York, the Prisoners’ Rights Project of the Legal Aid Society continued monitoring the Facility until August 2004 to ensure that reforms were institutionalized.

41. Kate Walsh, *Inadequate Access: Reforming Reproductive Health Care Policies for Women Incarcerated in New York State Correctional Facilities*, 50 COLUMBIA J. OF L. & SOC. PROBLEMS 45, 68 (2016).

42. Women in Prison Project, Correctional Association of New York, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165, 219 (Feb. 2015), available at

York noted that the DOCCS policy on this issue differ from community standards.⁴³ According to the report, community standards require that HIV-positive women should have two Pap tests six months apart for the first year after their diagnosis. These tests should be followed by annual tests if the results are normal. They should be followed by tests at least every six months if they are not. DOCCS' written policy also does not specify that HIV-positive women with abnormal Pap smear results should be referred for a colposcopy (a cervical exam) to rule out more serious cervical disease.⁴⁴ For more information regarding your legal rights about HIV/AIDs in prison, see Chapter 26 of the *JLM*, "Infectious Diseases (AIDS, Hepatitis and Tuberculosis) in Prison."

Although the Eighth Amendment requires you to show "deliberate indifference," state tort law often only requires you to show that the doctor or prison official was *negligent*.⁴⁵ Negligent medical care means that the care is below the standard that a reasonable medical provider would give. To find out the specific requirement in your state, consult Chapter 2 of the *JLM*, "Introduction to Legal Research."

2. Abortion

(a) Your Right to Choose: Access to Elective Abortions

An "elective abortion" is the voluntary termination of a pregnancy, where a woman personally chooses to have her pregnancy ended for non-emergency reasons. You do not lose your legal right to decide whether to continue a pregnancy or to have an elective abortion just because you are in prison.⁴⁶ However, states are allowed to place restrictions or limitations on a woman's right to an abortion, like requiring parental consent for pregnant minors. States can have these restrictions or limitations as long as they do not place an "undue burden" on a woman's right to choose.⁴⁷ An undue burden exists if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus is "viable" (able to live outside the womb).⁴⁸ A provision of a law is invalid if an undue burden exists. Courts decide what kind of obstacles might count as an "undue burden." Prisons and jails sometimes have regulations that make it difficult to obtain an abortion. So, if you think you could be pregnant and might want an abortion, you should get a pregnancy test as soon as possible. You can do this by contacting your prison's medical center.

<https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf>
(last visited Feb. 16, 2020).

43. Women in Prison Project, Correctional Association of New York, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

44. Women in Prison Project, Correctional Association of New York, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

45. *Knight v. State*, 127 A.D.3d 1435, 1435, 6 N.Y.S.3d 807, 808 (3d Dept. 2015) ("Where an inmate alleges that defendant has abdicated its duty to provide adequate medical care, he or she must present competent evidence demonstrating defendant's common-law negligence or that it departed from accepted standards of care and that such deviation was the proximate cause of the sustained injuries").

46. American Civil Liberties Union, *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, available at <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0> (last visited Nov. 7, 2019); see *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004); *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999); *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007).

47. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876–877, 112 S. Ct. 2791, 2820–2821, 120 L. Ed. 2d 674, 714–715 (1992).

48. See *Planned Parenthood v. Casey*, 505 U.S. 833, 877, 112 S. Ct. 2791, 2820–2821, 120 L. Ed. 2d 674, 714–715 (1992).

There are two main types of prison abortion policies that have been challenged in the courts:⁴⁹

- (1) Policies that say no incarcerated person can be transported off prison grounds to get an abortion (assuming the abortion is not medically necessary),⁵⁰ and
- (2) Court order provisions that require incarcerated women to get a court order before they can get an abortion.⁵¹

In both of these kinds of cases, courts have relied on the Supreme Court's "reasonableness" standard as set forth in *Turner v. Safley*, to decide whether the challenged policies violated a woman's right to an abortion under the Fourteenth Amendment.⁵² *Turner* also stated that prison regulations that restrict the rights of incarcerated people must be substantially related to some legitimate (justified) concern of the prison. In *Turner*, the Supreme Court held that restrictions on the right of incarcerated people to marry non-incarcerated people were not reasonably related to any prison objective.⁵³

When considering whether prison policies involving blanket prohibitions and court order provisions are unreasonable, courts consider a range of concerns. These concerns include the safety risk of transporting incarcerated people off prison grounds, and the need to allocate scarce resources and time.⁵⁴ To show that it is unreasonable to refuse to transport women to clinics or hospitals for an abortion, courts have cited the prison's ability to provide transportation for other kinds of medical examinations during pregnancy, including delivery.⁵⁵ Likewise, as the Third Circuit explained in *Monmouth*, prisons already have to provide all pregnant incarcerated people with proper pre-natal and post-natal care, so taking an incarcerated person to get an abortion does not require prisons to use more resources than they are already required to use.⁵⁶ The *Monmouth* court further found that prison officials must provide abortion services even if the incarcerated person cannot pay for them.⁵⁷

49. For summary and analysis of these cases, see Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?* 41 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 59, 59 (Mar. 2009), available at <http://www.guttmacher.org/pubs/psrh/full/4105909.pdf> (last visited Feb. 16, 2020). See also 2007 (11) AELE Monthly Law Journal 301, 304–308 (Nov. 2007), available at <http://www.aele.org/law/2007JBNOV/2007-11MLJ301.pdf> (last visited Nov. 7, 2019).

50. See *Roe v. Crawford*, 514 F.3d 789, 800–801 (8th Cir. 2008).

51. See *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987), *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007).

52. *Turner v. Safley*, 482 U.S. 78, 89–91, 107, S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987). The reasonableness test requires that courts consider “(1) the rational relationship between the regulation and the governmental interest put forward to justify it; (2) the existence of alternative means to exercise the asserted right; (3) the impact on prison resources of accommodating the asserted right; and (4) the existence of “ready alternatives” to accommodate the asserted right at “*de minimus*” cost to valid penological interests.” when deciding whether or not to strike down a prison regulation. *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 332 (3d Cir. 1987) (citing *Turner v. Safley*, 482 U.S. 78, 91, 107, S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987)).

53. *Turner v. Safley*, 482 U.S. 78, 91, 107, S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987).

54. Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?*, 41 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 59, 60 (Mar. 2009), available at <http://www.guttmacher.org/pubs/psrh/full/4105909.pdf> (last visited Feb. 16, 2020).

55. *Roe v. Crawford*, 514 F.3d 789, 795 (8th Cir. 2008); *Doe v. Arpaio*, 214 Ariz. 237, 242, 150 P.3d 1258, 1263 (Ct. App. 2007) (finding prison's court order policy unreasonable and noting that the prison already transports incarcerated people without a court order for other medical care and court dates).

56. *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 341 (3d Cir. 1987) (citing *Turner v. Safley*, 107 S. Ct. 2254, 2262 (1987)).

57. *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987); see also *Rust v. Sullivan*, 500 U.S. 173, 178, 203, 111 S. Ct. 1759, 1764, 1778, 114 L. Ed. 2d 233, 245–246, 262 (1991) (upholding federal regulation prohibiting federally funded medical clinics from counseling or referring women for abortion); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 511, 109 S. Ct. 3040, 3053, 106 L. Ed. 2d 410, 431 (1989) (upholding Missouri statute prohibiting the use of public facilities or personnel from performing non-therapeutic abortions); *Harris v. McRae*, 448 U.S. 297, 302, 100 S. Ct. 2671, 2680, 65 L. Ed. 2d 784, 795 (1980) (upholding congressional restriction of Medicaid funds for any abortion unnecessary to protect the life of the mother, or in

Your right to access an abortion varies depending on the kind of prison you are in and where it is located. In federal prison, federal regulations require incarcerated women to be offered medical, religious, and social counseling before having an abortion.⁵⁸ The incarcerated person must be allowed to make the final decision herself.⁵⁹ Federal prisons do not have to pay for non-medically necessary abortions.⁶⁰ However, if an incarcerated person requests an abortion, and is entitled to one under state law, then a prison official is required to transport her to a clinic.⁶¹ In state prisons, the rights of incarcerated women to get abortions will depend on the state-specific abortion laws, which vary greatly.⁶²

In New York, under a law passed in 2019, abortions are legal if they are performed in the first twenty-four weeks of the pregnancy.⁶³ They can also be legal after twenty-four weeks if the mother's life or health is at risk or if the fetus is nonviable.⁶⁴ This new law should still apply to incarcerated people, though DOCCS does not currently have any written guidelines regarding abortion access for incarcerated people. Delays can also be a problem. In the Second Circuit case of *Bryant v. Maffucci*, the prison took so long to schedule the incarcerated woman's abortion that the twenty-four-week deadline had passed. She was unable to get an abortion.⁶⁵ The court found that the prison officials had not violated the Eighth Amendment because they were "merely negligent," rather than "deliberately indifferent" to the incarcerated woman's need for an abortion (see above for definitions of these terms).⁶⁶

Some states, like California, have codes that say incarcerated women have the same right to an abortion as any other woman in the state.⁶⁷ The Third Circuit, which covers Delaware, New Jersey, and Pennsylvania, has recognized that the denial of elective abortions is a serious medical need. It has also recognized that this denial will have "irreparable" physical and emotional consequences for incarcerated people who do not want to carry their pregnancy to term.⁶⁸ However, other courts have not ruled similarly to the Third Circuit. Many courts do not consider non-elective abortion to be a serious medical need.⁶⁹

The Eighth Circuit rejected the Missouri Department of Corrections' claim that its ban on transporting incarcerated women for abortions was reasonable. The Department argued that the ban applied equally to all elective procedures. In doing so, they made it just a "specific application of a general policy." The court disagreed, finding that "abortion [was] treated differently" from other medical care at the prison, and that this different treatment was not reasonable.⁷⁰

The Fifth Circuit upheld a restriction that required a court order before abortions. The court accepted the jail's insistence that the court-order requirement did not target abortion because it

cases involving rape or incest). *But see* *Roe v. Crawford*, 514 F.3d 789, 800-801 (8th Cir. 2008) (finding that the Monmouth decision was "exceptionally broad" in requiring prisons to pay for elective abortions, and that "the Supreme Court has made it clear the state has no affirmative duty to provide, fund, or help procure an abortion for any member of the general population.").

58. 28 C.F.R. § 551.23(a)-(c) (2016).

59. 28 C.F.R. § 551.23(a) (2016).

60. *Harris v. McRae*, 448 U.S. 297, 326-327, 100 S. Ct. 2671, 2693, 65 L.Ed.2d 784, 811 (1980).

61. *See Harris v. McRae*, 448 U.S. 297, 326, 100 S. Ct. 2671, 2693, 65 L.Ed.2d 784, 811 (1980); *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 351-352 (3d Cir. 1987).

62. For more information on your state's laws governing access to abortions as well as pregnancy-related healthcare, see The American Civil Liberties Union, *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, available at <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0> (last visited Feb. 16, 2020).

63. N.Y. PUB. HEALTH LAW § 2599-bb (Consol. 2019).

64. N.Y. PUB. HEALTH LAW § 2599-bb (Consol. 2019).

65. *Bryant v. Maffucci*, 923 F.2d 979, 979 (2d Cir. 1991).

66. *Bryant v. Maffucci*, 923 F.2d 979, 985 (2d Cir. 1991).

67. CAL. PENAL CODE § 4028 (West 2010).

68. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 349 (3d Cir. 1987).

69. *Roe v. Crawford*, 514 F.3d 789, 800-801 (8th Cir. 2008).

70. *Roe v. Crawford*, 514 F.3d 789, 797 n.6 (8th Cir. 2008).

applied equally to transportation for other non-emergency medical care.⁷¹ This case applies throughout Mississippi, Louisiana, and Texas; if you live in any of these states, you might have to get a court order before an abortion. It may be difficult to challenge the prison's policy in court.

(b) Medically Necessary Abortions: Your Right under the Eighth Amendment

At a minimum, courts agree that abortion is a serious medical need if it is necessary to preserve the incarcerated woman's health. For example, the Eighth Circuit said that a "medically necessary abortion certainly could qualify as a serious medical need."⁷² The decision does not define "medically necessary" in the prison abortion context. But under long-standing Supreme Court precedent, medically necessary abortions include those that, in a physician's professional medical judgment, are necessary to prevent harm to the woman's physical or mental health.⁷³ Because prisons have to provide for incarcerated people's serious medical needs, the prison authorities must pay for your medically necessary abortion if you cannot afford to pay for it yourself.⁷⁴ If you believe that you will suffer serious physical or mental health problems if you do not have an abortion and your doctor has confirmed this with you, you could have an Eighth Amendment claim if your prison denies you the right to an abortion.

3. Pregnancy

Many women report being pregnant at the time of their incarceration, including 4% of women in state prisons, 3% of women in federal prisons, and about 5% of women in jails nationwide.⁷⁵ In New York State, DOCCS requires incarcerated women to take pregnancy tests when you first enter prison and when you are removed from a work release program. You can also ask for a pregnancy test at any other time during your incarceration.⁷⁶

In New York state, a pregnant incarcerated person has the right to complete and thorough prenatal care, which includes medical examinations, HIV education, and advice about exercise, safety, and nutrition.⁷⁷ Pregnant incarcerated people in New York are housed at Taconic Correctional Facility and Bedford Hills Correctional Facility. A recent report found that both facilities generally provide pregnant incarcerated people with access to adequate pre-natal care, including pre-natal education and vitamins. However, the report also noted problems including long waiting times for appointments, insufficient food, and inadequate dental care for pregnant women.⁷⁸ In New York state prisons,

71. *Victoria W. v. Larpernter*, 369 F.3d 475, 485 (5th Cir. 2004).

72. *Roe v. Crawford*, 514 F.3d 789, 799 (8th Cir. 2008) (finding that an elective abortion sought for non-medical reasons does not rise to the level of a "serious medical need" under the Eighth Amendment).

73. *Doe v. Bolton*, 410 U.S. 179, 192, 93 S. Ct. 739, 747, 35 L. Ed. 2d 201, 212–213 (1973).

74. *See, e.g., Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 351–352 (3d Cir. 1987) (holding that prisons must pay for medically necessary abortions that incarcerated women cannot afford themselves); *Right to Choose v. Byrne*, 450 A.2d 925, 937, 91 N.J. 287, 310 (1982) (holding that the State may not jeopardize the health of poor women by excluding medically necessary abortions from a system providing them all other medically necessary care); *see also Harris v. McRae*, 448 U.S. 297, 322–323 100 S. Ct. 2671, 2691 65 L. Ed.2d 784, 808–809 (1980).

75. *Women in Prison Fact Sheet*, CORRECTIONAL ASSOCIATION OF NEW YORK WOMEN IN PRISON PROJECT (Apr. 2009), available at http://www.ncdsv.org/images/WIPP_Wome_in_Prison_Fact_Sheet_4-2009.pdf (last visited Feb. 16, 2020).

76. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 88 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

77. N.Y. COMP. CODE R. & REGS. tit. 9, § 7651.17(a).

78. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 97 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

pregnant incarcerated people are not to be placed in Special Housing Units other than in exceptional circumstances.⁷⁹

Shortly before she is about to give birth, an incarcerated woman should be moved from the prison to a hospital, institution, or clinic and provided with comfortable accommodations, maintenance, and medical care.⁸⁰ However, 11 out of 18 respondents to the Correctional Association of New York's recent survey reported that nurses initially dismissed their symptoms of labor. These dismissals resulted in delays in obtaining medical care during labor.⁸¹ A pregnant incarcerated person will be returned to the prison or jail as soon after the birth of her child as the state of her health permits.⁸² Bedford Hills is currently the only New York state prison with a nursery program. The program allows women who met certain criteria to live in a special unit with their babies for up to one year, or up to 18 months if the mother will be paroled within that period.⁸³

Federal prisons and some state prisons ban the use of shackles or leg irons on pregnant women while being transported to the hospital or during labor. In fact, some courts have recognized this practice as a violation of the Eighth Amendment.⁸⁴ As of 2014, twenty-one states including New York, California, Connecticut, Illinois, Washington, and the District of Columbia have laws or policies that explicitly prevent this practice.⁸⁵ New York passed an anti-shackling law in 2009. This law covers all state prisons and local jails. It banned the use of any restraints on women during transportation to hospital, throughout labor, delivery and recovery after giving birth, other than in exceptional circumstances.⁸⁶ Despite these protections, however, news reports and other surveys have indicated that the rules are not being properly enforced. A recent report by the Correctional Association of New York found that 23 of the 27 women interviewed who had given birth between 2009 and 2013 had been shackled, in violation of the law.⁸⁷ A new law passed in December 2015 extends the protection to all transportation throughout a woman's pregnancy and for eight weeks after the woman gives birth,

79. *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, NEW YORK CIVIL LIBERTIES UNION (Feb. 19, 2014), available at <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement> (last visited Feb. 16, 2020).

80. N.Y. CORRECT. LAW § 611(1) (McKinney 2010).

81. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 110 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

82. N.Y. CORRECT. LAW § 611(1) (McKinney 2014).

83. N.Y. CORRECT. LAW § 611(1)–(2) (McKinney 2014).

84. *Nelson v. Corr. Med. Services*, 583 F.3d 522, 534 (8th Cir. 2009) (en banc) (holding it is clearly established that a woman “in the final stages of labor cannot be shackled absent clear evidence that she is a security or flight risk”); *Women Prisoners v. Dist. of Columbia*, 877 F. Supp. 634, 668–669 (D.D.C. 1994), *vacated and modified in part on other grounds*.

85. For the full list of states, see Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 136 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020). See also *Shadow Report to the U.N. Committee Against Torture*, THE UNIVERSITY OF CHICAGO HUMAN RIGHTS CLINIC (Sept. 2014), available at https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18526_E.pdf (last visited June 19, 2020); Adam Liptak, *Prisons Often Shackle Inmates in Labor*, N.Y. TIMES (2 Mar. 2006), available at <http://www.nytimes.com/2006/03/02/national/02shackles.html?pagewanted=2&r=1> (last visited Feb. 16, 2020); Sadhbh Walshe, *Women are Born Free in the US but Everywhere Give Birth in Chains*, THE GUARDIAN (6 June 2012), available at <http://www.guardian.co.uk/commentisfree/2012/jun/06/women-born-free-give-birth-in-chains> (last visited Feb. 16, 2020).

86. N.Y. CORRECT. LAW § 611(1) (McKinney 2014).

87. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 6 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

other than in exceptional circumstances.⁸⁸ The new law also prohibits a correctional officer from being present during the birth unless requested by medical staff or the mother.⁸⁹ If you are incarcerated in a state where it is against the law to use shackles on women while they are in labor, and if this happens to you, you can sue the prison in state or federal court.⁹⁰

In other states, it is still common to shackle women while on the way to the hospital, or even while they are in labor.⁹¹ If you live in a state that does not currently have anti-shackling laws, you may still try to challenge this practice in federal court as a violation of the Eighth Amendment.

You may also have an Eighth Amendment claim if the prison is deliberately indifferent to your serious medical needs during your pregnancy. In other words, if they show a real lack of care towards you. In a case in Wisconsin, an incarcerated woman charged prison nurses with violating her Eighth Amendment rights by failing to bring her to the hospital when she was in labor.⁹² The woman gave birth in her prison cell.⁹³ The court held that a reasonable jury could conclude that the nurses showed deliberate indifference toward the woman because the nurses ignored her request to go to the hospital and they “only examined [her] through the small tray slot in the cell door, rather than conducting a more comprehensive exam.”⁹⁴

Pregnant incarcerated people have also had some success using state tort law to claim that prisons were negligent (or careless) in treating their medical needs during pregnancy and delivery. (As discussed above, negligence is easier to prove than deliberate indifference, so tort law can be a better option than the Eighth Amendment in the context of medical treatment.) For example, in a Louisiana case, the court found a prison responsible for the wrongful death of a premature baby born to an incarcerated person because the prison was careless in their treatment of the incarcerated woman.⁹⁵ Prison officials did not follow the prison’s procedures. They failed to identify the problem despite complaints of bleeding and abdominal pain. They also did not bring the incarcerated person to a hospital until it was too late to prevent the premature birth.⁹⁶

Prisons have a duty to care for you during your pregnancy. They also have a duty to provide you with safe conditions for labor and delivery. If these rights are violated, you may have a claim against the prison under the Eighth Amendment (requiring deliberate indifference) or state tort law (requiring negligence). For information on possible federal claims, see *JLM*, Chapter 14, “Prison Litigation Reform Act,” and Chapter 16, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Laws.” For information on state tort claims, see *JLM*, Chapter 17, “The State’s Duty to Protect You and Your Property: Tort Actions.”

88. N.Y. CORRECT. LAW § 611(1) (McKinney 2014); *Governor Cuomo Signs Legislation to Prohibit Shackling of Pregnant Inmates During Transportation*, OFFICE OF GOVERNOR ANDREW A. CUOMO (22 Dec. 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-prohibit-shackling-pregnant-inmates-during-transportation> (last visited Feb. 16, 2020).

89. N.Y. CORRECT. LAW § 611(1)(c) (McKinney 2014); Office of Governor Andrew A. Cuomo, *Governor Cuomo Signs Legislation to Prohibit Shackling of Pregnant Inmates During Transportation* (December 22, 2015), available at <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-prohibit-shackling-pregnant-inmates-during-transportation> (last visited Feb. 16, 2020).

90. In 2012, a lawsuit against Cook County Jail in Illinois settled for \$4.1 million dollars after a group of pregnant women who were incarcerated at the jail sued. The women alleged that they were shackled during labor despite state laws that prevented shackling. Amy Fetting, *\$4.1 Million Settlement Puts Jails on Notice: Shackling Pregnant Women is Unlawful*, ACLU (May 24, 2012), available at <https://www.aclu.org/blog/41-million-settlement-puts-jails-notice-shackling-pregnant-women-unlawful> (last visited Feb. 16, 2020).

91. Lori Teresa Yearwood, *Pregnant and Shackled: Why Inmates are Still Giving Birth Cuffed and Bound*, THE GUARDIAN (24 Jan. 2020), available at <https://www.theguardian.com/us-news/2020/jan/24/shackled-pregnant-women-prisoners-birth> (last visited June 19, 2020).

92. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1007 (E.D. Wisc. 2003).

93. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1007 (E.D. Wisc. 2003).

94. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1009 (E.D. Wisc. 2003).

95. Calloway v. City of New Orleans, 524 So. 2d 182, 187 (La. Ct. App. 1988).

96. Calloway v. City of New Orleans, 524 So. 2d 182, 187 (La. Ct. App. 1988).

D. Sexual Assault, Harassment, and Privacy Concerns

Chapter 24, “Your Right to be Free from Assault by Prison Guards and Other Incarcerated People,” and Chapter 25, “Your Right to Be Free From Illegal Body Searches,” address assault and illegal searches in general. This Part focuses on three issues—privacy, sexual harassment, and sexual assault and rape—as they affect incarcerated women specifically.

1. Privacy

This Section explains your right to be free from inappropriate pat-downs, involuntary exposure, and illegal body searches.

(a) Cross-gender Pat-downs

Under the Fourth Amendment of the Constitution, you are guaranteed the right to be free from unreasonable searches and seizures.⁹⁷ A seizure is a capture of your person or property by force or an interference with your person or property by force. However, the Supreme Court has found that this right is severely limited in prison. It is limited because of the security concerns of prison and incarceration.⁹⁸ Nonetheless, a few courts have recognized that random searches of incarcerated women by male guards may violate the Eighth Amendment. For example, incarcerated women sued the Washington Corrections Center for Women over the prison policy of random full-body pat-down searches by male guards.⁹⁹ Many of these women had been severely sexually and physically abused by men in the past, and experienced severe trauma during these searches. As a result, the Court of Appeals for the Ninth Circuit found that these searches were “cruel and unusual” punishment in violation of the Eighth Amendment.¹⁰⁰ However, following the lead of the Supreme Court, all courts recognize limitations on incarcerated women’s right to privacy when it involves an emergency or another important prison security issue.¹⁰¹ In New York, the DOCCS policy prohibits male guards from pat frisking incarcerated women unless there are “exigent circumstances.”¹⁰² “Exigent circumstances” are any set of temporary and unforeseen circumstances that require immediate action to combat a threat to the security or institutional order of a facility.¹⁰³

In June 2012, as part of the Prison Rape Elimination Act (PREA), the Department of Justice issued National Standards to help prevent, reduce and punish prison rape, and sexual abuse between incarcerated people or between guards and incarcerated people. The National Standards include a ban on cross-gender pat-down searches of incarcerated women.¹⁰⁴ As of August 20, 2015 (or August 21, 2017 for a facility with fewer than 50 incarcerated people), the National Standards prohibit adult

97. U.S. CONST. amend IV.

98. *See* *Hudson v. Palmer*, 468 U.S. 517, 524, 104 S. Ct. 3194, 3198, 82 L. Ed. 2d 393, 400 (1984).

99. *Jordan v. Gardner*, 986 F.2d 1521, 1525–1526 (9th Cir. 1993).

100. *Jordan v. Gardner*, 986 F.2d 1521, 1525–1526 (9th Cir. 1993).

101. *See, e.g.,* *Forts v. Ward*, 621 F.2d 1210, 1215–1218 (2d Cir. 1980) (holding that the privacy interests of incarcerated women did not extend to a protection against being viewed while sleeping by male guards so long as suitable sleepwear was provided); *Carlin v. Manu*, 72 F. Supp. 2d 1177, 1179–1180 (D. Or. 1999) (finding it was acceptable during an emergency removal of incarcerated women to a men’s prison that male guards watched as female guards strip searched the women, since the male guards were not touching the women, and it was a one-time event, as opposed to an indefinite infliction of pain).

102. State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control and Search of Contraband § III(B)(3)(b) (2019), *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Feb. 16, 2020). Pat frisks are required when incarcerated people are entering the visiting room, when an entire area of the institution is being searched, when an officer has an articulable basis to suspect an incarcerated person possesses contraband, or as directed by supervisory staff. Pat frisks are also allowed when an incarcerated person is going or returning to housing, program, and recreation areas and outside work details.

103. State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control and Search of Contraband § III(B)(3)(b) (2019), *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Feb. 16, 2020).

104. 28 C.F.R. § 115.15 (2020).

prisons, jails, and community confinement facilities from permitting cross-gender pat-down searches of incarcerated women, absent exigent (urgent) circumstances.¹⁰⁵ Facilities are also banned from restricting incarcerated women's access to regularly available programming or other out-of-cell opportunities in order to follow this provision.¹⁰⁶ For more information, please read *JLM*, Chapter 25, "Your Right to Be Free from Illegal Body Searches."

(b) Involuntary Exposure

"Involuntary exposure" is when your naked or partly naked body is seen by guards of the opposite sex, such as when you are using showers or toilets. The Supreme Court in *Turner v. Safley* stated that prison regulations that restrict the rights of incarcerated people must be substantially related to some legitimate (justified) concern of the prison.¹⁰⁷ Thus, your privacy rights can be limited if the prison gives a reason that is substantially related to a legitimate prison policy.

One important prison policy is to treat male and female prison officials the same, as required by federal employment discrimination laws.¹⁰⁸ This can make it difficult to challenge involuntary exposure situations. Prisons cannot treat male and female employees differently. Prisons cannot be required to assign only female workers to a position unless there is a legally recognized need for the position to be filled by a woman.¹⁰⁹ Courts have occasionally upheld the designation of certain jobs as female-only jobs, usually where there is a strong privacy concern.¹¹⁰ Courts have also upheld this designation where there has been a long, well-recorded history of abuse by male officers and other efforts to address the problem have failed.¹¹¹ Some courts have recognized that all incarcerated people

105. 28 C.F.R. § 115.15(b) (2020).

106. 28 C.F.R. § 115.15(b) (2020).

107. See, e.g., *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 322, 132 S. Ct. 1510, 1511, 182 L. Ed. 2d 566, 569 (2012) (detailing what constitutes a legitimate interest for search and seizures of a pre-trial detainee); *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 78 (1987).

108. Title VII of the U.S. Code prohibits denying employment, promotions, or raises based on sex, and the hiring of only female employees for female correctional facilities has been seen as a violation of this law. 42 U.S.C. § 2000e-2(a)-(d) (2012). See, e.g., *Breiner v. Nevada Dept. of Corr.*, 610 F.3d 1202, 1216 (9th Cir. 2010) (holding that policy of hiring only female correctional lieutenants at women's prison violated Title VII); *Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980) (finding that that male prison guards could not be excluded from night shifts in a women's prison because other measures to ensure women's privacy were available).

109. 42 U.S.C. § 2000e-2(a)-(d) (2012); see, e.g., *Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980) (holding that male prison guards could not be excluded from night shifts in a women's prison because other measures to ensure women's privacy were available).

110. See *Teamsters Local Union No. 117 v. Washington Dept. of Corr.*, 789 F.3d 979, 990 (9th Cir. 2015) (concluding that policy rationales of protecting incarcerated women from sexual misconduct by male deputies, maintaining jail security, and protecting the privacy of incarcerated women were all reasonably necessary to the essence of prison administration justifying the designation of certain positions as female-only); *Mills v. City of Barbourville*, 389 F.3d 568, 579 (6th Cir. 2004) ("As to jail employees of the opposite gender viewing prison inmates or detainees, ... a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked...would provide the basis of a claim on which relief could be granted."); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing the right of incarcerated people to bodily privacy "because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981))).

111. *Teamsters Local Union No. 117 v. Washington Dept. of Corr.*, 789 F.3d 979, 991 (9th Cir. 2015) (policy saying that certain jobs were female-only was adopted in the face of documented allegations of abuse); *Everson v. Mich. Dept. of Corr.*, 391 F.3d 737, 762 (6th Cir. 2004) (finding that officers in female prison housing units must be women because the prison adequately demonstrated that this policy would enhance security, decrease the likelihood of sexual abuse, protect the privacy rights of the women incarcerated at the prison, and that there were no reasonable alternatives to this plan); *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998) (finding that it was proper for male prison guards to be excluded in order to accommodate the privacy of incarcerated women and reduce risk of sexual conduct between guards and women incarcerated at the prison); *Jennings v. New York State Office of Mental Health*, 786 F. Supp. 376, 387 (S.D.N.Y. 1992) (holding that gender was a genuine requirement to be a "treatment assistant" in a female ward, and therefore, the requirement that at least one woman be assigned to a female prison ward was permissible under the Civil Rights Act).

have a right to be free from unnecessary viewing in the nude or while performing private bodily functions by guards of the opposite sex. A few courts have been particularly sensitive to the privacy interests of incarcerated women. These courts have required that they be able to cover their windows when undressing or using the toilet.¹¹² But if these factors are not present, courts may decide that the incarcerated person's interest in protecting bodily privacy is not as strong as the state's interest in offering equal employment opportunities for correctional officers.¹¹³ For more information on your right to be free from involuntary exposure, see *JLM*, Chapter 25, "Your Right to Be Free From Illegal Body Searches."

(c) Body Searches

In deciding whether a prison search violates your right to be free from unreasonable searches, courts weigh the need for prison security against the privacy interests of the incarcerated people.¹¹⁴ Then they decide which of these interests is more important in the particular case.¹¹⁵ For example, one court held that when an incarcerated person is being moved from one area of a prison to another, the prison's need for a visual body cavity search to make sure the incarcerated person is not carrying drugs or weapons is more important than the need for privacy.¹¹⁶ A "visual body cavity search" is when a prison officer inspects an incarcerated person's ears, nose, mouth, anus, or vagina to see if there are drugs, weapons, or other contraband.

Courts usually find that the prison's security concerns outweigh the incarcerated person's privacy interests.¹¹⁷ In some cases, courts have found that non-medical personnel (prison officers) are allowed to conduct clothed body frisks (searches of the outer clothing of an incarcerated person),¹¹⁸ cell

112. See, e.g., *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992) (denying qualified immunity to a male parole officer who walked in on a female parolee urinating as part of a required drug test); *Forts v. Ward*, 621 F.2d 1210, 1214–1216 (2d Cir. 1980) (allowing incarcerated women to cover the window of their cells for privacy for 15-minute intervals).

113. See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 147–148 (7th Cir. 1995) (recognizing that "[a] warden must accommodate conflicting interests—the embarrassment of reticent prisoners and the entitlement of women to equal treatment in the workplace."), *overruled on other grounds by* *Henry v. Hulett*, 969 F.3d 769, 783 (7th Cir. 2020); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) (finding that to restrict or disallow female guards from holding positions which involve occasional viewing of incarcerated men would require tremendous rearrangement of work schedules and possibly produce a risk to both internal security needs and equal employment opportunities for female guards).

114. *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990) (holding that when a court reviews whether a prison violated an incarcerated person's constitutional rights, the court must consider whether the prison has legitimate institutional concerns that justify the restrictions or actions the plaintiff challenges).

115. *Hudson v. Palmer*, 468 U.S. 517, 527, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 403 (1984) ("[It would be] impossible to accomplish the prison objectives [of ensuring the safety of prisoners, staff, and visitors] if inmates retained a right of privacy in their cells."); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005) (employing a balancing test, weighing the degree to which the search intrudes on an individual's privacy against the degree to which it promotes a legitimate governmental interest).

116. See *Story v. Foote*, 782 F.3d 968, 971 (8th Cir. 2015) (holding that Story's allegation of a body-cavity search by itself does not state a claim for the violation of a clearly established right given what the Supreme Court and the circuit court have said about the strong institutional interests in maintaining security, and about the reasonableness of visual body-cavity inspections when detainees enter a facility); *Goff v. Nix*, 803 F.2d 358, 366–371 (8th Cir. 1986).

117. See, e.g., *Calhoun v. Detella*, 319 F.3d 936, 939 (7th Cir. 2003) (stating that, while such strip searches may be unpleasant and humiliating, strip searches of incarcerated men by female officers would not violate the Eighth Amendment if done for a legitimate, penological purpose); *Timm v. Gunter*, 917 F.2d 1093, 1101 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209, 111 S. Ct. 2807, 115 L. Ed. 2d 979 (holding that prisons are not required to provide same-gender pat-downs, and that prison administrators are entitled to find "the best balance among...competing concerns..."); *Sroka v. Welcher*, 2016 U.S. Dist. LEXIS 7835, *15 (W.D.N.Y. Jan. 20, 2016) ("Although the privacy interests of an arrestee are generally greater than those of prison inmates, the practice of allowing a male officer to conduct a pat-down search of a female arrestee to insure that she is not armed is not, in and of itself, constitutionally unreasonable.").

118. See *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982) (holding female guards may conduct "pat down"

searches,¹¹⁹ and visual body cavity or strip searches (searches where incarcerated people must take off their clothes and be visually inspected by a guard).¹²⁰ Particularly appalling circumstances may convince a court that the search was unconstitutional. For example, in one federal case, the court found that it was a violation of due process to force a female pretrial detainee who was seven months pregnant to squat uncomfortably for two visual body cavity searches by untrained officers.¹²¹

However, the test for a “digital body cavity search”—when a guard places his or her fingers into an incarcerated person’s nose, mouth, anus, or vagina—is stricter because it is more intrusive of your body than other types of searches.¹²² To perform a digital body cavity search, prison officials must have a reasonable suspicion that is *specific* to the individual incarcerated person. A reasonable suspicion could be that an incarcerated person has a weapon.¹²³ Courts have found that digital body cavity searches are unreasonable unless medical personnel perform them both in a private area and in a hygienic (clean) manner.¹²⁴ The presence of male officers might make a digital body search unreasonable for women who are incarcerated.¹²⁵ Similarly, medical personnel (physicians, nurses, or their assistants), *not* correctional personnel, must conduct body cavity searches. These searches involve putting an instrument into a part of an incarcerated person’s body or taking something out of a body cavity.¹²⁶

searches without violating the privacy of incarcerated men); *Sroka v. Welcher*, 2016 U.S. Dist. LEXIS 7835, *15, (W.D.N.Y. Jan. 20, 2016) (“Although the privacy interests of an arrestee are generally greater than those of prison inmates, the practice of allowing a male officer to conduct a pat-down search of a female arrestee to insure that she is not armed is not, in and of itself, constitutionally unreasonable”); *Talman Caldwell v. Rubbo*, 1993 U.S. App. LEXIS 20412, *3 (4th Cir. 1993) (“Caldwell had no constitutional right to have the pat-down search performed by someone of her gender.”).

119. See *Hudson v. Palmer*, 468 U.S. 517, 525–526, 104 S. Ct. 3194, 3199, 82 L. Ed. 2d 393, 402–403 (holding that an incarcerated woman has no reasonable expectation of privacy in her cell); *Martin v. Lane*, 766 F. Supp. 641, 646 (applying *Hudson v. Palmer* to deny Fourth Amendment relief to an incarcerated person whose cell was searched during a lockdown); *Block v. Rutherford*, 468 U.S. 576, 589–591, 104 S. Ct. 3227, 3235, 82 L. Ed. 2d 438 (1984) (holding that security concerns justify regular “shakedown” searches of cells).

120. See *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (holding that visual body cavity searches of people in a pre-trial detention facility did not violate the Fourth Amendment, as it did not punish them prior to trial, and served the legitimate purpose of insuring prison security) (the gender of the guards assigned to conduct the searches is not mentioned in the case); *Wood v. Hancock Cnty. Sheriff's Dept*, 354 F.3d 57, 68–69 (1st Cir. 2003) (holding that, due to the security threats posed by contact visits, a blanket policy of strip searching incarcerated people after contact visits is constitutional); *Michenfelder v. Sumner*, 860 F.2d 328, 332–333 (9th Cir. 1988) (citing many cases for the rule that incarcerated people may be subject to cavity searches when entering and leaving cells, even when such searches are very frequent).

121. *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (finding that an incarcerated woman who was seven months pregnant was twice forced to bend over painfully by officers who were not medically trained, and that they did not conduct the search in a medical environment or use appropriate medical equipment).

122. 28 C.F.R. § 552.11(d) defines a “digital or simple instrument search” as “inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps.” These searches may only be conducted by designated qualified health personnel, upon approval by Warden or Acting Warden, if there is reasonable belief by the Warden or Acting Warden that a person is concealing contraband.

123. See *Chapman v. Nichols*, 989 F.2d 393, 395–396 (10th Cir. 1993) (holding that blanket policy for strip searches of detainees was unconstitutional because strip searches should only be conducted on an individual basis, when necessary).

124. See *Foster v. City of Oakland*, 621 F. Supp. 2d 779, 789 (N.D. Cal. 2008) (quoting *Vaughan v. Ricketts*, 859 F.2d 736, 741 (9th Cir. 1988) which states that “body cavity searches of inmates to be unreasonable where they were performed by inadequately trained medical assistants”); see also *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 43 (1st Cir. 2009) (noting that physical rectal examinations of incarcerated people can be reasonable only when they are carried out by trained medical staff under sanitary conditions).

125. See *Bonitz v. Fair*, 804 F.2d 164, 172–173 (1st Cir. 1986), *overruled in part* by *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988) (pointing to the presence of male officers as one reason why the search of incarcerated women was unreasonable).

126. See *DaVee v. Mathis*, 812 S.W.2d 816, 825–826 (Mo. Ct. App. 1991) (concluding that searches involving

In conclusion, incarcerated women may be searched because of security concerns in prison. But, these searches must be conducted for a good reason and in a safe and respectful manner. For more information on illegal searches and potential legal remedies, see *JLM*, Chapter 25, “Your Right to Be Free from Illegal Body Searches.”

2. Sexual Harassment

Just because you are in prison does not mean you give up your right to be free from unwanted sexual activity. Any unwanted sexual attention that you experience, like leering, pinching, patting, verbal comments, or pressure to engage in sexual activity can be considered sexual assault or harassment.

Incarcerated women should never feel forced to engage in sexual activity with abusive staff who promise better treatment or threaten disciplinary action.¹²⁷ You have the right to be free from any unwanted sexual attention. If an officer acts inappropriately towards you in a sexual manner, it may be considered cruel and unusual punishment in violation of your Eighth Amendment rights.

To qualify as a violation of the Eighth Amendment, the behavior must be serious enough, and the officer must have been deliberately indifferent (ignored a risk to your health or safety that the officer either knows about or that is so obvious he should have known about it).¹²⁸ However, because sexually abusive officers are the ones creating the risk to your health or safety, they naturally know about it.”¹²⁹ It is somewhat harder to prove that the behavior is serious enough. For some courts, the fewer times abuse has occurred, the more severe it must have been. Likewise, the less severe it was, the more times it must have occurred.¹³⁰

If you cannot bring an Eighth Amendment claim against the prison official who harassed you, you may be able to bring an Eighth Amendment claim against supervisory officials for failing to protect you from unwanted sexual conduct. To do this, you have to show that supervisors were “deliberately indifferent” towards your abuse (meaning that they knew about the harassment, or it was so obvious they should have known about it, and did nothing).¹³¹ You also have to show that the act violated “evolving standards of decency” (in other words, the act violated the level of physical contact that is acceptable in this day and age).¹³² Some courts have found that certain extreme cases of sexual groping

physical intrusion and removal of foreign objects must be conducted by medical personnel, but purely visual searches that do not involve physical contact do not require medical personnel).

127. HUMAN RIGHTS WATCH, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996), available at http://www.hrw.org/legacy/reports/1996/Us1.htm#N_880 (last visited Nov. 7, 2019).

128. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811 (1994); Wilson v. Seiter, 501 U.S. 294, 298–299, 111 S. Ct. 2321, 2324, 115 L. Ed. 2d 271, 278 (1991).

129. Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir. 1997) (“Because sexual abuse by a corrections officer may constitute serious harm inflicted by an officer with a sufficiently culpable state of mind, allegations of such abuse are cognizable as Eighth Amendment Claims.”); Giron v. Corrections Corporation of America, 191 F.3d 1281, 1290 (10th Cir. 1999).

130. Crawford v. Cuomo, 796 F.3d 252, 257 (2d Cir. 2015) (finding that “severe or repetitive sexual abuse” of an incarcerated person by a prison officer can be “objectively sufficiently serious’ enough to constitute an Eighth Amendment violation.”) (quoting Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir. 1997)); Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir. 1997) (requiring severe or repeated sexual abuse for Eighth Amendment violation). *But see* Morrison v. Cortright, 397 F. Supp. 2d 424, 425 (W.D.N.Y. 2005) (male correctional officer running finger between buttocks and pressing against male plaintiff during strip frisk was not sufficiently serious to be a violation of the Eighth Amendment); Davis v. Castleberry, 364 F. Supp. 2d 319, 321 (W.D.N.Y. 2005) (male correctional officer grabbing an incarcerated man’s penis during a pat frisk failed to state a claim under 18 U.S.C. § 1983); Montero v. Crusie, 153 F. Supp. 2d 368, 373, 375 (S.D.N.Y. 2001) (allegations that a male officer squeezed the male plaintiff’s genitalia and made sexual propositions during pat frisks and offered privileges in exchange for sexual favors was not sufficiently serious to be a violation of the Eighth Amendment).

131. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 824 (1994).

132. Hudson v. McMillian, 503 U.S. 1, 8, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992) (“The objective component of an Eighth Amendment claim is therefore contextual and responsive to ‘contemporary standards of decency.’”) (quoting Estelle v. Gamble, 429 U.S.C. 97, 101, 97 S. Ct. 285, 289, 50 L. Ed. 2d (1976)).

and touching do violate “evolving standards of decency.”¹³³ If your case is similar, you might be able to make an Eighth Amendment claim against the supervisors.

Generally, to bring an Eighth Amendment claim in federal court, you must have exhausted (used) your administrative remedies. However, under the Prison Rape Elimination Act’s National Standards, DOCCS has recently changed its requirements for exhaustion in relation to sexual abuse and made it easier to bring sexual abuse cases. If you want to bring a legal claim against the person who sexually abused or harassed you, you no longer need to file a grievance and appeal it to Central Office.¹³⁴ You can now satisfy the exhaustion requirement in a number of ways. You can report the incident to (1) facility staff; (2) Central Office staff in writing; (3) to an outside agency that has agreed to receive and forward reports of abuse; *or* (4) to the Office of Special Investigations.¹³⁵ You can also satisfy the exhaustion requirement if another person reports, if you confirm the report.¹³⁶ After taking any of these steps, you are able to submit your claim to court. You have to complete those steps and submit your claim within the statute of limitations. The statute of limitations for an Eighth Amendment claim is usually three years. For more information on how to make an Eighth Amendment claim, consult *JLM*, Chapter 16, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Law.”

3. Sexual Assault and Rape

(a) Your Right to be Free from Sexual Assault and Rape

The rate of female sexual assault varies dramatically between prisons. The highest reported rate currently shows that one in four women are assaulted during their time in prison.¹³⁷ While a prison official is permitted to touch you for security reasons, for example in a legal search, he or she is never allowed to touch you in a sexual way. Under federal law, it is illegal for a prison official with “custodial, supervisory, or disciplinary authority” to engage in any type of sexual conduct with incarcerated people.¹³⁸ In federal prisons, it is also a felony for prison officers to obtain sex from an incarcerated person by using violence or the threat of violence, or to have sex with an incarcerated person after making her unconscious with drugs or alcohol.¹³⁹ Almost all states also have laws that make sex between incarcerated people and prison officers illegal.¹⁴⁰ Check your state’s laws to see what kind of protections you are offered.

133. See *Rodriguez v. McClenning*, 399 F. Supp. 2d 228, 237–238 (S.D.N.Y. 2005) (concluding that an incarcerated man properly stated a claim for a violation of his Eighth Amendment rights where he alleged that a correctional officer groped him, relying on trend toward statutory prohibition of sexual contact between prison employees and incarcerated people); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (“Rape, coerced sodomy, unsolicited touching of women prisoners’ vaginas, breasts and buttocks by prison employees are ‘simply not part of the penalty that criminal offenders pay for their offenses against society.’”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 824 (1994)).

134. State of New York, Department of Corrections and Community Supervision Directive 4040, Inmate Grievance Policy, at § 701.3 (2016).

135. State of New York, Department of Corrections and Community Supervision Directive 4040, Inmate Grievance Policy, at § 701.3 (2016).

136. State of New York, Department of Corrections and Community Supervision Directive 4040, Inmate Grievance Policy, at § 701.3 (2016).

137. JUST DETENTION INTERNATIONAL, *The Basics about Sexual Abuse in U.S. Detention*, 1 (Jan. 2009), available at <https://www.prearesourcecenter.org/sites/default/files/library/22-jdi-usdetentionbasics.pdf> (last visited Nov. 28, 2020) (quoting Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prison*, 39 J. SEX RES. 217, 220 (2002)).

138. 18 U.S.C. § 2243(b)(2).

139. 18 U.S.C. § 2241.

140. See, e.g., N.Y. PENAL LAW § 130.05(3)(e); ARIZ. REV. STAT. ANN. § 13–1419 (2011); CAL. PENAL CODE § 289.6 (Deering 2019); CONN. GEN. STAT. ANN. § 53a–73a (West 2019); MASS. GEN. LAWS ANN. ch. 268, § 21A (West 1999). For a full list of all states criminalizing corrections officers’ sexual contact with incarcerated people as of August 2015, see *Crawford v. Cuomo*, 796 F.3d 252, 259 n.6 (2d Cir. 2015) (only two states have not criminalized officers’ sexual contact with incarcerated people).

Even consensual sex between an incarcerated person and a prison official can be a violation of the Eighth Amendment or a crime under state law.¹⁴¹ In New York, sexual intercourse between an employee of the New York State Department of Correctional Services and an incarcerated person—even with the incarcerated person’s consent—is considered rape.¹⁴² The reason for this policy is that prison officials may attempt to abuse their position of authority to get sexual favors from incarcerated people.

Prison officials may also be liable for the acts of another incarcerated person under the Eighth Amendment. The officer will only be liable for sexual assault committed by another person incarcerated at your facility when the officer knew that you faced a substantial risk of serious harm, but did nothing to protect you.¹⁴³ For example, if prison officials knew that you were going to be sexually assaulted by another incarcerated person and did not try to prevent the assault, that could be a violation of your Eighth Amendment rights.

(b) What should you do if you have been raped or sexually assaulted?

If you have been raped or sexually assaulted, you should tell someone immediately and request to go to the hospital. Getting a medical exam (including a vaginal inspection and blood tests) at a hospital emergency room or other medical facility after you have been raped is important for several reasons:

- (1) Internal injuries can be assessed.
- (2) Some injuries that you can’t see or feel can only be detected by examination.
- (3) Pregnancy can be prevented. If you are not using birth control, “morning-after” emergency contraceptives greatly decrease the chance of pregnancy.
- (4) Evidence can be collected. Physical evidence that can identify and convict your rapist can be captured and stored in what is called a “rape kit.”

A rape kit is evidence that can be used in court if you choose to bring charges. Many hospitals have “Sexual Assault Rape Trauma” nurses (called “SART nurses”) who specialize in collecting evidence from rape victims. You should ask at your hospital if there is a SART nurse available to collect your rape kit. Many hospitals also provide rape trauma counselors to help assist you during the examination process. To complete the rape kit, medical professionals will:

- (1) Collect any semen, other body fluids, and hair;
- (2) Look for clothing fibers and evidence from the scene, such as grass or soil; and
- (3) Take clippings of your fingernails to examine any residue from your attacker.¹⁴⁴

141. See, e.g., *Carrigan v. Davis*, 70 F. Supp. 2d 448, 452–453 (D. Del. 1999) (“[A]s a matter of law, an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment.”). Note that this holding was restricted to vaginal intercourse and/or fellatio. See also *Cash v. County of Erie*, Slip Op., 2009 WL 3199558, *2 (W.D.N.Y. Sept. 30, 2009) (“even if [the corrections officer]’s defense was that the sexual intercourse with [the incarcerated person] was physically consensual, this may also constitute a constitutional violation”); *Perez v. State of N.Y.*, 33 Misc. 3d 667, 929 N.Y.S.2d 678 (N.Y. Ct. Cl. 2011) (Even where an incarcerated person and a corrections officer were involved in a romantic relationship, the court stated that their sexual encounters cannot be consensual); *Hammond v. Gordon County*, 316 F. Supp. 2d 1262, 1285 n.6 (N.D. Ga. 2002) (rejects the argument that the Court should rely on other cases where consent was considered a defense to sexual conduct in a correctional setting); *Paz v. Weir*, 137 F. Supp. 2d 782, 807 (S.D. Tex. 2001) (noting that Texas law deems sex non-consensual if engaged in by a public servant who exerts coercion on the other person or if the perpetrator takes advantage of their position as a member of the clergy).

142. N.Y. PENAL LAW § 130.05(3)(e)–(f) (Consol. 2018); N.Y. Penal Law § 130.25 (Consol. 2001).

143. *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 1084, 128 L. Ed. 2d 811, 832 (1994) (holding that a prison official was liable under the Eighth Amendment because he had knowledge that a transgender person incarcerated at the prison faced a substantial risk of serious harm and subsequently disregarded the risk); see also *Winton v. Bd. of Comm’rs*, 88 F. Supp. 2d 1247, 1252–1253 (N.D. Okla. 2000) (denying a defendant institution’s motion for summary judgment because there was evidence that prison officials both knew there was substantial risk of serious harm from other people incarcerated at the prison, and did nothing to protect the plaintiff from it).

144. RAINN, *What is a Sexual Assault Forensic Exam?*, available at <https://www.rainn.org/articles/rape->

You should also ask the nurse or health professional to take pictures of any injuries that occurred during the attack (bruises, hand marks, cuts, burns, etc.). You have the right to skip any particular part of the exam because it makes you feel too uncomfortable. However, bear in mind that a rape kit increases the likelihood of prosecution.¹⁴⁵

It is important to make a rape kit so that you can prosecute your rapist later if you choose to do so. You do not have to decide immediately whether to report the rape to the prison authorities. You can collect the evidence now and then decide later. But if you choose to report the person who raped you to prison authorities, your chances of convicting them depend heavily on the evidence in your rape kit. You only have one chance to get that evidence—immediately after the rape. Because of this, it is important that you do not bathe or shower, brush your hair, change your clothes or shoes, or douche until after you have gone to the hospital and had samples collected.

It is important to see a doctor again within a week or two to receive your blood test results and to treat any injuries. Emotional care is also very important. Many rape survivors will experience Rape Trauma Syndrome (RTS). RTS is a collection of emotional responses to the extreme stress of the sexual assault. Some survivors openly display their emotions. Others may appear calm and detached. Sleeping and eating patterns may change and nightmares are common.¹⁴⁶ It is important for you to seek and continue counseling and support groups for as long as you need them. Your prison should provide mental health services (like counseling) for rape and sexual assault.¹⁴⁷ You should also know that many mental health providers employed by corrections departments have an obligation to report any abuse revealed to them. So, if you want to discuss your abuse without reporting it, you should ask your counselor about his reporting obligations before sharing information.

If your facility does not provide counseling, the Rape, Abuse and Incest National Network (RAINN) offers counseling and other forms of assistance to rape and sexual assault victims. You can reach their hotline at 1-800-656-HOPE (1-800-656-4673), online at <https://ohl.rainn.org/online/>, or write to them at:

Rape, Abuse & Incest National Network
1220 L Street NW, Suite 505
Washington, DC 20005

(c) What Are Your Legal Remedies if You Have Been Raped or Sexually Assaulted?

First, you should file a report through your prison's internal grievance procedures. If the prison administration does not remedy the situation, you may want to consider bringing civil charges.

If you decide to bring a lawsuit in a civil court, the Prison Litigation Reform Act (PLRA) will apply to you. This Act generally provides that incarcerated people cannot bring a civil lawsuit for any mental or emotional injury suffered in prison unless you can show some kind of physical injury as well.¹⁴⁸ This made the collection of physical evidence through a rape kit important. However, the Violence Against Women Act has changed this requirement. It does not require you to show evidence of physical injury.¹⁴⁹ Furthermore, the Second Circuit has held that sexual assaults alleged to arise from "intrusive body searches" meet the physical injury requirement of the PLRA.¹⁵⁰

kit (last visited June 20, 2020).

145. RAINN, *What is a Sexual Assault Forensic Exam?*, available at <https://www.rainn.org/articles/rape-kit> (last visited June 20, 2020).

146. KING COUNTY SEXUAL ASSAULT RESOURCE CENTER, *Rape Trauma Syndrome 1*, available at <https://www.kcsarc.org/sites/default/files/Resources%20-%20Rape%20Trauma%20Syndrome.pdf> (last visited June 21, 2020).

147. National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37,221 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

148. Prison Litigation Reform Act of 1995, 110 Stat. 1321, § 802(e) (1996). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA.

149. The Violence Against Women Act, 42 U.S.C. § 13981.

150. *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (holding that allegations of sexual assault, if true,

Courts have found that a prison official's sexual assault of an incarcerated person violates the Eighth Amendment. It is "cruel and unusual punishment[]" ¹⁵¹ and violates the "evolving standards of decency that mark the progress of a maturing society." ¹⁵² Here, "evolving standards of decency" refers to conduct that violates standards of conduct considered acceptable today. ¹⁵³ The Supreme Court stated that, "being violently assaulted in prison is not 'part of the penalty that criminal offenders pay for their offenses against society.'" ¹⁵⁴ In a recent decision, the Second Circuit held that intentional contact by a correctional officer with an incarcerated person's genitalia or other intimate area violates the Eighth Amendment if it serves no penological purpose and is undertaken with the intention to gratify the officer's sexual desire or humiliate the victim. ¹⁵⁵ The Court referred to the national standards and the criminalization of sexual conduct by correctional officers. The Court said that, "sexual abuse of prisoners, once passively accepted by society, deeply offends today's standards of decency." ¹⁵⁶

As described in the "Sexual Harassment" Section above, there are two components to bringing an Eighth Amendment claim against prison supervisors. First, you have to show that there was a substantial risk of serious harm to your safety. ¹⁵⁷ Second, you must show that the prison knew about the situation and yet did nothing about it. For more information on how to bring an Eighth Amendment claim, see Chapter 16 of the *JLM*, "Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Law."

E. Drug Treatment Programs

The crackdown on drugs has been a major cause of the female prison population growth. As of March 2020, nearly 20% of incarcerated people in the United States were incarcerated for a drug offense. ¹⁵⁸ Furthermore, drug offenses accounted for 91% of the increase in the number of women sentenced to prison from 1986 to 1995. This trend is partially due to New York's harsh Rockefeller Drug Laws. These laws gave judges little discretion in sentencing for drug offenses. However, in 2004, New York reformed the state's old Rockefeller drug laws by adopting the Drug Law Reform Act (DLRA). ¹⁵⁹ If you were sentenced under the old laws, you may be allowed to apply for re-sentencing. ¹⁶⁰ For more information, read *JLM*, Chapter 10, "Applying for Re-Sentencing for Drug Offenses."

If you are in prison for a drug-related offense, you might have access to various alternative sentencing programs. You may have access even if you are already in prison. One of these options is the "drug court." ¹⁶¹ In this type of program, judges, prosecutors, and defense attorneys take part in the treatment and rehabilitation of the offenders. ¹⁶² Judges keep track of the treatment and progress

"qualify as physical injuries"); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) ("A sexual assault on an inmate by a guard—regardless of the gender of the guard or of the prisoner—is deeply 'offensive to human dignity.'... 'Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society'"" (internal citations omitted)).

151. U.S. CONST. amend. VIII.

152. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992); *Ullery v. Bradley*, 949 F.3d 1282, 1290–1291 (10th Cir. 2020) (holding that a prison guard's sexual assault of an incarcerated person clearly offended society's standards of decency).

153. See *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015).

154. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)).

155. *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015).

156. *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015).

157. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811 (1994).

158. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE, March 24, 2020, available at <https://www.prisonpolicy.org/reports/pie2020.html> (last visited June 21, 2020).

159. 2004 N.Y. Sess. Laws 1474 (A. 11895, S. 7802).

160. *Rivera v. New York*, No. 11-CV-6185 MAT, 2012 WL 1342988, at *2 (W.D.N.Y. Apr. 18, 2012).

161. See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L. J. 847, 857 (2001).

162. See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female*

of offenders and the offenders follow a plan that includes detoxification (coming off drugs), counseling, education, vocational courses, group meetings, and urine testing.¹⁶³ According to the U.S. General Accounting Office, as of June 2010, there were over 2,500 drug courts operating nationwide.¹⁶⁴

Another alternative sentence that might be right for you is a “boot camp.” A boot camp is a military-style program that attempts to “instill discipline and self-respect in participants.”¹⁶⁵ However, due to budgetary constraints and doubts as to their ability to rehabilitate people who have been convicted of a crime, these programs are increasingly rare. Their availability to women is also rare.¹⁶⁶ Even if you are in a regular correctional facility, your institution should have drug treatment programs available for you. For example, the Federal Bureau of Prisons (BOP) offers drug treatment plans to all incarcerated people who qualify, prior to their release from custody.¹⁶⁷

F. Clemency

“Clemency” is a term used to describe the power of a public official to lessen the sentence of a criminal defendant. Clemency exists to protect incarcerated people from unjustifiably harsh sentences.

It is very hard to get clemency. But you should file a petition if you think have a good reason to receive it. In thirty-five states, including New York, the governor grants clemency.¹⁶⁸ In other states, either an advisory board or the governor and advisory board together makes the decision.¹⁶⁹ Non-violent offenders have the best chance of getting clemency. But women who are in jail for killing their abusive spouses or taking other actions to defend themselves may also have a chance. Note that if you are currently seeking clemency for a death sentence, you have a right to a lawyer.¹⁷⁰

There are four types of clemency: amnesty, reprieve, pardon, and commutation:

- (1) **Amnesty** applies to a group of people who have committed political offenses.
- (2) **Reprieve** postpones a scheduled execution.
- (3) **Pardon** attempts to clear a person’s name of a crime entirely and restore their reputation.
- (4) **Commutation** does not attempt to clear the person’s name of the crime, but merely substitutes a milder sentence for the current sentence being served.

This Part focuses on clemency for battered (or abused) women. But, the procedures discussed below apply to any clemency petition. For more information on clemency in the state of New York, see “Guidelines for Review of Executive Clemency Applications,” which is on file in the law library of each

Offenders, 39 BRANDEIS L. J. 847, 857 (2001).

163. See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L. J. 847, 857 (2001).

164. U.S. General Accounting Office, GAO-12-53, “Adult Drug Courts: Studies Show Courts Reduce Recidivism, but DOJ Could Enhance Future Performance Measure Revision Efforts” (Dec. 2011).

165. See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L.J. 847, 853 (2001); *Practice Profile: Adult Bootcamps*, NATIONAL INSTITUTE OF JUSTICE, available at <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=5> (last visited Nov. 10, 2019).

166. See Richard Willing, *U.S. Prisons to End Boot Camp Programs*, USA TODAY (Feb. 2005), available at http://usatoday30.usatoday.com/news/nation/2005-02-03-boot-camps_x.htm (last visited Feb. 18, 2020).

167. *Substance Abuse Treatment*, FEDERAL BUREAU OF PRISONS, available at https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Feb. 18, 2020).

168. See, e.g., *Apply for Clemency*, N.Y. STATE, available at <https://www.ny.gov/services/apply-clemency> (last visited Jun 22, 2020); *Clemency – Commutations & Pardons*, STATE OF CALIFORNIA, available at <https://www.gov.ca.gov/clemency/> (last visited June 22, 2020).

169. See, e.g., *Clemency Applications*, COMMONWEALTH OF PENNSYLVANIA, available at <https://www.bop.pa.gov/application-process/Pages/clemency.aspx> (last visited Jun 22, 2020); *Executive Clemency Overview*, COMMONWEALTH OF MASSACHUSETTS, available at <https://www.mass.gov/service-details/executive-clemency-overview> (last visited June 22, 2020). For a complete list of all states’ different types of clemency authority, see *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RIGHTS PROJECT, available at <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> (last visited Jun 22, 2020).

170. *Harbison v. Bell*, 556 U.S. 180, 188, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009).

correctional facility in New York.¹⁷¹ For more information on pardons, commutations, and other forms of early release, please see *JLM*, Chapter 35, “Getting Out Early: Conditional and Early Release.” If you are not in New York, you must look up your state’s rules on clemency.¹⁷² For further information on clemency for battered women nationwide, contact the National Clearinghouse for the Defense of Battered Women, which accepts collect calls from incarcerated battered women (see Appendix A).

1. How to Request Clemency

To be considered for clemency in New York, send a written petition requesting clemency to either of the following addresses:

The Governor of the State of New York
Executive Chamber
State Capitol
Albany, New York 12224

New York State
Department of Corrections and Community Supervision
Executive Clemency Bureau
The Harriman State Campus – Building 2
1220 Washington Ave
Albany, NY 12226-2050

Alternatively, you can scan and email your application to: PardonsAndCommutations@doccs.ny.gov.

You should send all supporting materials within thirty days of sending the application. Applications are usually considered in the order that they are received. If your petition has not been granted, you can re-apply a year after you found out about the decision. You may re-apply a year later, unless you have been authorized to do so sooner in the letter informing you of the unfavorable decision.¹⁷³ In either case, you will be informed of the decision by letter from the Clemency Bureau of your state.

2. Writing Your Petition

(a) Tips for Organizing Your Petition

Try to make the petition as brief as you can. But, be sure not to leave out any information you think is important. Use headings to separate the points that you make. If you have evidence of past incidents of abuse, it may be helpful to make a table that includes the date of each incident, the details of the abuse, and the evidence of the incident.

For example:¹⁷⁴

DATE	NATURE OF THE ABUSE	DOCUMENT
7/1/15	Dan found on top of Paula with his hands around her neck.	Smith Affidavit, Exhibit 1

171. State of New York, Department of Corrections and Community Supervision, *Community Supervision Handbook: Questions and Answers Concerning Parole Release and Community Supervision* (July 2017), available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Feb. 18, 2020). For instructions on how to apply for clemency in New York, you can also visit <https://www.ny.gov/services/apply-clemency> (last visited Dec. 2, 2020).

172. To find your state’s requirements for commutation, go to the Criminal Justice Policy Foundation website (<http://www.cjpf.org/state-clemency/>) and click “Select your State.”

173. Criminal Justice Policy Foundation, *New York Applicable Form of Executive Clemency* (June 2014), available at <http://www.cjpf.org/clemency-ny> (last visited Feb. 18, 2020).

174. Michigan Women’s Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMich (2008), available at http://www.umich.edu/~clemency/clemency_mnl/ch7.html (last visited Feb. 18, 2020).

11/23/15	Dan beats Paula so badly that she has contusions all over her body.	Cook County Hospital Records, Exhibit 2
10/3/16	Crisis Center overhears abuse and calls police.	Support Service Records, Exhibit 4
4/4/17	Dan violates restraining order. He is arrested for punching hand through window.	Police Report, Exhibit 6

An affidavit is a statement taken under oath or affirmed by a notary public or commissioner of oaths. An exhibit is a document or another object presented as evidence in court. You should describe the strongest part of your petition at the beginning of the document in the first paragraph. You may wish to include any special circumstances that affect your case, or significant achievements you have accomplished in prison. For example, one woman who recently submitted a petition for clemency graduated summa cum laude from Western Michigan University while in prison.¹⁷⁵ Another woman's sentencing judge specifically stated that he hoped the Parole Board would commute her sentence.¹⁷⁶ Put such facts at the beginning. Do not hide facts like these in the middle of the petition.

(b) What to Include in Your Petition

Your clemency petition should include a thorough description of your life before you were convicted. This description should:

- (1) Let the Board know what kind of person you were;
- (2) Discuss your childhood, your family, your hobbies, and your ambitions;
- (3) Record your educational background, the names of any organizations to which you belonged, and every job you have held, including responsibilities and length of employment; and
- (4) Briefly discuss your criminal history and any type of domestic violence (sexual, physical, and/or emotional) you may have experienced throughout your life.

You should also describe the event causing your conviction. You should note any differences between the evidence that was entered at your trial and what is known now. If you want to give a different version of what happened from what you said before trial or from the facts as found to be true at trial, you should explain these differences.

Next, you should describe why you think you should get clemency (your "theory of the case"). Your theory should set out the facts, law, and any policy reasons supporting your petition for clemency. If your criminal case went to trial, you may want to base your theory for clemency on the defense presented at trial.

Finally, describe why the Governor should grant you a special exception (the "plea for justice or mercy"). Clemency is extraordinary relief and you should remind the Governor that only he or she has the power to grant it.

You want to show the Governor that you are a model incarcerated person making the most of the rehabilitative services available to you in prison. If you have taken or completed any courses in prison, include copies of your transcripts, grades, diplomas, and degrees. You should include any skills programs or counseling programs you have completed. You should also include any certificates from the programs. If you are in a privileged housing area or have been moved to a lower security level, explain this and list the privileges that you have received. If you have a clean disciplinary record, list any housing honors and explain how you were able to avoid disciplinary problems. Also include any jobs that you have held at the facility, your length of employment at each job, and your duties and responsibilities. If you know a prison official, including a counselor, who will support your clemency petition, ask them to write a letter on your behalf. Finally, list the people that you have stayed in contact with through visits, phone calls, and letters.

175. Michigan Women's Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at http://www.umich.edu/~clemency/clemency_mnl/ch7.html (last visited Feb. 18, 2020).

176. Michigan Women's Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at http://www.umich.edu/~clemency/clemency_mnl/ch7.html (last visited Feb. 18, 2020).

It is very important to show the Governor that you will be a productive and law-abiding member of society after your release. Write down your plans for the future. For example, include where you will live, support groups and/or therapy in which you will participate, and family and friends who will help support you financially and emotionally. Also include plans to seek help for a drug or alcohol addiction, employment plans (including marketable skills that will help you find a job), and family plans.

You should also provide evidence to help give the Governor a sense of who you are as a person. Try to get letters from family members discussing their relationship with you, particularly if you have any children or grandchildren who are dependent on you. Include if a family member is able to offer you a place to live or a job upon release. Consider getting letters from religious or community leaders describing your involvement in their organization. Also consider including letters from people who knew you as a child, especially if you suffered abuse, neglect, or other hardships growing up. Finally, you may be able to get members of the victim's family to write a letter stating that they are not opposed to your clemency petition. Keep in mind that this is a very sensitive issue, so do not press for such a letter if you have reason to think that the victim's family may oppose your request.

(c) Using Evidence to Support Your Petition

You should include evidence to support all of the aspects of your claim. This evidence includes letters of support, police records, and affidavits from family and friends.¹⁷⁷ You should label them as "exhibits" at the back of your petition. When using affidavits or letters, state whether the authors of those affidavits or letters testified at your criminal trial. Because you may have difficulty getting all of these documents while in prison, try to have a close friend or family member assist you in gathering this information and developing your petition. Here are some basic types of evidence to consider:

- (1) Affidavits. Affidavits are where a person writes out facts that they know to be true in the form of a statement. The person signs the affidavit in front of a notary to make it authoritative. For example, if someone was with you during the events that led to your incarceration, you might want them to write an affidavit stating what happened.
- (2) Records, including hospital records, police records, and sentencing materials.
- (3) Letters, e-mail printouts, photographs, and anything that shows your story to be true.
- (4) Letters of support written by people who believe you should receive a commutation. You can ask for letters of support from family, clergy, prison staff, and possibly the victim's family. More information on letters of support is below.

To show that you were abused or battered, think about the following types of evidence:

- (1) Medical records of injuries from abuse;
- (2) Mental health records showing your diminished capacity at the time of the crime and/or the stress, fear and anxiety caused by living in a violent relationship;
- (3) Orders of protection;
- (4) Police reports related to the abuse;
- (5) Photographs showing physical injury;
- (6) Records from battered women's shelters;
- (7) Any testimony referring to battered women's syndrome at your trial. Include the abuser's criminal history if he had a violent criminal past.

To get police records, you should call or write to the county where the incident happened. Different police departments have different policies and you may have to fill out a Freedom of Information Law ("FOIL") request, a formal request to a government agency to release documents. To learn more about how to make a FOIL request, see *JLM*, Chapter 7, "Freedom of Information." To get hospital records, call or write to the patient records office at the hospital where you went for treatment. A written

177. Michigan Women's Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at http://www.umich.edu/~clemency/clemency_mnl/ch7.html (last visited Feb. 18, 2020).

request should include your name, date of birth, social security number, and the specific information you are requesting.

You should also try to get letters of support from the following people:

- (1) Anyone who can say that they knew or suspected that you were battered;
- (2) Co-workers who witnessed bruises, health problems, or work absences resulting from battering, or heard stories about battering episodes;
- (3) Neighbors who heard or saw violent episodes or called the police in response to them;
- (4) Medical professionals who witnessed the results of battering, such as bruises or fear and anxiety;
- (5) Social workers who witnessed the effects of your battering;
- (6) Lawyers (in your criminal case or elsewhere) if they were aware of the battering and attempted to document its effects;
- (7) Experts consulted for trial regarding battered women's syndrome and battering and its effects;
- (8) Witnesses who testified to the battering at trial;
- (9) Private investigators if one was hired for your case;
- (10) Women's groups and community organizations. You can seek letters from groups that would support your clemency petition, such as battered women's groups, women's rights groups, groups that support incarcerated people, or any community group of which you are a member.

In addition to the documents described previously, you will want to obtain your DOCCS records (records concerning the time you have spent in prison), your parole file, and your case file. Your DOCCS records include:

- (1) All misbehavior reports and supplemental (additional) sheets;
- (2) Physical force and unusual incident sheets;
- (3) Adjustment committee reports and dispositions;
- (4) Copy of legal dates;
- (5) Crimes of commitment;
- (6) Personal history record;
- (7) Disciplinary record;
- (8) Correctional supervision history;
- (9) Certificates of program completion; and
- (10) Recognition letters.

(d) Obtaining your DOCCS file, case record, parole file, case file and rap sheet

In order to obtain your DOCCS file, write to the inmate records coordinator of your facility. Include your name, DOCCS number, where you would like the records sent, and a list of the documents you want to receive. If the documents are being sent to someone other than you, you must authorize their release.

The case record is the most complete set of records maintained by the Board of Parole. It can be obtained by writing to the senior parole officer of your facility. In your request, include your name, ID number, and release interview date (or revocation hearing date or appeal pending date, whichever applies). State that you want to review all the information in the file that will be considered by the Board of Parole to prepare for the upcoming date.

The parole file is a less complete record in the central office. It can be obtained by writing to the Chairman of the Board of Parole, 97 Central Avenue, Albany, NY 12206. State that you are requesting these records under FOIL and the New York Personal Privacy Protection Law (PPPL).

You should also obtain a copy of your case file. Your case file includes police reports, hearing transcripts, and other useful information from your trial. Ask your attorney for copies of these

documents and transcripts. You may need to call the criminal courthouse to get copies if your attorney does not have complete transcripts.

For your rap sheet, send a written request to:

Record Review Unit
New York State Division of Criminal Justice Services
Alfred E. Smith Building
80 South Swan Street
Albany, NY 12210.

You should include your name, date of birth, social security number, and department identification number, and send the request in a facility envelope, if possible. You can also ask them to *RUSH* processing of your file if you need the information quickly. Otherwise, it can take eight weeks or longer to receive your rap sheet. You also have a right to obtain pre-sentencing reports.¹⁷⁸ To get them, send a written request to the above address, addressed “To Whom It May Concern”, with your name, birth date, indictment/information/complaint number, sentencing court, the address to which you would like the information sent, and a signed release authorizing another person to receive the information, if necessary.

G. Conclusion

This Chapter outlines some of the unique problems that women frequently face in prison. It identifies different ways that incarcerated women can advocate for themselves in prison. In particular, this Chapter explains incarcerated women’s right to receive the same programming as incarcerated men, right to adequate medical care, and right to be free from sexual harassment or assault. It also discusses rights regarding searches and privacy, as well as how to file for clemency. This Chapter is meant to supplement the rest of the *JLM*, which discusses the rights of all incarcerated people, and describes how to file grievances and bring lawsuits. If you need additional support, the organizations listed in Appendix A of this Chapter may be helpful to you.

178. N.Y. CRIM. PROC. LAW § 390.50(2)(a) (McKinney’s 2018).

Appendix A

Contacts for Further Assistance

Resources in New York

Battered Women:

STEPS to End Family Violence (Rising Ground)
<https://www.risingground.org/program/steps/>
STEPShelpline@RisingGround.org
(877) 783-7794

The Domestic Violence Prosecution Hybrid Clinic at Albany Law School
80 New Scotland Avenue
Albany, NY 12208-3494
(518) 445-2328

Discharge Planning & Work Release:

Women's Prison Association
110 Second Avenue
New York, NY 10003
(646) 292-7740

Health Care:

The Legal Aid Society, Prisoners' Rights Project
199 Water Street, 6th Floor
New York, NY 10038
(212) 577-3300

Sexual Harassment:

Prisoner's Legal Services
ITHACA
114 Prospect St.
Ithaca, NY 14850
(607) 273-2283

Prisoner's Legal Services
ALBANY
41 State Street, Suite M112
Albany, NY 12207

Women's Program Services:

Women's Advocate Ministry, Inc.
211 West 129th Street
New York NY 10027
(212) 280-7320

General Questions:

Women in Prison Project
The Correctional Association of New York
2090 Adam Clayton Powell Blvd
Suite 200
New York, NY 10027
(212) 254-5700

National Resources Outside of New York:**Battered Women:**

National Clearinghouse for the Defense of Battered Women
125 S. 9th Street, Suite 302
Philadelphia, PA 19107
(215) 351-0010 or 1-800-903-0111 ext. 3
(Accepts collect calls from incarcerated battered women)

National Coalition Against Domestic Violence
One Broadway, Suite B210
Denver, CO 80203
(303) 839-1852 or 1-800-799-SAFE (1-800-799-7233)

Health:

Cancer Hotline:
1-800-4CANCER (1-800-422-6237)

Sexual Assault and Rape:

Rape, Abuse, and Incest National Network
National Sexual Assault Hotline
1-800-656-HOPE (1-800-656-4673)
(Free and confidential, 24 hours a day)

General Information:

National Women's Law Center
Women in Prison Project
11 Dupont Circle, NW
Suite 800
Washington, DC 20036
(202) 588-5180

APPENDIX I
ADDRESSES OF FEDERAL COURTS
&
NEW YORK STATE PRISONS AND THEIR RESPECTIVE FEDERAL JUDICIAL
DISTRICTS

A. Addresses of Federal Courts

1. Federal Courts in the First Circuit

Court of Appeals

John Joseph Moakley U.S. Courthouse
1 Courthouse Way
Boston, MA 02210
Phone: (617) 748-9057
Website: <http://www.ca1.uscourts.gov/>

District Courts

Maine District Court

Website: <http://www.med.uscourts.gov/>

Edward T. Gignoux U.S. Courthouse
156 Federal Street
Portland, ME 04101
Phone: (207) 780-3356

Margaret Chase Smith Federal Building &
Courthouse
202 Harlow Street
Bangor, ME 04401
Phone: (207) 945-0575

Massachusetts District Court

Website: <http://www.mad.uscourts.gov/>

John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2300
Boston, MA 02210
Phone: (617) 748-9152

United States Courthouse
300 State Street, Suite 120
Springfield, MA 01105
Phone: (413) 785-6800

Donahue Federal Building & U.S. Courthouse
595 Main Street
Worcester, MA 01608

Phone: (508) 929-9900

New Hampshire District Court

Website: <http://www.nhd.uscourts.gov/>

Warren B. Rudman U.S. Courthouse
55 Pleasant Street, Room 110
Concord, NH 03301
Phone: (603) 225-1423

Puerto Rico District Court

Website: <http://www.prd.uscourts.gov/>

Clemente Ruiz Nazario U.S. Courthouse &
Federico Degetau Federal Building
150 Ave. Carlos Chardón, Suite 150
San Juan, Puerto Rico 00918
Phone: (787) 772-3000

Rhode Island District Court

Website: <http://www.rid.uscourts.gov/>

Federal Building and Courthouse
One Exchange Terrace
Providence, RI 02903
Phone: (401) 752-7200

2. Federal Courts in the Second Circuit

Court of Appeals

Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007
Phone: (212) 857-8500
Website: <http://www.ca2.uscourts.gov/>

District Courts

Connecticut District Court

Website: <http://www.ctd.uscourts.gov/>

Abraham Ribicoff Federal Building
450 Main Street, Suite A012
Hartford, CT 06103
Phone: (860) 240-3200

Richard C. Lee U.S. Courthouse
141 Church Street
New Haven, CT 06510
Phone: (203) 773-2140

Brien McMahon Federal Building
915 Lafayette Boulevard
Bridgeport, CT 06604
Phone: (203) 579-5861

New York Eastern District Court

Website: <https://www.nyed.uscourts.gov/>

United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
Phone: (718) 613-2600

United States District Court
Eastern District of New York
Long Island Courthouse
100 Federal Plaza
Central Islip, NY 11722
Phone: (631) 712-6000

New York Northern District Court

Website: <http://www.nynd.uscourts.gov/>

James T. Foley Courthouse
445 Broadway, Suite 509
Albany, NY 12207
Phone: (518) 257-1800

U.S. District Court
Northern District of New York
Binghamton Courthouse
15 Henry Street
Binghamton, NY 13901
Phone: (607) 773-2893

U.S. District Court
Northern District of New York
The Gateway Building
14 Durkee Street.
Plattsburgh, NY 12901
Phone: (518) 247-4501

U.S. District Court
James M. Hanley Federal Building, 7th Floor
100 South Clinton Street
Syracuse, NY 13261
Phone: (315) 234-8500
Mailing address:
P.O. Box 7367
Syracuse, NY 13261-7367

Alexander Pirnie Federal Building
10 Broad Street
Utica, NY 13501-1233
Phone: (315) 793-8151

New York Southern District CourtWebsite: <http://www.nysd.uscourts.gov/>

Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007
Phone: (212) 805-0136

Thurgood Marshall
United States Courthouse
40 Foley Square
New York, NY 10007
Phone: (212) 857-8500

The Hon. Charles L. Brieant Jr.
Federal Building and Courthouse
Southern District of New York
300 Quarropas Street
White Plains, NY 10601
Phone: (914) 390-4100

United States Courthouse
355 Main Street
Poughkeepsie, NY 12601
Phone: (845) 452-4200

New York Western District CourtWebsite: <http://www.nywd.uscourts.gov/>

United States Courthouse
2 Niagara Square Buffalo, NY 14202
Phone: (716) 551-1700

Kenneth B. Keating Federal Building
100 State Street
Rochester, NY 14614
Phone: (585) 613-4000

Vermont District CourtWebsite: <http://www.vtd.uscourts.gov/>

U.S. District Court
Room 200
11 Elmwood Avenue
Burlington, VT 05401
Phone: (802) 951-6301
Mailing Address:
U.S. District Court
P.O. Box 945
Burlington, VT 05402

US District Court
151 West Street, Room 204
Rutland, VT 05701
Phone: (802) 773-0245
Mailing Address:
U.S. District Court
P.O. Box 607
Rutland, VT 05702

3. Federal Courts in the Third Circuit

Court of Appeals

James A. Byrne Courthouse
601 Market Street
Philadelphia PA 19106
Phone: (215) 597-2995
Website: <http://www.ca3.uscourts.gov/>

Mailing Address:
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

District Courts

Delaware District Court
Website: <http://www.ded.uscourts.gov/>

J. Caleb Boggs Federal Building
844 North King Street, Unit 18
Wilmington, DE 19801
Phone: (302) 573-6170

New Jersey District Court
Website: <http://www.njd.uscourts.gov/>

Mitchell H. Cohen Bldg & U.S. Courthouse
4th & Cooper Streets Room 1050
Camden, NJ 08101
Phone: (856) 757-5021

Martin Luther King Bldg & U.S. Courthouse
50 Walnut Street Room 4015
Newark, NJ 07101
Phone: (973) 645-3730

Clarkson S. Fisher Bldg & U.S. Courthouse
402 East State Street Room 2020
Trenton, NJ 08608
Phone: (609) 989-2065

Pennsylvania Eastern District Court
Website: <http://www.paed.uscourts.gov/>

James A. Byrne U.S. Courthouse
601 Market Street, Room 2609
Philadelphia, PA 19107
Phone: (215) 597-7704

Edward N. Cahn Courthouse & Federal
Building
504 West Hamilton Street
Allentown, PA 18101
Phone: (610) 434-3896

The Gateway Building
201 Penn Street
Reading, PA 19601

Holmes Building, 4th Floor
101 Larry Holmes Drive
Easton, PA 18042

Pennsylvania Middle District CourtWebsite: <http://www.pamd.uscourts.gov/>

William J. Nealon Federal Building & U.S.
Courthouse
235 North Washington Avenue
P.O. Box 1148
Scranton, PA 18503
Phone: (570) 207-5600

Ronald Reagan Federal Building &
U.S. Courthouse
228 Walnut Street
P.O. Box 983
Harrisburg, PA 17101
Phone: (717) 221-3920

Herman T. Schneebeli Federal Building &
U.S. Courthouse
240 West Third Street, Suite 218
Williamsport, PA 17701
Phone: (570) 323-6380

Max Rosenn U.S. Courthouse
197 South Main Street, Suite 161
Wilkes-Barre, PA 18701

Pennsylvania Western District CourtWebsite: <http://www.pawd.uscourts.gov/>

Joseph F. Weis, Jr. U.S. Courthouse
700 Grant Street
Pittsburgh, PA 15219
Phone: (412) 208-7500

U.S. Courthouse
17 South Park Row
Erie, PA 16501
Phone: (814) 464-9600

U.S. Courthouse
208 Penn Traffic Building
319 Washington Street
Johnstown, PA 15901
Phone: (814) 533-4504

Virgin Islands District CourtWebsite: <http://www.vid.uscourts.gov/>

Ron deLugo Federal Building
5500 Veterans Drive, Rm 310
St. Thomas, VI 00802
Phone: (340) 774-0640

District Court of the Virgin Islands
3013 Estate Golden Rock, Suite 219
St. Croix, VI 00820
Phone: (340) 718-1130

4. Federal Courts in the Fourth Circuit

Court of Appeals

Lewis F. Powell, Jr. United States Courthouse
1000 East Main Street, Suite 501
Richmond, VA 23219
Phone: (804) 916-2700
Website: <http://www.ca4.uscourts.gov/>

District Courts

Maryland District Court

Website: <http://www.mdd.uscourts.gov/>

Edward A. Garmatz Federal Building and
U.S. Courthouse
101 W. Lombard Street
Baltimore, MD 21201
Phone: (410) 962-2600

United States Courthouse
6500 Cherrywood Lane
Greenbelt, MD 20770
Phone: (301) 344-0660

129 East Main Street, Rom 104
Salisbury, MD 21803
Phone: (410) 962-2600

North Carolina Eastern District Court

Website: <http://www.nced.uscourts.gov/>

Terry Sanford Federal Building and
Courthouse
310 New Bern Avenue
Raleigh, NC 27611
Phone: (919) 645-1700
Mailing Address:
Clerk of Court
P.O. Box 25670
Raleigh, NC 27611

U.S. Courthouse
201 South Evans Street, Rm 209
Greenville, NC 27858
Phone: (252) 830-6009

U.S. Courthouse
1003 South 17th Street
Wilmington, NC 28401
Phone: (910) 815-4663

U.S. Courthouse
413 Middle Street
New Bern, NC 28560
Phone: (252) 638-8534

North Carolina Middle District Court

Website: <http://www.ncmd.uscourts.gov/>

L. Richardson Preyer Federal Building
324 West Market Street
Greensboro, NC 27401
Phone: (336) 332-6000

Hiram H. Ward Federal Building and U.S.
Courthouse
251 North Main Street
Winston-Salem, NC 27101
Phone: (336) 332-6000

U.S. District Court
323 East Chapel Hill Street
Durham, NC 27702
Phone: (919) 541-5413
Mailing Address:
P.O. Box 1091
Durham, NC 27702

North Carolina Western District Court

Website: <http://www.ncwd.uscourts.gov/>

U.S. Courthouse
100 Otis Street, Room 309
Asheville, NC 28801
Phone: (828) 771-7200

Charles R. Jonas Federal Building
401 West Trade Street, Room 210
Charlotte, NC 28202
Phone: (704) 350-7400

United States Courthouse
200 West Broad Street, Room 304
Statesville, NC 28677
Phone: (704) 883-1000

South Carolina District Court

Website: <http://www.scd.uscourts.gov/>

Charles E. Simons Jr. Federal Courthouse
223 Park Avenue, S.W.
Aiken, SC 29801
Phone: (803) 648-6896

G. Ross Anderson, Jr. Federal Building and
U.S. Courthouse
315 South McDuffie Street, 2nd Floor
Anderson, SC 29624
Phone: (864) 241-2700

Charleston Federal Courthouse
85 Broad Street
Charleston, SC 29401
Phone: (843) 579-1401

J. Waties Judicial Center
83 Meeting Street
Charleston, SC 29401
Phone: (843) 579-1401

Matthew J. Perry, Jr. Courthouse
901 Richland Street
Columbia, SC 29201
Phone: (803) 765-5816

McMillan Federal Building
401 West Evans Street
Florence, SC 29501
Phone: (843) 676-3820

Clement F. Haynsworth Federal Building &
U.S. Courthouse
300 East Washington Street
Greenville, SC 29601
Phone: (864) 241-2700

Donald S. Russell Courthouse & U.S.
Courthouse
201 Magnolia Street
Spartanburg, SC 29306
Phone: (864) 241-2700

Virginia Eastern District Court

Website: <http://www.vaed.uscourts.gov/>

Albert V. Bryan U.S. Courthouse
401 Courthouse Square
Alexandria, VA 22314
Phone: (703) 299-2100

Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510
Phone: (757) 222-7202

U.S. Courthouse
2400 West Avenue
Newport News, VA 23607
Phone: (757) 247-0784

Spottswood W. Robinson III and Robert R.
Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219
Phone: (804) 916-2200

Virginia Western District Court

Website: <http://www.vawd.uscourts.gov/>

Richard H. Poff Federal Building
210 Franklin Road S.W., Suite 540
Roanoke, VA 24011
Phone: (540) 857-5100

Virginia Western District Court
180 West Main Street, Room 104
Abingdon, VA 24210
Phone: (276) 628-5116

C. Bascom Slemp Federal Building
322 East Wood Avenue, Room 204
Big Stone Gap, VA 24219
Phone: (276) 523-3557
Mailing Address:
180 West Main Street, Room 104
Abingdon, VA 24210

Virginia Western District Court
255 West Main Street, Room 304
Charlottesville, VA 22902
Phone: (434) 296-9284

Dan Daniel United States Post Office
700 Main Street, Suite 202
Danville, VA 24541
Phone: (434) 793-7147
Mailing Address:
P.O. Box 1400
Danville, VA 24543

United States Courthouse
116 North Main Street, Room 314
Harrisonburg, VA 22802
Phone: (540) 434-3181

United States Courthouse
1101 Court Street, Suite A66
Lynchburg, VA 24504
Phone: (434) 847-5722

West Virginia Northern District Court
Website: <http://www.wvnd.uscourts.gov/>

U.S. District Court
500 West Pike Street, Room 301
Clarksburg, WV 26302
Phone: (304) 622-8513
Mailing Address:
P.O. Box 2857
Clarksburg, WV 26302

The Jennings Randolph Federal Center
300 Third Street
Elkins, WV 26241
Phone: (304) 636-1445
Mailing Address:
P.O. Box 1518
Elkins, WV 26241

W. Craig Broadwater Federal Building & U.S.
Courthouse
217 West King Street, Room 102
Martinsburg, WV 25401
Phone: (304) 267-8225

U.S. District Court
1125 Chapline Street
Wheeling, WV 26003
Phone: (304) 232-0011
Mailing Address:
P.O. Box 471
Wheeling, WV 26003

West Virginia Southern District Court
Website: <http://www.wvwd.uscourts.gov/>

Robert C. Byrd U.S. Courthouse
300 Virginia Street, East, Suite 2400
Charleston, WV 25301
Phone: (304) 347-3000
Mailing Address:
P.O. Box 2546
Charleston, WV 25329

U.S. District Court
601 Federal Street, Room 1000
Bluefield, WV 24701
Phone: (304) 327-9798

Sidney L. Christie Federal Building
845 Fifth Avenue, Room 101
Huntington, WV 25701
Phone: (304) 529-5588

Robert C. Byrd United States Courthouse
110 North Heber Street, Room 119
Beckley, WV 25801
Phone: (304) 253-7481

5. Federal Courts in the Fifth Circuit

Court of Appeals

U.S. Court of Appeals for the Fifth Circuit
600 South Maestri Place, Suite 115
New Orleans, LA 70130-3408
Phone: (504) 310-7700

Website: <http://www.ca5.uscourts.gov/>

District Courts

Louisiana Eastern District Court

Website: <http://www.laed.uscourts.gov/>

U.S. District Court
Eastern District of Louisiana
Room C-151
500 Poydras Street
New Orleans, LA 70130
Phone: (504) 589-7600

Louisiana Middle District Court

Website: <http://www.lamd.uscourts.gov/>

Russell B. Long Federal Building & U.S.
Courthouse
777 Florida Street, Suite 139
Baton Rouge, LA 70801
Phone: (225) 389-3500

Louisiana Western District Court

Website: <http://www.lawd.uscourts.gov/>

U.S. Post Office and Courthouse
515 Murray Street, Suite 105
Alexandria, LA 71301
Phone: (318) 473-7415

U.S. Courthouse
800 Lafayette Street, Suite 2100
Lafayette, LA 70501
Phone: (337) 593-5000

Edwin F. Hunter, Jr.
U.S. Courthouse & Federal Building
611 Broad Street, Suite 188
Lake Charles, LA 70601
Phone: (337) 437-3870

U.S. Courthouse
300 Fannin Street, Suite 1167
Shreveport, LA 71101
Phone: (318) 676-4273

Federal Building
201 Jackson Street, Suite 215
Monroe, LA 71210
Phone: (318) 322-6740

Mississippi Northern District Court

Website: <http://www.msnd.uscourts.gov/>

Thomas G. Abernathy Federal Building
301 West Commerce Street
Aberdeen, MS 39730
Phone: (662) 369-4952
Mailing Address:
P.O. Box 704
Aberdeen, MS 39730

Post Office and Federal Building
305 Main Street, Room 329
Greenville, MS 38701
Phone: (662) 234-1971
Mailing address:
Federal Building Room 369
911 Jackson Avenue East
Oxford, MS 38655

Federal Building Room 369
911 Jackson Avenue East
Oxford, MS 38655
Phone: (662) 234-1971

Mississippi Southern District Court

Website: <http://www.mssd.uscourts.gov/>

U.S. District Court

Thad Cochran United States Courthouse
501 East Court Street, Suite 2.500
Jackson, MS 39201
Phone: (601) 608-4000

U.S. District Court

William M. Colmer Federal Building & U.S.
Courthouse
701 North Main Street, Suite 200
Hattiesburg, MS 39401
Phone: (601) 255-6400

U.S. District Court

Dan M. Russell, Jr., U.S. Courthouse
2012 15th Street, Suite 403
Gulfport, MS 39501
Phone: (228) 563-1700

U.S. District Court

U.S. Courthouse
109 South Pearl Street, 2nd Floor
Natchez, MS 39120
Phone: (601) 897-6945

Mailing address:**U.S. District Court**

Thad Cochran United States Courthouse
501 East Court Street, Suite 2.500
Jackson, MS 39201

Texas Eastern District Court

Website: <http://www.txed.uscourts.gov/>

**Jack Brooks Federal Building and U.S.
Courthouse**

300 Willow Street, Suite 104
Beaumont, TX 77701
Phone: (409) 654-7000

Ward R. Burke U.S. Courthouse

104 North Third Street
Lufkin, TX 75901
Phone: (936) 632-2739

**Sam B. Hall Jr. Federal Building and U.S.
Courthouse**

100 East Houston, Room 125
Marshall, TX 75670
Phone: (903) 935-2912

Paul Brown U.S. Courthouse

101 East Pecan Street, Room 216
Sherman, TX 75090
Phone: (903) 892-2921

U.S. Courthouse

7940 Preston Road Room 101
Plano, TX 75024
(214) 872-4800

U.S. Courthouse and Post Office

500 North State Line Avenue
Texarkana, TX 75501
Phone: (903) 794-8561

**William M. Steger Federal Building and U.S.
Courthouse**

211 West Ferguson Street, Room 106
Tyler, TX 75702
Phone: (903) 590-1000

Texas Northern District Court

Website: <http://www.txnd.uscourts.gov>

Earle Cabell Federal Building

1100 Commerce Street, Room 1452
Dallas, TX 75242
Phone: (214) 753-2200

U.S. District Court - Abilene Division

341 Pine Street, Room 2008
Abilene, TX 79601
Phone: (325) 677-6311

U.S. District Court - Amarillo Division

205 S.E. 5th Avenue, Room 133
Amarillo, TX 79101
Phone: (806) 468-3800

U.S. District Court - Fort Worth Division

501 West 10th Street, Room 310
Fort Worth, TX 76102
Phone: (817) 850-6600

U.S. District Court - Lubbock Division

1205 Texas Avenue, Room 209
Lubbock, TX 79401
Phone: (806) 472-1900

U.S. District Court - San Angelo Division

33 East Twohig Avenue, Room 202
San Angelo, TX 76903
Phone: (325) 655-4506

U.S. District Court - Wichita Falls Division
1000 Lamar Street, Room 203
Wichita Falls, TX 76301
Phone: (940) 767-1902

Texas Southern District

Website: <http://www.txs.uscourts.gov/>

Reynaldo G. Garza-Filemon B. Vela
U.S. Courthouse
600 East Harrison Street, #101
Brownsville, TX 78520
Phone: (956) 548-2500
Mailing Address:
David J. Bradley
Clerk of Court
600 East Harrison Street, #101
Brownsville, TX 78520

U.S. Courthouse
1133 North Shoreline Boulevard
Corpus Christi, TX 78401
Phone: (361) 888-3142
Mailing Address:
David J. Bradley
Clerk of Court
1133 North Shoreline Boulevard
Corpus Christi, TX 78401

U.S. Post Office and Courthouse
601 Rosenberg, Room 411
Galveston, TX 77550
Phone: (409) 766-3530
Mailing Address:
David J. Bradley
Clerk of Court
601 Rosenberg, Room 411
Galveston, TX 77550

Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002
Phone: (713) 250-5500
Mailing Address:
David J. Bradley
Clerk of Court
P.O. Box 61010
Houston, TX 77208

George P. Kazen Federal Building and U.S.
Courthouse
1300 Victoria Street
Laredo, TX 78040
Phone: (956) 790-1377
Mailing Address:
David J. Bradley
Clerk of Court
1300 Victoria Street, Suite 1131
Laredo, TX 78040

U.S. Courthouse
1701 West Business Highway 83
McAllen, TX 78501
Phone: (956) 618-8065
Mailing Address:
David J. Bradley
Clerk of the Court
P.O. Box 5059
McAllen, TX 78501

Martin Luther King, Jr. Federal Building
312 South Main Street, Room 406
Victoria, TX 77901
Phone: (361) 788-5000
Mailing Address:
David J. Bradley
Clerk of the Court
312 South Main Street, Room 406
Victoria, TX 77902

Texas Western District Court

Website: <http://www.txwd.uscourts.gov>

U.S. District Clerk's Office
501 West 5th Street, Suite 1100
Austin, TX 78701
Phone: (512) 916-5896

U.S. District Clerk's Office
111 East Broadway, Room L100
Del Rio, TX 78840
Phone: (830) 703-2054

U.S. District Clerk's Office
525 Magoffin Avenue, Suite 105
El Paso, TX 79901
Phone: (915) 534-6725

U.S. District Clerk's Office
200 East Wall, Room 222
Midland, TX 79701
Phone: (432) 686-4001

U.S. District Clerk's Office
410 South Cedar
Pecos, TX 79772
Phone: (432) 445-4228

U.S. District Clerk's Office
2450 State Highway 118
Alpine, TX 79830
Phone: (432) 837-7323

U.S. District Clerk's Office
655 E. Cesar E. Chavez Boulevard., Room G65
San Antonio, TX 78206
Phone: (210) 472-6550

U.S. District Clerk's Office
800 Franklin Avenue, Room 380
Waco, TX 76701
Phone: (254) 750-1501

U.S. District Clerk's Office
MG Williams Judicial Center
Bldg. 5794, Tank Destroyer Boulevard
Fort Hood, Texas 76544
Phone: (254) 287-5158
Mailing Address:
P. O. Box 5507
Fort Hood, TX 76544

6. Federal Courts in the Sixth Circuit**Court of Appeals**

Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202
Phone: (513) 564-7000
Website: <http://www.ca6.uscourts.gov/>

District Courts**Kentucky Eastern District Court**

Website: <http://www.kyed.uscourts.gov/>

U.S. District Court
Eastern District of Kentucky
101 Barr Street, Suite 206
Lexington, KY 40507
Phone: (859) 233-2503

336 Carl Perkins Federal Building
1405 Greenup Avenue
Ashland, KY 41101
Phone: (606) 329-2465

35 West 5th Street
Covington, KY 41011
Phone: (859) 392-7925

313 John C. Watts Federal Building
330 West Broadway
Frankfort, KY 40601
Phone: (502) 223-5225

310 South Main Street
London, KY 40741
Phone: (606) 877-7910

110 Main Street, Suite 203
Pikeville, KY 41501
Phone: (606) 437-6160

Kentucky Western District Court

Website: <http://www.kywd.uscourts.gov/>

Clerk's Office
241 East Main Street, Suite 120
Bowling Green, KY 42101
Phone: (270) 393-2500

Clerk's Office
Gene Snyder U.S. Courthouse
601 West Broadway, Rm 106
Louisville, KY 40202
Phone: (502) 625-3500

Clerk's Office
423 Frederica Street, Suite 126
Owensboro, KY 42301
Phone: (270) 689-4400

Clerk's Office
501 Broadway, Suite 127
Paducah, KY 42001
Phone: (270) 415-6400

Michigan Eastern District

Website: <http://www.mied.uscourts.gov/>

Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard, Room 599
Detroit, MI 48226
Phone: (313) 234-5005

U.S. District Courthouse
Federal Building
200 East Liberty Street, Room 120
Ann Arbor, Michigan 48104
Phone: (313) 234-5005

U.S. District Court
U.S. Post Office Building
1000 Washington Avenue, 2nd Floor
Bay City, MI 48708
Phone: (313) 234-5005
Mailing Address:
P.O. Box 913
Bay City, MI 48707

Federal Building & U.S. Courthouse
600 Church Street, Room 140
Flint, MI 48502
Phone: (313) 234-5005

Federal Building and U.S. Courthouse
526 Water Street
Port Huron, MI 48060

Michigan Western District Court

Website: <http://www.miwd.uscourts.gov/>

U.S. District Court
399 Federal Building
110 Michigan Street NW
Grand Rapids, MI 49503
Phone: (616) 456-2381

U.S. District Court
107 Federal Building
410 West Michigan Avenue
Kalamazoo, MI 49007
Phone: (269) 337-5706

U.S. District Court
113 Federal Building
315 West Allegan Street
Lansing, MI 48933
Phone: (517) 377-1559

U.S. District Court
229 Federal Building
202 West Washington Street
PO Box 698
Marquette, MI 49855
Phone: (906) 226-2021

Ohio Northern District Court

Website: <http://www.ohnd.uscourts.gov/>

John F. Seiberling Federal Building and U.S.
Courthouse
2 South Main Street
Akron, Ohio 44308
Phone: (330) 252-6000

Carl B. Stokes U.S. Court House
801 West Superior Avenue
Cleveland, Ohio 44113
Phone: (216) 357-7000

James M. Ashley and Thomas W.L. Ashley
U.S. Courthouse
1716 Spielbusch Avenue
Toledo, Ohio 43604
Phone: (419) 213-5500

Thomas D. Lambros Federal Building & U.S.
Courthouse
125 Market Street
Youngstown, Ohio 44503
Phone: (330) 884-7400

Ohio Southern District Court

Website: <http://www.ohsd.uscourts.gov/>

Office of the Clerk
Potter Stewart U.S. Courthouse
100 East Fifth Street, Room 103
Cincinnati, Ohio 45202
Phone: (513) 564-7500

Office of the Clerk
Joseph Kinneary U.S. Courthouse
85 Marconi Boulevard, Room 121
Columbus, Ohio 43215
Phone: (614) 719-3000

Office of the Clerk
Federal Building
200 West Second Street, Room 712
Dayton, Ohio 45402
Telephone: (937) 512-1400

Tennessee Eastern District Court

Website: <http://www.tned.uscourts.gov/>

James H. Quillen U.S. Courthouse
220 West Depot Street, Suite 200
Greeneville, TN 37743
Phone: (423) 639-3105

Howard H. Baker, Jr. U.S. Courthouse
800 Market Street, Suite 130
Knoxville, TN 37902
Phone: (865) 545-4228

Joel W. Solomon Federal Building, U.S.
Courthouse
900 Georgia Avenue
Chattanooga, TN 37402
Phone: (423) 752-5200

Federal Building – Post Office – Courthouse
200 South Jefferson Street
Winchester, TN 37398
Phone: (423) 752-5200
Mailing Address:
900 Georgia Avenue
Chattanooga, TN 37402

Tennessee Middle District Court

Website: <http://www.tnmd.uscourts.gov/>

U.S. Courthouse
Estes Kefauver Federal Building &
Courthouse
801 Broadway, Room 800
Nashville, TN 37203
Phone: (615) 736-5498
Mailing Address:
U.S. District Court
801 Broadway, Room 800
Nashville, TN 37203

U.S. Courthouse & Post Office Building
815 South Garden Street
Columbia, TN 38401
Phone: (615) 736-5498
Mailing Address:

U.S. District Court
801 Broadway, Room 800
Nashville, TN 37203

L. Clure Morton U.S. Post Office and
Courthouse
9 East Broad Street
Cookeville, TN 38501
Phone: (615) 736-5498
Mailing Address:
U.S. District Court
801 Broadway, Room 800
Nashville, TN 37203

Tennessee Western District Court

Website: <http://www.tnwd.uscourts.gov/>

Western Divisional Office
167 North Main Street, Room 242
Memphis, TN 38103
Phone: (901) 495-1200

Eastern Divisional Office
111 South Highland Avenue, Room 262
Jackson, TN 38301
Phone: (731) 421-9200

7. Federal Courts in the Seventh Circuit

Court of Appeals

Court of Appeals for the Seventh Circuit
Everett McKinley Dirksen
U.S. Courthouse
219 South Dearborn Street
Room 2722
Chicago, IL 60604
Phone: (312) 435-5850

Website: <http://www.ca7.uscourts.gov/>

District Courts

Illinois Central District Court

Website: <http://www.ilcd.uscourts.gov/>

Peoria Division
309 U.S. Courthouse
100 North East Monroe Street
Peoria, IL 61602
Phone: (309) 671-7117

Rock Island Division
U.S. District Court
Rock Island Division
131 E. 4th Street, Room 250
Davenport, IA 52801
Phone: (309) 793-5778

Springfield Division
151 U.S. Courthouse
600 East Monroe Street
Springfield, IL 62701
Phone: (217) 492-4020

Urbana Division
218 U.S. Courthouse
201 South Vine Street
Urbana, IL 61802
Phone: (217) 373-5830

Illinois Northern District Court

Website: <http://www.ilnd.uscourts.gov/>

Main Office
Everett McKinley Dirksen Building
U.S. Courthouse

219 South Dearborn Street
Chicago, IL 60604
Phone: (312) 435-5670

Rockford Division
Stanley J. Roszkowski
United States Courthouse
327 South Church Street
Rockford, IL 61101
Phone: (815) 987-4354

Illinois Southern District Court

Website: <http://www.ilsd.uscourts.gov/>

U.S. District Court
301 West Main Street
Benton, IL 62812
(618) 439-7760

U.S. District Court
750 Missouri Avenue
East St. Louis, IL 62201
(618) 482-9371

Indiana Northern District Court

Website: <http://www.innd.uscourts.gov/>

Fort Wayne Division
U.S. District Court
Northern District of Indiana
1300 South Harrison Street
Fort Wayne, IN 46802
Phone: (260) 423-3000

Hammond Division
U.S. District Court

Northern District of Indiana
5400 Federal Plaza
Suite 2300
Hammond, IN 46320
Phone: (219) 852-6500

Lafayette Division
U.S. District Court
Northern District of Indiana
214 Charles A. Halleck Federal Building
230 North Fourth Street, Room 105
Lafayette, IN 47901
Phone: (765) 420-6250

South Bend Division
U.S. District Court
102 Federal Building
204 South Main Street
South Bend, IN 46601
Phone: (574) 246-8000

Indiana Southern District Court
Website: <http://www.insd.uscourts.gov/>

Evansville Division
304 Federal Building
101 Northwest MLK Boulevard, Room 304
Evansville, IN 47708
Phone: (812) 434-6410

Indianapolis Division
105 Birch Bayh Federal Building and U.S.
Courthouse
46 East Ohio Street, Room 105
Indianapolis, IN 46204
Phone: (317) 229-3700

New Albany Division
210 Lee H. Hamilton Federal Building and
U.S. Courthouse
121 West Spring Street, Room 210

New Albany, IN 47150
Phone: (812) 542-4510

Terre Haute Division
U.S. District Court
921 Ohio Street, Room 104
Terre Haute, IN 47807
Phone: (812) 231-1840

Wisconsin Eastern District Court
Website: <http://www.wied.uscourts.gov/>

Milwaukee Division
United States Federal Building and
Courthouse
517 E. Wisconsin Ave - Room 362
Milwaukee, WI 53202
Phone: (414) 297-3372

Green Bay Division
Jefferson Court Building
125 South Jefferson Street, Room 102
Green Bay, WI 54305-4541
Phone: (920) 884-3720

Wisconsin Western District Court
Website: <http://www.wiwd.uscourts.gov/>

Clerk of Court
U.S. District Court
Western District of Wisconsin
120 North Henry Street, Room 320
Madison, WI 53703
Phone: (608) 264-5156

8. Federal Courts in the Eighth Circuit

Court of Appeals

Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102
Phone: (314) 244-2400

Court of Appeals for the Eighth Circuit
St. Paul Office
Federal Court Building
316 North Robert Street
Room 500
St. Paul, MN 55101
Phone: (651) 848-1300

Website: <http://www.ca8.uscourts.gov/>

District Courts

Arkansas Eastern District Court

Website: <http://www.are.uscourts.gov>

Richard Sheppard Arnold U.S. Courthouse
500 West Capitol Avenue
Little Rock, AR 72201
Phone: (501) 604-5351
Mailing Address:
U.S. District Court
Eastern District of Arkansas
600 W Capitol Ave, Rm A149
Little Rock, AR 72201

E.C. Gathings Federal Building and U.S.
Courthouse
615 South Main Street, Room 312
Jonesboro, AR 72401
Phone: (870) 972-4610

Jacob Trieber Federal Building, U.S. Post
Office, and U.S. Courthouse
617 Walnut
Helena, AR 72342
Phone: (501) 604-5351
Mailing Address:
US District Court
Eastern District of Arkansas
600 W Capitol Ave, Rm A149
Little Rock, AR 72201

Arkansas Western District Court

Website: <http://www.arwd.uscourts.gov/>

El Dorado Division
U.S. Courthouse
101 South Jackson Avenue, Room 205
El Dorado, AR 71730
Phone: (870) 862-1202

Fayetteville Division
John Paul Hammerschmidt Federal Building
35 East Mountain St, Suite 510
Fayetteville, AR 72701
Phone: (479) 521-6980

Main Office
Judge Isaac C. Parker Federal Building
30 South 6th Street, Room 1038
Fort Smith, AR 72901
Phone: (479) 783-6833

Hot Springs Division
U.S. Courthouse
100 Reserve Street, Room 347
Hot Springs, AR 71901
Phone: (501) 623-6411 / (479) 783-6833
Mailing Address:
Judge Isaac C. Parker Federal Building
30 South 6th Street, Room 1038
Fort Smith, AR 72901

Texarkana Division
U.S. Courthouse and Post Office Building
500 North State Line Avenue, Room 302
Texarkana, AR 71854
Phone: (870) 773-3381
Mailing Address:
Judge Isaac C. Parker Federal Building
30 South 6th Street, Room 1038
Fort Smith, AR 72901

Iowa Northern District Court

Website: <http://www.iand.uscourts.gov/>

U.S. District Court
Northern District of Iowa
111 Seventh Avenue SE
Box 12
Cedar Rapids, IA 52401
Phone: (319) 286-2300

U.S. District Court
Northern District of Iowa
320 6th Street
Room 301
Sioux City, IA 51101
Phone: (712) 233-3900

Iowa Southern District Court

Website: <http://www.iasd.uscourts.gov/>

U.S. District Court
Southern District of Iowa
123 East Walnut Street, Suite 300
Des Moines, IA 50309
Phone: (515) 284-6248

U.S. District Court
Southern District of Iowa
131 East 4th Street, Suite 150
Davenport, IL 52801
Phone: (563) 884-7607

U.S. District Court
Southern District of Iowa
8 South 6th Street, Room 313
Council Bluffs, IA 51501
Phone: (712) 328-0283

Minnesota District Court

Website: <http://www.mnd.uscourts.gov/>

Diana E. Murphy U.S. Courthouse
300 South Fourth Street - Suite 202
Minneapolis, MN 55415
Phone: (612) 664-5000

Warren E. Burger Federal Building and U.S.
Courthouse
316 North Robert Street
Suite 100
St. Paul, MN 55101
Phone: (612) 664-5000

Gerald W. Heaney Federal Building and U.S.
Courthouse and Customhouse
515 West First Street
Suite 417
Duluth, MN 55802-1397
Phone: (612) 664-5000

Edward J. Devitt U.S. Courthouse and
Federal Building
118 South Mill Street
212 USPO Building
Fergus Falls, MN 56537
Phone: (612) 664-5000

Missouri Eastern District Court

Website: <http://www.moed.uscourts.gov/>

Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Suite 3.300
St. Louis, MO 63102
Phone: (314) 244-7900

Rush Hudson Limbaugh, Sr. U.S. Courthouse
555 Independence Street
Cape Girardeau, MO 63703
Phone: (573) 331-8800

801 Broadway
Hannibal, MO 63401
Phone: (573) 221-0757

Missouri Western District

Website: <http://www.mow.uscourts.gov/>

Jefferson City – Central Division
Christopher S. Bond Court House
80 Lafayette Street
Jefferson City, MO 65101
Phone: (573) 636-4015

Springfield – Southern Division
1400 U.S. Courthouse
222 North John Q. Hammons Parkway
Springfield, MO 65806
Phone: (417) 865-3869

Kansas City – Western Division
Charles Evans Whittaker U.S. Courthouse
400 East 9th Street
Kansas City, MO 64106
Phone: (816) 512-5000

Nebraska District Court

Website: <http://www.ned.uscourts.gov/>

Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, Suite 1152
Omaha, NE 68102
Phone: (402) 661-7350

Robert V. Denney Federal Building
100 Centennial Mall North
Room 593
Lincoln, NE 68508
Phone: (402) 437-1900
Mailing Address:
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, Suite 1152
Omaha, NE 68102

North Dakota District Court

Website: <http://www.ndd.uscourts.gov/>

Bismarck Division
William L. Guy Federal Building
U.S. Courthouse
220 East Rosser Avenue #476
Bismarck, ND 58501
Phone: (701) 530-2300
Mailing Address:
U.S. District Court
P.O. Box 1193
Bismarck, ND 58502-1193

Minot Division
Bruce M. Van Sickle
U.S. Courthouse
100 1st Street SW
Minot, ND 58701
Phone: (701) 530-2300
Mailing Address:
U.S. District Court
P.O. Box 1193
Bismarck, ND 58502-1193

Fargo Division
Quentin N. Burdick
U.S. Courthouse
655 1st Avenue North, #130
Fargo, ND 58102
Phone: (701) 297-7000

Grand Forks Division
Ronald N. Davies Federal Building and
U.S. Courthouse
102 North 4th Street, Suite 308
Grand Forks, ND 58203
Phone: (701) 297-7000
Mailing Address:
U.S. Courthouse
655 1st Avenue North, #130
Fargo, ND 58102

South Dakota District Court

Website: <https://www.sdd.uscourts.gov/>

Main Office

U.S. District Court

400 South Phillips Avenue

Sioux Falls, SD 57104

Phone: (605) 330-6600

U.S. Post Office and Courthouse

225 South Pierre Street

Pierre, SD 57501

Phone: (605) 945-4600

Mailing Address:

PO Box 7147

U.S. Post Office and Courthouse

225 South Pierre Street

Pierre, SD 57501

Andrew W. Bogue Federal Building and U.S.
Courthouse

515 Ninth Street

Rapid City, SD 57701

Phone: (605) 399-6000

U.S. District Court

102 Fourth Avenue S.E., Room 408

Aberdeen, SD 57401

Phone: (605) 377-2600

9. Federal Courts in the Ninth Circuit

Court of Appeals

Website: <http://www.ca9.uscourts.gov/>

Court of Appeals for the Ninth Circuit
James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103
Phone: (415) 355-8000
Mailing Address:
Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119

The Richard H. Chambers Courthouse
125 South Grand Avenue
Pasadena, CA 91105
Phone: (626) 229-7250
Mailing Address:
Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119

The Pioneer Courthouse
700 S.W. 6th Avenue, Suite 110
Portland, Oregon 97204
Phone: (503) 833-5311
Mailing Address:
Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119

William K. Nakamura Courthouse
1010 Fifth Avenue
Seattle, WA 98104
Phone: (206) 224-2200
Mailing Address:
Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119

District Courts

Alaska District Court

Website: <http://www.akd.uscourts.gov/>

U.S. District Court
222 West 7th Avenue, Room 229, Box/Suite #4
Anchorage, AK 99513
Phone: (907) 677-6100; (866) 243-3814 toll free

U.S. District Court
101 12th Avenue, Room 332
Fairbanks, AK 99701
Phone: (907) 451-5791; (866) 243-3813 toll free

Hurff Ackerman Saunders Federal Buildings
and Robert Boochever U.S. Courthouse
U.S. District Court
709 W. 9th Street, Rm 979
Juneau, AK 99801
Phone: (907) 586-7458; (866) 243-3812 toll free
Mailing Address:

PO Box 020349
Juneau, AK 99802

U.S. District Court
U.S. District Court
3609 Tongass Avenue #5822
Ketchikan, AK 99901
Phone: (907) 586-7458; (866) 243-3812 toll free
Mailing Address:
U.S. District Court
PO Box 5822
Ketchikan, AK 99901

Norton Sound Regional Building
306 W. 5th Avenue
Nome, AK 99762
Phone: (907) 443-2259
Mailing Address:
U.S. District Court
PO Box 130
Nome, AK 99762

Arizona District CourtWebsite: <http://www.azd.uscourts.gov/>

U.S. Courthouse
123 North San Francisco Street, Suite 200
Flagstaff, AZ 86001
Phone: (928) 774-2566

Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street, Suite 130, SPC 1
Phoenix, AZ 85003
Phone: (602) 322-7200

Evo A. DeConcini U.S. Courthouse
405 West Congress Street, Suite 1500
Tucson, AZ 85701
Phone: (520) 205-4200

John M. Roll United States Courthouse

98 West 1st Street
Yuma, AZ 85364
Phone: (928) 329-4766

California Central District CourtWebsite: <http://www.cacd.uscourts.gov/>

George E. Brown, Jr. Federal Building & U.S.
Courthouse
3470 Twelfth Street
Riverside, CA 92501
Phone: (951) 328-4450

Ronald Reagan Federal Building &
Courthouse
411 West Fourth Street, Room 1053
Santa Ana, CA 92701
Phone: (714) 338-4750

Edward R. Roybal Federal Building & U.S.
Courthouse
255 East Temple Street
Los Angeles, CA 90012
Phone: (213) 894-1565

U.S. Courthouse
350 W 1st Street, Suite 4311
Los Angeles, CA 90012-4565
Phone: (213) 894-1565

California Eastern District CourtWebsite: <http://www.caed.uscourts.gov>

Robert T. Matsui Federal Courthouse
501 I Street, Room 4-200
Sacramento, CA 95814
Phone: (916) 930-4000

Robert E. Coyle Federal Courthouse
2500 Tulare Street, Room 1500
Fresno, CA 93721
Phone: (559) 499-5600

Yosemite Federal Courthouse
9004 Castle Cliff Court
Yosemite, CA 95389
Phone: (209) 372-0320

Mailing Address:

Robert E. Coyle Federal Courthouse
2500 Tulare Street, Room 1500
Fresno, CA 93721

Redding Federal Courthouse
2986 Bechelli Lane
Redding, CA 96002
Phone: (530) 246-5416

Mailing Address:

Robert T. Matsui Federal Courthouse
501 I Street, Room 4-200
Sacramento, CA 95814

Bakersfield Federal Courthouse
510 19th Street, Suite 200
Bakersfield, CA 93301
Phone: (661) 326-6620

Mailing Address:

Robert E. Coyle Federal Courthouse
2500 Tulare Street, Room 1500
Fresno, CA 93721

California Northern District CourtWebsite: <http://www.cand.uscourts.gov/home>

U.S. Courthouse
3140 Boeing Avenue
McKinleyville, CA 95519
Phone: (707) 445-3612

Ronald V. Dellums Federal Building
1301 Clay Street, Suite 400 S
Oakland, CA 94612
Phone: (510) 637-3530

Phillip Burton Federal Building & U.S.
Courthouse
450 Golden Gate Avenue, 16th Floor
San Francisco, CA 94102
Phone: (415) 522-2000

Robert F. Peckham Federal Building & U.S.
Courthouse
280 South 1st Street, 2nd Floor
San Jose, CA 95113
Phone: (408) 535-5363

California Southern District Court
Website: <http://www.casd.uscourts.gov/>

James M. Carter & Judith N. Keep
U.S. Courthouse
333 West Broadway, Suite 420
San Diego, CA 92101
Phone: (619) 557-5600

Edward J. Schwartz U.S. Courthouse
221 West Broadway
San Diego, CA 92101
Phone: (619) 557-5600
Mailing Address:
U.S. District Court
Southern District of California
Office of the Clerk
333 West Broadway, Suite 420
San Diego, CA 92101

U.S. District Court
2003 West Adams Ave, Suite 220
El Centro, CA 92243
Phone: (760) 339-4242
Mailing Address:
U.S. District Court
Southern District of California
Office of the Clerk
333 West Broadway, Suite 420
San Diego, CA 92101

Guam District Court
Website: <http://www.gud.uscourts.gov/>

U.S. Courthouse
520 West Soledad Avenue FL 4
Hagatna, Guam 96910
Phone: (671) 969-4500

Hawaii District Court
Website: <http://www.hid.uscourts.gov/>

300 Ala Moana Boulevard, Room C338
Honolulu, HI 96850
Phone: (808) 541-1300

Idaho District Court
Website: <http://www.id.uscourts.gov/>

James A. McClure Federal Building & U.S.
Courthouse
550 West Fort Street, Suite 400
Boise, ID 83724
Phone: (208) 334-1361; 866-496-1250 toll free

U.S. Courthouse
6450 North Mineral Drive
Coeur d'Alene, ID 83815
Phone: (208) 665-6850; (866) 299-5515 toll free

U.S. Courthouse
801 East Sherman Street, Room 119
Pocatello, ID 83201
Phone: (208) 478-4123; (866) 444-6086 toll free

Montana District Court
Website: <http://www.mtd.uscourts.gov/>

James F. Battin Courthouse
2601 2nd Avenue North
Billings, MT 59101
Phone: (406) 247-7000

Mike Mansfield Federal Courthouse
U.S. District Court
400 North Main Street
Butte, MT 59701
Phone: (406) 497-1279

Missouri River Federal Courthouse
U. S. District Court
125 Central Avenue West
Great Falls, MT 59404
Phone: (406) 727-1922

Paul G. Hatfield Federal Courthouse
901 Front Street
Helena, MT 59626
Phone: (406) 441-1355

Russell Smith Federal Courthouse
201 East Broadway
Missoula, MT 59802
Phone: (406) 542-7260

Nevada District Court

Website: <http://www.nvd.uscourts.gov/>

333 Las Vegas Boulevard South
Las Vegas, NV 89101
Phone: (702) 464-5400

400 South Virginia Street
Reno, NV 89501
Phone: (775) 686-5800

Northern Mariana Islands District Court

Website: <http://www.nmid.uscourts.gov/>

United States District Court
for the Northern Mariana Islands
1671 Gualo Rai Road
Saipan, MP 96950
Phone: (670) 237-1200
Mailing Address:
United States District Court
for the Northern Mariana Islands
P.O. Box 500687
Saipan, MP 96950

Oregon District Court

Website: <http://www.ord.uscourts.gov/>

Mark O. Hatfield U.S. Courthouse
Office of the Clerk, Suite 740
1000 S.W. Third Avenue
Portland, OR 97204
Phone: (503) 326-8000

Wayne L. Morse U.S. Courthouse
405 East Eighth Avenue, Room 2100
Eugene, OR 97401
Phone: (541) 431-4100

James A. Redden U.S. Courthouse
310 West Sixth Street, Room 201
Medford, OR 97501
Phone: 541-608-8777

John F. Kilkenny U.S. Post Office and
Courthouse
104 S.W. Dorion
Pendleton, OR 97801
Phone: (503) 326-8000

Washington Eastern District Court

Website: <http://www.waed.uscourts.gov/>

Thomas S. Foley U.S. Courthouse
920 West Riverside Avenue, Room 840
Spokane, WA 99201
Phone: (509) 458-3400
Mailing Address:
US District Court
PO Box 1493
Spokane, WA 99210

U.S. Courthouse & Federal Building
825 Jadwin Avenue, Room 174
Richland, WA 99352
Phone: (509) 943-8170

William O. Douglas Courthouse
25 South Third Street, Room 201
Yakima, WA 98901
Phone: (509) 573-6600
Mailing Address:
US District Court
P.O. Box 2706
Yakima, WA 98907

Washington Western District Court

Website: <http://www.wawd.uscourts.gov/>

U.S. District Court
Clerk's Office
700 Stewart Street, Suite 2310
Seattle, WA 98101
Phone: (206) 370-8400

Union Station Courthouse
Clerk's Office
1717 Pacific Avenue, Room 3100
Tacoma, WA 98402
Phone: (253) 882-38

10. Federal Courts in the Tenth Circuit

Court of Appeals

Court of Appeals for the Tenth Circuit
The Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257
Phone: (303) 844-3157

Website: <http://www.ca10.uscourts.gov/>

District Courts

Colorado District Court

Website: <http://www.cod.uscourts.gov/>

Alfred A. Arraj U.S. Courthouse
901 19th Street, Room A105
Denver, Colorado 80294
Phone: (303) 844-3433

Kansas District Court

Website: <http://www.ksd.uscourts.gov/>

Robert J. Dole Courthouse
500 State Avenue, Room 259
Kansas City, Kansas 66101
Phone: (913) 735-2200

Frank Carlson Federal Building
444 S.E. Quincy Street, Room 490
Topeka, Kansas 66683
Phone: (785) 338-5400

Wichita U.S. Courthouse
401 North Market Street, Room 204
Wichita, Kansas 67202
Phone: (316) 315-4200

New Mexico District Court

Website: <http://www.nmcourt.fed.us/>

Pete V. Domenici U.S. Courthouse
333 Lomas N.W. Suite 270
Albuquerque, NM 87102
Phone: (505) 348-2000

Clerk's Office
U.S. District Court
100 North Church Street Suite 280
Las Cruces, NM 88001
Phone: (575) 528-1400

Santiago E. Campos U.S. Courthouse
106 South Federal Place
Santa Fe, NM 87501
Phone: (505) 988-6481

U.S. Circuit Court
500 North Richardson
Roswell, NM 88201
Phone: (575) 637-7960

Oklahoma Eastern District Court

Website: <http://www.oked.uscourts.gov/>

101 North 5th Street, Room 208
Muskogee, OK 74401
Phone: (918) 684-7920
Mailing Address:
P.O. Box 607
Muskogee, OK 74402

Oklahoma Northern District Court

Website: <http://www.oknd.uscourts.gov/>

Page Belcher Federal Building
333 West 4th Street, Room 411
Tulsa, OK 74103
Phone: (918) 699-4700
Boulder Building
224 South Boulder Avenue
Tulsa, OK 74103
Phone: (918) 699-4700

Oklahoma Western District Court

Website: <http://www.okwd.uscourts.gov/>

200 N.W. 4th Street, Room 1210
Oklahoma City, OK 73102
Phone: (405) 609-5000

Utah District CourtWebsite: <http://www.utd.uscourts.gov/>

351 South West Temple, Room 1.100
Salt Lake City, UT, 84101
Phone: (801) 524-6100

Wyoming District CourtWebsite: <http://www.wyd.uscourts.gov/>

Joseph C. O'Mahoney Federal Center
2120 Capitol Avenue, Room 2131
Cheyenne, WY 82001
Phone: (307) 433-2120

Ewing T. Kerr Federal Building & U.S.
Courthouse
111 South Wolcott Street, Room 121
Casper, WY 82601
Phone: (307) 232-2620

Yellowstone Justice Center
105 Albright Avenue, 2nd Floor
Mammoth, WY 82190
Phone: (307) 344-2569
Mailing Address:
P.O. Box 387
Yellowstone National Park, WY 821

Federal Courts in the Eleventh Circuit**Court of Appeals**

Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303
Phone: (404) 335-6100

Website: <http://www.ca11.uscourts.gov/>

District Courts**Alabama Middle District Court**

Website: <http://www.almd.uscourts.gov/>

Frank M. Johnson Federal Courthouse
One Church Street
Room B-110
Montgomery, AL 36104
Phone: (334) 954-3600

207 Northwest Second Street, Rm. 337
Ocala, FL 34475
Phone: (352) 369-4860

U.S. Courthouse
401 West Central Boulevard, Suite 1200
Orlando, FL 32801
Phone: (407) 835-4200

Alabama Northern District Court

Website: <http://www.alnd.uscourts.gov/>

Hugo L. Black U. S. Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203
Phone: (205) 278-1700

Sam M. Gibbons U.S. Courthouse
801 North Florida Avenue
Tampa, FL 33602
Phone: (813) 301-5400

U.S. Courthouse & Federal Building
2110 First Street, Rm. 2-194
Fort Myers, FL 33901
Phone: (239) 461-2000

United States District Court
101 Holmes Avenue
Huntsville, AL 35801
Phone: (256) 534-6495

Florida Northern District Court
Website: <http://www.flnd.uscourts.gov/>

Alabama Southern District Court

Website: <http://www.alsd.uscourts.gov/>

United States District Courthouse
155 St. Joseph Street
Mobile, AL 36602
Phone: (251) 690-2371

United States Courthouse
401 SE First Avenue, Room 243
Gainesville, FL 32601
Phone: (352) 380-2400

United States Courthouse
30 West Government Street
Panama City, FL 32401
Phone: (850) 691-0770

Florida Middle District Court

Website: <http://www.flmd.uscourts.gov/>

Bryan Simpson United States Courthouse
300 North Hogan Street, Rm. 9-150
Jacksonville, FL 32202
Phone: (904) 549-1900

United States Courthouse
1 North Palafox Street
Pensacola, FL 32502
Phone: (850) 435-8440

Golden-Collum Memorial Federal Building &
U.S. Courthouse

United States Courthouse
111 North Adams Street, Suite 322
Tallahassee, FL 32301-7730
Phone: (850) 521-3501

Florida Southern District Court

Website: <http://www.flsd.uscourts.gov/>

United States Federal Building & Courthouse
299 East Broward Boulevard #108
Fort Lauderdale, FL 33301
Phone: (954) 769-5400

Alto Lee Adams, Sr. U.S. Courthouse
101 South U.S. Highway 1, Room #1016
Fort Pierce, FL 34950
Phone: (772) 467-2300

Wilkie D. Ferguson, Jr. U.S. Courthouse
400 North Miami Avenue, Room 8N09
Miami, FL 33128
Phone: (305) 523-5100

Sidney M. Aronovitz U.S. Courthouse
301 Simonton Street
Key West, FL 33040
Phone: (305) 295-8100

Paul G. Rogers Federal Building & U.S.
Courthouse
701 Clematis Street, Room 202
West Palm Beach, FL 33401
Phone: (561) 803-3400

Georgia Middle District Court

Website: <http://www.gamd.uscourts.gov/>

C. B. King U.S. Courthouse
201 West Broad Avenue
Albany, Georgia 31701
Phone: (229) 430-8432

U.S. Post Office & Courthouse
115 East Hancock Avenue
Athens, GA 30601
Phone: (706) 227-1094
Mailing Address:
P.O. Box 1106
Athens, GA 30601

U.S. Post Office & Court House
120 12th Street, Suite 216
Columbus, GA 31902
Phone: (706) 649-7816
Mailing Address:
P.O. Box 124
Columbus, GA 31902

William A. Bootle Federal Building and U.S.
Courthouse
475 Mulberry Street
Macon, GA 31201
Phone: (478) 752-3497
Mailing Address
P.O. Box 128
Macon, GA 31202

U.S. Courthouse & Post Office
401 N. Patterson Street
Valdosta, GA 31601
Phone: (229) 242-3616

Mailing Address:
P.O. Box 68
Valdosta, GA 31601

Georgia Northern District Court

Website: <http://www.gand.uscourts.gov/>

Richard B. Russell Federal Building & U.S.
Courthouse
2211 United States Courthouse
75 Ted Turner Drive, SW
Atlanta, GA 30303
Phone: (404) 215-1600

U.S. Courthouse & Federal Building
121 Spring Street SE, Room 201
Gainesville, Georgia 30501
Phone: (678) 450-2760

Lewis R. Morgan Federal Building & U.S.
Courthouse
18 Greenville Street
Newnan, Georgia 30263
Phone: (678) 423-3060

United States Courthouse
600 East First Street
Rome, Georgia 30161
Phone: (706) 378-4060

Georgia Southern District Court

Website: <http://www.gasd.uscourts.gov/>

U.S. Courthouse
125 Bull Street
Savannah, GA 31401
Phone: (912) 650-4020
Mailing Address:
P.O. Box 8286
Savannah, GA 31412

Federal Justice Center
600 James Brown Boulevard
Augusta, GA 30901
Phone: (706) 849-4400
Mailing Address:
P.O. Box 1130
Augusta, GA 30903

Frank M. Scarlett Federal Building
801 Gloucester Street
Brunswick, GA 31520
Phone: (912) 280-1330
Mailing Address:
P.O. Box 1636
Brunswick, GA 31521

Dublin Courthouse
100 North Franklin Street
Dublin, GA 31021
Phone: (478) 272-2121 / (706) 849-4400
Mailing Address:
PO Box 1130
Augusta, GA 30903

Waycross Courthouse
601 Tebeau Street.
Waycross, GA 31501
Phone: (912) 283-2870 / (912) 280-1330
Mailing Address:
P.O. Box 1636
Brunswick, GA 31521

Statesboro Courthouse
52 North Main Street
Statesboro, GA 30458
Phone: (912) 764-3276 / (912) 650-4020
Mailing Address:
PO Box 8286
Savannah, GA 31412

11. Federal Courts in the D.C. Circuit and Federal Circuit**DC Circuit Court of Appeals**

Court of Appeals for the D.C. Circuit
 E. Barrett Prettyman U.S. Courthouse and William B. Bryant Annex
 333 Constitution Avenue, N.W.
 Washington, DC 20001
 Phone: (202) 216-7300

Website: <http://www.cadc.uscourts.gov>

DC District Court

United States District Court for the District of Columbia
 5423 E. Barrett Prettyman U.S. Courthouse
 333 Constitution Avenue, N.W.
 Room 1225
 Washington, DC 20001
 Phone: (202) 354-3000

Website: <http://www.dcd.uscourts.gov/>

Federal Circuit

U.S. Court of Appeals for the Federal Circuit
 717 Madison Place, N.W.
 Washington, DC 20005
 Phone: (202) 275-8000

Website: <http://www.cafc.uscourts.gov/>

B. New York State Prisons and Their Respective Federal Judicial Districts

Prison	Federal District	Prison	Federal District
Adirondack	Northern	Fishkill	Southern
Albion	Western	Five Points	Western
Altona	Northern	Franklin	Northern
Attica	Western	Gouverneur	Northern
Auburn	Northern	Gowanda	Western
Bare Hill	Northern	Great Meadow	Northern
Bedford Hills	Southern	Green Haven	Southern
Cape Vincent	Northern	Greene	Northern
Cayuga	Northern	Groveland	Western
Clinton	Northern	Hale Creek	Northern
Clinton Annex	Northern	Hudson	Northern
Collins	Western	Lakeview	Western
Coxsackie	Northern	Marcy	Northern
Downstate	Southern	Mid-State	Northern
Eastern	Northern	Mohawk	Northern
Edgecombe	Southern	Moriah	Northern
Elmira	Western	Ogdensburg	Northern

Orleans	Western
Otisville	Southern
Queensboro	Eastern
Riverview	Northern
Rochester.....	Western
Shawangunk	Northern
Sing Sing	Southern
Southport	Western
Sullivan	Southern
Taconic	Southern
Ulster.....	Northern
Upstate.....	Northern
Wallkill.....	Northern
Washington	Northern
Watertown.....	Northern
Wende.....	Western
Willard	Western
Woodbourne	Southern
Wyoming	Western

APPENDIX II

NEW YORK STATE: FILING INSTRUCTIONS & ADDRESSES OF NEW YORK STATE COURTS

This Appendix contains information on how to file legal papers in New York State as well as contact information for New York State Courts, including clerks' offices.

A. General Filing Instructions

Each Chapter explaining the legal action you are filing should tell you with whom you need to file your papers. This Appendix provides the addresses for the Supreme Courts and County Clerks of New York. Part B of this Appendix explains how to file your poor person's papers with a County Attorney. Part C lists the addresses of the New York Supreme Courts. Part D lists the addresses of the New York County Clerks. Part E lists the addresses of the New York Court of Appeals and Appellate Division Courts.

The County Clerk generally forwards all mail to the judge in his or her county. But the addresses of Supreme Court Clerks are also included for your convenience. If you are unsure of the Supreme Court address, always send your mail to the County Clerk, who will forward it to the appropriate party.

If you already have an index number, you should send your documentation to the Supreme Court Clerk and should include the index number with all correspondence. If you do not have an index number and you are filing a new petition (like an Article 78 petition), you need to file a Request for Judicial Intervention ("RJI") with the County Clerk to obtain an index number. When you mail documentation, you should specifically refer to the person you are trying to contact by addressing the envelope: "[name or title of the person you are trying to contact] c/o County Clerk [or Supreme Court Clerk], _____ County," followed by the correct town, state, and ZIP code.

For Article 440 and other proceedings related to your criminal sentence, you should mail documents and letters to the "Clerk of the Criminal Court, Supreme Court, _____ County." For Article 78 and all civil proceedings, you should mail documents and letters to the "Clerk of the Civil Court, Supreme Court, _____ County."

If the Chapter about the type of lawsuit you are filing instructs you to file any of your papers (for example, poor person's papers, notice of your suit, or any other motion or filing) with the District Attorney, see Appendix III for a list of their addresses.

B. How to File Poor Person's Papers with the County Attorney

If you are applying for poor person's status to not have to pay full court costs, send a copy of your poor person's papers either to the County Clerk or to the County Attorney for the county where the court is located. The County Attorney is not the same as the District Attorney. The County Attorney can be reached at the county office building, listed in this Appendix's Part C. Send your papers to the "County Attorney" at that address. If you address the envelope "County Attorney, _____ County Office Building, [name of county], New York," your papers should arrive at the right place.

If you are filing suit in New York City, you should send a copy of your poor person's papers to the Corporation Counsel instead of the County Attorney. The address is Corporation Counsel, 100 Church Street, 4th Floor, New York, New York 10007. The phone number is (212) 788-0303.

C. New York Supreme Court Addresses

Supreme Court Clerk Addresses Within New York City

BRONX COUNTY

Supreme Court Clerk, Civil Term
Bronx County Courthouse
851 Grand Concourse
Bronx, NY 10451
(718) 618-1400

Supreme Court Clerk, Criminal Term
265 East 161st Street
Bronx, NY 10451
(718) 618-3000

KINGS COUNTY (BROOKLYN)

Supreme Court Clerk, Civil Term
Kings County Courthouse
360 Adams Street
Brooklyn, NY 11201
(718) 675-7699

Supreme Court Clerk, Criminal Term
320 Jay Street
Brooklyn, NY 11201
(646) 386-4500

NEW YORK COUNTY (MANHATTAN)

Supreme Court Clerk, Civil Term
60 Centre Street, Room 161
New York, NY 10007
(646) 386-5955

Supreme Court Clerk, Criminal Term
New York County Courthouse
100 Centre Street, Room 1000
New York, NY 10013
(646) 386-4000

QUEENS COUNTY

Queens County has three different Supreme Courts. If you don't know which of these three parts you are in, call (718) 520-3933 to find out.

Supreme Court Clerk, Civil Term
88-11 Sutphin Boulevard
Jamaica, NY 11435
(718) 298-1140

Supreme Court Clerk, Civil Term
25-10 Court Square
Long Island City, NY 11101
(718) 298-1616

Supreme Court Clerk, Criminal Term
125-01 Queens Boulevard
Kew Gardens, NY 11415
(718) 298-1408

RICHMOND COUNTY (STATEN ISLAND)

Supreme Court Clerk, Civil Term
130 Stuyvesant Place, Room 302
Staten Island, NY 10301
(718) 675-8700

Supreme Court Clerk, Criminal Term
18 Richmond Terrace, Room 110
Staten Island, NY 10301
(718) 675-8760

Supreme Court Clerk Addresses Outside of New York City

ALBANY COUNTY

Supreme Court Clerk
Albany County Courthouse
16 Eagle Street, Room 102
Albany, NY 12207
(518) 285-8989

ALLEGANY COUNTY

Supreme Court Clerk
Allegany County Courthouse
7 Court Street
Belmont, NY 14813-1084
(585) 268-5941

BROOME COUNTY

Supreme Court Clerk
Broome County Courthouse
P.O. Box 1766
Binghamton, NY 13902
(607) 240-5800

CATTARAUGUS COUNTY

Supreme Court Clerk
Cattaraugus County Courthouse
303 Court Street
Little Valley, NY 14755
(716) 938-6636

CAYUGA COUNTY

Supreme Court Clerk
Cayuga County Courthouse
152 Genesee Street
Auburn, NY 13021
(315) 237-6450

CHAUTAUQUA COUNTY

Supreme Court Clerk
Chautauqua County Courthouse
P.O. Box 292
3 North Erie Street
Mayville, NY 14757-0292
(716) 753-4000
(716) 753-4993

CHEMUNG COUNTY

Supreme Court Clerk
Hazlett Building
P.O. Box 588
224 Lake St.
Elmira, NY 14902
(607) 737-2084
(607) 873-9450

CHENANGO COUNTY

Supreme Court Clerk
Chenango County Office Building
5 Court Street
Norwich, NY 13815
(607) 337-1457

CLINTON COUNTY

Supreme Court Clerk
Clinton County Government Center
137 Margaret Street, 3rd Floor
Plattsburgh, NY 12901
(518) 565-4715

COLUMBIA COUNTY

Supreme Court Clerk
Columbia County Courthouse
401 Union Street
Hudson, NY 12534
(518) 851-2874
(518) 267-3150

CORTLAND COUNTY

Supreme Court Clerk
Cortland County Courthouse
46 Greenbush Street, Suite 301
Cortland, NY 13045
(607) 753-5013
(607) 218-3320

DELAWARE COUNTY

Supreme Court Clerk
Delaware County Courthouse
3 Court Street
Delhi, NY 13753
(607) 746-2131
(607) 376-5400

DUTCHESS COUNTY

Supreme Court Clerk
Dutchess County Courthouse
10 Market Street
Poughkeepsie, NY 12601
(845) 431-1710

ERIE COUNTY

Supreme Court Clerk
Erie County Court Building
25 Delaware Avenue, Ground Floor
Buffalo, NY 14202
(716) 845-9301

ESSEX COUNTY

Supreme Court Clerk
Essex County Courthouse
7559 Court Street
P.O. Box 217
Elizabethtown, NY 12932
(518) 873-3370

FRANKLIN COUNTY

Supreme Court Clerk
Franklin County Courthouse
355 West Main Street
Malone, NY 12953
(518) 353-7340

FULTON COUNTY

Supreme Court Clerk
Fulton County Office Building
223 West Main Street
Johnstown, NY 12095
(518) 706-3275

GENESEE COUNTY

Supreme Court Clerk
Genesee County Courts Facility
1 West Main Street
Batavia, NY 14020
(585) 201-5730

GREENE COUNTY

Supreme Court Clerk
Greene County Courthouse
320 Main Street
Catskill, NY 12414
(518) 625-3160

HAMILTON COUNTY

Supreme Court Clerk
139 White Birch Lane
P.O. Box 780
Indian Lake, NY 12842
(518) 648-5411

HERKIMER COUNTY

Supreme Court Clerk
Herkimer County Office & Court Facility
301 N. Washington Street
Herkimer, NY 13350
(315) 619-3400

JEFFERSON COUNTY

Supreme Court Clerk
State Office Building
317 Washington Street
Watertown, NY 13601
(315) 211-5818

LEWIS COUNTY

Supreme Court Clerk
Lewis County Courthouse
7660 State Street
Lowville, NY 13367
(315) 376-5366

LIVINGSTON COUNTY

Supreme Court Clerk
County Court Building
2 Court Street
Geneseo, NY 14454
(585) 371-3920

MADISON COUNTY

Supreme Court Clerk
Madison County Courthouse
North Court Street
P.O. Box 545
Wampsville, NY 13163
(315) 231-5301

MONROE COUNTY

Supreme Court Clerk
Monroe County Court of Justice
99 Exchange Boulevard, Room 545
Rochester, NY 14614
(585) 371-3758

MONTGOMERY COUNTY

Supreme Court Clerk
58 Broadway
P.O. Box 1500
Fonda, NY 12068
(518) 853-4516

NASSAU COUNTY

Supreme Court Clerk
Supreme Court Building
100 Supreme Court Drive
Mineola, NY 11501
(516) 493-3400

NIAGARA COUNTY

Supreme Court Clerk
Angelo A. Delsignore Civic Building
775 Third Street
Niagara Falls, NY 14031
(716) 371-4000

ONEIDA COUNTY

Supreme Court Clerk
Oneida County Courthouse
200 Elizabeth Street
Utica, NY 13501
(315) 266-4200

ONONDAGA COUNTY

Supreme Court Clerk
Onondaga County Courthouse
401 Montgomery Street
Syracuse, NY 13202
(315) 671-1030

ONTARIO COUNTY

Supreme Court Clerk
County Court Building
27 North Main Street
Canandaigua, NY 14424
(585) 412-5300

ORANGE COUNTY

Supreme Court Clerk
285 Main Street
Goshen, NY 10924
(845) 476-3500

ORLEANS COUNTY

Supreme Court Clerk
Orleans County Courthouse
1 South Main Street, Suite 3
Albion, NY 14411
(585) 283-6622

OSWEGO COUNTY

Supreme Court Clerk
Oswego County Courthouse
25 East Oneida Street
Oswego, NY 13126
(315) 207-7500

OTSEGO COUNTY

Supreme Court Clerk
County Court Courthouse
197 Main Street
Cooperstown, NY 13326
(607) 322-3140

PUTNAM COUNTY

Supreme Court Clerk
20 County Center
Carmel, NY 10512
(845) 208-7800

RENSSELAER COUNTY

Supreme Court Clerk
Rensselaer County Courthouse
80 Second Street
Troy, NY 12180
(518) 285-5025

ROCKLAND COUNTY

Supreme Court Clerk
Rockland County Courthouse
1 South Main Street
New City, NY 10956
(845) 483-8310

SARATOGA COUNTY

Supreme Court Clerk
Municipal Center
30 McMaster Street
Ballston Spa, NY 12020
(518) 451-8840

SCHENECTADY COUNTY

Supreme Court Clerk
Schenectady County Judicial Building
612 State Street, 4th Floor
Schenectady, NY 12305
(518) 285-8401

SCHOHARIE COUNTY

Supreme Court Clerk
Schoharie County Courthouse
P.O. Box 669
Schoharie, NY 12157
(518) 453-6998

SCHUYLER COUNTY

Supreme Court Clerk
105 9th Street, Unit 35
Watkins Glen, NY 14891
(607) 228-3350

SENECA COUNTY

Supreme Court Clerk
48 West Williams Street
Waterloo, NY 13165
(315) 835-6229

ST. LAWRENCE COUNTY

Supreme Court Clerk
St. Lawrence County Courthouse
48 Court Street
Canton, NY 13617
(315) 379-2219

STEUBEN COUNTY

Supreme Court Clerk
3 East Pulteney Square
Bath, NY 14810
(607) 622-8219

SUFFOLK COUNTY

Supreme Court Clerk
One Court Street
Riverhead, NY 11901
(631) 852-2334

SULLIVAN COUNTY

Supreme Court Clerk
Sullivan County Courthouse
414 Broadway
Monticello, NY 12701
(845) 791-3540

TIOGA COUNTY

Supreme Court Clerk
Tioga County Supreme Court
20 Court Street
P.O. Box 307
Owego, NY 13827
(607) 689-6102

TOMPKINS COUNTY

Supreme Court Clerk
Tompkins County Courthouse
320 North Tioga Street
P.O. Box 70
Ithaca, NY 14851
(607) 216-6610

ULSTER COUNTY

Supreme Court Clerk
Ulster County Courthouse
285 Wall Street
Kingston, NY 12401
(845) 481-9375

WARREN COUNTY

Supreme Court Clerk
Warren County Municipal Center
1340 State Route 9
Lake George, NY 12845
(518) 480-6335

WASHINGTON COUNTY

Supreme Court Clerk
Washington County Courthouse
383 Broadway
Fort Edward, NY 12828
(518) 746-2521

WAYNE COUNTY

Supreme Court Clerk
54 Broad Street
Lyons, NY 14489
(315) 665-8117

WESTCHESTER COUNTY

Supreme Court Clerk
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, NY 10601
(914) 824-5300 (civil department)
(914) 824-5400 (criminal department)

WYOMING COUNTY

Supreme Court Clerk
Wyoming County Courthouse
147 North Main Street
Warsaw, NY 14569
(585) 228-3200

YATES COUNTY

Supreme Court Clerk
415 Liberty Street
Penn Yan, NY 14527
(315) 835-6308

D. County Clerk Addresses for Counties Outside New York CityALBANY COUNTY

County Clerk
County Courthouse
16 Eagle Street, Room 128
Albany, NY 12207
(518) 487-5100

ALLEGANY COUNTY

County Clerk
P.O. Box 242
7 Court Street, Room 18
Belmont, NY 14813
(585) 268-9270

BROOME COUNTY

County Clerk
County Office Building
60 Hawley Street, Third Floor
P.O. Box 2062
Binghamton, NY 13902
(607) 778-2255

CATTARAUGUS COUNTY

Cattaraugus County Center
303 Court Street
Little Valley, NY 14755
(716) 938-2297

CAYUGA COUNTY

County Clerk
Cayuga County Office Building
160 Genesee Street, 1st Floor
Auburn, NY 13021
(315) 253-1271

CHAUTAUQUA COUNTY

County Clerk
1 North Erie Street
P.O. Box 170
Mayville, NY 14757
(716) 753-4331

CHEMUNG COUNTY

County Clerk
210 Lake Street
P.O. Box 588
Elmira, NY 14902
(607) 737-2920

CHENANGO COUNTY

County Clerk
County Office Building
5 Court Street
Norwich, NY 13815
(607) 337-1450

CLINTON COUNTY

County Clerk
County Government Center
137 Margaret Street, Suite 301
Plattsburgh, NY 12901
(518) 565-4700

COLUMBIA COUNTY

Courthouse
560 Warren Street
Hudson, NY 12534
(518) 828-3339

CORTLAND COUNTY

County Clerk
46 Greenbush Street, Suite 105
Cortland, NY 13045
(607) 753-5021

DELAWARE COUNTY

County Clerk
P.O. Box 426
Delhi, NY 13753
(607) 832-5000

DUTCHESS COUNTY

County Clerk
22 Market Street
Poughkeepsie, NY 12601
(845) 486-2120

ERIE COUNTY

County Clerk
92 Franklin Street
Buffalo, NY 14202
(716) 858-8785

ESSEX COUNTY

County Clerk
7559 Court Street
P.O. Box 247
Elizabethtown, NY 12932
(518) 873-3600

FRANKLIN COUNTY

County Clerk
P.O. Box 70
355 West Main Street, Suite 248
Malone, NY 12953
(518) 481-1681

FULTON COUNTY

County Clerk
County Office Building
223 West Main Street
Johnstown, NY 12095
(518) 736-5555

GENESEE COUNTY

County Clerk
County Building I
P.O. Box 379
Batavia, NY 14021
(585) 815-7802

GREENE COUNTY

County Clerk
411 Main Street
Catskill, NY 12414
(518) 719-3255

HAMILTON COUNTY

County Clerk
P.O. Box 204
102 County View Drive
Lake Pleasant, NY 12108
(518) 548-7111

HERKIMER COUNTY

County Clerk
County Office Building
109 Mary Street, Suite 1111
Herkimer, NY 13350
(315) 867-1129

JEFFERSON COUNTY

County Clerk
175 Arsenal Street, 1st Floor
Watertown, NY 13601
(315) 785-3312

LEWIS COUNTY

County Clerk
7660 State Street
P.O. Box 232
Lowville, NY 13367
(315) 376-5333

LIVINGSTON COUNTY

County Clerk
Livingston County Government Center
6 Court Street, Room 201
Geneseo, NY 14454
(585) 243-7010

MADISON COUNTY

County Clerk
County Office Building
138 N. Court Street, Building 4
P.O. Box 668
Wampsville, NY 13163
(315) 366-2261

MONROE COUNTY

County Clerk
County Office Building
39 West Main Street, Room 101
Rochester, NY 14614
(585) 753-1600

MONTGOMERY COUNTY

County Clerk
County Office Building
P.O. Box 1500
64 Broadway
Fonda, NY 12068
(518) 853-8111

NASSAU COUNTY

County Clerk
County Office Building
240 Old Country Road
Mineola, NY 11501
(516) 571-2660

NIAGARA COUNTY

County Clerk
Niagara County Courthouse
PO Box 461
175 Hawley Street, 1st Floor
Lockport, NY 14095
(716) 439-7022

ONEIDA COUNTY

County Clerk
Oneida County Office Building
800 Park Avenue
Utica, NY 13501
(315) 798-5776

ONONDAGA COUNTY

County Clerk
401 Montgomery Street, Room 200
Syracuse, NY 13202
(315) 435-2226

ONTARIO COUNTY

County Clerk
20 Ontario Street
Canandaigua, NY 14424
(585) 396-4200

ORANGE COUNTY

County Clerk
Orange County Government Center
255 Main Street
Goshen, NY 10924
(845) 291-2690

ORLEANS COUNTY

County Clerk
Courthouse Square
3 South Main Street, Suite 1
Albion, NY 14411
(585) 589-5334

OSWEGO COUNTY

County Clerk
46 East Bridge Street
Oswego, NY 13126
(315) 349-8621

OTSEGO COUNTY

County Clerk
P.O. Box 710
197 Main Street
Cooperstown, NY 13326
(607) 547-4276

PUTNAM COUNTY

County Clerk
Putnam County Office Building
40 Gleneida Avenue
Carmel, NY 10512
(845) 808-1142

RENSSELAER COUNTY

County Clerk
105 Third Street
Troy, NY 12180
(518) 270-4080

ROCKLAND COUNTY

County Clerk
Rockland County Courthouse
1 South Main Street, Suite 100
New City, NY 10956
(845) 638-5221

SARATOGA COUNTY

County Clerk
40 McMaster Street
Ballston Spa, NY 12020
(518) 885-2213

SCHENECTADY COUNTY

County Clerk
620 State Street
Schenectady, NY 12305
(518) 388-4220

SCHOHARIE COUNTY

County Clerk
P.O. Box 549
Schoharie, NY 12157
(518) 295-8316

SCHUYLER COUNTY

County Clerk
105 Ninth Street, Unit 8
Watkins Glen, NY 14891
(607) 535-8133

SENECA COUNTY

County Clerk
Seneca County Office Building
1 DiPronio Drive
Waterloo, NY 13165
(315) 539-1771

ST. LAWRENCE COUNTY

County Clerk
County Courthouse
48 Court Street
Canton, NY 13617
(315) 379-2237

STEUBEN COUNTY

County Clerk
3 East Pulteney Square
Bath, NY 14810
(607) 664-2563

SUFFOLK COUNTY

County Clerk
310 Center Drive
Riverhead, NY 11901
(631) 852-2000

SULLIVAN COUNTY

County Clerk
Sullivan County Government Center
100 North Street
P.O. Box 5012
Monticello, NY 12701
(845) 807-0411

TIOGA COUNTY

County Clerk
Courthouse
16 Court Street
P.O. Box 307
Owego, NY 13827
(607) 687-8660

TOMPKINS COUNTY

County Clerk
Courthouse
320 North Tioga Street
Ithaca, NY 14850
(607) 274-5431

ULSTER COUNTY

County Clerk
County Office Building
244 Fair Street
Kingston, NY 12401
(845) 340-3288

WARREN COUNTY

County Clerk
Warren County Municipal Center
1340 State Route 9
Lake George, NY 12845
(518) 761-6429

WASHINGTON COUNTY

County Clerk
Municipal Center
383 Broadway, Building A
Ft. Edward, NY 12828
(518) 746-2170

WAYNE COUNTY

County Clerk
9 Pearl Street
P.O. Box 608
Lyons, NY 14489
(315) 946-7470

WESTCHESTER COUNTY

County Clerk
110 Dr. Martin Luther King, Jr. Blvd.
White Plains, NY 10601
(914) 995-3070

WYOMING COUNTY

County Clerk
143 North Main Street, Suite 104
Warsaw, NY 14569
(585) 786-8810

YATES COUNTY

County Clerk
County Building
417 Liberty Street, Suite 1107
Penn Yan, NY 14527
(315) 536-5120

E. New York Court of Appeals and Appellate Division Addresses**COURT OF APPEALS**

20 Eagle Street
Albany, NY 12207
(518) 455-7700

FIRST DEPARTMENT

Appellate Division
First Department
27 Madison Avenue
New York, NY 10010
(212) 340-0422

District includes: Bronx and New York
(Manhattan) counties

SECOND DEPARTMENT

Appellate Division
Second Department
Supreme Court Building
45 Monroe Place
Brooklyn, NY 11201
(718) 722-6324

District includes: Dutchess, Kings (Brooklyn),
Nassau, Orange, Putnam, Queens, Richmond
(Staten Island), Rockland, Suffolk, and
Westchester counties

THIRD DEPARTMENT

Appellate Division
Third Department
Justice Building
P.O. Box 7288

Capitol Station
Albany, NY 12224
(518) 471-4777

District includes: Albany, Broome, Chemung,
Chenango, Clinton, Columbia, Cortland,
Delaware, Essex, Franklin, Fulton, Greene,
Hamilton, Madison, Montgomery, Otsego,
Rensselaer, St. Lawrence, Saratoga, Schenec-
tady, Schoharie, Schuyler, Sullivan, Tioga,
Tompkins, Ulster, Warren, and Washington
counties

FOURTH DEPARTMENT

Appellate Division
Fourth Department
M. Dolores Denman Courthouse
50 East Avenue, Suite 200
Rochester, New York 14604
(585) 530-3100

District includes: Allegany, Cattaraugus,
Cayuga, Chautauqua, Erie, Genesee,
Herkimer, Jefferson, Lewis, Livingston,
Monroe, Niagara, Oneida, Onondaga, Ontario,
Orleans, Oswego, Seneca, Steuben, Wayne,
Wyoming, and Yates counties

APPENDIX III

ADDRESSES OF NEW YORK DISTRICT ATTORNEYS

You should send copies of your papers to the District Attorney when you are filing a criminal appeal or Article 440 post-judgment motion.

ALBANY COUNTY

District Attorney
Albany Judicial Center
6 Lodge Street, 4th Floor
Albany, NY 12207
(518) 487-5460

ALLEGANY COUNTY

District Attorney
7 Court Street, Room 333
Belmont, NY 14813
(585) 268-9225

BRONX

District Attorney
198 East 161st Street
Bronx, NY 10451
(718) 590-2000

BROOKLYN

See KINGS COUNTY

BROOME COUNTY

District Attorney
George Harvey Justice Building
45 Hawley Street, 4th Floor
P.O. Box 1766
Binghamton, NY 13902
(607) 778-2423

CATTARAUGUS COUNTY

District Attorney
Cattaraugus County Center
303 Court Street
Little Valley, NY 14755
(716) 938-2220

CAYUGA COUNTY

District Attorney
95 Genesee Street
Auburn, NY 13021
(315) 253-1391

CHAUTAUQUA COUNTY

District Attorney
County Courthouse
1 North Erie Street
Mayville, NY 14757
(716) 753-4241

CHEMUNG COUNTY

District Attorney
226 Lake Street
P.O. Box 588
Elmira, NY 14902-0588
(607) 737-2944

CHENANGO COUNTY

District Attorney
26 Conkey Ave
Box 126, 2nd Floor
Norwich, NY 13815
(607) 337-1745

CLINTON COUNTY

District Attorney
County Government Center
137 Margaret Street, Suite 201
Plattsburgh, NY 12901
(518) 565-4770

COLUMBIA COUNTY

District Attorney
325 Columbia Street, Suite 260
Hudson, NY 12534
(518) 828-3414

CORTLAND COUNTY

District Attorney
Cortland County Courthouse
46 Greenbush Street, Room 101
Cortland, NY 13045
(607) 753-5008

DELAWARE COUNTY

District Attorney
1 Courthouse Square, Suite 5
Delhi, NY 13753
(607) 832-5299

DUTCHESS COUNTY

District Attorney
Dutchess County Courthouse
236 Main Street
Poughkeepsie, NY 12601
(845) 486-2300

ERIE COUNTY

District Attorney
25 Delaware Avenue
Buffalo, NY 14202
(716) 858-2424

ESSEX COUNTY

District Attorney
7559 Court Street
P.O. Box 217
Elizabethtown, NY 12932
(518) 873-3335

FRANKLIN COUNTY

District Attorney
Franklin County Courthouse
355 West Main Street, Suite 466
Malone, NY 12953-1826
(518) 481-1544

FULTON COUNTY

District Attorney
Fulton County Office Building
223 West Main Street
Johnstown, NY 12095
(518) 736-5511

GENESEE COUNTY

District Attorney
Genesee County Courts Facility
1 West Main Street
Batavia, NY 14020
(585) 344-2550

GREENE COUNTY

District Attorney
Greene County Courthouse
411 Main Street
Catskill, NY 12414
(518) 719-3590

HAMILTON COUNTY

District Attorney
P.O. Box 277
139 White Birch Lane
Indian Lake, NY 12842
(518) 648-5113

HERKIMER COUNTY

District Attorney
Herkimer County Courthouse
301 N. Washington Street, Suite 2401
Herkimer, NY 13350
(315) 867-1155

JEFFERSON COUNTY

District Attorney
175 Arsenal Street
Watertown, NY 13601
(315) 785-3053

KINGS COUNTY

District Attorney
350 Jay Street
Brooklyn, NY 11201
(718) 250-2340

LEWIS COUNTY

District Attorney
7660 North State Street
Lowville, NY 13367
(315) 376-5390

LIVINGSTON COUNTY

District Attorney
2 Court Street
Geneseo, NY 14454-1403
(585) 243-7020

MADISON COUNTY

District Attorney
Veterans Memorial Building
138 North Court Street
P.O. Box 578
Wampsville, NY 13163
(315) 366-2236

MANHATTAN

See NEW YORK COUNTY

MONROE COUNTY

District Attorney
47 South Fitzhugh Street
Rochester, NY 14614
(585) 753-4500

MONTGOMERY COUNTY

District Attorney
New County Courthouse
58 Broadway
P.O. Box 1500
Fonda, NY 12068-1500
(518) 853-8250

NASSAU COUNTY

District Attorney
262 Old Country Road
Mineola, NY 11501
(516) 571-3800

NEW YORK COUNTY

District Attorney
1 Hogan Place
New York, NY 10013
(212) 335-9000

NIAGARA COUNTY

District Attorney
Niagara County Courthouse, 3rd Floor
175 Hawley Street
Lockport, NY 14094-2740
(716) 439-7085

ONEIDA COUNTY

District Attorney
235 Elizabeth Street
Utica, NY 13501
(315) 798-5766

ONONDAGA COUNTY

District Attorney
505 South State Street, 4th Floor
Syracuse, NY 13202
(315) 435-2470

ONTARIO COUNTY

District Attorney
Ontario County Courthouse, 3rd Floor
27 North Main Street
Canandaigua, NY 14424
(585) 396-4010

ORANGE COUNTY

District Attorney
255 Main Street
Goshen, NY 10924
(845) 291-2050

ORLEANS COUNTY

District Attorney
13925 State Route 31, Suite 300
Albion, NY 14411
(585) 590-4130

OSWEGO COUNTY

District Attorney
Public Safety Building
39 Churchill Road
Oswego, NY 13126
(315) 349-3200

OTSEGO COUNTY

District Attorney
197 Main Street
Cooperstown, NY 13326-1129
(607) 547-4249

PUTNAM COUNTY

District Attorney
40 Gleneida Avenue
Carmel, NY 10512
(845) 808-1050

QUEENS COUNTY

District Attorney
125-01 Queens Boulevard
Kew Gardens, NY 11415
(718) 286-6000

RENSSELAER COUNTY

District Attorney
Rensselaer County Courthouse
Congress Street
Troy, NY 12180
(518) 270-4040

RICHMOND COUNTY

District Attorney
130 Stuyvesant Place
Staten Island, NY 10301
(718) 876-6300

ROCKLAND COUNTY

District Attorney
County Office Building
1 South Main Street, Suite 500
New City, NY 10956-3594
(845) 638-5001

SARATOGA COUNTY

District Attorney
Saratoga County Municipal Center
25 West High Street
Ballston Spa, NY 12020
(518) 885-2263

SCHENECTADY COUNTY

District Attorney
3rd Floor – Judicial Building
612 State Street
Schenectady, NY 12305-2113
(518) 388-4364

SCHOHARIE COUNTY

District Attorney
PO Box 129
Howes Cave, NY 12092
(518) 295-2272

SCHUYLER COUNTY

District Attorney
105 9th Street, Unit 26
Watkins Glen, NY 14891
(607) 535-8383

SENECA COUNTY

District Attorney
44 West Williams Street
Waterloo, NY 13165
(315) 539-1300

ST. LAWRENCE COUNTY

District Attorney
St. Lawrence County
48 Court Street
Canton, NY 13617
(315) 379-2225

STATEN ISLAND

See RICHMOND COUNTY

STEUBEN COUNTY

District Attorney
Steuben County Office Building
3 East Pulteney Square
Bath, NY 14810
(607) 664-2270

SUFFOLK COUNTY

District Attorney
William J. Lindsay County Complex,
Building 77
Veterans Memorial Highway
Hauppauge, NY 11788
(631) 853-4161

SULLIVAN COUNTY

District Attorney
Sullivan County Courthouse
414 Broadway
Monticello, NY 12701
(845) 794-3344

TIOGA COUNTY

District Attorney
20 Court Street
Owego, NY 13827
(607) 687-8650

TOMPKINS COUNTY

District Attorney
320 North Tioga Street
Ithaca, NY 14850
(607) 274-5461

ULSTER COUNTY

District Attorney
Ulster County Courthouse
275 Wall Street
Kingston, NY 12401
(845) 340-3280

WARREN COUNTY

District Attorney
1340 State Route 9
Lake George, NY 12845
(518) 761-6405

WASHINGTON COUNTY

District Attorney
Washington County Courthouse
383 Broadway, Building C
Fort Edward, NY 12828
(518) 746-2525

WAYNE COUNTY

District Attorney
Wayne County Courthouse
Hall of Justice, Suite 202
54 Broad Street
Lyons, NY 14489
(315) 946-5905

WESTCHESTER COUNTY

District Attorney
County Courthouse
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, NY 10601
(914) 995-3414

WYOMING COUNTY

District Attorney
Wyoming County Courthouse
147 North Main Street
Warsaw, NY 14569
(585) 786-8822

YATES COUNTY

District Attorney
Yates County
415 Liberty Street
Penn Yan, NY 14527
(315) 536-5550

APPENDIX IV

DIRECTORY OF LEGAL AND SOCIAL SERVICES FOR INCARCERATED PEOPLE

This Appendix contains a directory of legal and social services that will be useful for incarcerated people, returning citizens and community members, and their families. Please be aware that this type of information changes rapidly.

A. Legal Services

- (1) Organizations that Specifically Serve Incarcerated People
- (2) Organizations that Serve Specific Regional and Cultural Interest Groups
- (3) Organizations that Do Not Specifically Serve Incarcerated People
- (4) Other Legal Services Organizations
 - a. New York City
 - b. Other Counties
- (5) Organizations that Specialize in Death Penalty Cases

B. Social Services

- (1) New York City
- (2) Other Counties

C. Official Corrections Agencies

- (1) Watchdog Agencies
- (2) Administrative Agencies

A. Legal Services

1. Organizations That Specifically Serve Incarcerated People

(a) Prisoners' Legal Services of New York ("PLS")

If you are incarcerated at a New York State correctional facility and in need of legal assistance, you should first contact PLS. PLS provides legal services, free of charge, to people incarcerated in New York State prisons who cannot afford legal representation. PLS will only handle cases that other attorneys and legal services are unlikely to handle. For example, PLS does not handle criminal trials or direct criminal appeals because these are normally handled by private attorneys or legal service organizations. However, PLS will provide assistance to incarcerated people in other matters.

If you qualify for PLS legal assistance, you should contact the PLS office serving your institution (see below). Check with the PLS serving your institution for more information. Application forms for PLS assistance should be available in the prison law library. The offices are listed below:

41 State Street, Suite M112
Albany, NY, 12207
(518) 438-8046
FAX: (518) 438-6643

Prisons served: Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

24 Margaret St., Suite 9
Suite 202
Plattsburgh, NY 12901
(518) 561-3088
FAX: (518) 561-3262

Prisons served: Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.

14 Lafayette Square, Suite 510
Buffalo, NY 14203
(716) 854-1007
FAX: (716) 854-1008

Prisons served: Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

114 Prospect Street
Ithaca, NY 14850
(607) 273-2283
FAX: (607) 272-9122

Prisons served: Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

(b) Other Organizations Serving Incarcerated People in New York

Prisoners' Rights Project

The Legal Aid Society
Criminal Appeals Bureau
199 Water Street, 6th Floor
New York, NY 10038
(212) 577-3300
www.legalaidnyc.org/programs-projects-units/the-prisoners-rights-project/

This organization specializes in cases involving jail and confinement conditions. It represents New York City residents incarcerated in city jails or New York State prisons. It handles only those cases that might expand prisoners' rights or improve prison conditions for large numbers of people in jail or prison; thus, it rarely accepts cases involving only one incarcerated person.

Parole Revocation Defense Unit

The Legal Aid Society
Criminal Defense Division
199 Water Street, 6th Floor
New York, NY 10038
(212) 577-3300

This organization represents incarcerated people who either violate or are accused of violating parole. It represents only New York City residents in city jails or New York State prisons.

National Lawyers Guild, Buffalo Chapter

Prison Task Force

John Lord O'Brian Hall
State University of New York Law School
Buffalo, NY 14260
E-mail: buffaloptf@yahoo.com

The Prison Task Force goes to prisons to provide eight-week courses for incarcerated people in legal research and writing.

American Civil Liberties Union

National Prison Project

915 15th Street NW, 7th Floor
Washington, D.C. 20005
(202) 393-4930; Fax: (202) 393-4931
www.aclu.org/prisoners-rights

The National Prison Project is the only organization to litigate on behalf of incarcerated people at a national level. Since its founding in 1972, the National Prison Project has worked in more than twenty-five states to improve conditions of confinement.

2. Organizations That Serve Specific Regional and Cultural Interest Groups

These groups are in no way affiliated with consulates and receive no rights or privileges under the Vienna Convention. They also tend not to represent individual criminal defendants. They may be interested in your case if you have a claim that you are being discriminated against because of your ethnic or cultural background. In addition, most of these organizations will probably provide you with a referral to another organization that can help you.

If you are experiencing difficulties of a religious nature (for example, if you cannot find a clergyperson of your faith or are not being allowed to practice your religion), you should also consult the resources listed in Chapter 27 of the *JLM*, "Religious Freedom in Prison."

AFRICAN

African Services Committee, Inc.
429 West 127th Street
New York, NY 10027
(212) 222-3882
www.africanservices.org
African Services Committee, Inc. provides social services and conducts outreach programs for immigrants from Africa, the Caribbean, and the Middle East, without regard to ethnicity. They also provide referrals.

NAACP National Headquarters
4805 Mt. Hope Drive
Baltimore, MD 21215
(877) 622-2798; Local: (410) 580-5777
www.naACP.org/
The National Association for the Advancement of Colored People ("NAACP") helps all minority people in the United States. It can only take a few legal cases every year, but it may be able to provide referrals. It also has a wide variety of non-legal programs.

ARAB

American-Arab Anti-Discrimination Committee
1705 DeSales St., NW, Suite 500
Washington, D.C. 20036
(202) 244-2990
E-mail: legal@adc.org
www.adc.org
The American-Arab Anti-Discrimination Committee is a national grassroots non-profit civil rights organization that defends the civil rights of Arab-Americans.

ASIAN

Asian-American Legal Defense and Education Fund
99 Hudson Street, 12th Floor
New York, NY 10013
(212) 966-5932
www.aaldef.org
Asian-American Legal Defense and Education Fund may be particularly interested in your case if it involves police brutality. They do not represent criminal defendants; instead, they usually conduct large-scale impact litigation (lawsuits that are designed to get a result for a broad class of people) on civil issues, much like the American Civil Liberties Union.

Asian Counseling & Referral Service
3639 Martin Luther King Jr. Way South
Seattle, WA 98144
(206) 695-7600
www.acrs.org
Asian Counseling and Referral Service is a community-based, multi-cultural, multilingual, private nonprofit organization that provides and advocates for social services to empower Asian and Pacific Islanders.

Asian Law Caucus, Inc.
55 Columbus Avenue
San Francisco, CA 94111
(415) 896-1701
www.asianlawcaucus.org
Asian Law Caucus, Inc. serves the needs of predominantly monolingual, low-income Asian Pacific Americans living in the San Francisco Bay Area. It provides legal services and educational programs, in English and seven Asian languages, in the areas of civil rights, housing, employment, immigration, and the rights of the elderly.

Organization of Chinese Americans (OCA)

1322 18th Street NW

Washington, D.C. 20036-1803

(202) 223-5500

www.ocanational.org

OCA is a civil rights organization that lobbies on behalf of Chinese-Americans and other Asian-Americans.

World Relief

7 East Baltimore Street

Baltimore MD, 21202

(443) 451-1900 and (800) 535-5433

www.worldrelief.org

World Relief is a Christian organization that provides free legal representation for refugees and assists with employment and citizenship.

CARIBBEAN

Caribbean Bar Association

Tricia-Gaye Cotterell, President

PO Box 14513

Fort Lauderdale, FL 33302

(305) 416-3180

E-mail: caribbeanbarassociation@gmail.com

www.caribbeanbar.org

The Caribbean Bar Association ("CBA") is a voluntary bar organization that has over 150 attorneys from the Caribbean-American community in Florida. CBA attorneys work in the public and private sector and practice in several areas of the law, including criminal and commercial litigation.

National Association of Jamaican and Supportive Organizations ("NAJASO")

5234 Illinois Avenue, NW

Washington, D.C. 20011

(410) 908-0123

www.najaso.org

E-mail: president@najaso.org

NAJASO addresses general problems affecting Caribbean communities in the United States.

See also AFRICAN.

HMONG

Hmong National Development, Inc. ("HND")

1075 Arcade Street

Saint Paul, MN 55106

(651) 495-1557 Fax: 651-495-1699

www.hndinc.org/

E-mail: info@hndinc.org

HND advocates on behalf of Hmong-American communities through legal advocacy, civic engagement, and policy advocacy.

JEWISH (ALL NATIONALITIES)

Jewish Family and Children's Services

2150 Post Street, PO Box 159004

San Francisco, CA 94115

(415) 449-1200

E-mail: admin@jfcs.org.

www.jfcs.org

Jewish Family and Children's Services helps refugees, immigrants, and other newcomers to the San Francisco Bay area and provides services in Russian.

Jewish Federation of Greater Philadelphia

2100 Arch Street

Philadelphia, PA 19103

(215) 832-0500

www.jewishphilly.org/index.html

Jewish Federation of Greater Philadelphia tends to assist Israeli and Ethiopian Jews who have recently immigrated to the United States.

Jewish Prisoner Services International

P.O. Box 85840

Seattle, WA 98145-1840

(206) 617-2367; (206) 528-0363

E-mail: jewishprisonerservices@msn.com

www.jpsi.org

Provides pen pals, advocacy, and outreach programs for incarcerated people who are Jewish. See also the Appendix to JLM Chapter 27, "Religious Freedom in Prison" for religious outreach programs.

KURDISHAmerican Kurdish Information Network
("AKIN")

4412 Sedgwick Street NW

Washington, D.C. 20016

(202) 483-6444

E-mail: akin@kurdish.org

www.kurdistan.org

LATIN AMERICAN

Alianza Dominicana (now a division of
Catholic Charities Community Services)

1011 First Avenue, 6th Floor

New York, NY 10022

888-744-7900

www.cccsny.org/alianza

*Alianza Dominicana maintains several offices
in northern Manhattan in New York City.*

*They do not provide legal assistance but can
help you with a wide variety of related
matters, including drug addiction, health
problems, and youth programs. They also have
a cultural center that offers various classes
that may be of interest to you.*

Hispanic National Bar Association

1020 19th Street NW, Suite 505

Washington, D.C. 20036

(202) 223-4777

www.hnba.com

*Hispanic National Bar Association maintains a
directory of over 4,000 Hispanic attorneys
nationwide and may be able to assist
consulates.*

Mexican-American Legal Defense and
Educational Fund ("MALDEF")

634 South Spring Street #1100

Los Angeles, CA 90014

(213) 629-2512

www.maldef.org

*Mexican-American Legal Defense and
Educational Fund promotes equality and
protects the civil rights of Hispanics
nationwide through litigation, leadership
training, and law school scholarships.*

LatinoJustice PRLDEF (Puerto Rican Legal
Defense and Education Fund)

475 Riverside Dr. Suite 1901

New York, NY 10115

(212) 219-3360; Toll Free: (800) 328-2322

www.latinojjustice.org

*LatinoJustice PRLDEF conducts primarily
large-scale, civil impact litigation. They do not
represent criminal defendants, but you can
contact them if your rights are being violated,
and they will at least provide you with a
referral. They help all Hispanic people, not just
Puerto Ricans.*

NATIVE AMERICAN

International Indian Treaty Council ("IITC")

The Redstone Building

2940 16th Street, Suite 305

San Francisco, CA 94103-3664

(415) 641-4482

E-mail: alberto@treatycouncil.org

www.treatycouncil.org

*International Indian Treaty Council is an
organization of indigenous peoples from North,
Central, and South America, the Caribbean
and the Pacific, which seeks to protect
indigenous human rights, culture, and sacred
lands. Services are also available in Spanish.*

Native American Rights Fund ("NARF")

1506 Broadway

Boulder, CO 80302-6296

(303) 447-8760

www.narf.org

*NARF provides legal representation and
assistance to Indian tribes. They probably will
not take your case if it will affect only you as an
individual, but they can provide referrals.*

United American Indians of New England

info@uaine.org

www.uaine.org

3. Organizations That Do Not Specifically Serve Incarcerated People

The following is a list of legal organizations that have previously represented incarcerated people in cases involving prison conditions, parole, sentencing, etc. Note that the primary function of these organizations is not to provide legal services to incarcerated people.

American Civil Liberties Union ("ACLU")
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
www.aclu.org
The ACLU's mission is to preserve all of the protections and guarantees of the United States Constitution.

Center for Constitutional Rights ("CCR")
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
www.ccrjustice.org
CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

Children's Defense Fund
Juvenile Justice Division
840 First Street NW Suite 300
Washington, D.C. 20002
(202) 628-8787
Email: cdinfo@childrensdefense.org
www.childrensdefense.org
The Children's Defense Fund provides assistance to incarcerated women facing legal problems involving custody of their children.

Community Law Offices ("CLO") of
The Legal Aid Society
Volunteer Division
230 E. 106th Street
New York, NY 10029
(212) 426-3000
www.legal-aid.org
Provides free legal services to residents of Central and East Harlem who meet its low-income requirements. CLO handles civil matters; however, it has not had extensive dealings with the Parole Board, Corrections Department, disciplinary hearings, or prisoners' rights litigation.

Jewish Board of Family and Children's Services ("JBFCs")
135 W. 50th Street
New York, NY 10020
(212) 582-9100; Toll Free: (888) 523-2769
E-mail: admin@jbfcs.org
www.jbfcs.org
This organization is a nonprofit mental health and social services agency providing a range of community-based programs, residential facilities, and day-treatment centers. JBFCs makes referrals to legal services through its family violence prevention program, and provides therapy to adolescents who have been involved with the criminal justice system through its juvenile justice program.

Legal Action Center ("LAC")
225 Varick Street, 4th Floor
New York, NY 10014
(212) 243-1313; Toll Free: (800) 223-4044
www.lac.org
The Legal Action Center is a public interest law firm that generally handles law reform litigation. LAC has a program that focuses on challenging discrimination against returning citizens, especially in employment. It has also handled challenged guard brutality at a New York City correctional institution.

National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004
(212) 285-3025
www.nelp.org
Handles employment discrimination cases. Returning citizens with employment-related problems and currently incarcerated people with work-related problems should contact this organization.

National Lawyers Guild ("NLG") National Office
132 Nassau Street, Suite 922
New York, NY 10038
(212) 679-5100
www.nlg.org

The NLG seeks to unite the lawyers, law students, legal workers and jailhouse lawyers of America in an organization that acts as an

effective political and social force in the service of the people to promote human rights.

4. Other Legal Services Organizations

Below is a list of free legal service organizations in New York City and State. These groups do not necessarily provide legal services to incarcerated people. But, if you are incarcerated at a city or county jail in either New York City or New York State, and you do not have access to any of the organizations listed above, you should contact a general legal service organization in the city or county where you are incarcerated. However, be aware that law or the people funding them might prevent them from helping people in prison or jail.

If you are incarcerated at a state institution and seek legal assistance in a criminal trial or direct criminal appeal, you should contact a legal service organization in the city or county where you are incarcerated. Many counties in New York State have a public defender's office and a county bar association program designed to assist you by providing free legal counsel. These organizations are not listed below. To find the address for your county's public defender's office and bar association program, ask your librarian or consult a telephone book for your county.

(a) Legal Services Organizations in New York City

(i) The Legal Aid Society (Civil and Criminal Divisions)

MANHATTAN

Civil Practice
199 Water Street, 3rd Floor
New York, NY 10038
(212) 577-3300

Criminal Defense Office
100 Centre Street
New York, NY 10013
(212) 732-5000

Juvenile Rights Office
New York County Family Court Building
60 Lafayette Street, Room 9A
New York, NY 10013
(212) 312-2260

Harlem Community Law Office (Civil)
Theresa Towers
20290 Adam Clayton Powell Jr. Blvd.
New York, NY 10027
New York, NY 10029
(212) 426-3000

BRONX

Civil Practice
260 E. 161st Street
Bronx, NY 10451
(718) 991-4600

Criminal Defense Office
260 E. 161st Street
Bronx, NY 10451
(718) 579-3000

Juvenile Rights Office
Bronx County Family Court Building
900 Sheridan Avenue, Room 6-C12
Bronx, NY 10451
(718) 579-7900

BROOKLYN

Civil and Criminal Practices
111 Livingston Street, 7th Floor
Brooklyn, NY 11201
(718) 722-3100 (Civil Practice)
(718) 237-2000 (Criminal Defense Office)

Juvenile Rights Office
111 Livingston Street, 8th Floor
Brooklyn, NY 11201
(718) 237-3100

QUEENS

Civil and Criminal Division
120-46 Queens Boulevard
Kew Gardens, NY 11415
(718) 286-2450 (Civil Division)
(718) 286-2000 (Criminal Division)

STATEN ISLAND

Civil Division
60 Bay Street
Staten Island, NY 10301
(347) 422-5333

Juvenile Rights Division
60 Bay Street, 3rd Floor
Staten Island, NY 10301
(347) 422-5333

(ii) Community Action for Legal Services (civil cases only)**MANHATTAN**

Legal Services for New York - Manhattan
40 Worth Street, Suite 606
New York, NY 10013
(646) 442-3100

Harlem Legal Services, Inc.
1 West 125th Street, 2nd Floor
New York, NY 10027
(646) 442-3100

BROOKLYN

South Brooklyn Legal Services
105 Court Street, 3rd Floor
Brooklyn, New York, NY 11201
(718) 237-5500

Legal Services of Brooklyn
3049 Brighton Sixth Street
Brooklyn, NY 11235
(718) 592-2100

Bedford-Stuyvesant Community Legal
Services
1360 Fulton Street, Suite 301
Brooklyn, NY 11216
(718) 636-1155

Brooklyn Legal Services Corp. A
(718) 487-2300
260 Broadway, Suite 2
Brooklyn, New York 11211
and
1471 Fulton Street
Brooklyn, NY 11216

BRONX

Bronx Legal Services Corporation
349 East 149th St., 10th Floor
Bronx, NY 10451
(718) 928-3700

QUEENS

Queens Legal Services Corporation
89-00 Sutphin Boulevard, 5th Floor
Jamaica, NY 11435
(347) 592-2200

(b) Legal Services Organizations in Other Counties

ALBANY COUNTY

Legal Aid Society of Northeastern New York
95 Central Ave
Albany, NY 12206
(518) 462-6765; Toll Free: (800) 462-2922
www.lasnny.org

ALLEGANY COUNTY

Legal Assistance of Western New York
16 West William Street
P.O. Box 272
Bath, NY 14810
(607) 776-4126; Toll Free: (877) 776-4126

AUBURN COUNTY

Legal Services of Mid-New York
221 South Warren Street, Suite 310
Syracuse, NY 13202
(315) 703-6600
www.lasmny.org

BROOME COUNTY

Legal Aid Society of Mid-New York
168 Water Street
Binghamton, NY 13901
(607) 231-5900
www.lasmny.org

CATTARAUGUS COUNTY

Southern Tier Legal Services
103 South Barry Street
Olean, NY 14760
(716) 373-4701; Toll Free: (888) 767-1950

CAYUGA COUNTY

Legal Aid Society of Mid-New York
472 South Salina Street, Suite 300
Syracuse, NY 13202
(315) 703-6600
www.lasmny.org

CHAUTAUQUA COUNTY

Legal Assistance of Western New York
115 East Third Street
Jamestown, NY 14701
(716) 664-4535
www.lawny.org

CHEMUNG COUNTY

Legal Assistance of Western New York
215 East Church Street, Suite 301
Elmira, NY 14901
(607) 734-1647
www.lawny.org

COLUMBIA COUNTY

Legal Aid Society of Northeastern New York
95 Central Avenue
Albany, NY 12206
833-628-0087
www.lasnny.org

CORTLAND COUNTY

Legal Aid Society of Central New York
1 North Main Street, Suite 308
Cortland, NY 13045
(607) 428-8400
www.lscny.org

ERIE COUNTY

New York Civil Liberties Union,
Western Region
661 Main Street
Buffalo, NY 14203
(716) 852-4033
www.nyclu.org

Legal Aid Bureau of Buffalo, Inc.
Civil, Public Defender, and Appellate Divisions
290 Main Street, Suite 400
Buffalo, NY 14202
(716) 853-9555
www.legalaidbuffalo.org

GENESEE COUNTY

Neighborhood Legal Services
45 Main Street
Batavia, NY 14020
(585) 343-5450

GREENE COUNTY

Legal Aid Society of Northeastern New York
95 Central Avenue
Albany, NY 12206
833-628-0087
www.lasnny.org

JEFFERSON COUNTY

Legal Aid Society of Mid-New York
215 Washington Street, Suite 202
Watertown, New York 13601
(315) 955-6700
www.lasmny.org

Legal Aid Society of Nassau County
Criminal Bureau
40 Main St
Hempstead, NY 11550
(516) 560-6400
<https://nclas.org/index.html>

Legal Aid Society of Rochester
1 West Main Street
Rochester, NY 14614
(585) 232-4090
www.lasroc.org

Legal Services of the Hudson Valley
90 Maple Avenue
White Plains, NY 10601
(914) 949-1305; (877) 574-8529
www.lshv.org

LEWIS COUNTY

Legal Aid Society of Mid-New York
215 Washington Street, Suite 202
Watertown, New York 13601
(315) 955-6700
www.lasmny.org

LIVINGSTON COUNTY

Legal Assistance of Western New York
361 South Main Street
Geneva, NY 14456
(315) 781-1465; toll free: (866) 781-5235
www.lawny.org

MONROE COUNTY

Legal Aid Society of Rochester
1 West Main Street
Rochester, NY 14614
(585) 232-4090
www.lasroc.org

Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
(585) 454-4060
www.empirejustice.org

NASSAU COUNTY

Nassau/Suffolk Law Services
1 Helen Keller Way, 5th Floor
Hempstead, NY 11550
(516) 292-8100
www.nslawservices.org

Legal Aid Society of Nassau County
Criminal Bureau
40 Main St
Hempstead, NY 11550
(516) 560-6400
<https://nclas.org/index.html>

NIAGARA COUNTY

Neighborhood Legal Services
225 Old Falls Street, 3rd Floor
Niagara Falls, NY 14302
(716) 284-8831

ONEIDA COUNTY

120 Bleecker Street
Utica, NY 13501
(315) 793-7000
www.lasmny.org

ONONDOGA COUNTY

Frank H. Hiscock Legal Aid Society
351 South Warren Street
Syracuse, NY 13202
(315) 422-8191
www.hiscocklegalaid.org

Legal Aid Society of Mid-New York
221 South Warren Street, Suite 310
Syracuse, NY 13202
(315) 703-6600
www.lasmny.org

ONTARIO COUNTY

Legal Assistance of Western New York
361 South Main Street
Geneva, NY 14456
(315) 781-1465; toll free: (866) 781-5235
www.lawny.org

ORANGE COUNTY

Legal Services of the Hudson Valley
90 Maple Avenue
White Plains, NY 10601
(914) 949-1305; (877) 574-8529
www.lshv.org

ORLEANS COUNTY

Neighborhood Legal Services
45 Main Street
Batavia, NY 14020
(585) 343-5450

OSWEGO COUNTY

Legal Aid Society of Mid-New York
108 West Bridge Street
Oswego, NY 13126
(315) 532-6900
www.lasmny.org

OTSEGO COUNTY

Legal Aid Society of Mid-New York
189 Main Street, Suite 301
P.O. Box 887
Oneonta, NY 13820
(607) 433-2220; toll free: (800) 821-9895
www.lasmny.org

PUTNAM COUNTY

Putnam County Legal Aid Society
12 Fair Street
Carmel, NY 10512
(845) 225-8466

RENSSELAER COUNTY

Legal Aid Society of Northeastern New York
95 Central Avenue
Albany, NY 12206
(833) 628-0087
www.lasnny.org

ROCKLAND COUNTY

Legal Aid Society of Rockland County
2 Congers Road
New City, NY 10956
(845) 634-3627; toll free: 800-454-3627
<https://legalaidrockland.org/>

SARATOGA COUNTY

Legal Aid Society of Northeastern New York
40 New Street
Saratoga Springs, NY 12866
(833) 628-0087
www.lasnny.org

SCHENECTADY COUNTY

Legal Aid Society of Northeastern New York
95 Central Avenue
Albany, NY 12206
(833) 628-0087
www.lasnny.org

SENECA COUNTY

Legal Assistance of Western New York
361 South Main Street
Geneva, NY 14456
(315) 781-1465; toll free: (866) 781-5235
www.lawny.org

STEUBEN COUNTY

Legal Assistance of Western New York
16 West William Street
P.O. Box 272
Bath, NY 14810
(607) 776-4126; Toll Free: (877) 776-4126

SUFFOLK COUNTY

Legal Aid Society of Suffolk County
Children's Law Bureau
Courthouse Corporate Center
320 Carleton Avenue, Suite 3800
Central Islip, NY 11722
(631) 439-2450

Legal Aid Society of Suffolk County
Criminal Division
Arthur M. Cromarty Court Complex
300 Center Drive, First Floor
Riverhead, NY 11901
(631) 852-1650

SULLIVAN COUNTY

Legal Services of the Hudson Valley
309 E. Broadway
Monticello, NY 12748
(845) 569-9110, Ext. 200
www.lshv.org

TIOGA COUNTY

Legal Assistance of Western New York
902 Taber Street, Suite 1
Ithaca, NY 14850
(607) 273-3667; Toll Free: (800) 724-4170
www.lawny.org

TOMPKINS COUNTY

Legal Assistance of Western New York
902 Taber Street, Suite 1
Ithaca, NY 14850
(607) 273-3667; Toll Free: (800) 724-4170
www.lawny.org

WAYNE COUNTY

Legal Assistance of Western New York
361 South Main Street
Geneva, NY 14456
(315) 781-1465; toll free: (866) 781-5235
www.lawny.org

WESTCHESTER COUNTY

Legal Services of the Hudson Valley
90 Maple Avenue
White Plains, NY 10601
(914) 949-1305; (877) 574-8529
www.lshv.org

WYOMING COUNTY

Neighborhood Legal Services
45 Main Street
Batavia, NY 14020
(585) 343-5450

YATES COUNTY

Legal Assistance of the Finger Lakes
1 Franklin Square, P.O. Box 487
Geneva, NY 14456
(315) 781-1465
www.mclac.org

5. Organizations that Specialize in Death Penalty Cases**NATIONAL**

American Bar Association
Death Penalty Representation Project
1050 Connecticut Avenue NW
Suite 400
Washington D.C., 20036
(202) 662-1738
FAX: (202) 662-8649
www.americanbar.org/groups/committees/death_penalty_representation/

ALABAMA

Equal Justice Initiative
Bryan Stevenson, Executive Director
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
FAX: (334) 269-1806
www.eji.org

ARIZONA

Arizona Justice Project
111 E. Taylor St.,
Phoenix, AZ 85004
(Contact for more info)
(602) 496-0286
www.azjusticeproject.org

CALIFORNIA

California Appellate Project
345 California Street, Suite 1400
San Francisco, CA 94104
(415) 495-0500
FAX: (415) 495-5616
www.capsf.org

Habeas Corpus Resource Center
303 2nd St. #N400
San Francisco, CA 94107
(415) 348-3800
www.hcrc.ca.gov

COLORADO

Federal Public Defender
633 17th Street, Suite 1000
Denver, CO 80202
(303) 294-7002
FAX: (303) 294-1192

CONNECTICUT

Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800
FAX: (203) 432-1426

FLORIDA

Commission on Capital Cases
402 S. Monroe Street
Tallahassee, FL 32399-1300
(850) 921-4704
FAX: (850) 921-4737

GEORGIA

Southern Center for Human Rights
60 Walton Street, NW
Atlanta, GA 30303
(404) 688-1202
FAX: (404) 688-9440
www.schr.org

Georgia Appellate Practice and
Educational Resource Center
303 Elizabeth Street, NE
Atlanta, GA 30307
(404) 222-9202
FAX: (404) 222-9212

IDAHO

Capital Habeas Unit
702 W. Idaho, Suite 900
Boise, ID 83702
(208) 331-5530
FAX: (208) 331-5559
www.fdsidaho.org

ILLINOIS

Office of the State Appellate Defender
Post-Conviction Unit, Attn: Tiffany Green
203 N. LaSalle, 24th Floor
Chicago, IL 60601
(312) 814-5472
FAX: (312) 814-1447

INDIANA

Public Defender of Indiana
1 North Capitol, Suite 800
Indianapolis, IN 46204
(317) 232-2475
(Only state court post-conviction relief)

KANSAS

Paul E. Wilson Kansas Defender Project
University of Kansas School of Law
1535 W 15th Street
Green Hall #409
Lawrence, KS 66045
(785) 864-5571

Death Penalty Defense Unit
700 SW Jackson St, Suite 500
200 Topeka, KS 66603
785-291-3976
FAX: 785-291-3979

KENTUCKY

Department of Public Advocacy
Capital Post-Conviction Branch
5 Mill Creek Park
Frankfort, KY 40601
(502) 564-8006
FAX: (502) 695-6767

LOUISIANA

Center for Equal Justice
7100 St. Charles Avenue
New Orleans, LA 70118
(504) 864-0700
FAX: (504) 864-0780

Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867
FAX: (504) 558-0378

MARYLAND

Federal Public Defender
Northern Division
Tower II, 9th Floor
100 South Charles Street
Baltimore, MD 21201-2705
(410) 962-3962
FAX: (410) 962-0872

Federal Public Defender
Southern Division
6411 Ivy Lane, Suite 710
Greenbelt, MD 20770-4510
(301) 344-0600
FAX: (301) 344-0019

MISSOURI

Missouri State Public Defender, Capital
Litigation Central District
Woodrail Centre
1000 West Nifong, Building 7, Suite 100
Columbia, MO 65203
(573) 777-9977, ext. 412
FAX: (573) 777-9963

Missouri State Public Defender, Capital
Litigation Eastern District
1010 Market Street, Ste 1100
St. Louis, MO 63101
(314) 340-7662
FAX: (314) 340-7666

Missouri State Public Defender, Capital
Litigation Western District
920 Main Street, Suite 500
Kansas City, Missouri 64105
(816) 889-7699
FAX: (816) 889-2088

Eastern Federal Public Defender
1010 Market Street, Second Floor
St. Louis, MO 63101
(314) 241-1255
FAX: (314) 421-3177

NEVADA
Nevada Federal Public Defender
411 E. Bonneville Ave.
Las Vegas, NV 89101
(702) 388-6577 ext. 279
FAX: (702) 388-6261

NEW JERSEY
Office of the Public Defender – Capital
Litigation
Hughes Justice Complex
25 Market Street
P.O. Box 850
Trenton, NJ 08625
(609) 292-7087

NEW YORK
Capital Defender Office c/o Peter M. Zimroth
399 Park Avenue, 36th Floor
New York, NY 10022-4690
(212) 417-3187

NORTH CAROLINA
Center for Death Penalty Litigation
123 West Main St., Suite 700
Durham, North Carolina 27701
(919) 956-9545
FAX: (919) 956-9547

OHIO
Ohio Public Defender
Death Penalty Division
250 East Broad Street, Suite 1400

Columbus, Ohio 43215
(614) 466-5394; Toll Free: (800) 686-1573
FAX: (614) 728-3670
www.opd.ohio.gov

OKLAHOMA
Oklahoma Indigent
Defense System
P.O. Box 926
Norman, OK 73070
(405) 801-2700 (Capital Trials)
(405) 801-2665 (Capital Direct Appeals)
(405) 801-2770 (Capital Post-Conviction)
www.ok.gov/OIDS/

OREGON
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
(503) 378-3349
FAX: (503) 375-9701
www.oregon.gov/opds/Pages/default.aspx

PENNSYLVANIA
Defender Association of Philadelphia
1441 Sansom St
Philadelphia, PA 19102
(215) 568-3190
www.phillydefenders.org

Capital Habeas Unit
Federal Community Defender Office
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
www.pae.fd.org

SOUTH CAROLINA
Justice 360 (formerly Center for Capital
Litigation)
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
www.justice360sc.org

TENNESSEE
Tennessee Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
FAX: (615) 736-5265
www.tnm.fd.org

TEXAS

Texas Defender Service – Austin Office
1023 Springdale Road, Suite 14E
Austin, Texas 78721
(512) 320-8300
FAX: (512) 477-2153
www.texasdefender.org

Texas Defender Service – Houston Office
Texas Defender Service
1927 Blodgett Street
Houston, Texas 77004
(713) 222-7788
FAX: (713) 222-0260
www.texasdefender.org

VIRGINIA

Virginia Capital Representation Resource
Center
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
(434) 817-2970
www.vcrrc.org

WYOMING

Office of the State Public Defender
316 West 22nd Street
Cheyenne, Wyoming 82002
(307) 777-7519

B. Social Services

The following is a list of social service agencies and prisoners' rights projects in New York City and New York State. Most do not provide legal services, although many refer clients to legal services. Some of these organizations provide counseling, referral, and support services specifically for currently and formerly incarcerated people. Others provide services to members of the general public.

A short description of the services provided follows most addresses. In some of the counties in New York State, no agencies are listed. This does not necessarily mean that no social service agencies exist in these counties. If there are no agencies listed for your county, you should consult your telephone book or the internet for a Department of Social Services office under either the name of the county or New York State; you should also consult the listings for neighboring counties.

1. Social Services in New York City

In the New York City listings, the code following each address describes the services provided by the particular agency.

C = Counseling

R = Referral

JD = Job Development

EV = Educational and Vocational Training

FA = Financial Assistance

SS = Support Services

P = Directed Especially Towards Currently or Formerly Incarcerated People

H = Housing

Argus Community, Inc.
760 East 160th Street
Bronx, NY 10456
(718) 401-5700
www.arguscommunity.org
C, EV, JD

and provides career counseling, including help preparing for job interviews.

Pathways to Graduation (formerly GED Plus)
Over 90 different locations in NYC—visit website to find locations.
(212) 244-1274 (Midtown Manhattan office)
(718) 518-4530 (Bronx office)
(718) 804-6750 (Central Brooklyn office)
(718) 935-9457 (Downtown Brooklyn office)
(718) 739-2100 (Queens office)
(718) 273-3225 (Staten Island office)
www.p2g.nyc
EV, JD, R
Pathways to Graduation (P2G) is a full-time, free program for youth ages 17-21. As of January 2014, New York State replaced the GED with the TASC high-school equivalency exam. P2G helps you prepare for the TASC,

Center for Alternative Sentencing and
Employment Services, Inc. (CASES, Inc.)
www.cases.org
C, EV, SS, P, R, JD

Provides alternatives to incarceration and detention. Provides counseling, and vocational and educational assistance to selected participants, aiming for non-jail sentences.

CASES—Downtown Brooklyn office:
151 Lawrence Street, 3rd Floor
Brooklyn, NY 11201
(212) 553-6300

CASES—Central Harlem office:
2090 Adam Clayton Powell, Jr. Boulevard, 8th
Floor
New York, NY 10027
(212) 553-6606

Civil Rights Clinic
New York University School of Law
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6448
C, R
Helps incarcerated people understand their legal problems. Represents incarcerated people in litigation concerning prison conditions and civil rights, or refers them to legal services.

Congress of Racial Equality (CORE)
P.O. Box 264
New York, NY 10276
(212) 598-4000
www.core-online.org
EV, R, C, SS
Administers welfare-to-work programs available to returning citizens. Prefers that those interested in their services contact them by writing a letter.

Fortune Society
29-76 Northern Boulevard
Long Island City, NY 11101
(212) 691-7554
www.fortunesociety.org
C, R, SS, P, EV, JD, H
Works with returning citizens on a one-to-one basis to help them readjust to society. Counsels individuals in alternative-to-incarceration programs, returning citizens and the families of incarcerated people. Provides information and referral services for returning citizens who are HIV positive or have AIDS-related diseases.

Greenhope Services for Women
435 East 119th Street
New York, NY 10035
(212) 360-4002
www.greenhope.org
H, JD, C, R, P, EV, SS
Counsels both incarcerated women and those participating in programs affording an alternative to incarceration. Provides counseling for substance abuse, HIV/AIDS, parenting and nutrition, as well as preparation for the high-school equivalency exam, employment, medical and residence referral services, and legal advocacy.

Institute for Community Living
125 Broad Street
New York, NY 10004
(844) 425-4673
www.iclinc.org/
EV, H, C, R, JD, SS
Serves patients with mental illness or substance abuse issues.

NAACP
44 Wall Street
New York, NY 10005
(212) 344-7474
www.nysnaacp.org

Salvation Army
Main Office:
120 West 14th Street
New York, NY 10011
(800) 725-2769

Salvation Army
Drug Rehabilitation Office:
535 West 48th Street
New York, NY 10036
(212) 757-2311
C, R, JD, SS

State University Educational Opportunity
Center in Brooklyn
111 Livingston Street
Brooklyn, NY 11201
(718) 802-3300
www.sunybeoc.org/
EV, JD
Provides academic and career counseling and job placement assistance through a tuition-free program.

The Correctional Association of New York
P.O. Box 793
Brooklyn, NY 11207
(212) 254-5700
www.correctionalassociation.org
SS, P
Monitors New York state prisons, ensures proper conditions, and investigates complaint letters.

The Osborne Association, Inc.
NYC Reentry Hotline: 1-833-672-3733
www.osborneny.org
EV, JD, FA, P, R, SS

Provides services to incarcerated people in prisons and to returning citizens and their families outside of prisons. Offices throughout New York State, including the following locations:

175 Remsen Street, 8th Floor
Brooklyn, NY 11201
(718) 637-6560

388 Ann St.
Newburgh, NY 12550
(845) 345-9845

809 Westchester Avenue
Bronx, NY 10455
(718) 707-2600

Women's Prison Association & Home, Inc.
110 Second Avenue
New York, NY 10003
(646) 292-7740

www.wpaonline.org

P, EV, JD, FA, H, C, R

Rehabilitates women who were previously incarcerated. Operates as a halfway house available to those with alternative-to-incarceration acceptance; clients may stay for six months without paying a fee. Also offers counseling and training in life-skills. Provides additional services for women involved in the prison system.

2. Social Services in Other Counties

ALBANY COUNTY

New York State Catholic Conferences
465 State Street
Albany, NY 12203
(518) 434-6195
www.nyscatholic.org
C

Acts as a liaison for Catholic chaplains in New York state correctional institutions.

BROOME COUNTY

The Reverend Cris Mogenson
The Jail Ministry
Broome County Council of Churches
3 Otsenigo Street
Binghamton, NY 13903
(607) 724-9130
www.broomecouncil.net/jail-ministry/
C, SS, FA

Counsels incarcerated people and provides family support, clothing and services to releasees.

CHENANGO COUNTY

Opportunities for Chenango
44 West Main Street
Norwich, NY 13815
(607) 334-7114
www.ofcinc.org
SS, FA

Assists families in moving out of poverty and into situations where they are self-sufficient.

GREENE COUNTY

Department of Social Services
411 Main Street
Catskill, NY 12414
(518) 719-3700
FA, H, SS

Helps find housing and provides support services for returning citizens.

HAMILTON COUNTY

Department of Social Services
139 White Birch Lane
P.O. Box 725
Indian Lake, NY 12842
(518) 648-6131
FA, SS

Provides support services, such as public assistance, food stamps, and Medicaid, for low-income residents of Hamilton County.

See WARREN COUNTY

LEWIS COUNTY

Lewis County Opportunities
8265 State Route 812

Lowville, NY 13367

(315) 376-8202

www.lewiscountyopportunities.com/

SS

Provides support services for low-income residents of Lewis County.

MONROE COUNTY

Judicial Process Commission

1921 Norton Street

Rochester, NY 14609

(585) 325-7727

C, EV, SS, R

Develops public awareness of the criminal justice system. Answers letters from incarcerated people and provides referrals to legal services. Runs a community jobs program and a mentorship program for returning citizens, and advocates on behalf of incarcerated people.

NASSAU COUNTY

Port Washington Community Action Council

382 Main Street

Port Washington, NY 11050

(516) 883-3201

SS

Food pantry and family support center.

Nepperhan Community Center

342 Warburton Avenue

Yonkers, NY 10701

(914) 965-0203

www.nepperhan.org

C, JD, EV, SS, P

Provides support services for youth (ages 21 and under) both inside and outside of prison, including education, job training, and support services.

New Rochelle Outreach Center

33 Lincoln Avenue

Suite # 2

New Rochelle, NY 10801

(914) 636-2721

C, R

Provides both voluntary and mandated treatment for drug addiction.

NIAGARA COUNTY

Niagara Community Action Program, Inc.

1521 Main Street

Niagara Falls, NY 14305

(716) 285-9681

www.niagaracommunityactionprogram.org

SS, H

Provides support for low-income Niagara County residents, particularly housing, food, and emergency shelter.

Open Door Family Medical Group

165 Main Street

Ossining, NY 10562

(914) 632-2737

C

Provides medical and dental care, HIV testing, and counseling.

Pretrial Services Institute of Westchester County

10 Woods Road, Box 10

Valhalla, NY 10595

(914) 428-6663

Interviews and screens criminal defendants in the Westchester County Jail for release without bail, through its "ROR" Program. Runs a bail expediting program for defendants whose bail is less than \$5,000, assisting with calls to collect the necessary funds for bail.

SCHOHARIE COUNTY

Schoharie County Community Action Program, Inc.

795 East Main Street, Suite 5

Cobleskill, NY 12043

(518) 234-2568

www.sccapinc.org

FA, SS

Provides family development and emergency support services for low-income residents but only after other social services have been exhausted.

SENECA COUNTY

Salvation Army
P.O. Box 532
41 North Street
Geneva, NY 14456
(315) 789-1055
C, SS, R

Provides support services for returning citizens, including counseling, referral to drug rehabilitation programs, help with food and medication, and jail visitation (if requested).

Society of St. Vincent de Paul
Central Council, Diocese of Rockville Centre
249 Broadway
Bethpage, NY 11714
(516) 822-3132
C, R, JD, H, SS, EV

Provides transitional programming for returning citizens with substance abuse problems. Provides job assistance and subsidized housing. Runs a program for justice-involved youth.

SULLIVAN COUNTY

Tioga Opportunities Program
9 Sheldon Guile Boulevard
Owego, NY 13827
(607) 687-4222
SS, P, H

Provides support services for returning citizens, including housing, and head-start programs for family health and planning.

TOMPKINS COUNTY

Opportunities, Alternatives, and Resources ("OAR")
518 West Seneca Street
Ithaca, NY 14850
(607) 272-7885
SS, P

Provides support services and advocacy for returning citizens to aid in community readjustment.

WARREN COUNTY

Warren-Hamilton Counties
Community Action Agency
P.O. Box 968
190 Maple Street
Glens Falls, NY 12801
(518) 793-0636
R, FA, SS, P

Provides support services for returning citizens, including referrals and emergency food, clothing, and rental assistance.

WAYNE COUNTY

Wayne County Action Program
30 Church Street
Lyons, NY 14489
(315) 333-4155
www.waynecap.org
C, SS

Provides support services for qualifying returning citizens through a structured program that includes counseling and referral (even people who were incarcerated for periods as short as one day may be admitted). Works with probation and parole officers.

WESTCHESTER COUNTY

Mount Vernon Community Action Group of WestCOP
28 East 1st Street
Mount Vernon, NY 10550
(914) 664-8680
C, P

Provides counseling for drug addiction, alcoholism, and AIDS.

C. Official Corrections Agencies

1. Watchdog Agencies

The New York State Commission of Correction and the New York City Board of Correction provide information and investigate complaints from incarcerated people in State prisons and New York City jails.

NEW YORK STATE COMMISSION OF CORRECTION

Alfred E. Smith State Office Building
80 South Swan Street, 12th Floor
Albany, NY 12210
(518) 485-2346
www.scoc.ny.gov

NEW YORK CITY BOARD OF CORRECTION

1 Centre St.
Room 2213
New York, NY 10007
(212) 669-7900
www1.nyc.gov/site/boc/index.page

2. Administrative Agencies

These agencies oversee the prisons and jails in New York State and New York City.

STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES

Building 2, 1220 Washington Avenue
Albany, NY 12226
(518) 457-8126
www.doocs.ny.gov

NEW YORK CITY DEPARTMENT OF CORRECTIONS

75-20 Astoria Blvd.
East Elmhurst, NY 11370
(718) 546-1500
www.nyc.gov/doc

APPENDIX V

DEFINITIONS OF WORDS USED IN THE *JLM**

A.L.R.: stands for American Law Reporter; a reference book that aids your legal research by referring you to cases and legal writings on particular topics. The different editions of A.L.R. are indicated by numbers. For example, A.L.R. refers to the first edition, and A.L.R.2d refers to the second edition.

Acquit (acquittal): When a jury or court finds a defendant not guilty of a crime, the jury or court **acquits** the defendant. The jury or court's decision is called an **acquittal**.

Adjournment: Delaying or temporarily stopping a court *session* that is already in progress. For example, a judge may call an adjournment due to a holiday, after which the court *session* will continue.

Administrative agency: A political body created by the state or *federal* government to carry out the laws. For example, the New York's Department of Corrections is an administrative agency that carries out the laws passed by the New York state legislature relating to prisons.

Administrative law judge: An administrative law judge (ALJ) is a representative of an administrative agency. The ALJ *hears* cases related to the *administrative agency* (for example, the Social Security Administration) when disputes arise between the agency and a person whom the agency's decision affects. The ALJ has the power to take testimony and decide issues of *evidence*, like a judge who *hears civil* and *criminal* cases in a court of law.

Admissible evidence: *Evidence* that can legally be introduced at a trial; the evidence must be relevant and not, for example, unfairly *prejudicial*, based on *hearsay*, or *privileged*.

Affidavit: A written or printed statement of facts that is made *voluntarily* by a person who swears to the truth of the statement before a public officer, such as a *notary public*.

Affidavit of service: A sworn statement saying that legal papers have been delivered to, or *served* upon, the other party in a lawsuit.

Affirm: When the *appellate court* agrees with the decision of the trial court, the appellate court affirms the decision of the trial court. When this happens, the party who lost in the trial court and *appealed* to the *appellate court* is still the loser in the case.

Affirmative defense: A defense the *defendant* offers to justify his *criminal* act. When a *defendant* asserts an affirmative defense, he means that even if the *allegations* against him are true, he should still be found not guilty. Affirmative defenses include self-defense, *coercion*, insanity, and *duress*.

Aggravated felony: A type of *felony* offense that involves serious bodily injury or the use of a dangerous weapon. It also means that a harsher *sentence* may be imposed. In the context of immigration, aggravated *felony* has a different meaning. Please refer to the Immigration and Consular Access Supplement to the *JLM* for more information about immigration.

* Words that are defined elsewhere in this Appendix are printed in *italics*.

Aggravating factors: In deciding whether to impose a *sentence*, a judge and *jury* consider certain “aggravating factors,” which are defined by *statutes*. Aggravating factors require a harsher punishment. Some examples of aggravating factors are murder committed for money, robbery committed by someone out on bail, or assault perpetrated for racist reasons.

Allege: To claim or to charge that someone acted, or that something happened, but that act or occurrence has yet to be proven. When you allege something, you make an allegation.

Amendment (for example, 14th Amendment): Any change that is made to a law after it is written originally. In the United States Constitution, an amendment is a law added to the original document that further defines the *rights* and duties of individuals and the government.

Annotation: A remark, note, or comment on a section of legal writing, which is intended to explain and clarify the passage.

Appeal: To complain to a higher court that the *judgment* of a lower court was wrong or that the lower court made an error. For example, if you lose in the trial court, you may *appeal* to the *appellate court*.

Appellate Court: A court that reviews the decision of the lower court on *appeal*. It has the authority to *affirm*, *reverse*, or *remand* the decision of the lower court.

Appellate Term: One of the two types of *intermediate appellate courts* in New York State. The appellate term is housed within the New York Supreme Court and initially handles all of the appeal cases coming from lower courts such as county courts, town courts, district courts, civil courts, etc.

Appellate Division: One of the two types of *intermediate appellate courts* in New York State. New York State is divided up into territorial departments, and each department has an Appellate Division that serves as its *intermediate appellate court*. The *Appellate Division* handles appeals from the *Appellate Term* and the New York Supreme Court.

Arbitrator: An *impartial* person who, in a special *proceeding* called arbitration, decides a dispute between parties, who have chosen arbitration instead of trial. Arbitration is sometimes required by law.

Authorities: Legal sources affecting how your case is decided. Authorities include cases and *statutes*. If neither cases nor *statutes* exist, secondary sources such as law reviews may be considered authorities.

Beyond a reasonable doubt: The standard by which the government must prove every element (part) of its case in a *criminal trial*. It is the most demanding *burden of proof*.

Burden of proof: A party’s duty in a trial to prove a fact or facts at issue to convince the *jury* of the truth of the party’s claim. If a party does not fulfill this duty, all or part of the case must be dismissed. In *civil* cases, juries must decide whether the *plaintiff* proved the case by a *preponderance of the evidence*; in other words, the plaintiff’s burden of proof in *civil* suits is a *preponderance of the evidence*. In *criminal* cases, juries must decide whether the government proved its case *beyond a reasonable doubt*; in other words, the government’s burden of proof is *beyond a reasonable doubt*. *Beyond a reasonable doubt* is a higher burden of proof than a *preponderance of the evidence*, meaning it is more difficult to satisfy.

Certiorari, Writ of (cert.) An order by an *appellate* (higher) *court* declaring that it will review the decision of a lower court. “Certiorari *granted*” means that the appellate court decided to approve a *petition* for certiorari and review the trial court’s decision. “Certiorari denied” means that the appellate court decided not to approve a *petition* for certiorari and, thus, not to review the lower court’s decision. Some courts, such as in New York, simply call certiorari “leave to *appeal*.”

Cf. A signal used in legal writing that means “compare” but that still supports the statement to which it cites. *Cf.* directs the reader to another case or article to compare, contrast, or explain differing views.

Circuit Court of Appeals The United States has thirteen *federal* judicial circuits. Eleven of these circuits are referred to by number (the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits). The other two circuits are the D.C. Circuit and the Federal Circuit. Each of the thirteen circuits has a court of *appeals* known as the U.S. Court of Appeals for that particular circuit. These courts are one level below the U.S. Supreme Court. Twelve of these circuits are split up by geographical region, meaning they decide cases brought in *federal* courts in particular states.

- For example, the U.S. Court of Appeals for the Second Circuit (2d Cir.) decides cases brought in federal court in New York, Connecticut, and Vermont, while the Fifth Circuit (5th Cir.) decides cases brought in federal court in Texas, Louisiana, Mississippi.

The Circuit Court of Appeals reviews *appeals* of decisions made by *federal district courts*.

- For example, let’s say you bring a lawsuit in the U.S. District Court for the Southern District of New York (S.D.N.Y.) and lose. If you want to appeal that decision, you would file your appeal in the U.S. Court of Appeals for the Second Circuit (2d Cir.).

The Circuit Courts of Appeals can also review some decisions made by administrative agencies, such as by immigration agencies. The U.S. Court of Appeals for the Federal Circuit is unique because the cases that it *hears* are not limited to a particular geographical region. The Federal Circuit *hears* appeals in special kinds of cases that are generally not relevant to the issues discussed in the *JLM*. See the front inside cover of the *JLM* for a diagram of the structure of the U.S. judiciary. For more information, review Chapters 2 (“Introduction to Legal Research”), and 5 (“Choosing a Court and a Lawsuit: An Overview of the Options”) of the *JLM*.

Civil (“civil trial,” “civil case,” or “civil action”) In general, all types of actions that are not *criminal*. Civil actions are brought by a private party to protect a private right. The *burden of proof* and the procedural rules in a civil trial may be different from those in a *criminal* trial.

Class action A lawsuit in which the *plaintiffs* represent and sue on behalf of all the people in the same situation as the *plaintiffs* and with similar legal claims. See Chapter 16 for an explanation of class actions.

Clear and convincing evidence A *burden of proof* that requires more convincing evidence than a *preponderance of the evidence*, but not as much as *beyond a reasonable doubt*. This *burden of proof* is used in certain types of immigration proceedings. Please refer to the Immigration and Consular Access Supplement to the *JLM* for more information.

Clemency (mercy, leniency) Kindness that is shown toward a criminal act. It is often used to describe the act of a state governor in which he or she *commutes* or reduces a *sentence*.

Coerce/coercion To force someone to do something. A confession of a *defendant* that is coerced may be *held inadmissible* by a court. Coercion is defined as force—physical or mental—that overcomes a person’s free choice in doing something. Coercion can be an *affirmative defense*.

Collateral (attack or appeal): To make a collateral appeal means to bring a *civil proceeding* to challenge an error in an earlier *proceeding* with the purpose of obtaining a ruling on the alleged *error*. This takes place in a different *proceeding* than a direct appeal from the earlier case.

Commuted sentence: A *sentence* that is reduced.

Concurrent sentences: When a person is *convicted* of several *criminal* charges, the judge can order that the person's *sentences* run at the same time (concurrently) rather than one after another (consecutively). For example, if you are sentenced to six months for assault and nine months for robbery, you would have to serve fifteen months total under consecutive sentencing; however, if the judge orders your sentences to run concurrently, you only have to serve nine months total.

Contingent fee: A method of fee payment describing how a lawyer may agree to represent a client. The *plaintiff* who *retains* (hires) the lawyer only pays the lawyer if the *plaintiff* wins the case. The lawyer accepts an agreed-upon percentage of the money *judgment* the *plaintiff* wins. For example, most lawyers who are paid like this charge a 33% contingency fee, which means that if you win \$1000, the lawyer will keep \$330 plus his or her expenses for things like phone calls and photocopies. Some lawyers may charge you for their expenses even if you lose your case. Lawyers generally may *not* charge contingent fees in *criminal* cases.

Convict: To find a *defendant* guilty of the crime he or she has been accused of committing.

Counsel: A lawyer (attorney).

Court of Appeals: In New York, the Court of Appeals is the highest level appellate court that can review your case. It reviews the decision of the *appellate division*, which reviewed the trial court decision.

Counterclaim: In a *civil proceeding*, a *defendant* who is sued may then bring suit against the person suing him or her. This suit brought by the *defendant* against the *plaintiff* is called a counterclaim.

Criminal ("criminal case," "criminal proceeding," or "criminal trial"): A case in which the government brings a charge against a person for a crime the person is accused of committing. The *burden of proof* and the procedural rules in a criminal *trial* may be different from those in a *civil trial*. See the definition of *beyond a reasonable doubt*.

Cross-examination: At a trial or *hearing*, when the lawyer for the opposing party questions a witness. Cross-examination takes place after the direct examination. The lawyer usually asks questions that require a yes or no answer. Each party has a *right* to cross-examine the other party's witnesses.

Custody (Custodian): Being "in custody" means that police officers or law enforcement authorities have control over you. It may refer to arrest, actual imprisonment, or a temporary restraint of liberty at the station house. A custodian is the person or law enforcement agency with the control over a person.

Damages: The money awarded by a court to a person who has suffered loss, injury, or harm, either to the person's body or to property.

De minimis: A term used to describe something that is insignificant or small, and thus ignored by the law and the courts. For example, you experienced a *de minimis* injury if your car was bumped by another car, and you will not be successful if you try to sue the person who bumped you for assault.

Declaratory judgment (Declaratory relief): A court's decision in a civil case declaring the *rights* of the parties or expressing the court's *opinion* on a certain part of the law, without ordering *relief* for either side.

Defendant: The party against whom a lawsuit is brought.

Denial: A rejection, as in rejecting an application, motion, or *petition*. Also, denial can be an assertion that the statement offered is untrue, as someone who denies a statement made about him that he has committed a crime.

Determinate sentence: A prison *sentence* that sets a fixed period of incarceration, as opposed to an *indeterminate sentence*, which sets a range of possible periods of incarceration.

Dictum (plural: Dicta): A Latin¹ word for an observation, remark, or statement made by a judge in his or her *opinion*, about a *question of law* related to the case, but that is not critical to the case's outcome. Dictum generally extends beyond the issue before the court to decide. As dictum may be unrelated to the issue being decided, it is not law and is not binding on later courts. Dictum is not the legal basis for the judge's decision on a litigated issue. Later judges can choose to follow the legal analysis found in dictum, but they do not have to. In other words, dictum is not binding *precedent*. The plural form of dictum is "dicta."

- To figure out if something the court says is dictum, ask yourself: "if this statement was not in the opinion, could the court have decided the case in the same way?" If the answer is yes (the court's opinion would still make sense without the statement), then the statement is probably dictum. If the answer is no (without the statement, the court's opinion does not make sense), then the statement is probably not dictum. Keep in mind that people often disagree on whether a particular statement in an opinion is dictum. In fact, because dictum is not binding on later courts, lawyers often argue in court that a particular statement is or is not dictum, depending on whether or not they want the court to follow the statement.

Direct examination: At a trial or *hearing*, when the lawyer questions a *witness* for the *party* that the lawyer is representing in attempting to prove his or her side of the case.

Discipline (Disciplinary proceeding): Punishment for violation of rules. At the *proceeding*, a person or committee decides what punishment is appropriate.

Discovery: In preparation for a trial, the process of obtaining information about your case. See Chapter 8 for more information.

Discretion: The power of a legal body, such as a court or agency, to act or decide in a situation in which the law provides no precise answers. For example, the judge may have discretion to create remedies for you if the law does not say precisely how to do so.

Disposition: The disposition of a case refers to how the case was decided or settled. It can also be used to refer to a particular issue in a case (for example, the result of one of the motions in a case).

Dissent (Dissenting opinion): A judge who disagrees with the decision of the *majority* of the other judges on the same appellate court. He or she writes the reasons for disagreeing in what is known as a dissenting *opinion*. The dissenting opinion is not the main opinion of the case nor is it considered the law.

¹ Latin phrases are *italicized* in legal writing. Therefore, if you submit any motions, briefs, complaints, etc. to the court, you should *italicize* any Latin phrases you use.

District Court(s): The United States has 94 *federal* district courts. These courts are *trial* courts. If you lose in district court, you may be able to *appeal* the decision to the *Circuit Court of Appeals* for your circuit (which is the *intermediate appellate court* in the federal system). Some states have state courts called “district courts.” (For example, some of Louisiana’s state courts are called “district courts.”). So, when you see the name “district court,” make sure to check whether it is a *federal* or state court. This can be very confusing because the name of a particular federal district court will include the state it is located in (for example, the “Eastern District of Louisiana” is one of the *federal* district courts in that state). One big clue to look for is if you see “United States” or “U.S.” in the name of the court (such as, “U.S. District Court for the Eastern District of Louisiana.”). If you see that, then the court is *federal*. See Chapter 2 of the *JLM* (“An Introduction to Legal Research”) for more information.

Due process (Constitutional right to due process): You have two types of due process rights. Your *right* to **procedural** due process means government proceedings must treat you fairly. It limits the ways the government can take away your property, liberty, and life. Your *right* to **substantive** due process prevents government interference with other *rights* individuals have that the government cannot take away—rights such as privacy, speech, and religion. Many Chapters in the *JLM* deal with these two types of due process.

Duress: A threat of harm that causes a person to do some act that the person otherwise would not have done. Duress can be an *affirmative defense*. Threats of imprisonment and injury are examples of duress.

Entitled: Having a legal right.

Evidence: Anything presented to a court that proves, or helps to prove, the claim of a party. Evidence can be presented orally by *witnesses* or through documents, physical objects, or any means to help prove a point.

Ex rel. (Ex relatione): A Latin phrase meaning “by or on the relation of.” A lawsuit “*ex rel.*” is brought by the government if a private party (someone not acting as a government official) interested in the matter asks the government to bring suit. For example, if Smith asks the government to bring a lawsuit against Jones, the case would be written as “State *ex rel.* Smith v. Jones.”

Exclude from evidence: The use of legal means to keep certain *evidence* from being considered in deciding the case.

Exculpate: To free from blame. For example, “*exculpatory evidence*” is *evidence* that shows the innocence of the *defendant*. A prosecutor is required to disclose such *evidence* to the defendant. For more information about the prosecutor’s disclosure duty, see Part C of Chapter 8 of the *JLM*.

Facially: Appearing on the surface. Something may seem to be true on the surface, but turn out to be false upon further investigation. This word comes up often when a court is trying to decide if a *statute* violates the U.S. Constitution. There are two ways to argue a *statute* violates the U.S. Constitution. First, you can argue the text of the *statute* violates the Constitution. This is called a “facial challenge” to the *statute* (you argue the *statute* is unconstitutional “on its face.”). Second, you can argue a *statute* is unconstitutional because it affects a particular person or group of people in an unconstitutional way. This is called an “as applied” challenge. In a facial challenge, you argue the *statute* is always unconstitutional, because of the language it uses. In an “as applied” challenge, the *statute* may be constitutional when it is applied to someone else, but you argue the *statute* violates the Constitution when it is applied to you. So, when you challenge a *statute* through an “as applied” challenge, you argue the *statute* at least sometimes violates the Constitution (when it is applied to a particular person or group of people).

Federal: In the *JLM*, “federal” is used to describe a system of government, including courts and laws, organized under the United States Constitution. In contrast, “state” describes fifty separate and differing systems of government, including courts and laws, organized under the constitutions and statutes of each of the fifty states that make up the United States of America.

Felony: In many states, this is any crime that is punishable by imprisonment of more than one year in prison or is punishable by death. Felonies are crimes that are supposed to be more serious than *misdemeanors*.

Felony murder: In many states, this is an unintended death that occurs during the commission of a *felony* (such as armed robbery). In those states, anyone accused of the felony can automatically be charged with murder, too. This is called the “felony murder doctrine”).

File: To submit for recognition, as in “filing papers with the court.”

Footnote (Footnote Number): A number appearing in the body of a piece of legal writing that indicates that at the bottom of the page there is more information about the particular section or sentence next to which the number appears. The information at the bottom of the page is the footnote itself.² In legal citations, footnotes are usually abbreviated as ‘n.’—for example to refer to footnote number 7, you should use “n.7.” In the *JLM*, this information is especially useful for clarifying sentences in the text and providing cases to support the text.

Grant (as in “grant a motion”): To allow or permit. For example, when the court grants a *motion*, it allows what the *motion* was requesting.

Habeas corpus (writ of habeas corpus): This is a Latin term that refers to the form of relief that the court may grant, after an incarcerated person files a petition, to release the person from unlawful confinement or incarceration. The incarcerated person must prove that he or she was held in violation of his rights. The *habeas writ* can be sought in both state and federal courts. For more information, see Chapters 13 and 21 of the *JLM*. A *habeas* petition is a form of *collateral attack* on a conviction or sentence.

Hear (for example, “hear a motion”): To listen to both sides on a particular legal issue. For example, when a judge hears a case, he or she considers the validity of the case by listening to the arguments of the lawyers from both sides in the *litigation*.

Hearing officer: A person appointed to preside over a *hearing*. This person does not have to be a judge.

Hearing: A legal *proceeding* before a judge or *hearing officer* that is similar to a trial. In a hearing, the judge or *hearing officer* decides an issue of the case, but does not decide the *defendant’s* guilt or innocence.

Hearsay: Used to describe testimony in which a witness talks about something he or she does not know through personal experience, but that he or she has been told by others. (Hearsay is defined by Fed. R. Evid. 801(c) as a “statement other than one made by the declarant [the person testifying] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”) Hearsay testimony generally is **not** *admissible* in court and may be excluded. But, many exceptions to the hearsay rule exist.

² This is an example of a footnote. If you were citing it, you would call it n.1.

Holding: The decision of a court on a *question of law* in a particular case. The court's holding is not the same thing as its "ruling." The court's "ruling" is typically procedural, such as denying a *motion*, dismissing a case, *reversing* the decision of the lower court, or ordering the defendant to pay money *damages*. The court's holding is generally more substantive, such as concluding that a *statute* allows a certain group of plaintiffs to sue for monetary *damages*, or deciding that a word in the U.S. Constitution has a particular meaning that resolves a plaintiff's lawsuit.

- It can be difficult to identify the holding in a court opinion. Some clues that you can look for are phrases like "We hold..."; "In conclusion,..."; "Therefore,..."; "For the reasons stated,..."; and similar language. Once you identify the holding, try and work backwards to figure out what reasons the court says justify its decision. Courts that decide similar cases in the future might be required to follow that reasoning, or at the very least, might think that reasoning is persuasive. See definition of *Precedent* below, and Chapters 2 ("Introduction to Legal Research"), and 5 ("Choosing a Court and a Lawsuit: An Overview of the Options") of the *JLM* for more information.

Immunity (as in "immunity from lawsuit"): When a person or governmental body cannot be sued (is immune from suit). For example, sovereign immunity means that you cannot sue certain parts of the government without the government's consent.

Impartial: Not favoring either side; fair and unbiased.

Inadmissible evidence: *Evidence* that cannot legally be introduced at trial.

Indeterminate Sentence: A prison *sentence* that does not set a fixed period of time for incarceration, but sets a minimum and a maximum period, so that the incarceration cannot last less than a certain period or more than a certain period. The length of incarceration is determined later, according to factors such as behavior in prison.

Indictment (pronounced "in-DITE-ment"): A written accusation presented by the grand jury charging a person with a particular crime or crimes. After the issuing of an indictment, the charges must be proven at trial in order for the defendant to be convicted.

Indigent person: A person who does not have enough money to hire a lawyer to defend him or herself. In most *criminal* cases, an indigent *defendant* is *entitled* to *counsel* provided by the state. Court costs may also be waived for an indigent *defendant*. To request the services of an attorney or a reduction or waiver of court filing fees, you must *file* poor person's papers, which is also called filing "*in forma pauperis*."

Injunction (Injunctive relief): An order of the court that a person should immediately stop doing something, or should begin to do something it has stopped doing.

Intentional: On purpose. In general, to act with intention is to act with the conscious objective of bringing about a particular result. For certain crimes, intentional acts may have to be proven by the state.

Intermediate appellate court: The court above the trial court that reviews some decisions of the trial court, but that is lower than the final *appellate court* (such as the New York Court of Appeals). There are two intermediate appellate courts in New York State, the *Appellate Division* and the *Appellate Term*. These courts review decisions of the lower trial court (in New York it is confusingly called the New York Supreme Court), and their decisions are reviewed by the *New York Court of Appeals*. Generally, in the federal justice system, the *circuit court* is the intermediate appellate court; it reviews the decisions of the district courts, and its own decisions are reviewed by the U.S. Supreme Court in Washington, D.C.

Interrogatories: A set of questions. See Chapter 8 for an explanation of interrogatories and how they fit into the *discovery* process.

Involuntary: Describes an act that you did not intend to do.

Judgment: The final decision of a court that resolves a case and determines the parties' rights and duties.

Jurisdiction: The authority under which a court decides a case. A court must have subject matter jurisdiction over the kind of dispute (for example, only *criminal* courts can *hear criminal* cases) and personal jurisdiction over both sides. Put very simply, personal jurisdiction means that either you have agreed to come to that particular court or you have certain relationships with the state that allow them to bring you to court—for example, if you live in that state.

Jury: A jury is a group of people who will vote to decide the outcome of a case. The Sixth *Amendment* of the U.S. Constitution provides for a jury trial for *criminal* offenses. State constitutions also often contain the *right* to a jury trial. For some “petty offenses” (low-level offenses that do not carry *sentences* of more than six months), a *defendant* may not be *entitled* to a jury trial.

Lesser included offense: A crime that has some, but not all, of the elements of another, more serious, crime. It must also not have any elements that are different from the greater crime. A lesser included offense occurs when it is impossible to commit a crime without also committing a crime of a lesser degree. For example, manslaughter is a lesser included offense of murder. See Chapter 9 for more information.

Liable: To be obligated by the court to make compensation. For example, if the court decides that A must pay B \$100 for the injury A caused B, A is liable to B for \$100.

Litigate (Litigation): To participate in a *trial*. All the events in a *trial*, including the *trial* itself and *proceedings* prior to *trial* (sometimes called pre-trial proceedings), constitute litigation.

Majority (Majority opinion): An *opinion* signed by more than half of the judges of a court or panel; it constitutes the court's decision.

Mandamus (writ of mandamus): This is a Latin term that refers to a special kind of remedy that a court may grant. A mandamus is a court order commanding that a government official, institution (such as a prison or jail), or lower court do something that is one of the duties or responsibilities of the official, institution, or court.

- For example, if you apply for benefits from a government agency, and the agency does not make a decision on your application within the period of time it is supposed to, you might be able to ask a court to issue a *mandamus* requiring the agency review and decide your application. This is not the same as requiring the agency to make a particular kind of decision about your application, such as to approve or deny it. Instead, the *mandamus* order just requires the agency to complete a task that is one of its regular or routine duties (in this example, reviewing and deciding applications for benefits).

Material evidence: Evidence that is *relevant* and important to the legal issues being decided in a lawsuit.

Minor: Someone under the legal age of adulthood. In most states, the age of adulthood is eighteen years old. Being charged as a minor in a criminal case means there will be much lower penalties; however, this decision is up to the court's *discretion*.

Minutes: Transcript. The final copy of the *record* taken from the shorthand originally written by the court reporter.

Miranda (*Miranda v. Arizona*): A U.S. Supreme Court case setting forth the rights you should be informed about just after you are arrested. This case requires police officers to inform suspects in police custody of certain rights before their interrogation.

Misdemeanor: In general, misdemeanors are punishable by fine, penalty, or imprisonment of less than one year. In most states and under *federal* law, any offense that is not a *felony* is classified as a misdemeanor. Both felonies and misdemeanors are grouped into classes (for example, Class A, B, C, etc.) and the *sentencing* varies by the class. There may be procedural differences in how felonies and misdemeanors are handled by a court.

Misrepresentation: A written or oral statement that is an untrue statement of the facts.

Mistrial: If a fundamental error occurs during *trial* (for example, a court does not have *jurisdiction*, or a *jury* selection error or hung *jury* occurs) that cannot be corrected, a judge may decide the *trial* should not continue and declare a “mistrial.” A judge may also declare a mistrial if an extraordinary event takes place (like a juror’s or attorney’s death). Often, when a mistrial occurs, the accused may be tried again.

Mitigating factors: Factors that reduce your blameworthiness and that the *jury* or judge may rely upon to decide on a lower level of punishment. Examples of mitigating factors are you have no significant history of prior criminal activity, you committed the crime while you were under the influence of extreme mental disturbance, or you were very young when you committed the crime. Mitigating factors are sometimes defined by *statute*.

Moot: An issue or case is considered moot when it is no longer necessary for a court to render a decision about that issue or case because of a change in circumstances or passage of time. For example, if the law changes, then the case concerning that old law can (but not always does) become moot. Another example is a case about custody of a *minor*; if the *minor* becomes an adult, then that case becomes moot.

Motion: In *litigation*, a request that the judge take some sort of action, or make some sort of ruling.

Motion papers: Papers presented to court requesting that the judge make a decision. Typically, if a factual question is raised in motion papers, the court will hold a *hearing*.

Negligence: To be negligent is to not behave as a reasonable person would under the same circumstances. This includes to do something that a reasonable person would not do, or to not do something thing a reasonable person would do. Negligence is often a standard in a case, meaning that a party needs to prove that the opposing party in the suit was negligent in order to win the case. For example, if you do not shovel your sidewalks all winter (and you live in a place where it snows), you may be negligent.

Notary (*Notary public*): A person who is authorized to fix his or her seal on certain legal papers in order to verify that a particular person signed the papers. This is known as notarizing the papers.

Notice (Notification): “Notice” has several meanings in the law. First, the law often requires that “notice” be given to an individual about a certain fact. For example, the government is required to provide “notice” to a *defendant* of the charges against the *defendant* in *criminal proceedings* or in *civil proceedings* in which an individual’s interests are involved. This means the government must give you a piece of paper explaining the charges. It also means that if you sue someone, you must give them “notice” through *service of process*. Second, “notice” is used in cases to refer to whether an individual was aware of something. For example, a *statute* may require that before an individual be *held liable* for *damages*, the individual have “notice” about a certain fact.

Objection: During a trial, the prosecutor or the defense attorney may disagree, based on the rules of the courtroom, with something opposing *counsel* says (for example, the way questioning is being conducted during testimony) or does (for example, the way *evidence* is presented). An attorney tells the court of his or her disagreement by saying “I object” or “objection.” The judge decides immediately after each objection whether to “sustain” (uphold) or “*overrule*” the objection. If the judge sustains an objection, it means the judge (based on his or her interpretation of the law) agrees with the attorney raising the objection and whatever is objected to must stop because it is against the rules. If an objection is *overruled*, it means the judge disagrees with the attorney raising the objection and whatever is objected to may continue.

Off the record: This is what the judge says when he or she wants to say something or wants to hold a discussion that he or she does not want to appear in the court *record*. For example, *plea* bargaining discussions between lawyers and the judge usually are held off the record.

Opinion: When a court decides a case, the court writes an explanation of how it reached its decision. This is an “opinion.”

Oral arguments: Spoken arguments made by the parties of a case that a judge may *hear* before reaching a decision and issuing an *opinion*. Oral arguments are often presented to appellate judges; see Chapter 9 for more information on the *criminal appeals* process.

Overrule: To *reverse*, reject or rule against. When a court’s later decision on a point of law conflicts with a prior decision by the same court, it “overrules” the prior decision. The earlier decision is no longer *precedent* because it has been *reversed*. A judge also “overrules” an attorney’s *objection* when he or she disagrees with that attorney and believes that the conduct objected to should be allowed.

Party: The people who are involved in the lawsuit on either side. For example, the defendant is a party. Multiple defendants can also collectively be considered one party.

Peace officer: Officers in various state agencies appointed to maintain order or “keep the peace,” including sheriffs, police officers, and state highway patrol.

Per se: A Latin phrase meaning “by itself” or “in itself.” For example, in considering a *habeas* petition, a court may consider a violation “*per se* prejudicial” and not require you to present further evidence to prove you were prejudiced (harmed) because the court has already assumed that you were prejudiced by the violation.

Peremptory strike or peremptory challenges: In selecting a *jury* for a *jury trial*, both the prosecution and defense can remove a potential juror from serving on the *jury* without providing a reason; each such removal is called a peremptory strike or challenge. The number of peremptory challenges for the prosecution and defense are fixed, and after the given number is used up, each side must then provide reasons for refusing a potential juror. Peremptory challenges are defined by state *statutes*.

Personal property: Everything that a person owns that does not fall under the definition of *real property*.

Petition: A formal, written request to the court to take action on a particular matter. The petition should contain all necessary information and be presented in the proper format.

Petitioner: The person who brings a lawsuit or an *appeal* by “petitioning” the court for *relief*.

Plaintiff: The person who brings a lawsuit.

Pleas: After being *indicted* for a particular crime, a *defendant* enters a plea of guilty, not guilty, or no contest. A plea of no contest, usually in a situation of a *misdemeanor* as part of a plea arrangement, means you are not denying or admitting the allegations against you on the *record* but that you accept the *sentence*. A plea of not guilty may lead to a trial. A guilty plea may be a requirement of “plea bargaining,” which takes place when the prosecutor and the accused negotiate a resolution to the case subject to court approval. Usually, a “plea bargain” includes a *defendant* pleading guilty in return for a lower *sentence*. A plea of guilty leads to a *sentencing hearing* at which the *defendant’s sentence* is decided by a judge.

Post-conviction relief: A *remedy granted* by a court after *conviction* that changes the terms of *conviction*, either by awarding a new *sentence* or trial, or by reversing the *conviction*. Examples of post-conviction relief include *habeas corpus* and, in New York, Article 440 motions.

Precedent: A case decided by a court that serves as the rule to be followed in similar later cases. For example, a case decided in the United States Supreme Court is precedent for all other courts—any rules established in that case become laws that must be followed by all other courts unless or until *overruled* by a later decision of the Supreme Court.

Prejudice, Prejudicial: When something happens that biases the jury against one of the parties in a case, there has been prejudice to that party’s case. For example, if there has been a long delay between your arrest and your final parole revocation *hearing*, *habeas corpus* may be *granted* because of the delay, which may have been prejudicial to your case.

Preponderance of the evidence: This is the *burden of proof* in a *civil* suit. To meet this *burden of proof*, there must be more *evidence* that the thing being proved happened than that it did not happen.

Presumption: Something that a court takes to be true according to the rules of the court or the laws of the *jurisdiction*. For example, in all *criminal trials*, a *defendant* is presumed innocent. Therefore a *jury* must believe the *defendant* is innocent unless there is sufficient *evidence* to demonstrate that the *defendant* is guilty. A rebuttable presumption is one that can be overcome by proof that it is not true in the case being considered by the court. For a presumption to be rebutted, the rebutter must meet the *burden of proof* (either by *preponderance of the evidence*, *clear and convincing evidence*, or *beyond a reasonable doubt*, depending upon the type of presumption). An irrebuttable presumption is one that the court always considers to be true, and cannot be rebutted by any amount of proof.

Privilege: A special legal right or exemption that allows certain people to not testify about information they learned from a specific source—for example, the attorney-client privilege and the spousal privilege. The attorney-client privilege means that the information exchanged between an attorney and his or her client is confidential, so an attorney may not reveal information regarding the representation of a client without the client’s consent. The spousal privilege means that information exchanged between spouses is also protected, and a spouse may not be required to testify against his or her spouse. There are narrow exceptions to these privileges.

Pro se: A Latin phrase meaning “for oneself”; someone who appears in court *pro se* is representing him or herself without the services of a lawyer.

Probable Cause: A reasonable ground for believing, based on existing facts, that a crime has been committed, or that an arrest or search is necessary. Generally, the police must show probable cause to have a judge issue an arrest, search, or eavesdropping warrant. Same as *reasonable cause*.

Proceeding: Courtroom or related matter that occurs during the course of a dispute or lawsuit, or any individual courtroom or related event that takes place during the course of the dispute or lawsuit.

Questions of fact: The issues of a case that deal with the facts, or, in other words, what actually happened. This is in contrast to the issues of a case that deal with the law. In a jury trial, the *jury* decides questions of facts. In the absence of a jury, the judge decides the questions of fact (as well as *questions of law*).

Questions of law: The issues of a case that deal with what the law means, or how the law is applied or should be applied to the facts of the case. A *jury* cannot decide questions of law; only the judge can.

Real property: Land, and whatever is built or grows upon land.

Reasonable cause: Same as *probable cause*.

Reckless: To act despite the fact that you are aware that your action creates a substantial and unjustifiable (large and unnecessary) risk of harm to others. For certain crimes, recklessness is the mental state that must be proved by the prosecution.

Record (as in the record of a trial): A written account of all of the *proceedings* of a trial, as transcribed by the court reporter. Errors made by the court that appear in the record can be *appealed*, while those that do not appear in the record must be *collaterally* attacked.

Regulation: A rule or order that manages or governs a situation, as in “prison regulation.” A regulation has the same effect as a law if the regulation is legally issued by an executive authority of government.

Relator: The person on whose behalf the state brings a claim, or who is permitted to bring a claim in the name of the state. See *ex rel*.

Relevant: A fact or circumstance that is important or helpful in the process of determining the truth of a matter is relevant. Something that is not important to determining the truth is “irrelevant.”

Relief: *Remedy* or benefit that a *plaintiff* or *petitioner* seeks from a court or that is awarded by a court to a plaintiff or petitioner. See *remedy*, as these terms are often used interchangeably.

Remand: When a case is sent back from the *appellate court* to the trial court for further action or *proceedings*.

Remedy: When a court decides a *criminal* or *civil* issue, it often issues an order so that a *right* recognized by the court may be enforced. For example, a court may find that a confession taken by the police was *coerced* in violation of a *defendant's* right. Under these circumstances, the remedy the court may order is to not allow the *defendant's* confession to be used by the prosecution in its case to the *jury*. Remedies can consist of damages, injunctive relief, other orders, or solutions that a judge may use his or her *discretion* to create. See *relief*.

Reply: The *plaintiff's* answer to the *defendant's* case, either in a written brief or, at trial, orally.

Reprieve Temporary delay in carrying out a *criminal* punishment.

Respondent The person against whom a lawsuit or *appeal* is brought. This person “responds” to the claims of *petitioner*. See *Defendant*.

Retain (as in “to retain counsel”) To hire, usually used with respect to hiring a lawyer.

Reversed When an *appellate court* changes the decision of a lower court, it reverses the lower court’s decision. The party who lost in the trial court and then *appealed* to the appellate court is now the winner of the case.

Revoke (Revocation) To take back or cancel; the act of taking back or cancelling. For example, when the parole board revokes your parole, it cancels your parole and places you back in prison.

Right A legal power that someone possesses. For example, if you are arrested, at the time of the arrest, you have the *right* to remain silent.

Right to an attorney You have a *right* to the assistance of *counsel* (attorney) at any critical stage of your prosecution—meaning you have the *right* to *counsel* when adversarial *proceedings* have begun (in other words, after a formal charge has been *filed*, a preliminary *hearing* held, or during an *indictment* or an arraignment). This *right* to *counsel* is guaranteed by the Sixth *Amendment* to the Constitution, even if you cannot afford an attorney. In such cases, *counsel* is provided by the state. You also have the *right* to *counsel* during an interrogation, as guaranteed by the Fifth *Amendment* to the Constitution, which protects you from self-incrimination. You may also be *entitled* to an attorney in *proceedings* other than *criminal* prosecutions. See Chapter 9 on *criminal appeals* and Chapter 4 on finding a lawyer for more information.

Right to be free from arbitrary search and seizure The Fourth *Amendment* to the Constitution provides this right. The police in many cases must have a search warrant (especially if police are going to search a person’s home). However, there are many exceptions to the requirement of a search warrant. If police locate *evidence* as a result of an illegal search, a judge may exclude the *evidence* from being heard or presented at trial.

Right to be free from torture The Eighth *Amendment* to the Constitution states that you have a *right* to be free from “cruel and unusual punishment.” State constitutions have similar provisions. See Chapter 16 for more information on enforcing your civil *rights* in prison.

Right to freely practice your religion You have the *right* to practice your religion even though you are in prison. Prison officials may restrict your *right* to practice your religion only if the restriction imposed reasonably relates to the requirements of running the prison system. See Chapter 27 for more information on your religious freedom.

Right to remain silent After a *defendant* is arrested, he or she has the *right* to not say anything. Police officers are required to inform a *defendant* of this *right* as part of the *Miranda* warnings given to an accused.

Sentence The punishment imposed by the court or a judge against a defendant after he or she has been convicted of a crime.

Sentencing hearing: After a trial is concluded and the *jury* has reached a *verdict* (the *jury's* decision), the *sentence* of the *defendant* is still to be decided. Prior to sentencing, a *hearing* is held and a judge may review any *relevant* material before deciding on a *sentence*. These materials usually include a pre-sentencing report that often contains information such as the circumstances of the crime, and the educational and employment background of a *defendant*, among other factors.

Service (“to serve”): As used in legal language, the physical act of handing something over, or delivering something to a person, as in serving legal papers on a person.

Session (“in session”): That period of time during any given year in which a legal body (for example, a court, or the state legislature) carries on its usual business.

Settlement: A settlement is when the plaintiff in a lawsuit or administrative proceeding agrees to withdraw his claims in exchange for the defendant paying him some amount of money and/or taking certain actions. Settlement is a way for the parties to agree to end the lawsuit before the judge or the jury reach a verdict.

Standard (of proof): How the court will judge your evidence and decide your case. Certain situations require meeting a higher standard. In a *criminal* case, for example, the prosecution must show the court that you are guilty “*beyond a reasonable doubt*” for you to be convicted. Some other common standards of proof besides “*beyond a reasonable doubt*” include by “*clear and convincing evidence*” and by “*a preponderance of the evidence*.”

Statute: Laws passed by the U.S. Congress or state legislatures. *Criminal* offenses are defined by statutes.

Statute of limitations: A law that sets out time limitations within which different types of lawsuits or *criminal* charges must be brought. After the *statute* of limitations has “run” on a particular type of lawsuit, a *plaintiff* can no longer bring that lawsuit. For example, if the *statute* of limitations on a *tort* action is five years, the *plaintiff* cannot wait for five years and one day after the cause of action arises to bring the lawsuit. If the *plaintiff* waits that extra day, he or she can no longer sue.

Stenographer: The person who makes the court *record* by writing it in shorthand; same as the court reporter.

Subpoena: An official court document that requires a person to appear in court at a specific time and place. A particular type of subpoena requires an individual to produce books, papers, and other things.

Suppress (motion to suppress): To prevent *evidence* from being introduced at trial.

Tort: A legal term that means a “wrong” or “injury” inflicted on someone for which a *remedy* may be obtained in a *civil* case. Someone who destroys your property or injures you may have committed a tort. See Chapter 17 for more information on tort actions.

Trial: A *proceeding* that takes place before a judge or a judge and a *jury*. In a trial, both sides present arguments and *evidence*, which the court examines.

United States Law Week (U.S.L.W.): A reference book that contains newly-reported cases not yet printed in bound volumes.

v. (vs., versus): Means “against;” used to indicate opponents in a case, as in *Doe v. Smith*.

Vacate: To set aside, ignore, not give any merit. This term is used when an *appellate court* will vacate the *judgment* of a trial court if it concludes that the decision was wrong. It will ignore that decision so that the *appellate court* can decide the case as if they are seeing it for the first time, or so that it can send the case back to be looked at as if it is being viewed for the first time by the trial court.

Vague: Indefinite; not easy to understand; can be reasonably interpreted more than one way.

Verdict: At the end of a trial, a *jury* reaches a verdict (a decision) of not guilty or guilty based on the *evidence* presented at trial and in accordance with the legal questions presented to the *jury* by the court.

Verify: To confirm the authenticity of a legal paper by *affidavit* or oath.

Verified Complaint: A complaint where the allegations are sworn to by the plaintiff. A verified complaint tells the court that the plaintiff believes that the charges against the defendant have been investigated and found to be of substance. In federal court, a complaint generally does not have to be verified unless a rule or statute specifically states that a complaint must be verified. Typically, there is a verification page where a notary public or other officer certified to certifies that he/she administered an oath to the plaintiff and the plaintiff signed the affidavit in the notary's presence.

Voir dire: Before selecting a *jury* for a *trial*, the court and attorneys for each side ask the *jury* questions to determine which people are suitable jurors in that case. This questioning of jurors is called voir dire.

Voluntary: An act that a person freely carries out and is not forced to do.

Waive (Waiver): To give up a certain right. For example, a waiver of the *right* to a *jury* trial or the *right* to be present at a *hearing* means to give up those *rights*.

Witness: A person a *party* in a legal *proceeding* calls upon to *testify* for or against a party. They can give factual *evidence* (like what they saw, felt, heard, etc.) or can be experts about the subject matter at issue.

Writ: An order written by a judge that requires a specific act to be performed, or gives someone the power to have the act performed. For example, when a court issues a *writ of habeas corpus*, it demands that the person who is detaining you release you. A *mandamus* is another type of writ that a court can issue.

APPENDIX VI

DEFINITIONS OF LATIN¹ WORDS USED IN THE *JLM**

Actus reus: Latin for “guilty act,” *actus reus* refers to a wrongful act or omission. This wrongful act or omission is the physical element of a crime. *Actus reus* is one of the necessary elements that must be proven before a court may find a defendant guilty of a criminal offense. *Actus reus* is the direct physical action taken to commit a crime. A physical action is usually defined as a “bodily movement whether voluntary or involuntary.” Criminal statutes generally require proof of both *actus reus* (the physical act) and *mens rea* (the mental state of the accused and his criminal intent).

Amicus curiae: Latin for “friend of the court,” an *amicus curiae* is someone who is not a party to the litigation, but who believes that the court’s decision may affect his interests. An *amicus curiae* may therefore offer information to assist a court in deciding a matter. This information is often provided in a legal opinion in the form of an *amicus* brief. The court has the discretion to decide whether or not to admit this information in the case before it.

Certiorari, Writ of (cert.): An order by an appellate (higher) court declaring that it will review the decision of a lower court on appeal. “*Certiorari* granted” means that the appellate court decided to approve a petition for *certiorari* and review the trial court’s decision. “*Certiorari* denied” means that the appellate court decided not to approve a petition for *certiorari* and will not review the lower court’s decision. Some courts, such as those in New York, simply call *certiorari* “leave to appeal.”

Coram nobis (writ of coram nobis): A writ of *coram nobis* is an order for a court to review its earlier decision in light of possible errors that were not obvious at the time the decision was made. These writs are usually used when no other remedy, such as direct appeal or habeas corpus, is available. An example of when a writ of *coram nobis* might be ordered is when an incarcerated person has already been convicted of a crime and completely served his prison sentence.

Coram non judice: Latin for “before one who is not a judge,” *coram non judice* is a legal term used to indicate a legal proceeding held without a judge, with improper venue, or without jurisdiction

Corpus delicti: Latin for the “body of evidence,” *corpus delicti* refers to the principle that there must be proof that a crime has taken place before a person can be convicted of that crime. For example, in a murder case, there must be an actual body of a victim or enough circumstantial evidence to prove the death of a victim beyond a reasonable doubt before a defendant may be convicted of murder.

¹ Latin phrases are italicized in legal writing. Therefore, if you submit any motions, briefs, complaints, etc. to the court, you should italicize any Latin phrases that you use.

* Words that are defined elsewhere in this Appendix are printed in italics.

De facto: Meaning “concerning fact,” *de facto* describes an action occurring in practice but that is not necessarily created by law. *De facto* is commonly used in contrast to *de jure*. When discussing a legal situation, *de jure* refers to what the law itself states, while *de facto* refers to what actually happens in practice when a law is followed.

De jure: This Latin expression is used to reference an action or regulation that is formally established by law. It is commonly used in contrast to *de facto*. When discussing a legal situation, *de jure* refers to what the law says, while *de facto* refers to what actually happens in practice when the law is followed.

De minimis: Meaning “of minimum importance,” *de minimis* describes things that are insignificant or small. If something is *de minimis*, the law and the courts ignore it for lack of importance.

De novo: A standard of review that a court uses for certain issues in a case on appeal. When a court reviews an issue with a *de novo* standard of review, it may decide the issue as if it were the court that heard the case for the first time. Therefore, a court reviewing a case with a *de novo* standard will not necessarily consider the findings of the lower court on a particular issue.

***Dictum* (plural: *Dicta*)**: This is a statement of a judge’s opinion discussing the meaning of a law related to the case, but not critical to the case’s outcome. *Dictum* generally extends beyond the issue before the court to decide. As *dictum* may be unrelated to the issue being decided, it is not law and is not binding on later courts. *Dictum* is not the legal basis for the judge’s decision on a litigated issue. Later judges can choose to follow the legal analysis found in *dictum*, but they do not have to. The plural form of *dictum* is “*dicta*.”

Ex post facto: This Latin phrase means “from a thing done afterward,” or after the fact. *Ex post facto* describes the situation in which a new law applies to acts committed in the past. The U.S. Constitution prohibits *ex post facto* criminal laws. This means that someone can only be punished under a law that was in effect at the time he committed an offense. His punishment cannot be increased if stricter laws are passed after he broke the law. While *ex post facto*, or retroactive, criminal laws are not allowed, *ex post facto* civil laws are sometimes allowed.

Ex parte: This Latin phrase means “from (by or for) one party.” An *ex parte* motion or petition is brought by one person or party in the absence of, and without representation or notification of, other parties. An *ex parte* judicial proceeding is where the opposing party has not received notice for the proceeding and is not present for the decision. The Fifth and Fourteenth Amendments of the U.S. Constitution limit the availability of *ex parte* orders. The Fifth and Fourteenth Amendments provide that a person shall not be deprived of his liberty or property without sufficient notice. Because of the absence of parties from *ex parte* proceedings, *ex parte* orders are usually temporary, like restraining orders. Any parties affected by the temporary *ex parte* order are given an opportunity to contest it before it is made into a permanent order.

Ex rel. (ex relatione): This Latin phrase means “by/on the relation of.” The government brings a lawsuit ex rel. if a private party (someone not acting as a government official) interested in the matter asks the government to bring suit and the government agrees. For example, if Smith asks the government to bring a lawsuit against Jones, the case would be written as “State ex rel. Smith v. Jones.”

Guardian ad litem: Meaning “guardian for the suit,” a guardian ad litem is a party appointed by a court to assist a minor or other incapable defendant or plaintiff in a particular legal matter. The guardian ad litem directs litigation in the best interests of the person that he assists in the suit, often in juvenile or domestic relations matters.

Habeas corpus (writ of habeas corpus): This Latin term refers to the form of relief that a court may grant in order to release an incarcerated person from unlawful imprisonment. The incarcerated person must prove that he is being held in violation of his rights, for instance because his trial was unfair due to ineffective assistance of counsel. The habeas writ can be sought in both state and federal courts. For more information on habeas corpus, see Chapters 13 and 21 of the *JLM*.

In forma pauperis: This Latin term means “like a poor person.” A court sometimes will allow someone without enough money in a lawsuit to proceed in forma pauperis and avoid paying all filing fees and other court costs. A criminal defendant who proceeds in forma pauperis will also usually have a defense lawyer appointed free of charge.

In absentia: Meaning “in the absence,” in absentia notes that the defendant is not physically present for trial. This term usually pertains to a defendant's right to be present in court proceedings in a criminal trial. U.S. courts have held that the Constitution protects a criminal defendant's right to appear in person as a matter of due process; however, there are certain exceptions to the rule, including the defendant's waiver of his right to be present by voluntarily leaving the trial after it has started.

Malum in se: An offense that is malum in se is one that is seen as wrong in and of itself, such as murder or theft. Although there are laws written prohibiting malum in se crimes, these laws simply codify the inherent moral wrongness of these acts. Malum in se offenses are different from malum prohibitum crimes, which are wrong only because they are prohibited by law and are not considered morally wrong in and of themselves.

Malum prohibitum: Malum prohibitum crimes are crimes that are wrong because they have been prohibited by law. These crimes can therefore vary from jurisdiction to jurisdiction depending on what the legislatures decide the law should be. An example of a malum prohibitum crime is speeding. Driving at 70 miles per hour is not a bad act by itself. It is only bad when the law has set a speed limit below 70 miles per hour, so that anyone exceeding the speed limit is breaking a law. As distinguished from malum in se crimes that are morally wrong, malum prohibitum crimes are wrong only because the law declares these acts to be illegal.

Modus operandi (M.O.) Meaning “method of operating,” this term is used to describe someone’s habits or the way a person works or functions. In a criminal context, *modus operandi* can be used to identify a culprit based on a characteristic pattern of methods used to commit repeated criminal acts.

Mens rea Meaning “guilty mind,” *mens rea* is the mental state, or state of mind, when a criminal act is committed. *Mens rea* is one of the necessary elements of a crime in criminal law. *Mens rea* relates to the mental state of the accused, as compared with *actus reus*, which relates to the direct physical action used to commit a crime.

Nolle prosequi A declaration made before or during trial declaring that the case against a defendant is being dropped. This can be made in a criminal case by the prosecutor, or in a civil lawsuit by the plaintiff. A *nolle prosequi* declaration may be made for many reasons, including because the charges against the defendant cannot be proven, because the prosecutor no longer thinks that the defendant is guilty, or because the defendant has died.

Nolo contendere When a defendant pleads *nolo contendere*, he is stating “no contest,” meaning that he does not deny responsibility for the charges; however, he is not explicitly admitting guilt either. A criminal defendant’s *nolo contendere* plea differs from a guilty plea because it cannot be used against him in another cause of action. Because of this, some defendants plead *nolo contendere* to avoid civil suits that may arise from a criminal conviction.

Per curiam A court decision made *per curiam* is one that refers to a decision handed down by the court as a whole acting collectively and anonymously, without identifying any individual judge as the author.

Per se This Latin phrase means “by/in itself.” For example, in considering a habeas petition, a court may consider that a violation was “*per se* prejudicial” and not require a party to show further evidence to prove the violation was prejudicial (harmful). If a violation is “*per se* prejudicial,” it is by its nature harmful to the party. The court will automatically assume that he was prejudiced.

Prima facie case The facts sufficient to allow the judge or jury to find in a party’s favor if everything he said was undisputed by the other side.

Pro se This Latin phrase means “for oneself.” Someone who appears in court *pro se* is representing himself without the services of a lawyer.

Res ipsa loquitur This Latin phrase means “the thing speaks for itself.” In tort claims of negligence, *res ipsa loquitur* describes certain situations in which it can be assumed (without having to be proven) that an individual’s injury was caused by the negligent action of another party because the accident was the sort that would not have occurred unless someone were negligent.

Res judicata Meaning “a matter already judged,” *res judicata* is a legal concept that requires that issues cannot be re-litigated after a final judgment is made by a court. This notion may also be called “collateral estoppel” or “issue preclusion.”

Respondeat superior: Most commonly used in tort claims, respondeat superior is a legal doctrine which states that an employer or other principal can be held to be legally responsible for the wrongful acts of his employee or agent if those acts occur within the scope of the employment or agency. This rule may also be called the “master-servant rule” or the “rule of supervisor liability.”

Stare decisis: Meaning “to stand by things decided,” stare decisis is the basic legal principle that a court should follow the rules, or ‘precedent,’ established by higher courts or by earlier courts. Stare decisis ensures that the law remains predictable and constant in its application by different judges or courts. Courts cite to stare decisis when a particular issue has been previously brought to the court and a ruling has already been made on that issue. While courts will generally adhere to the previous ruling, this is not universally true.

Sua sponte: Meaning “of one’s own will,” this usually refers to an order made by the judge’s own will without a request by any party to the case. An action is subject to dismissal on a court’s own motion where grounds for dismissal exist. A trial court has the power to dismiss such an action sua sponte. An example of a situation where a trial court could dismiss an action sua sponte would be where there was a failure to comply with the rules of civil procedure or where the judge has determined that his court does not have jurisdiction over the case at issue.

Sub judice: Meaning “under judgment,” sub judice is a term used to indicate that a particular case or matter is before the court and is under judicial consideration.

Subpoena: A command that a person must appear before the court, subject to a penalty if he does not appear.

Subpoena duces tecum: Meaning “bring with you under penalty of punishment,” a subpoena duces tecum is an order to compel the production of certain documents or evidence for a case. A subpoena duces tecum is not limited to the parties to a lawsuit. It may also be used to demand documents or evidence from other persons or entities. It may be used to force a witness to appear before the court and to bring specified items to the court as evidence.